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Co-Petitioners on behalf of the Arizona Association for Justice

IN THE SUPREME COURT
STATE OF ARIZONA

PETITION TO AMEND RULE 26(b)(4)(C) OF THE ARIZONA RULES OF CIVIL PROCEDURE	) Petition No.)) **[Petition and Motion for Expedited**) **Consideration of Petition Pursuant to**) **Rule 28(g), Ariz.R.Sup.Ct.]**

Pursuant to Rule 28, Arizona Rules of the Supreme Court. Petitioner Arizona Association for Justice, also known as the Arizona Trial Lawyers Association, respectfully submits this Petition and Motion for emergency consideration of an amendment to Ariz.R.Civ.Proc. 26(b)(4)(C) to express the long-standing policy and custom in Arizona that treating physicians are entitled to reasonable compensation when compelled to testify.

This matter is urgent due to the opinion in *Sanchez v. Superior Court*, Arizona Court of Appeals, Division One, Case No. 1 CA-SA 12-072 (Aug. 20, 2013) (holding that treating physicians are not generally entitled to reasonable compensation when compelled to testify about a patient's medical treatment) (hereinafter "*Sanchez*"), the effect of which will cause immediate and irreparable harm to injured parties and physicians. A copy of the *Sanchez* opinion is attached as Exhibit 1, and a redlined version of Rule 26(b)(4)(C), showing the proposed change, is attached as Exhibit 2.

The *Sanchez* interpretation of Ariz.R.Civ.Proc. 26(b)(4)(C) overturns the Arizona practice that treating physicians who testify about the care they rendered to a patient are entitled to a reasonable fee for their time. Physicians may now be dragged out of their offices without meaningful compensation, which will be financially devastating for physicians and will quickly cause them to refuse to treat injury victims. If Rule 26(b)(4)(C) is not immediately revised to clearly provide that treating physicians are to be paid as experts, as they have been for quite some time, thousands of Arizona physicians and many thousands of Arizona injury victims will needlessly suffer.

In accordance with Arizona Supreme Court Rule 28, Petitioner asks the Court to amend Arizona Rule of Civil Procedure 26(b)(4)(C). Petitioner moves

for emergency consideration of the proposed amendment under Rule 28(g) because this is a matter of statewide importance with an immediate, direct, deleterious impact on the rights of treating physicians and their patients.

The annual rule-processing cycle is inadequate to address this situation before it dramatically causes widespread damage and confusion for treating physicians and their patients. Moreover, the *Sanchez* interpretation of Ariz.R.Civ.Proc. 26(b)(4)(C) threatens to irreparably harm the carefully nurtured and constructive interdisciplinary relationships between the medical and legal communities.

Overview of Rules re Compensating Expert Witnesses

Witnesses may be compelled to testify, at deposition or trial, by subpoena. Ariz.R.Civ.Proc. 45. If the person is required to attend a proceeding, the subpoena must be served with "fees for one day's attendance and the mileage allowed by law." Ariz.R.Civ.Proc. 45(d)(1). A.R.S. § 12-303 sets the amount of the fee and was last amended in 1970. The required fees are $12 per day and twenty cents per mile, one-way only.

Under Ariz.R.Civ.Proc. 26(b)(4)(C), this Court set a policy that an "expert" must be paid a "reasonable fee for time spent responding to discovery." Rule 26(b)(4)(C) also requires that fee must be paid by "the party seeking [the]

discovery." *Id.* Accordingly, if a treating physician is not an "expert" under Rule 26(b)(4)(C), then she may be compelled to testify, at deposition or trial, for $12 plus applicable mileage. If she is an "expert" under Rule 26(b)(4)(C), she is entitled to "reasonable compensation."

The *Sanchez* opinion answers this question contrary to the well-established custom and practice in Arizona, and further aggravates the statewide crisis in obtaining healthcare. This problem is so urgent that it cannot be left to the appellate process or regular rules cycle.[1]

The *Sanchez* Opinion

Until *Sanchez* was decided, litigants routinely paid treating physicians a professional hourly rate for depositions and trial time. This custom and practice was supported by this Court's policy set forth in Ariz.R.Civ.Proc. 26(b)(4)(C) as well as interdisciplinary agreements in the medical and legal communities.

