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IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of:	Supreme Court No. R-17-0006
PETITION TO AMEND RULES 16, 16.1, 26.2, 38 AND 38.1 OF THE ARIZONA RULES OF CIVIL PROCEDURE	**COMMENT TO PETITION TO AMEND RULES 16, 16.1, 26.2, 38, AND 38.1 OF THE ARIZONA RULES OF CIVIL PROCEDURE**

Undersigned counsel, on behalf of Mutual Insurance Company of Arizona (hereinafter "MICA"), oppose the Petition to Amend Rules 16, 16.1, 26.2, 38 and 38.1.[1] Founded in 1976 by Arizona physicians, MICA is a physician-owned and directed medical professional liability company insuring the majority of physicians in private practice in the State of Arizona.

Medical malpractice claims make up less than 1% of all civil actions filed in Arizona, and yet they are some of the more complex claims flowing through Arizona's court system, frequently including multiple defendants, requiring specialized knowledge, involving

[1] The late William R. Jones, Jr., Bar #001481 was a major contributor to this Comment but passed away before its filing.

high alleged damages, and implicating professional licensure. Thus, the Rules must be written in a way that acknowledges the unique realities and complexities of medical malpractice claims, which is exactly why separate provisions for medical malpractice claims currently exist.

The Rules as currently written are efficient and effective, to the extent they are enforced. Accordingly, the proposed amendments are unnecessary and will increase the time and cost of litigation. The following identifies the most compelling reasons this Court should reject the proposed amendments.

I. ANALYSIS

A. Proposed Rule 16 fails to incorporate key provisions applicable to medical malpractice claims.

The Petition seeks to abrogate Rule 16(e) and integrate its provisions into Rules 16(b)-(d). The proposed amendments fail to adequately do so. First, the proposed amendment abrogating Rule 16(e)(1) eliminates the medical malpractice defendant's right to have the scheduling order include "any medical examination that a defendant desires to be made of a plaintiff." This is a critical omission. A medical malpractice defendant's right to require a plaintiff to undergo an independent medical examination from a physician of the defendant's choosing is essential to the defendant's ability to present a full and fair defense. Eliminating this provision (without including it elsewhere in the rule) – and of necessity requiring the defendant to file a motion asking the court to approve an IME with a physician of the defendant's choosing – not only increases the time and costs of litigation, but also increases the chances that the plaintiff will obtain his own medical examination, and then use that to argue that the court should deny defendant's motion as "duplicative." In this way, the proposed abrogation of Rule 16(e)(1) deprives the defendant of a valuable right to confront the plaintiff's claims against him. Rule 16(e)(1) should either be left as is, or at a minimum, Subsections (b) through (d) should include a provision requiring the scheduling order to include "any medical examination that a defendant desires to be made of a plaintiff."

Second, abrogating Rule 16(e)(1) would eliminate a medical malpractice defendant's right to obtain a court order requiring plaintiff to authorize the defendant to obtain copies of records previously produced under Rule 26.2(a)(2). Plaintiffs' counsel commonly produce only the records that support a plaintiff's underlying claim. As such, medical malpractice defendants frequently must request copies of a plaintiff's records directly from the plaintiff's medical providers to ensure a complete and accurate set of records. This oftentimes produces records the plaintiff did not disclose or produce under Rule 26.2(a)(2). Abrogation of this requirement, without incorporating it elsewhere, encourages plaintiffs to "censor" the records provided, knowing the plaintiff is not automatically required to authorize defendant to obtain his own copies directly from the provider. This undermines the ultimate goal of encouraging robust initial disclosure. The defendant has no other way to determine whether the plaintiff in fact produced all of his or her relevant medical records. Yet it goes without saying that a complete and accurate understanding of a plaintiff's medical history is critical to a medical malpractice defendant's ability to present a full and fair defense. Moreover, under the current rules, the defense bears the costs of obtaining a separate set of records and must produce a copy of same to the plaintiff. Thus, the current rules are sufficient and equitable to all parties. Accordingly, Rule 16(e)(1) should not be abrogated, or at a minimum, Subsections (b) through (d) should include a requirement that plaintiff must authorize the medical malpractice defendant to independently obtain a plaintiff's medical records even if plaintiff argues they have been previously produced.

