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Justices of the Supreme Court of Arizona
State of Arizona
1501 West Washington
Phoenix, AZ 85007

Re: Comment to Purposed Amendment to Rule 75(a), Arizona Rules of Civil Procedure (Opposition by the Arizona Trial Lawyers Association)

Dear Justices:

I have been a licensed attorney in Arizona since 1998. My practice is limited to representing claimants in personal injury and wrongful death claims and related matters.

On behalf of my clients and the public at large, I support the pending effort to improve the arbitration process. However, I opposed the proposed amendments to Rule 75(a), Arizona Rules of Civil Procedure, which I understand would require in all arbitration cases that personal injury plaintiffs voluntarily waive their rights to privacy and privilege as to their medical records by requiring a mandatory HIPAA-complaint medical authorization that could reveal all of plaintiff's medical records. Existing Arizona law relating to the physician/ patient privilege, as discussed by this Court in *Bain v. Superior Court*, 148 Ariz. 331, 334, 712 P.2d 824, 827 (1996), is that a personal injury plaintiff impliedly waives the physician/patient privilege only to the extent that plaintiff "places a particular medical condition at issue by means of a claim or affirmative defense." This existing rule is fair and reasonable. It protects the plaintiff's right to privacy as to medical and psychological conditions, treatment, and history which have nothing to do with the claims or affirmative defenses in litigation relating to personal injuries. I am against the automatic waiver of these important rights of our clients in future arbitration level tort cases.

It is already common practice for defense counsel to uniformly seek waivers of HIPAA and the physician/patient privilege in order to obtain ALL the plaintiff's medical records, as far back as is practical, the right to privacy, etc. The result of the proposed "automatic waiver" arbitration rule would be that in most cases, an innocent tort victim's entire medical history of the last five, ten or more years can and will be learned by a defendant whose only "right" to that information is that said defendant (and his/her counsel) is involved in defending a claim caused by said defendant's [alleged] negligent and/or intentional misconduct. That should not normally be the only basis by which defendant becomes entitled to obtain irrelevant, personal, private, and currently privileged information relating to, for example, sexually transmitted diseases, an

embarrassing physical condition or deformity in a different area of the body than (and unrelated to) the area of the claimed injury, an unrelated crime that should be privileged under the 5th Amendment, marital infidelity, drug use, etc.

I understand that the proposed changes to Rule 75(a) would "streamline" discovery in arbitration proceedings and thereby serve the often legitimate economic interests of tort defendants (and with that, the insurance defense industry) and would also promote judicial economy. It is easy to understand the strong financial interests of tort defendants (and the insurance defense industry that defends and indemnifies them) in wanting to simplify and automate the defense of arbitration-level personal injury claims by obtaining broader medical records discovery with less work.

I also understand that, by taking away the personal injury claimant's physician/patient privilege and HIPAA right to privacy, plus other potential privileges (e.g., spousal privilege may be implicated in medical records, etc.), many meritorious claims will never be asserted due to the foreseeable embarrassment, humiliation, and emotional pain it would cause. The question then is: "Do the elements of greater economy, efficiency, and expediency outweigh the fundamental privilege and privacy rights of Arizona citizens, in the context of the civil justice system?" The answer in connection with the proposed change to Rule 75(a) should be: " No, at least not automatically." It is simply wrong to force personal injury claimants to give up so much of their recognized right under current law of privacy, the physician/patient privilege, other privileges, and HIPAA safeguards in order to assert any type or kind of personal injury claim.

I feel confident that you Justices of the Supreme of Arizona, having established a long and respected body of law in connection with the physician/patient privilege, etc, ,. as evidenced by such cases as *Bain v. Superior Court*, supra, will not override this proud history of individual rights and civil justice for the sake of convenience, expedience, simplification, and insurer profits at the expense of protecting the valid traditional rights and privileges of Arizona consumers and families. There is simply no sufficient justification for such an overreaching, overbroad, significant, harmful change in the law of privacy and privilege by the proposed change to Rule 75(a).