Sanchez will disrupt medical practices, harm physicians, and make it difficult or impossible for injury victims to obtain care. What medical practice can survive if the doctors are regularly required to testify without payment of

[1] This Petition is not a backdoor appeal of *Sanchez*, and does not address the Court of Appeals' interpretation of current Rule 26(b)(4)(C). This Petition seeks to change the rule to expressly state that treating health care providers *are* entitled to payment as experts when required to testify about their professional services.

professional fees for their time? Whether or not the Court of Appeals was correct in its analysis of the existing rule, Ariz.R.Civ.Proc. 26(b)(4)(C) needs to be clarified to provide "reasonable compensation" to treating physicians who are compelled to testify. This is an issue of immediate statewide importance.

Sanchez arose as a result of a casualty insurer seeking to avoid paying claimants' treating physicians any professional fee for their time at depositions. The opinion would allow parties to compel treating physicians of every specialty to trials and depositions without paying them the expert-witness fees traditionally paid for disrupting their professional work. The treating physicians would instead be paid $12 per day and 20¢ a mile (one way) for the privilege of not treating their patients and having lawyers bombard them with questions. *Sanchez* transforms treating physicians into fact witnesses, entitled to nothing more for testimonial travel and appearance than the citizen who happens to see a car crash.

Most people are rarely percipient fact witnesses, so having to testify is rare and the burden of occasional testimony is bearable. Medical providers, many of whom daily treat injury victims, play a unique and integral role in the justice system; they are required to testify far more frequently than other witnesses. Indeed, the American Medical Association itself imposes a professional ethical

obligation upon physicians to participate in the administration of justice.[2] Upsetting the custom and practice of fairly paying them for their time will financially devastate physicians, profoundly reduce the healthcare available for injured persons, and would be poor public policy indeed.

The Petitioner

Petitioner is a non-profit organization consisting of about 700 Arizona attorneys. It is the sole Arizona bar association expressly dedicated to protecting the rights of tort victims and insurance consumers. Petitioner's members protect their clients and the public through continuing legal instruction, public education, legislative presentations, trial and appellate advocacy, and the proposal and support of judicious changes to procedural and ethical rules.

Discussion

1. Drawing a distinction between a treating physician's fact testimony (non-compensable) and expert testimony (compensable) will create an undue burden on the courts.

Sanchez held that whether a treating physician is entitled to reasonable compensation for responding to discovery is within the trial court's discretionary powers. *Sanchez* at 19. Specifically, *Sanchez* held that:

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[2] AMA Code of Medical Ethics Opinion 9.07 – Medical Testimony (2004), attached as Exhibit 5 ("As citizens and as professionals with specialized knowledge and experience, physicians have an obligation to assist in the administration of justice.").

> Whether a treating doctor is a fact or expert witness depends on the content of the physician's testimony. When a treating doctor is testifying only to the injury, medical treatment, and other first-hand knowledge not obtained for purposes of litigation, the treating doctor is a fact witness and need not be compensated as an expert. However, where expert testimony is solicited, whether the source of the expert's information is from personal observation or the observations of others, but the testimony is developed for purposes of litigation, the doctors must be compensated accordingly. **Often it will depend on the questions being presented to the treating physician. We lean on the discretionary powers of the trial court to determine when expert testimony is being solicited.**

Id. (emphasis added). However, trying to draw that distinction will create havoc for litigants, trial lawyers, and trial judges.[3]

Treating physicians are generally considered "hybrid experts" because their testimony involves: (1) factual testimony related to the patient's condition, injuries, and treatment, and (2) expert testimony regarding diagnosis, causation, prognosis, reasonableness of care, propriety of past and future medical costs, and so forth. Since treating physicians are experts in their fields and apply that expertise to all that comes before them, it is nearly impossible to elicit purely "factual testimony" from a treating physician without delving into opinion

[3] "It is common place for a treating physician during, and as part of, the course of treatment of a patient to consider things such as the cause of the medical condition, the diagnosis, the prognosis and the extent of disability caused by the condition, if any. Opinions such as these are part of the ordinary care of the patient . . . ." *E.g., Piper v. Harnischfeger Corporation*, 170 F.R.D. 173 (D.Nev. 1997).

