

1 John A. Furlong, Bar No. 018356
General Counsel
2 STATE BAR OF ARIZONA
3 4201 N. 24th Street, Suite 100
Phoenix, Arizona 85016-6266
4 Telephone: (602) 252-4804
John.Furlong@staff.azbar.org
5

6 **IN THE SUPREME COURT**
7 **STATE OF ARIZONA**

8 PETITION TO ADOPT RULE 412,
9 ARIZONA RULES OF EVIDENCE

Supreme Court No. R-12-0029

**Comment of the State Bar of Arizona
on the Petition to Promulgate New
Arizona Rules of Evidence, Rule 412**

10
11
12 The State Bar of Arizona opposes the petition to adopt proposed Arizona Rule
13 of Evidence 412, which would govern the admission of medical bills into evidence in
14 personal injury cases. The petition is similar to a previous petition filed by the same
15 petitioner in 2009, which the State Bar also opposed. Proposed Rule 412 both
16 restates the current common law that medical bills for treatment, occasioned by a tort
17 are admissible into evidence, but also creates a presumption that the charges for such
18 treatment are reasonable. The petitioner states that proposed Rule 412 is intended to
19 address the cost of litigation “[i]n cases involving minor injuries.” The petitioner
20 believes that the proposed rule is necessary because Arizona trial courts
21 unnecessarily require expert medical testimony to establish the foundation for the
22 admission of medical bills, the cost of which makes litigating “minor injury” cases
23 economically unattractive. The petitioner claims that Rule 412 would reduce
24 litigation costs by allowing the reasonableness of medical bills to be established
25

1 solely because they were incurred. For the reasons set forth below, the State Bar
2 does not believe that proposed Rule 412 should be adopted.

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

4 **The Rule Would Improperly Shift the Plaintiff's**
5 **Burden of Proof to the Defendant**

6 Arizona law is clear that the plaintiff has the burden of establishing an
7 evidentiary foundation for the admission of medical bills in a personal injury case,
8 and cannot rely solely on the bills to prove that medical expenses reflected in the bills
9 are reasonable. *Larsen v. Decker*, 196 Ariz. 239, 243, ¶ 20, 995 P.2d 281, 285 (App.
10 2000). While foundation for the reasonableness of medical bills is generally laid
11 through expert medical testimony, Arizona courts have not held such testimony is the
12 exclusive means of doing so.

13 Proposed Rule 412, however, shifts the burden and cost of proof to the
14 defendant by creating a foundational predicate of reasonableness for any medical bill
15 reflecting treatment provided by a licensed health care provider simply because it is
16 offered by a plaintiff. The State Bar of Arizona believes that facilitating plaintiffs'
17 litigation of minor personal injury cases, for which many cost-saving procedural
18 mechanisms already exist, does not justify reversal of the well-settled law governing
19 burden-shifting on this issue.

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

21 The vast majority of personal injury cases brought in Arizona are tried in
22 Maricopa County and Pima County. In both counties, cases with a stipulated value
23 of \$50,000 or less are subject to compulsory arbitration. In such cases, Arizona Rule
24 of Civil Procedure 75(e) permits the admission of medical records "without further
25 proof" where the arbitrator finds them to be relevant. Therefore, a plaintiff can meet

1 the burden of proof in those cases without calling a medical expert to testify about
2 the reasonableness of the bills.

3 In the limited number of cases which are appealed to superior court and tried
4 following compulsory arbitration, the parties often stipulate to the reasonableness of
5 the charges reflected in medical bills, unless there is a genuine dispute. If a
6 defendant unreasonably disputes those charges, a court may order that the bills be
7 admitted into evidence without expert testimony.

8 Where a genuine dispute does exist, expert medical testimony will already be
9 necessary to establish whether the care reflected in the medical records was needed
10 because of injuries caused by the alleged tort. In most cases, the witness who is
11 called to provide that foundation will also provide a foundation for the
12 reasonableness of the cost of that care.

13 Only in a case on appeal from arbitration, when a court believes a genuine
14 dispute exists about the reasonableness of the cost of medical care, and when the
15 plaintiff's causation expert will not testify about the reasonableness of the medical
16 expenses for such care, will a plaintiff appropriately be required to call a separate
17 witness, or produce other evidence, in order to lay foundation for the medical bills so
18 that jurors will not be left to speculate about that issue. The petition is primarily
19 concerned with this exceedingly limited number of cases.

20 In such cases, several rules provide plaintiffs with a means of shifting the cost
21 of proving the reasonableness of charges for medical treatment imposed by the more
22 restrictive evidentiary requirements of a trial. For example, Arizona Rule of Civil
23 Procedure 77(f) requires an appealing defendant to pay the expert witness fees
24 incurred by the plaintiff in connection with the appeal from arbitration, if the
25 defendant fails to obtain a judgment which is at least twenty-three percent better than

1 the arbitration award. Arizona Rule of Civil Procedure 68 permits a plaintiff to make
2 an offer of judgment to a defendant. If the judgment obtained by the defendant is not
3 more favorable to the defendant than a rejected offer, the defendant must pay the
4 reasonable expert witness fees incurred by the plaintiff after the date of the offer.
5 Arizona Rule of Civil Procedure 36 permits a plaintiff to ask a defendant to admit
6 that the cost of medical treatment was reasonable. If a defendant fails to make the
7 requested admission and the plaintiff proves its truth, the court may order the
8 defendant to pay the reasonable expenses in making the proof, including reasonable
9 attorney's fees, pursuant to Arizona Rule of Civil Procedure 37(e).

10 **The Rule May Have Unintended Consequences**

11 The adoption of proposed Rule 412 might also create unanticipated and
12 unintended consequences, which may negatively affect the interests of both plaintiffs
13 and defendants. For example, while the petition contemplates that proposed Rule
14 412 is meant to address perceived financial disincentives to litigating low value
15 personal injury cases, its language does not limit its application to such cases.
16 Accordingly, proposed Rule 412 would apply in every type of case, with potentially
17 questionable results, such as improper burden shifting. The potentially broad reach
18 of proposed Rule 412, which goes well beyond that contemplated by the Petition, is
19 not justified by the needs of plaintiffs in small personal injury cases.

20 **Conclusion**

21 Plaintiffs are already able to pursue the vast majority of low value personal
22 injury claims in a cost effective manner. The extremely small universe of cases,
23 about which the Petition is concerned, does not justify the wholesale changes
24 proposed Rule 412 would impose on the existing evidentiary framework for the
25

1 admission of medical bills in all cases. Therefore, the Court should deny the petition
2 and not adopt proposed Rule 412.

3 RESPECTFULLY SUBMITTED this 29th day of April
4 2013.

5

6

7

8

9

10 Electronic copy filed with the Clerk
11 of the Supreme Court of Arizona this
12 29th day of April, 2013.

12

13

14

15

16

17

18

19

20

21

22

23

24

25

By John A. Furlong
John A. Furlong
General Counsel

By: Kathleen A. Lundgren