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IN THE SUPREME COURT
STATE OF ARIZONA

PETITION TO ADOPT RULE 412,
ARIZONA RULES OF EVIDENCE

Supreme Court No. R-09-0022

**Comment of the State Bar of Arizona
Regarding Petition to Adopt Rule 412,
Arizona Rules of Evidence**

The State Bar of Arizona respectfully opposes the petition to adopt proposed Arizona Rule of Evidence 412, which would govern the admission of medical records and medical bills into evidence. The petitioner argues that the proposed rule would facilitate the litigation of “small” cases by eliminating the need for expert medical testimony in a plaintiff’s case-in-chief. Proposed Rule 412 would allow medical records and medical bills to be admitted into evidence without first requiring a plaintiff to establish a foundation for those documents, and would create presumptions that (i) the treatment reflected in the records was necessary as a result of the alleged injury, and (ii) the charges reflected in the bills for such treatment are reasonable.

As noted in the petition, Indiana has adopted a rule that incorporates some aspects of the rule that the petition proposes.¹ Indiana Rule of Evidence 413

¹ While petitioner also notes that the common law of some jurisdictions permits the admission of medical records and bills without expert testimony in personal injury cases, those jurisdictions all require at least some foundation, such as evidence that a bill was

1 provides:

2 Statements of charges for medical, hospital or other
3 health care expenses for diagnosis or treatment
4 occasioned by an injury are admissible into evidence.
5 Such statements shall constitute prima facie evidence that
6 the charges are reasonable.

7 It should be noted that, unlike the proposed rule, the Indiana Rule relates
8 solely to the admissibility of medical bills, as opposed to the broader category of
9 medical records. It also creates a presumption only that the charges shown in the
10 bills are reasonable, rather than a presumption that the underlying treatment was
11 necessary.

12 For the reasons given below, the State Bar does not believe that either the
13 proposed rule or the less ambitious provisions set forth in the Indiana Rule are
14 worth adopting in Arizona.

15 **PROPOSED RULE 412 SHOULD NOT BE ADOPTED**

16 **The Rule Would Improperly Shift a Plaintiff's Burden of Proof to the**
17 **Defendant**

18 A plaintiff has the burden of establishing an evidentiary foundation for the
19 admission of medical records and medical bills in a personal injury case. Unless
20 there is a genuine dispute about such issues, parties usually stipulate to the
21 admissibility of such evidence, as well as to the necessity of the medical treatment
22 reflected in the medical records and the reasonableness of the charges reflected in
23 the bills for such treatment. If a defendant is unreasonable in disputing the
24 necessity of medical treatment or reasonableness of the charges for such care, a

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26 actually paid, before a record or bill will be admitted. *E.g., Stanley v. State*, 197 N.W.2d
26 599 (Iowa 1972).

1 court may order that those records and bills be admitted into evidence without
2 expert testimony. Only when a genuine dispute arises is a plaintiff appropriately
3 required to make a prima facie case through expert testimony so that jurors will not
4 be left to speculate about those issues. The petition is primarily concerned with
5 this limited range of cases.

6 Proposed Rule 412 shifts the burden, and cost, of proof in every case, large
7 and small, to the defendant by creating a foundational predicate for any medical
8 record or medical bill simply because it is offered by a plaintiff. Facilitating
9 plaintiffs' litigation of "small" cases, for which cost-saving procedural
10 mechanisms already exist, does not justify reversal of the well-settled law
11 governing burden shifting on these issues.

12 **Sufficient Safeguards Already Protect Plaintiffs from the Cost of Experts**

13 Currently, the vast majority of personal injury cases that are brought in this
14 state are filed in Maricopa County and Pima County. In both counties, cases with a
15 stipulated value of less than \$50,000 are subject to compulsory arbitration. In such
16 cases, Arizona Rule of Civil Procedure 75(e) permits the admission of medical
17 records, medical bills and sworn written statements from medical experts "without
18 further proof" where the arbitrator finds them to be relevant. Therefore, a plaintiff
19 can meet the burden of proof in those cases without calling a medical expert to
20 testify about the necessity of the treatment or the reasonableness of the bills.

21 In the limited number of cases which are appealed to superior court and tried
22 following compulsory arbitration, several rules provide plaintiffs with a means of
23 shifting the cost of providing proof of the necessity of medical treatment and the
24 reasonableness of charges for such treatment imposed by the more restrictive
25 evidentiary requirements of a trial. One such rule is Arizona Rule of Civil
26 Procedure 77(f), which requires an appealing defendant to pay the expert witness

1 fees incurred by the plaintiff in connection with the appeal if the defendant fails to
2 obtain a judgment which is at least 23 percent better than the arbitration award.
3 Another is Arizona Rule of Civil Procedure 68, which permits a plaintiff to make
4 an offer of judgment to a defendant. If the judgment obtained by the plaintiff is
5 greater than the offer, the defendant must pay the expert witness fees incurred by
6 the plaintiff after the date of the offer. Yet another is Arizona Rule of Civil
7 Procedure 36, which permits a plaintiff to ask a defendant to admit that medical
8 treatment was necessary and the cost of the treatment was reasonable. Where a
9 defendant fails to make such admissions, and the plaintiff proves the truth of the
10 requested admissions, the court may order the defendant to pay the expert witness
11 fees and attorney's fees incurred by the plaintiff in making the proof.

12 **The Rule Creates the Potential for Abuse**

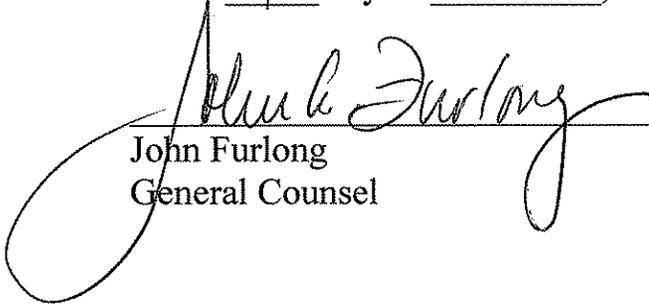
13 Proposed Rule 412 also, unfortunately, creates the potential for abuse by
14 permitting plaintiffs to offer medical records for treatment where there is a
15 questionable, or perhaps even no, causal relationship to an alleged injury. The rule
16 also may entice unscrupulous providers to inflate their bills for a variety of
17 reasons. The petition suggests these concerns would be viewed as threshold
18 relevance issues. If so, the practical effect would be to convert the court into the
19 plaintiff's medical expert. The court would be required to determine which of the
20 hundreds and sometimes thousands of medical documents in a case were relevant
21 and which were not. In addition to burdening the trial court, this would create
22 another avenue for appeal. The evidentiary safeguards currently in place preserve
23 judicial resources and protect plaintiffs from the potential for reversible error that
24 proposed Rule 412 creates and the substantial cost of appealing such error.

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Conclusion

In addition to the effects described above, the adoption of proposed Rule 412 would likely create a host of unanticipated and unintended consequences which may negatively affect the interests of both plaintiffs and defendants. Plaintiffs are currently able to pursue the vast majority of small claims in a cost-effective manner. The existing evidentiary framework for the admission of medical records and medical bills functions well and should not be disturbed. Therefore, the State Bar of Arizona respectfully requests that the Court deny the petition and not adopt proposed Rule 412.

RESPECTFULLY SUBMITTED this 24th day of March, 2010.



John Furlong
General Counsel

Electronic copy filed
with the Clerk of the Supreme
Court of Arizona this 24th
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By: Kathleen Lundgren