testimony. For example, even the medical history that a treating physician takes will rely on both factual and opinion testimony because the physician must use expert knowledge and skills in deciding what history is medically significant.[4]

Under *Sanchez*, trial judges will now be forced to rule on whether such testimony is "developed for the purposes of litigation." As *Sanchez* noted, that determination can only be made based upon the nature of the question presented to the treating physician. Trial judges will now be forced to rule on that hyper-technical issue *during depositions* without briefing and without being present to control the proceeding. Further, the trial judge's ruling will only be applicable to the question posed. How many times in *every* treating-physician deposition will litigants now call the judge to resolve disputes over whether the requested testimony was "developed for the purposes of litigation?" What happens when the judge is unavailable? Can litigants—or treating physicians themselves—end the deposition without the threat of sanctions? On top of that, what happens at trial? Will there be constant objections, interruptions, and sidebar conferences

[4] "Treating physicians . . . are witnesses testifying to the facts of their examination, diagnosis and treatment of a patient. It does not mean that the treating physicians do not have an opinion as to the cause of an injury based upon their treatment of the patient, or to the degree of the injury in the future. *These opinions are a necessary part of the treatment of the patient*." *E.g., Baker v. Taco Bell Corp.*, 163 F.R.D. 348 (D. Colo. 1995) (emphasis added).

when a treating physician testifies? After *Sanchez*, who knows?

In addition, treating physicians will now have to hire their own attorneys to appear at depositions to protect their rights. In *Sanchez*, Dr. Hobbs retained his own counsel to file the motion for protective order and to ensure he would be paid a reasonable fee for his deposition appearance. That practice will become commonplace as doctors try to protect their own financial interests—and will unnecessarily increase the cost and burden of litigation for parties and non-parties alike.

Sanchez will exponentially amplify a trial judge's day-to-day involvement in discovery and increase the time and money spent by both litigants *and non-parties* on depositions and other testimonial events. That would directly conflict with Arizona Rule of Civil Procedure 1, which requires construing the rules to secure the just, speedy, and inexpensive determination of every action.

2. As currently drafted and interpreted, in the post-*Sanchez* world, Rule 26(b)(4) will deprive injured victims of access to needed medical care.

Virtually every personal-injury case—and many wrongful-death cases—involves treating physicians testifying at trial. Those physicians provide not only medical care and service to the injured victim, but also provide an important civic service to the public by being willing to testify. *Sanchez* will have a chilling effect on the number of physicians willing to treat injury victims, will deprive

tort victims of their testimony, and will deprive juries of the benefit of their expertise.

Physicians are already pressed for time and resources. Even when properly compensated for time spent responding to discovery, many physicians are reluctant to treat tort victims because of the time and effort involved in participating in litigation and the disruption to their day-to-day work. In fact, many physicians already refuse to treat tort victims to avoid having to participate in litigation. Now, knowing they will not even be compensated for time testifying, many more physicians will logically refuse to provide much-needed care and treatment to tort victims. The financial burden on physicians will be intolerable if they are no longer entitled to reasonable professional compensation for time testifying.

3. The proposed amendment will harmonize Rules 26(b)(4) and 30(a).

"Rules and statutes should be harmonized wherever possible and read in conjunction with each other." *State v. Hansen*, 215 Ariz. 287, 289, 160 P.3d 166, 168 (2007). Ariz.R.Civ.Proc. 30 provides that "the testimony of parties or any expert witness expected to be called may be taken by deposition upon oral examination." Recognizing that treating physicians routinely testify as expert witnesses at tort trials, the State Bar Comment to the 1991 Amendment to Rule

30 explains that treating physicians are regarded as "disclosed experts" for the purposes of the rule.

Ariz.R.Civ.Proc. 26(b)(4)(A) lets a party depose "an expert witness whose opinions may be presented at trial." In addition, Rule 26(b)(4)(C) requires a party noticing a deposition to pay the expert witness reasonable compensation for time spent in responding to discovery. When read with Rule 30, Rule 26(b)(4) requires the payment of reasonable compensation to treating physicians because, at least before *Sanchez*, they were considered "disclosed experts."

