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7

8 **IN THE SUPREME COURT**

9 **STATE OF ARIZONA**

10 In the Matter of:

Supreme Court No. R-17-0010

11 **PETITION TO AMEND THE ARIZONA**
12 **RULES OF CIVIL PROCEDURE, TO**
13 **MODIFY RULES 8, 8.1, 11, 16, 26, 26.1-2,**
14 **29, 30, 31, 33-37, 45, 45.2; ABROGATE**
15 **RULE 16.3; ADOPT NEW RULES 26.2 and**
16 **45.2 AND MODIFY RULE 84**

COMMENT TO PETITION TO AMEND
THE ARIZONA RULES OF CIVIL
PROCEDURE, TO MODIFY RULES 8,
8.1, 11, 16, 26, 26.1-2, 29, 30, 31, 33-37, 45,
45.2; ABROGATE RULE 16.3; ADOPT
NEW RULES 26.2 and 45.2 AND
MODIFY RULE 84

17
18 Undersigned counsel, on behalf of Mutual Insurance Company of Arizona
19 (hereinafter "MICA"), oppose the proposed amendments laid out in the Petition to Amend the
20 Arizona Rules of Civil Procedure, to Modify Rules 8, 8.1, 11, 16, 26, 26.1-2, 29, 30, 31, 33-37,
21 45, 45.2; Abrogate Rule 16.3; Adopt New Rules 26.2 and 45.2 and Modify Rule 84.¹ Founded
22 in 1976 by Arizona physicians, MICA is a physician-owned and directed medical professional
23 liability company insuring the majority of physicians in private practice in the State of Arizona.
24

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

1 Medical malpractice claims make up less than 1% of all civil actions filed in
2 Arizona, and yet they are some of the most complex claims flowing through Arizona’s court
3 system, frequently including multiple defendants, requiring specialized knowledge, involving
4 high alleged damages, and implicating professional licensure. The Rules must be written in a
5 way that acknowledges the unique realities and complexities of medical malpractice claims,
6 which is exactly why separate provisions for medical malpractice claims currently exist. The
7 proposed “tier system” is simply inadequate to deal with the complexities of medical
8 malpractice actions and has the potential to infringe on a defendant medical provider’s due
9 process rights. Additionally, the expert written report requirement for Tier 3 cases – under
10 which nearly all medical malpractice claims would fall – would greatly increase the cost of
11 litigation and would make it more difficult for an expert’s opinions to evolve as the matter
12 proceeds through discovery. Finally, protecting an expert’s draft reports and communications
13 between an expert and the retaining attorney severely disadvantages defendant by prohibiting a
14 full and fair cross examination of the expert.

15 The Rules as currently written are efficient and effective, to the extent they are
16 enforced. Accordingly, the proposed amendments are unnecessary, will increase the time and
17 cost of litigation, and may infringe on a defendant’s due process rights. The following identifies
18 the most compelling reasons to either reject the proposed amendments in the Petition, or at least
19 exempt medical malpractice actions from the tier system, if adopted.

20 **I. ANALYSIS**

21 **A. The tier system is unduly prejudicial to a medical malpractice defendant.**

22 The tier system might work well for the 99% of cases filed in Arizona not based
23 on medical malpractice. But for medical malpractice actions, the tier system is simply not
24 feasible and might deprive defendant health care providers of their due process rights because
25 more is at stake than mere monetary considerations.²

26 ² The complex case designation and rules should also not be eliminated for many of the
same reasons that a tier 3 designation would be inadequate for medical malpractice actions.

1 Preliminarily, a plaintiff is statutorily barred from including an amount of damages
2 in the complaint, *see* A.R.S. §12-566; therefore, a plaintiff would have to assert a tier based on
3 qualitative factors under the Proposed Rule 8(g). Inevitably, medical malpractice actions would
4 be placed in Tier 3, given that usually they are logistically complex, involve voluminous
5 documentary evidence, require managing a large number of witnesses and separately
6 represented parties, and involve amounts in controversy exceeding \$300,000. To put medical
7 malpractice actions in any other tier, even if the amount in controversy were less than \$300,000
8 would unduly restrict a medical defendant's ability to present a full and fair defense, which
9 would violate the defendant's right to due process, particularly considering the professional
10 licensure rights at stake.

