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IN THE SUPREME COURT OF THE STATE OF ARIZONA

PETITION TO AMEND THE RULES)	
OF CIVIL PROCEDURE, SECTION IX.)	Supreme Court No. R- 06-0021
COMPULSORY ARBITRATION)	
RULES 72 – 76)	
_____)	

PETITIONER’S RESPONSE TO PUBLIC COMMENTS

Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the Committee on Compulsory Arbitration in the Superior Court, through the undersigned, responds to comments filed in response to the petition to amend the Arizona Rules of Civil Procedure, Section IX Compulsory Arbitration.

On June 14, 2007 the Committee on Compulsory Arbitration considered the formal comments filed by the State Bar of Arizona, the Arizona Association of Superior Court Clerks and multiple individual practitioners posted on the Supreme Court’s public website since filing the initial Petition on October 26, 2006. The Committee agrees with several of the recommendations and asks that the Court amend the rules proposed by the Committee to reflect those changes. The Committee, however, does not agree with every recommendation.

The Committee’s response to comments follows.

Comments by State Bar of Arizona

1. Rulings on Dispositive Motions

The Committee agrees with the State Bar that the existing rule language leads to different interpretations on the power of arbitrators to decide certain motions and orders they are authorized to enter. The Committee sought to eliminate this ambiguity by specifically listing those motions that may not be decided by the arbitrator and must be referred to the trial judge.

The State Bar expressed concern that sending dispositive motions to the trial judge would cause delay and “frustrate the primary purpose of arbitration – alleviating the burden on the judicial system by removing smaller cases to an arbitration system – with little apparent corresponding benefit.” The Committee discussed and concluded otherwise. Currently, motions for summary judgment are ruled on by the arbitrator. If the arbitrator rules in favor of the defendant, the plaintiff is likely to file an appeal. If the arbitrator denies the motion, the case oftentimes is appealed and a motion for summary judgment is the first motion filed with the trial judge. In other words, the trial judge ultimately will have to rule on dispositive motions; therefore, it is more efficient to decide these motions earlier, rather than later, in the life of the case.

The Committee’s intent is that a motion for summary judgment, which would dispose of the entire case, be decided by the trial judge. The entire case pertains to all issues and all parties. The Committee also does not favor the State Bar alternative of having local rules in arbitration cases, preferring a single, statewide standard. The Committee joins the State Bar in asking the Court to clarify any ambiguity that currently exists regardless of which rule the Court adopts.

2. Accelerated and Mandated Disclosure and Discovery

The State Bar expressed concern that the proposed rule would require use of “applicable uniform interrogatories” and offers no guidance to a practitioner as to which uniform interrogatories should be used. The Committee believes practitioners are capable of determining which uniform interrogatories are applicable in a case and, in fact, do so today. The earlier proffering of such materials should speed discovery without restricting counsel’s ability to seek additional materials through standard practice.

3. Deadline for conducting Arbitration Hearing

The State Bar recommends extending the deadline for holding an arbitration hearing from 120 to 150 days. The Committee does not favor extending the time. The Committee has offered changes to the rules of arbitration that are meant to accelerate, not delay, case processing times for cases referred to arbitration. The Committee also believes that Rule 74(b) already allows the arbitrator the ability to extend the time for cause.

4. Application of the Rules of Evidence

The Committee disagrees with the State Bar that the rule should stay as it is now written. The Committee believes that the change relating to the rules of evidence is in keeping with the current practice not only in superior court but in commercial arbitration. The Rules already offer guidance to the arbitrator; “the purpose of compulsory arbitration is to provide for the efficient and inexpensive handling of small claims and shall limit discovery whenever appropriate.” The arbitrator also already has the power “to determine the admissibility of evidence, to decide the law and the facts of the case submitted.”

5. Admission of Medical Reports at Arbitration

The State Bar suggests that a good cause exception be included in the proposed Rules for medical reports in medical injury cases. The Committee has no objection if this would add clarity but believes that a good cause exception already exists in Rule 74(b).

6. Referral of Case to Judge Where No Award is Filed

The Committee reiterates the position that Rule 38.1 is sufficient motivation for parties to act timely in arbitration cases and the 145 day notice to the judge is unnecessary.

7. Treating a Notice of Decision as an “Award” and Appeal Notices

The Committee agrees with the State Bar’s proposed modification to Rule 78(a) clarifying that the time for taking an appeal would begin 20 days after the filing of the award or after the notice of decision becoming the award, whichever occurs first.

8. Notice of Appointment of Arbitrator

The Committee agrees with the State Bar that the notice of appointment of the arbitrator be reinstated as Rule 73(c).