But *Sanchez* held that while treating physicians are "disclosed experts" under Ariz.R.Civ.Proc. 30(a), they are not providing expert testimony requiring payment of reasonable compensation under Ariz.R.Civ.Proc. 26(b)(4). The holding is anomalous. A person cannot be an expert witness under one rule and a lay witness under another, especially when both rules deal with whether a treating physician's testimony is expert-witness or lay-witness testimony. Thus, *Sanchez* created a previously nonexistent conflict between Rule 30(a) and Rule 26(b)(4).

4. *Sanchez* upends Arizona custom and practice.

In 1990, the Maricopa County Bar Association, Maricopa County Medical Society, and Arizona Osteopathic Medical Association jointly published the

Guidelines for Cooperation Between the Physicians and Attorneys in Maricopa County, Arizona. See copy attached as Exhibit 3. The Guidelines were meant "to assist physicians and attorneys in their inter-professional contacts in the hope that misunderstandings may be minimized and meaningful inter-professional relationships based on mutual respect may be engendered." The Guidelines discussed compensation of physicians for medical reports, depositions and court appearances based on the assumptions and prevailing practice of the legal community.

Likewise, the State Bar of Arizona, with input and help from medical and legal associations, published the *Guidelines for Interprofessional Relationships in Legal Proceedings* in 1993. A copy is attached as Exhibit 4. Those Guidelines stated "[e]xcept for the situation where a health care provider is a party to the action, he or she is entitled to reasonable compensation in time spent concerning the manner." Exh. 4 at 8 ("Depositions—Health Care Provider Responsibilities—Charges").

The *Sanchez* interpretation of Ariz.R.Civ.Proc. 26(b)(4) against fairly paying treating physicians for their time testifying about their professional treatment of injured people will disrupt ongoing medical care, medical practices, and thousands of current and future cases, all at enormous cost to injured Arizonans,

Arizona physicians, and the Arizona judicial system. It is contrary to the express policy of this Court in favor of compensating experts as well as thoughtfully cultivated interdisciplinary agreements recognizing the essential role of physicians in the administration of justice.

Conclusion

For the foregoing reasons, Petitioner asks this Court to amend Arizona Rule of Civil Procedure 26(b)(4)(C). Specifically, Petitioner requests the Court adopt, on an emergency basis pursuant to Rule 28(g), Arizona Rule of the Supreme Court, the proposed language in Exhibit 2.

DATED this 28th day of August, 2013

LEVENBAUM TRACHTENBERG, PLC

/s/ Geoffrey Trachtenberg, Esq.
Geoffrey Trachtenberg

PLATTNER VERDERAME, PC

/s/ Richard S. Plattner, Esq.
Richard S. Plattner

Exhibit 1

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SANTIAGO SANCHEZ, Petitioner, v. THE HONORABLE J. RICHARD GAMA, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, HEYDY SANTIZO HERNANDEZ; DAVID HOBBS, D. C., Real Parties in Interest.	1 CA-SA 13-0072 DEPARTMENT D **O P I N I O N**

Appeal from the Superior Court in Maricopa County

Cause No. CV2012-005320

The Honorable J. Richard Gama, Judge

JURISDICTION ACCEPTED; RELIEF GRANTED

The Cavanagh Law Firm By Steven D. Smith Brett T. Donaldson Attorneys for Petitioner	Phoenix
Michael James Wicks Attorney for David Hobbs, D.C.	Phoenix
Sternberg & Singer, LTD By Howard A. Singer and Law Office of Paul M. Briggs, PLLC By Paul M. Briggs Attorneys for Heydy Santizo Hernandez	Phoenix Phoenix

T H O M P S O N, Judge

Exhibit 1

¶1 This special action arises from a personal injury lawsuit in which a treating physician refused to testify unless he was compensated as an expert witness. The superior court ordered Santiago Sanchez (Sanchez), the defendant below, to compensate the treating physician as an expert witness. The narrow issue we address is whether a treating physician's testimony concerning diagnosis, treatment, and prognosis is expert testimony because it draws upon his or her skill, training, and experience as a doctor. For the following reasons, we accept jurisdiction of the special action petition and grant relief.

