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

Re: Public Comment Regarding Proposed Amendments to the Rules of Arbitration - Comment to Proposed Amendment to Ariz. R. Civ. Pro. 75(a)

Good Day:

I am an attorney licensed to practice law in the State of Arizona. I have tried many lawsuits in both state and federal courts. My practice is focused primarily in the field of personal injury litigation. I am submitting the following comment to express my opposition to the proposed amendment to Rule 75(a) of the Arizona Rules of Civil Procedure. In specific I oppose the provision that would require all personal injury plaintiffs to produce authorizations allowing the alleged tortfeasor to obtain the plaintiff's medical records including records which are not relevant to the claims put at issue by the plaintiff and which thus remain privileged under Arizona law.

The Proposed Amendment

The proposed amendment to Rule 75(a) provides in part:

> Within 10 days of service of an Answer the plaintiff shall provide to the answering defendants:
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> . . .
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> 3. In personal injury cases, medical records for any treatment of the injury or medical condition at issue. In addition, the plaintiff shall disclose the identity of any healthcare provider that treated the plaintiff within the 5 year period preceding the filing of the Complaint, with a general description of the treatment provided, and provide an executed HIPPA - compliant medical release for each such provider. If plaintiff believes such records are not discoverable, HIPPA releases may be withheld if plaintiff serves instead a specific reason for the objection.

Arizona Law Regarding The Physician/Patient Privilege

The physician/patient privilege is set forth in A.R.S. § 12-2235. The statute provides:

> In a civil action a physician or surgeon shall not, without the consent of his patient, or the conservator or guardian of the patient, be examined as to any communication made by his patient with reference to any physical or mental disease or disorder or supposed physical or mental disease or disorder or as to any such knowledge obtained by personal examination of the patient.

A.R.S. § 12-2236 provides that the physician/patient privilege is waived if the patient voluntarily testifies with respect to the confidential communication. Additionally, this court has held that when a party puts his/her medical condition at issue in a lawsuit, he/she impliedly waives the privilege "with respect to that particular medical condition." *Bain v. Superior Court*, 148 Ariz. 331, 337, 714 P.2d 824 (1986).

While the court in *Bain* confirmed that a personal injury claim acts as an implied waiver of the physician/patient privilege, nevertheless, the court explained that the implied waiver is limited in scope to the particular medical condition placed at issue by the plaintiff.

> 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. Here, petitioner has voluntarily placed a medical condition "conversion reaction" in issue by alleging Dr. Mill's negligence in failing to discover it. That condition, however, is the only one she has placed at issue. Therefore, petitioner would not have waived the psychologist/patient privilege with respect to treatment for other conditions.

Id. at p. 335. This court's holding of a limited implied waiver of the physician/patient privilege has been followed on several occasions by the Court of Appeals. *See, e.g., Blazek v. Superior Court*, 177 Ariz. 535, 542, 869 P.2d 509 (App. 1994) (the scope of an implied waiver of the psychologist/patient privilege is limited to only those communications concerning the specific condition which petitioner has placed at issue); *Duquette v. Superior Court*, 161 Ariz. 269, 275, 778 P.2d 634 (App. 1989) (a physician may not disclose intimate facts of the patient which are unrelated to the mental or physical condition placed at issue in the lawsuit).

The Problem With The Proposed Amendment To Rule 75

Under Arizona law, it is clear that an implied waiver of the physician/patient privilege resulting from the filing of a personal injury lawsuit is limited to records of treatment concerning the particular medical condition put at issue by the plaintiff's claim. Thus, a personal injury plaintiff should be required to produce the medical records for any treatment of the injury or medical condition which is at issue in the lawsuit as required by the first sentence of proposed Rule 75(a)(3). However, the proposed rule goes on to require that plaintiffs provide medical releases to allow defendants to obtain medical records of other treatment provided to the plaintiff within a 5 year period preceding the filing of the Complaint. To the extent such treatment is for the "injury or medical condition at issue", then the records will already have been disclosed by the plaintiff. If, however, the records are for treatment for some other condition, then the records remain privileged, and thus are not discoverable. Requiring plaintiffs to produce signed releases for such records would clearly abrogate the physician/patient privilege and violate this court's holding in the *Bain* case.

The Proposed Solution

There is nothing wrong with the requirement set forth in the first sentence of proposed Rule 75(a)(3) requiring personal injury plaintiffs to disclose all medical records for treatment of the injury or medical condition at issue in the lawsuit.[1] However, the requirement in the second sentence of the proposed rule which requires plaintiffs to provide medical releases for other unrelated treatment is clearly contrary to Arizona statutory and decisional law outlining the scope of the implied waiver of the physician/patient privilege in personal injury actions. While the Arizona appellate courts have not addressed the issue regarding the proper procedure for discovery of medical records in personal injury actions, this issue has been dealt with in detail by the appellate courts in Colorado. A proposed procedure was outlined by the Colorado Supreme Court in *Alcon v. Spicer*, 113 P.3d 735 (Colo. 2005).

In the *Alcon* case, the Colorado Supreme Court discussed the development of the scope of the implied waiver of the physician/patient privilege in the context of personal injury lawsuits. Similar to this court's decision in *Bain*, the court in *Alcon* noted that the implied waiver is limited to the physical or mental condition put at issue by the plaintiff, and that the privilege is still "retained with respect to communications unrelated to the claim or defense." *Id.* at p. 739. Moreover, the court in *Alcon* noted that a discovery order requiring a plaintiff to execute releases to obtain medical records was overbroad because it included medical records unrelated to the injuries and damages claimed by the plaintiff. *Id.* at p. 740. After outlining these general rules, the court in *Alcon* set forth a procedure for the production of medical records in personal injury actions. Rather than requiring

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[1]While plaintiffs must disclose records for accident related medical treatment, nevertheless, because such records contain personal and confidential information, any disclosure should be subject to a confidentiality order prohibiting secondary disclosure by the defendant. *See* 45 C.F.R. § 164.512(e)(1).

the plaintiff to execute a medical release to permit the defendants to obtain the plaintiff's medical records, including records which may contain references to treatment unrelated to the medical condition at issue in the lawsuit, the court in *Alcon* suggested that the plaintiff obtain all potentially relevant medical records, produce those which were for treatment of the condition(s) put at issue by the plaintiff, and produce a privilege log for any other records for which the plaintiff asserts a claim of physician/patient privilege. This procedure would be consistent with Arizona's disclosure rule (Ariz.R.Civ.P. 26.1) and would not abrogate the statutory physician/patient privilege.

Conclusion

The proposed amendment to Rule 75(a) creates a procedure which is contrary to Arizona law. I urge the court to reject the second sentence of the proposed Rule. The court may wish to replace the second sentence of the proposed Rule with the following language:

> If the defendant believes that additional medical records may be relevant, defendant may request them from the plaintiff. Plaintiff shall obtain all records requested by defendant and shall produce those records for which no claim of physician/patient privilege is asserted. If the plaintiff asserts a claim that any portion of the requested medical records is privileged, the plaintiff shall provide the defendant with a privilege log identifying any record, or portion of a record, for which the plaintiff claims a privilege. *See Alcon v. Spicer*, 113 P.3d 735 (Colo. 2005). Any dispute regarding the plaintiff's claim of privilege shall be determined by the court following an *in camera* inspection of the record(s) for which the claim of privilege has been asserted.

Very truly yours,

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