11 Even a tier 3 designation, however, can impermissibly restrict a medical
12 defendant's right to a full and fair defense, and potentially a plaintiff's right to a full and fair
13 prosecution of the claim. Consider, for example, a wrongful death medical malpractice case
14 involving five statutory beneficiaries (e.g., two parents, two children, and a spouse) and five
15 defendants (e.g., an internist, a surgeon, an anesthesiologist, a radiologist, and a hospital).
16 Under the hospital's umbrella are a dozen nurses who charted on the patient, radiology
17 technicians, and custodians of records; and the conduct of multiple treating providers is relevant
18 to the underlying claims and defenses. Such a scenario is not unusual for a medical malpractice
19 action. Given the numerous parties and fact witnesses, the discovery limits of tier 3 would be
20 unworkable. This would require additional, otherwise unnecessary motions and judicial
21 intervention, potentially resulting in defendants having to pay portions of the plaintiffs' costs
22 simply to mount a full and fair defense. If a court were to misapprehend the gravity of rights
23 involved, it could deny the requested discovery under Proposed Rule 37(h). Such a system is
24 cumbersome and creates the possibility of undue prejudice.

25 The final reason to reject this proposal for medical malpractice cases is that
26 medical malpractice attorneys agree (both defense and plaintiffs') that there is really no

1 discovery abuse problem to be solved in the medical malpractice context. The consensus is that
2 abuse of discovery is rarely an issue in medical malpractice actions. Accordingly, in addition to
3 the repercussions noted above, the fact that there is no discovery abuse problem to be solved in
4 the medical malpractice area dictates that the Court should exempt medical malpractice actions
5 from the tier system, if the Court is inclined to adopt it at all.

6 **B. Requiring expert written reports would greatly increase the cost of litigation.**

7 As discussed above, virtually all medical malpractice actions would fall into a tier
8 3 designation due to the complexities involved and the amounts in controversy over \$300,000.
9 As such, under the proposed Rule 26.1, every expert would be required to write a report. Taking
10 the hypothetical case above with five defendants, one of which (the hospital) is responsible for
11 the conduct of nurses and radiology suite technicians, the number of experts required would be a
12 minimum of six standard of care experts per side, and then each side would likely also have at
13 least several causation experts, depending on the issues involved. *See* A.R.S. §§ 12-2603, -
14 2604; Ariz. R. Civ. P. 26(b)(4)(D). Thus, the case could include nearly twenty experts, each of
15 whom would need to complete a full, written report under the proposed rule. This increase in
16 expert fees would exponentially increase the costs of litigation for all parties.

17 Between the Rules of Civil Procedure and Arizona case law, the disclosure rules
18 with respect to medical malpractice experts is sufficient to provide the parties fair notice as to
19 the substance of the expert's anticipated testimony. Moreover, an expert written report would
20 interfere with an expert's ability to evolve his or her opinion over time as fact development
21 continues through deposition discovery and would essentially require an expert to "script" his or
22 her opinions – something this Court has explicitly stated is not required. The written report
23 requirement is therefore unnecessary and should not be adopted, at least with respect to medical
24 malpractice actions.

1 **C. Protecting draft reports and communication between an expert and the**
2 **retaining attorney deprives parties of a full and fair cross examination of the**
3 **expert.**

4 Protecting from discovery an expert’s draft reports, if any, and communication
5 between the expert and the retaining attorney prejudicially deprives parties of a full and fair
6 cross examination of the expert. This would allow attorneys, consciously or unconsciously, to
7 “script” their experts’ opinions for them, and give the opposing party absolutely no means of
8 uncovering such impropriety, thereby allowing attorneys to hire, with impunity, a “talking head
9 with credentials.” Experts’ draft opinions are valuable – indeed essential – in gleaning an
10 expert’s thought progression, as well as the retaining attorney’s influence on the disclosed
11 opinions. For this reason, neither draft reports or opinions nor communications between an
12 expert and the retaining attorney should be shielded from discovery.