FACTS AND PROCEDURAL HISTORY

¶2 Heydy Santizo Hernandez (Hernandez) was involved in a motor vehicle accident with Sanchez in Scottsdale, Arizona. Hernandez sued Sanchez for personal injury damages resulting from the accident, and alleged that she required chiropractic treatment from Injury Chiropractic. As part of her prima facie case, Hernandez would have to prove that she was injured, and that her treatment and the charges were reasonable and necessary. *See* Rev. Ariz. Jury Instr. (RAJI) (Civil) Fault 3 & Personal Injury Damages 1 at 34, 108 (4th ed. 2005). In his disclosure statement, Hernandez listed Injury Chiropractic as a witness to "testify consistently with their medical records regarding the injuries sustained by Plaintiff and related

medical treatment." Hernandez also listed Injury Chiropractic as an expert witness, stating the "doctors will testify as Plaintiff's treating physicians, to the injuries and medical treatment and anticipated medical treatment." Treatment notes made by Dr. David Hobbs of Injury Chiropractic were attached to the disclosure statement.

¶3 During discovery, Sanchez subpoenaed Dr. Hobbs to take his deposition. Dr. Hobbs filed a motion to quash the subpoena, or in the alternative, sought entry of a protective order limiting the scope of inquiry by defense counsel and requiring Sanchez to pay expert witness fees in advance. Dr. Hobbs sought to limit the issues to: (1) the care and treatment of Hernandez; (2) the documentation and record-keeping related to the care provided; (3) the reasonableness of the medical services provided; and (4) the philosophy and modalities of the type of chiropractic medicine engaged in by Dr. Hobbs regarding Hernandez's medical condition. On October 17, 2012, Judge Gama granted the motion and agreed that Dr. Hobbs was an expert for purposes of Arizona Rule of Civil Procedure 26(b)(4)(a) & (c).[1] Two days after Dr. Hobbs's deposition was taken, a memorandum regarding the fees to be paid to Dr. Hobbs was filed on his

[1] The arbitrator in this matter made a similar ruling on October 19, 2012. It is unclear from the record why both Judge Gama and the arbitrator made rulings.

behalf. On January 15, 2013, the arbitrator issued a ruling determining that Dr. Hobbs was entitled to payment at the rate of $300 per hour. Sanchez then sought special action relief in this Court on March 15.

SPECIAL ACTION JURISDICTION

¶4 Special action jurisdiction is appropriate when a petitioner does not have an "equally plain, speedy, or adequate remedy by appeal." Ariz. R.P. Spec. Act. 1(a); *State ex rel. Romley v. Superior Court*, 172 Ariz. 109, 111, 834 P.2d 832, 834 (App. 1992). Where the issue is a purely legal question of first impression, is of statewide importance, and will arise again, special action jurisdiction may be warranted. *Vo v. Superior Court*, 172 Ariz. 195, 198, 836 P.2d 408, 411 (App. 1992).

¶5 The petition presents a purely legal question of statewide importance affecting numerous cases. The lack of guidance in this area has resulted in conflicting superior court rulings. Consequently, we exercise our discretion and accept special action jurisdiction.

DISCUSSION

¶6 Sanchez asserts that he should not have been required to pay expert witness compensation of Dr. Hobbs because of his specialized chiropractic knowledge, even though he would only be testifying about his examination, treatment, bills, and

chiropractic opinions formed during treatment of Hernandez. It is undisputed that Dr. Hobbs was not retained for purposes of this litigation, and that his expected testimony is based on his care and services during the treatment of Hernandez, not opinions formed after Hernandez's discharge from care in anticipation of litigation. Thus, the narrow issue in this special action is whether a treating physician's testimony concerning the patient's diagnosis, treatment, and prognosis is "expert testimony" within the meaning of our rules simply because it necessarily draws upon his or her skill, training, and experience as a doctor.

