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The Justices of the Supreme Court
State of Arizona
1501 W. Washington
Phoenix, AZ 85007

Re: Public Comment Concerning Proposed Amendments to the Rules for
Arbitration – Comment to Proposed Amendment to Rule 75(a)

Dear Justices:

I write this letter in opposition to the proposed amendment of Rule 75 (a). I believe you all know a bit about my background, but I would like to let you know that I served on the Rules Committee of the State Bar from 1983 until 1994. I say this because this is not the first time I have seen lawyers and members of State Bar Committees, try to do an end run around good decisions that judges have made from the bench—at the trial court and appellate court. This attempt to amend the Rules fits in that category.

I have read a copy of Amy Langerman's letter to you opposing this rule change and must echo her sentiments. Like Amy, I have had cases where defense counsel insists on getting a signed authorization for obstetric/gynecology records in cases where my client's broken arm was completely unrelated to the care provided by that doctor. Usually, defendants do not have the temerity to file a motion to get those records because the position is so outrageous. In those cases where the defendants did file a motion, and where the court thought that there might be some probative value to the evidence, judges have ordered in camera inspection of the records. This is the way the rules work now, and this is the way they should work. The fact that a case is in arbitration does not change the fact that the rules as currently written are satisfactory.

There are many other examples where requested records are irrelevant to the issues in the case. However, the larger issue is that there is nothing so compelling about the arbitration procedures that warrant such a drastic change in the rules, one that creates a presumption of entitlement that would eliminate all patient privacy.

Arguably, if you want to streamline the arbitration process, the rules should be changed to prohibit defendants from sending subpoenas for any records that have already been disclosed to them without first showing good cause. If anything, the time consumed with sending subpoenas for records already produced by the plaintiff slows down the process. If the plaintiff has already supplied the records, permitting the defendant to get

a second copy of the records is redundant and merely consumes more time and money before the arbitration hearing.

This rule change is written in a way which suggests that the defense is entitled to all records without discussion, and requires the plaintiff to then file a motion in every instance where protection is warranted or the arbitration cannot proceed. Such a change does not streamline the time to arbitration; it merely shifts the obligation from the defendant to the plaintiff to file the motion. Fights over disclosure will continue to occur at times, but the burden will be shifted to the plaintiff and, in nearly every case, a motion will have to be filed because the new rule calls for releases to be provided for all of the plaintiff's doctors—whether relevant to the disputed issues in the case or not. In the meantime, the arbitration process will be delayed. Since the burden shifts to the plaintiff to provide subpoenas for all of the plaintiff's doctors, my belief is that in most cases involving arbitration I will have to file a motion to protect my clients privacy.

In contrast, under the current rules, I usually get a stack of authorization forms from the defense attorney. If there are authorizations requested which are clearly out of bounds, I call the defense lawyer and speak with him about the request. In most instances, the issue is resolved without motions being filed and the process speeds along to arbitration. The fact is that the rules as currently written force the lawyers for the parties to talk with each other about which records are truly relevant before battles are fought in court over such issues. The State Bar has a professionalism program which encourages lawyers to communicate in a positive way about issues in the case. Why propose a rule that runs counter to that teaching?

Finally, I understand that the proposed change also calls for an increase in the arbitration limit to \$75,000.00. I question the wisdom of this change. As these monetary limits increase, fewer and fewer young lawyers are getting quality trial experience. I believe that we, as lawyers and judges, are stewards of this profession. As stewards practicing law under a constitution that mandates trial by jury, we have a responsibility to make certain that enough lawyers have the competency needed to conduct a jury trial. Young lawyers can't get that experience from watching it done by others any more than the public can do so from watching trials on television. The best way to learn to try a case is to do it—not by serving as a “second chair” or by attending CLE. In my view, the short term benefit of clearing the court calendars is outweighed by our responsibility as stewards of the profession.

The proposed change to Rule 75 is a bad idea and I urge you to reject it.

Respectfully,

Plattner Verderame, P.C.

Frank Verderame