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May 18, 2007

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JUSTICES OF THE SUPREME COURT OF ARIZONA
1501 West Washington Street
Phoenix, Arizona 85007

RE: *Comment to Proposed Amendments to Rules 75(a), Arizona Rules of Civil Procedure*

Dear Justices:

I have been a licensed attorney in Arizona since 1995. For the most part my practice focuses on representing injured victims pursuing personal injury and wrongful death claims. I am a member of the Arizona Trial Lawyers Association (AzTLA) and have handled literally hundreds of personal injury claims.

I write to express my opposition to the proposed changes to Rule 75(a), Arizona Rules of Civil Procedure and I echo the comments of opposition conveyed by Christopher Jensen, current president of AzTLA, Amy Langerman, Geoffrey M Trachtenberg, Steven A. Cohen, Scott I. Palumbo, Kent Hammond, Richard S. Plattner, Frank Verderame and others.

The amendment to Rule 75(a) attempts to accelerate disclosure in arbitration cases, which is reasonable, but it creates a requirement that all injured tort victims sign a HIPAA compliant authorization form for each medical provider that the injured tort victim saw in the five year period preceding the filing of the complaint. This proposed requirement will not accelerate anything. Rather, this requirement will actually stall the proceedings, because instead of arbitrating the claim quickly and efficiently (which is the purpose behind the arbitration rules), there will be a massive attack by the defense to litigate the HIPAA compliant authorization issue when the plaintiff's attorney refuses to allow his/her client to simply waive their right to privacy.

It is already a requirement that the plaintiff disclose all related medical records. Therefore, implementing a rule that allows a defense attorney to request all medical records, whether or not related to the claim, with a HIPAA compliant authorization serves only one purpose: a fishing expedition to test the veracity of the plaintiff or their attorney.

The current procedure protects the injured victim's right to privacy. The medical records must first be screened by plaintiff's counsel to ensure that what is being disclosed contains nothing

that is "out-of-bounds" or private. For example, more often than not, an injured tort victim will seek medical attention from their primary care physician, which makes sense. However, that same injured tort victim may have seen their primary care physician on numerous occasions either before or after the tort for unrelated medical problems, which if revealed, could humiliate or embarrass the injured victim. Giving the plaintiff's counsel the responsibility to first screen these records is crucial so that references to such things as rape, miscarriage, sexually transmitted diseases, alcohol and drug counseling, mental health issues and the like can be redacted to protect the injured victim's privacy rights. The doctor's office is certainly not going to do that, or at least that has been my experience.

Allowing this amendment, therefore, would cause a disastrous effect on those individuals who have viable tort claims, but at the same time, have private and potentially embarrassing or humiliating medical or mental health conditions they seek to keep private. If faced with the possibility that the defense and public will now see their private medical records, the injured victim may simply choose to drop their claim and go uncompensated rather than undergo potential humiliation and embarrassment. This is exactly what the defense bar wants: they want people to think twice about the consequences of bringing a viable claim, because frankly, it will save the insurance industry an immeasurable amount of money.

Rather than requiring an injured tort victim to execute a HIPAA authorization permitting the defendant to obtain their medical records, including records which may contain references to treatment unrelated to the medical condition at issue in the lawsuit, the injured tort victim should only be required to obtain all potentially relevant medical records, produce those which were for treatment of the condition(s) put at issue by the injured tort victim, and produce a privilege log for any other records for which the injured tort victim asserts a claim of physician/patient privilege. This procedure would be consistent with Arizona's disclosure rules and would not abrogate the statutory/patient privilege. This procedure would also be in harmony with this Court's holding in Bain v. Superior Court, 148 Ariz. 331, 714 P.2d 824 (1986), and related Court of Appeals cases, i.e., Blazek v. Superior Court, 177 Ariz. 535, 869 P.2d 509 (App. 1994), and Duquette v. Superior Court, 161 Ariz. 269, 778 P.2d 634 (App. 1989).

I urge the Court to consider the significant implications that will develop if injured tort victims are required to sign HIPAA authorizations for the defense. Everything should be done to protect the privacy rights of tort victims. They have already been injured once, is it not enough to also potentially humiliate and embarrass them too?

Finally, I want to echo the sentiments of another colleague who commented that the whole separate arbitration procedure is a failure. It is inherently biased in favor of the wealthier parties and it creates a two-tier system of justice. Many defendants eagerly use the arbitration system as a delaying tactic and absolutely do not participate in good faith. Any system in which a party should worry about being penalized for doing too well in Arbitration, only to have to re-litigate the case for real in another forum, with significant financial penalties hanging over clients' heads is, by definition, a bad system. The whole thing should either be abolished or re-written, perhaps even making some Arbitration claims binding, i.e., claims that have a value of a certain amount. Defendants and their insurance companies should not be allowed to use court supervised and mandated arbitration rules to gain an advantage that they do not have in either state or federal courts.

May 18, 2007

Sincerely,

LAW OFFICE OF J. SCOTT WICKLAND

A handwritten signature in black ink, appearing to read "J. Scott Wickland", with a long, sweeping horizontal line extending to the right.

J. Scott Wickland
Attorney at Law

JSW/JDC