12 **D. Requiring a joint report at the close of discovery on the amount of discovery**
13 **taken is uneconomical.**

14 Finally, Proposed Rule 26.2 requires the parties to file a joint report at the
15 conclusion of fact discovery to identify the amount of discovery taken. This provision merely
16 increases litigation costs. Furthermore, because its purpose is to have judges determine whether
17 fee-shifting orders are appropriate, this proposed provision enhances the adversarial nature of
18 the litigation rather than encouraging the parties to work together for the benefit of full and fair
19 litigation. The provision is also unfair in potentially requiring a defendant to pay the plaintiff’s
20 costs of bringing the suit against him or her. For these reasons, the undersigned believe this
21 Rule should not be adopted, at least with respect to medical malpractice actions.

22 **II. PILOT PROGRAM**

23 To the extent the Court is considering adopting the Proposed Rules, the
24 undersigned strongly urge the Court to consider implementing them in a limited, 12-month pilot
25 program only to determine their feasibility before deciding whether to adopt them with respect
26 to cases like medical malpractice actions.

1 In 1990-1991, the “Zlaket Rules” were developed to allow judges to manage
2 litigation more closely; to limit discovery and avoid discovery abuses; and to mandate disclosure
3 of relevant documents and witnesses – many of the same goals as the instant Petition. The
4 outcome was, of course, a great success and with few changes has guided Arizona’s civil
5 litigation process for the past twenty-five years. But before the Court completely overhauled the
6 Rules in 1992, it wisely tried them out in a one-year pilot program in four divisions of the
7 Maricopa County Superior Court. Of the approximately 5,800 cases assigned to those four
8 divisions, about 1,300 cases were included in the pilot program to determine the feasibility of
9 the new rules. At or near the conclusion of the pilot program, the Court determined that judges
10 and attorneys alike believed the Rules accomplished the desired goal, and the Court
11 implemented them across the state.

12 Because the CCJR’s Petition seeks a similar overhaul of the rules to reach similar
13 goals, if the Court is interested in its proposals, the Court should implement a pilot program for
14 one year to determine whether the proposed rules in fact meet the goal of streamlining litigation
15 – without denying litigants of due process – before they are adopted. As noted above, the
16 undersigned are hesitant to believe that the tier system and expert disclosure amendments will be
17 workable for most medical malpractice actions. Rather, we expect the result to be increased
18 motion practice, increased litigation costs, increased gamesmanship from opposing counsel,
19 increased need for judicial intervention, and stilted expert discovery. If we are correct, it would
20 be far better to learn so through a limited scope pilot program than to upend every medical
21 malpractice action until the rules can be amended yet again. If we are incorrect, there is no harm
22 in learning through a pilot program that the proposed rules can be successfully implemented for
23 all civil actions.

24 **III. CONCLUSION**

25 For the aforementioned reasons, the Petition to Amend the Arizona Rules of Civil
26 Procedure, to Modify Rules 8, 8.1, 11, 16, 26, 26.1-2, 29, 30, 31, 33-37, 45, 45.2; Abrogate Rule

1 16.3; Adopt New Rules 26.2 and 45.2 and Modify Rule 84 should be rejected, at least with
2 respect to medical malpractice actions.

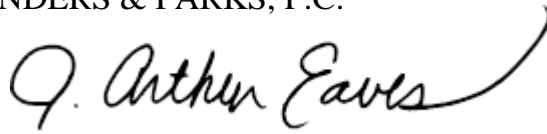
3 DATED this 22nd day of May 2017.

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25 Clerk of the Supreme Court of Arizona
26 this 22nd day of May 2017.

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