Finally, Rule 16(e) currently requires a plaintiff to notify the court that all served defendants have answered or filed responsive pleadings to the complaint, at which time a Comprehensive Pretrial Conference must be set. Under the proposed amendment, a party must file a written request in order to obtain a scheduling conference. Given the complexities of medical malpractice actions, a Comprehensive Pretrial Conference as currently required is appropriate and therefore should not be abrogated.

B. Abrogating the settlement conference requirement for medical malpractice actions deprives defendant physicians of a necessary "reality check" before trial.

As noted above, medical malpractice actions comprise only approximately 1% of all civil actions filed in Arizona, and only about 5% of those cases go to trial. This small percentage is due in part to the settlement conference requirement currently contained with Rule 16.1(b)(1)(A) that forces a medical malpractice defendant to consider the objective realities of the case. Many physicians' malpractice insurance policies include a "consent to settle" clause that requires the physician's consent before the insurance company may engage in settlement negotiations on the physician's behalf. This is because any settlement on behalf of the physician must be reported to the National Practitioner Data Bank and the defendant's health profession regulatory board, thereby leaving a negative mark on a physician's license. *See* A.R.S. §§ 12-570, 20-1742, 32-1403.01; *see also* A.R.S. § 32-3203. Thus, deciding whether to settle a claim is not merely an economical consideration. Many plaintiffs' attorneys consider the settlement conference requirement to be a waste of time if the defendant physician has not consented; however, the settlement conference requirement has been extremely successful in helping a defendant to understand the strengths of a plaintiff's claim and the serious risks of trial from an objective source, thereby encouraging consent and, ultimately, settlement. Thus, the abrogation of this requirement in favor of a merely permissive settlement conference is short-sighted and will increase the frequency of medical malpractice trials, which often occupy several weeks of the court's time. Accordingly, the undersigned oppose the abrogation of Rule 16.1(b)(1)(A) and the inclusion of a permissive settlement conference option in Rule 16.1(a).

C. Proposed Rule 26.2(b) prejudicially shifts to defendants the burden of persuading the court that "good cause" exists to stagger expert disclosures.

Under current Rule 16(e)(2), the parties must simultaneously disclose their standard of care and causation expert witnesses "[u]nless good cause is shown." Under this Rule, the defendant need only *identify* good cause for staggered disclosure. Plaintiff bears the burden of showing why good cause does not exist for staggered disclosures. Staggered

disclosures are frequently appropriate because a defendant has a right to know the basis for and scope of the claims against him or her in order to be able to defend them. Simultaneous disclosures does not allow that. Under the proposed amendment, however, staggered disclosure is permitted only if the parties agree or the court orders it. Thus, the burden shifts to the defendant to prove to the court that good cause exists such to justify a staggered disclosure order. A defendant has a right to be fully advised of the basis for and scope of the claims against him or her, but this this proposed amendment restricts that right. Not only is the proposed amendment a less fair way of handling expert disclosures, but also, as with some of the other proposed changes, this proposed amendment does nothing more than increase the time and costs associated with the litigation (which undermines the ultimate goal of streamlining it). The undersigned therefore oppose the suggested language on staggering expert disclosures.

D. The proposed Rule 38 abrogates the presumption for jury trial in medical malpractice actions.

The current Rule 38, as just adopted by this Court effective January 1, 2017, provides that jury trials are presumed in medical malpractice cases, and so medical malpractice parties need not request them. As the Court recognized in adopting this rule, this was a positive change which recognized that jury trials are the norm in medical malpractice actions, as they are often of long duration and implicate rights beyond mere property (monetary) rights. Proposed Rule 38 now apparently seeks to return to the pre-January 1, 2017 system, whereby all parties must request a jury trial if they want one. The undersigned oppose this. This reasoning behind the January 1 amendment still applies. The recently-recognized presumption that there will be a jury trial in all medical malpractice actions is appropriate and should not be abolished, especially given that it was only recently enacted.

II. CONCLUSION

For the aforementioned reasons, the undersigned oppose the amendments outlined in the Petition to Amend Rules 16, 16.1, 26.2, 38 and 38.1.

DATED this 22nd day of May 2017.

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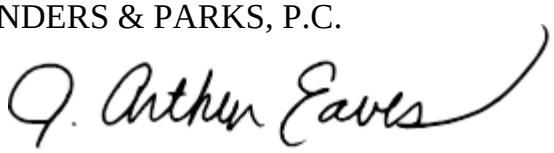

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