Comments by Arizona Association of Superior Court Clerks

9. Filing with the Clerk

The Clerks suggest that all references to filing be amended to specify that all documents in cases designated for arbitration be filed with the Clerk of Superior Court unless filing with the trial judge is specifically intended. The Committee agrees with the Clerks’ Association that filing with the Court is accomplished by filing all original documents with the Clerk, as the custodian of the record. However, the Rules of Civil Procedure routinely speak of filing with the Court

without specifying the Clerk, and the Committee believes that this is universally understood by practitioners.

10. Motions for Summary Judgment

The Clerks' Association suggests that the language of the proposed Rule 74(b) appears to require filing a Motion for Summary Judgment with the trial judge in every case. The Committee agrees and proposes the following language.

IF A MOTION FOR SUMMARY JUDGMENT IS FILED, the original shall be filed no less than 20 days prior to the date for hearing and a copy served upon the arbitrator and TRIAL JUDGE. If the court finds that the motion is frivolous or was filed for the purpose of delay or harassment, the court shall impose sanctions on the party filing the motion, including an award of reasonable attorneys fees incurred in responding to the motion. The time for conducting an arbitration hearing shall be tolled during the pendency of any such motion.

11. Arbitrator to Receive the Original Superior Court File

The Clerks' Association expresses concern that documents are increasingly being filed and maintained electronically and parts of, or entire original court files, may be in electronic format only. Specifically as it pertains to Maricopa County, the Clerk of the Superior Court may no longer be able to comply with the letter of the rule as written. The Committee agrees that consideration of court records other than the traditional paper document is advisable. After consultation with the Clerks' Association, the Committee proposes the following language.

Rule 74, Receipt of Court File

(d)(i) Receipt of Court File. If the arbitrator believes that the file contains materials needed to conduct the arbitration hearing, the arbitrator shall, within four days prior to the date of the hearing, sign for and receive from the Superior Court Clerk the original superior court file. IF THE ORIGINAL CASE WAS FILED AS AN ELECTRONIC COURT RECORD, THE ARBITRATOR SHALL HAVE ACCESS TO THE ORIGINAL IF AVAILABLE, OR CERTIFIED COPY OF THE FILE EITHER BY PRINT-OUTS OF SAID DOCUMENTS OR ON ALTERNATIVE MEDIA. THE CLERK MAY DELIVER THE DOCUMENTS ELECTRONICALLY TO ANY ARBITRATOR WHO FILES A CONSENT, EITHER TRADITIONALLY OR ELECTRONICALLY. Alternatively, the arbitrator may order the parties to

provide the arbitrator with those pleadings and other documents the arbitrator deems necessary to complete the arbitration hearing.

12. Time for Appeal

The Clerks' Association expresses concern that the proposed Rule 77 lacks clarity about when the time for taking an appeal begins. The Committee agrees and believes that the proposal put forth by the State Bar under response number seven (7) eliminates the confusion and satisfies the concern of the Clerks' Association.

13. Funds on Deposit with the Clerk

The Clerks' Association requests that a new provision be added as Rule 78(f) that would specify how funds on deposit with the Clerk would be treated after final disposition of the case and absent a court order. The Clerks propose that after the final disposition of the case, the Clerk's Office be authorized to return the funds on deposit with their office to the posting party, unless the court orders otherwise. The Committee has no objection to the addition of the section or the proposed language.

Other Comments

14. HIPPA Disclosures

A number of comments were filed objecting to the proposed changes to Rule 75 that would require the plaintiff in personal injury cases to "disclose the identity of any health care provider that treated the plaintiff within the five-year period preceding the filing of complaint, with a general description of the treatment provided and provide an executed HIPPA-compliant medical release for each such provider."

Some of those objecting to the disclosure cited Bain v. Superior Court, 148 Ariz. 331, 333, 714 P.2d 824 (1986). In Bain, the Court held that a patient may impliedly waive the physician/patient privilege by "placing a particular medical condition at issue by means of claim

or affirmative defense.” But, the filing of a law suit does not waive **all** claims to physician/patient privilege. Additionally, those objecting to this rule change assert requiring HIPPA releases beyond the medical condition at issue may be prohibited by Federal law.

The Committee agrees its proposed rule changes related to HIPPA medical releases may overreach disclosure allowed by Federal law or by the Bain decision. Accordingly, the Committee proposes a substitute Rule 75 (a)(3) to read as follows:

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 health care provider that treated the plaintiff within the five-year period preceding the filing of complaint, with a general description of the treatment provided.

The Committee believes the plaintiff’s provision of health care provider information and a general description of the treatment provided within 10 days of an answer will result in the more timely disclosure of medical information necessary in all personal injury cases.

Respectfully submitted this 29th day of June, 2007.



Mike Baumstark, Chair
Committee on Compulsory Arbitration

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This 29th day of JUNE, 2007