From: [redacted]
To: Amy Bowne
Subject: Proposed amendment to Illinois Supreme Court Rule 218
Date: Tuesday, April 30, 2019 10:20:26 AM

I am writing to urge the Court to not adopt the proposed amendment to Supreme Court Rule 218.

The proposed amendment would require the plaintiff to execute a wholesale "waiver of the plaintiff's right to privacy" over the medical information produced in discovery. The Supreme Court held in *Best v. Taylor Machine Works*, 19 Ill. 2d 367, 438-39 (1997) that the Legislature's similar attempt in amending735 ILCS 5/2-1003(a) to require plaintiffs to provide defendants with similar blanket waivers and authorizations to obtain medical records was unconstitutional, reasoning that the statute:

"obligates the courts of this state to become party to the forced disclosure of confidential medical information *even if such material is wholly unrelated to the lawsuit in issue,* or, if the plaintiff refuses to comply, to enter an order of involuntary dismissal.
Because involuntary dismissals are considered to be adjudications on the merits (134 Ill.2d R. 273), a plaintiff injured through the fault of another would lose his or her right of action as the penalty for not consenting to the blanket disclosure of all confidential medical information, irrespective of how irrelevant to the lawsuit and however personal, sensitive, or embarrassing the confidential medical information may be to the plaintiff".
(emphasis in original).

The *Best* court also based its decision on a patient's right to privacy in his medical records as described in *Petrillo v. Syntex Laboratories*, 148 Ill. App. 3d 581 (1st Dist. 1986) and related cases, stating:

"We believe that the rationale of the *Petrillo* court is sound and that there is a strong public policy against *ex parte* conferences between the plaintiffs' health care practitioners and defendants or their representatives. We further believe that the privacy interest referred to in the “certain remedy” clause of section 12 provides a constitutional source for the protection of the patient's privacy interest in medical information and records that are not related to the subject matter of the plaintiff's lawsuit. ... [W]e believe that a statement of “constitutional philosophy” is reflective of the strong public policy that was recognized in *Petrillo.* Therefore, we conclude that **patients in Illinois have a**

privacy interest in confidential medical information, and that the *Petrillo* court properly recognized a strong public policy in preserving patients' fiduciary and confidential relationship with his or her physicians."

Best, 179 Ill 2d at 458-59. (emphasis added).

The proposed amendment to Rule 218 therefore flies in the face of what, until now, the Court has stated in no uncertain terms the Constitution and strong public policy demand. There is, and can be, no rational reason for departing from this well-established precedent.

In the 22 years since *Best*, countless cases have been litigated and medical records provided under the protections required by *Best* and *Petrillo* without any forced waiver by plaintiffs of their right to privacy. Defendants have been able to vigorously and successfully defend cases without plaintiffs having to surrender their right to privacy as the price of gaining admission to the court house. Nothing has changed to justify such a radical and unnecessary change in Illinois law.

The proposed rule also is unlimited in time and scope. Must a plaintiff waive her privacy in records unrelated to the case? Even for records that are related to the injuries claimed, there is no rational reason for defendants to retain the right to that information in perpetuity, as the proposed rule seems to allow. While a plaintiff does put his medical condition at issue in a suit, it does not at all follow that he thereby consents to forego his rights all of his protected medical information forever.

The rule also puts no limits on what defendants can do with the information revealed in this forced "waiver". Insurers should not be permitted to build data bases for their own statistical analysis with the private information that they obtain only because they have been injured by the wrongful conduct of their insureds.

Finally, the proposed rule violates regulations under the Health Insurance Portability and Accountability Act ("HIPAA"), 45 CFR Secs. 160-164 that are designed to protect patients' medical records. Under the HIPAA, protected health information may not be disclosed without valid authorization and use or disclosure must be made in a manner consistent with the authorization granted.

These sections may be summarized as allowing disclosure only in response to: (1) a court order expressly authorizing the disclosure of the requested protected health information, or (2) a subpoena or discovery request issued pursuant to the Rules of Civil Procedure, if a qualified protective order has been requested or a good-faith effort has been made to give notice to the individual and any objections have been resolved. *Moss v. Amira*, 356 Ill. App. 3d 701, 711 (1st Dist. 2005).
By compelling an unlimited "waiver", the proposed amendment purports to destroy the protections litigants have under HIPPA to object to the disclosure of information and to limit the time and scope of the use of this information.

While a State may enact *more stringent* protections than those afforded by HIPAA, HIPA pre-empts state law restrictions that purport to vitiate the protections afforded by HIPAA. *Giangullio v. Ingals Memorial Hosp.*, 365 Ill. App. 3d 823, 840 (1st Dist. 2006). This means that no rule of any state court may force a litigant to give up the rights he has under HIPAA, as the proposed amendment does here.

Up until now, defendants have sought and routinely received qualified protective orders under HIPPA that have enabled them to obtain the information necessary to defend a case without wholesale violations of a plaintiff's privacy. This system has worked. There is no pressing need to change it.

This Rule would violate the Illinois Constitutional right to privacy, destroy a patient's right to prevent *ex parte* communications with his physicians and violate a patient's protections under HIPPA. No valid purpose would be served by this amendment. I therefore urge the Court in the strongest terms to not adopt this amendment.

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