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April 19, 2007

Clerk Of Court
ARIZONA SUPREME COURT
1501 West Washington St., Room 402
Phoenix, Arizona 85007

Re: OBJECTION TO PETITION TO AMEND THE RULES OF CIVIL PROCEDURE, SECTION IX. COMPULSORY ARBITRATION RULES 72 - 76

Dear Justices:

I write this letter to express my opposition to the proposed rule change in mandatory civil arbitration cases (Rules 72-76) that would require personal injury victims to provide the defense with HIPAA compliant medical record release authorizations, unless the plaintiff can state a good reason to object. The proposed rule would violate a plaintiff's privacy rights, Arizona law, Federal law and the Rules of Civil Procedure.

Arizona law does not require a plaintiff to provide medical record release authorizations in non-medical malpractice cases. A plaintiff's attorney has an obligation to protect the plaintiff's potentially privileged medical records from being improperly disseminated. It goes without saying that to assert a privilege, a plaintiff must be permitted to first screen his or her medical records for potentially privileged documents prior to producing the medical records to a defendant.

Under Arizona law an individual's communications with his/her physician are privileged. See A.R.S. § 12-2235. Such records are also privileged under Federal law. See 45 C.F.R. 164.508. Like other statutory privileges, the physician/patient privilege may be waived. *See Bain v. Superior Court*, 148 Ariz. 331, 333, 714 P.2d 824 (1986). However, the burden of demonstrating a waiver of the physician/patient privilege is on the party seeking to overcome the privilege. *State v. Miles*, 211 Ariz. 475, 123 P.3d 669 (App. 2005) at p.2 n.4, citing *Alcon v. Spicer*, 113 P.3d 735, 739 (Colo. 2005).

In the *Bain* case, the Supreme Court discussed the circumstances and manner in which the physician/patient privilege may be waived. First, the court in Bain held that a patient may expressly waive the privilege by voluntarily testifying about communications with his/her physician. *Bain*, supra, 148 Ariz. at 334 citing A.R.S. § 12-2236. Secondly, the court in *Bain* held that a patient may impliedly waive the physician/patient privilege by "placing a particular medical condition at issue by means of a claim or affirmative

defense." Id. The court in *Bain* emphasized, however, that the scope of an implied waiver is limited to the specific condition put at issue by the patient.

> The scope of an implied waiver of a statutory privilege only extends to privileged communications concerning the specific condition which has been voluntarily placed at issue by the privilege holder.

Id. at 335.

In specific, the court in *Bain* noted by placing the medical condition of "conversion reaction" at issue, Ms. Bain had not waived the privilege regarding treatment for other psychological conditions. *Id.*

In many non-medical malpractice cases, defendants argue that by filing a lawsuit, the plaintiff waives the physician/patient privilege with respect to all medical treatment he or she has ever received, not just the treatment related to the condition at issue in the lawsuit. Not only is this position unsupported by any legal authority, it is contrary to the Arizona Supreme Court's holding in *Bain* and the subsequent Court of Appeals holding in *Duquette v. Superior Court*, 161 Ariz. 269, 275, 778 P.2d 634, 640 (App. 1989). Indeed, in describing the scope of an implied waiver, the court in *Duquette* quoted directly from the Supreme Court's holding in *Bain*.

Arizona has recognized the concept of implied waiver. In *Bain v. Superior Court*, the Arizona Supreme Court stated that when a plaintiff 'places a particular medical condition at issue by means of a claim or affirmative defense, then the privilege will be deemed waived with respect to that particular medical condition.' *Duquette*, supra, 161 Ariz. at 272 (emphasis added).

Common sense dictates that to assert a privilege, or to know whether to assert a privilege, a plaintiff must first have the opportunity to screen the records for "intimate facts of the patient which are unrelated and irrelevant to the mental or physical condition placed at issue in the lawsuit." *Duquette* at 275, 778 P.2d at 640; Bain at 335, 714 P.2d at 828. If the proposed rule passes, however, plaintiffs will not be provided with that opportunity and defendants will automatically be entitled to obtain and disseminate highly personal, private, and currently privileged information relating to irrelevant and sensitive matters. For example, many medical records contain details of unrelated sexually transmitted diseases, martial infidelity, drug use, psychological disorders and embarrassing physical conditions or deformities completely unrelated to the claimed injuries.

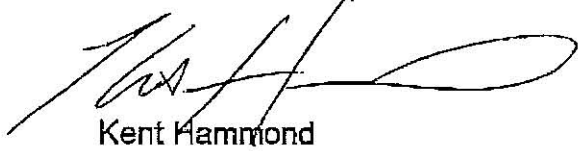
Moreover, the Arizona Rules of Civil Procedure do not require a party to sign releases in non-medical malpractice cases. Rule 16(c)(1) of the Arizona Rules of Civil Procedure, provides that a defendant in a medical malpractice case may seek a court order requiring the plaintiff to sign a medical authorization. Rule 16(c)(1), however, is limited to medical malpractice cases. The inclusion of the provision regarding medical authorization in Rule 16(c)(1), and its exclusion from Rule 16(b) (which deals with non-

medical malpractice cases), indicates that the so-called "right" to compel medical authorizations is limited to medical malpractice cases.

In conclusion, the proposed rule is unfair and unreasonable. Arizona law is clear that the implied waiver of the physician/patient privilege is limited to the medical condition put at issue by the plaintiff. The proposed rule would not provide any mechanism by which a plaintiff could exercise her or her right to object on the grounds of physician/patient privilege. Accordingly, I would respectfully urge the Supreme Court to reject the proposal that would require plaintiffs to provide HIPAA compliant medical release authorizations in mandatory arbitration cases.

Sincerely,

RUDOLPH & HAMMOND, LLC



Kent Hammond

KH/me

cc: Mike Baumstark, Chair
Committee on Compulsory Arbitration
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