On behalf of my current and future clients, I request that no HIPAA-complaint medical authorizations be automatically required of personal injury arbitration claimants. The civil justice system relating to tort claims is not broken. Rule 26.1 works very well in nearly all cases. When there is legitimate concern about failure of disclosure, the A.R.S. 12-2282 subpoena procedure (complete with potential objections to subpoenas, and "in camera" inspections of evidence by the trial-level Court to determine the appropriateness of what are usually very limited redactions ("black outs") to protect privilege in short portions of a small number of pages of the often voluminous records, <u>all of which</u> are normally

disclosed with the brief passages that are "blacked out" to be identified by a "privilege log" pursuant to Rule 26.1(f), Ariz. R. Civ. P., making the potential "in camera" inspection by the trial level Judge quick and easy), is a good, effective, and reasonable system. It allows for the possibility of protecting privacy and/or privilege. To throw out this carefully reasoned and well-balanced system for producing personal and private medical records information in litigation while still maintaining the right to claim privilege would be like "throwing out the baby with the bathwater." It is simply a bad idea which would cause unnecessary emotional hardship to the public and would incidentally and unfairly tip the scales of justice in favor of the tortfeasor and the defense.

The Health Insurance Portability and Accountability Act, Pub.L. No. 104-191 (1996) ("HIPAA"), is a federal law which should not be tampered with at the state level because it will produce much unnecessary litigation, spilling Arizona Superior Court disputes into the appellate and/or federal system, etc. The problems with the proposed changes to Rule 75(a) simply have not been fully considered by its proponents, who should see that the federal right to privacy guaranteed under HIPAA cannot properly be overridden by way of a change in the Arizona Rules of Civil Procedure, and the proposed mandatory waiver of HIPAA rights as a condition of asserting an arbitration level tort claim in Arizona will be controversial at best.

That the proposed automatic HIPAA-complain waiver of privacy and privilege rights could foreseeable do significant harm is illustrated by the language in *Duquette v. Superior Court*, 161 Ariz. 269 at 275-277, 778 P.2d 634 at 631-633 (App. 1989)m describing the mischief that may ensue when defense counsel are permitted ex parte contact with plaintiff's treating physicians. Duquette states that the "overriding public policy considerations [which] justify a prohibition on *ex parte* communications between a plaintiff's treating physician and defense attorneys" include:

> The physician-patient privilege is a confidential one involving a public expectation of privacy and confidentiality.
>
> The fiduciary relationship between the physician and patient requires the physician to exercise "the utmost good faith" [citation omitted]. Discussion of the patient's confidences other than in compliance with court-authorized discovery would be inconsistent with this fiduciary relationship [citations omitted].
>
> "*Ex parte* communications between defense attorneys and plaintiffs' treating physicians would be destructive to both the confidential and fiduciary natures of the physician-patient relationship that have been recognized by statutory and case law."
>
> The pressure brought to bear on the physician when he or she is faced with a request for an *ex parte* interview by a defense attorney is

> another consideration. "[T] he physician might feel compelled to participate in the *ex parte* interview because the insurer [for defendant] may also insure the physician witness."
>
> "A physician [who] allows [an *ex parte* interview] embarks, perhaps unknowingly, on a course which may involve a breach of professional ethics and potential liability."

Duquette concludes the analysis on these issues by stating that "we believe that resolution of any dispute over the scope of the [implied] waiver of the physician-patient privilege should be made in an adversarial as opposed to an *ex parte* setting." 161 Ariz. at 177.

The proposed automatic waiver of HIPAA rights and the physician-patient privilege will result in many negative consequences, as *Duquette* indicates, not all of which are fully foreseeable, but all of which I oppose on behalf of my current and future clients. In addition, the treating physicians should not be put into the confusing and conflicting position that will predictable result from potential (and likely) *ex parte* contact.

In conclusion, I agree with arbitration procedural changes designed to shorten, simplify, and economize arbitration for all concerned. However, our Arizona consumer family clients should not be required to pay such a high "tariff" for the right to claim tort damages by being forced to automatically waive other important rights.

Sincerely,

Eric S. Shapiro
Attorney at Law