¶7 Sanchez argues this case is governed by *State ex rel. Montgomery v. Whitten*, 228 Ariz. 17, 262 P.3d 238 (App. 2011), which addressed whether a treating physician is entitled to an expert witness fee in criminal cases. *Whitten* was a first degree murder and child abuse case in which the trial court ordered that six of the treating physicians be compensated as expert witnesses if called at trial despite the state's avowal that it would only question the doctors regarding their medical treatment of the child. *Id.* at 19-20, ¶¶ 2, 5, 9, 262 P.3d at 240-41. We rejected the position that physicians must be treated and compensated as expert witnesses "when any part of their testimony requires specialized knowledge obtained through professional education or work experience." *Id.* at 21, ¶ 12,

262 P.3d at 242. Instead, we laid out guidelines to aid in differentiating between expert testimony and fact testimony by treating physicians.

¶8 We held that "[a] fact witness typically testifies about information he or she has acquired independent of the litigation, the parties, or the attorneys." *Id.* at ¶ 14. Thus, a medical fact witness would not be required to perform additional work in order to answer questions other than reviewing his own records. *Id.* Fact-based testimony is derived from the five senses, i.e., what the treating doctor saw, heard, or felt, and typically is given in response to the "who, what, when, where, and why" questions. *Id.* at ¶ 15. Questions about experience, training, and the professional's background and specialization are "relevant to jurors in assessing the credibility of fact witnesses and in determining the weight to give their testimony." *Id.* at ¶ 13. In addition, having the doctors "educate" the jurors by explaining terms and procedures in a manner more understandable for the trier of fact does not constitute expert testimony. *Id.* at 22, ¶ 21, 262 P.3d at 243.

¶9 In contrast, we concluded testimony would constitute expert testimony requiring appropriate compensation if the questions required "a physician to review records or testimony of another health care provider or to opine regarding the standard of care or treatment given by another provider." *Id.*

at 21, ¶ 16, 262 P.3d at 242. Hypothetical questions or questions regarding causation also may be a signal that the doctor is being asked to give expert testimony. *Id.* at 21-22, ¶¶ 17, 19-20, 262 P.3d at 242-43. We noted that the "testimony of a treating physician is, by its nature, often more relevant, material, and probative, than that of the retained expert who is not only paid for his testimony but often gleans it from a cold record." *Id.* at 22, ¶ 21, 262 P.3d at 243 (citation omitted).

¶10 *Whitten* is consistent with *Duquette v. Superior Court*, 161 Ariz. 269, 270, 778 P.2d 634, 635 (App. 1989), a medical malpractice case addressing the issue of attorneys engaging in ex parte communication with a treating physician. Relevant to our discussion here, we stated: "A plaintiff's treating physician is not an 'expert witness' within the meaning of Rule 26(b)(4), Arizona Rules of Civil Procedure, because the facts known and opinions held by a treating physician are not 'acquired or developed in anticipation of litigation or for trial.'" *Id.* at 271 n.2, 778 P.2d at 636 n.2. Dr. Hobbs asserts that *Duquette* is "inapt"; if applied here, he argues, *Duquette* would render Arizona Rule of Civil Procedure 30 meaningless because the Comment to that Rule states that "[t]reating physicians are regarded as disclosed experts *for purposes of this rule*." Ariz. R. Civ. P. 30, 1991 comm. cmt. (emphasis added). Rule 30 provides that no court order or

stipulation is required in order to depose parties or expert witnesses. Ariz. R. Civ. P. 30(a). The phrase "for purposes of this rule" in the Comment refers to Rule 30 and has no impact on Arizona Rule of Civil Procedure 26(b)(4) and whether the treating physician is entitled to be paid as an expert.

¶11 Dr. Hobbs argues that *Whitten* is not persuasive because it involved a criminal matter requiring a civic duty, pointing out our caution that "[n]othing in this opinion, though, should be read as affecting disclosure obligations or witness compensation issues in civil cases." 228 Ariz. at 20 n.2, ¶ 8, 262 P.3d at 241 n.2. While a civic duty certainly attends in providing testimony in a criminal matter, civil litigants also have rights to have alleged wrongs addressed and to defend themselves. As with parties in criminal proceedings, civil litigants must have the ability to gather the facts relevant to their cases.

¶12 In *Whitten*, we considered and addressed the issue of treating physician compensation in the criminal context. It is not uncommon for courts to limit the application of their decisions to the issue before them, rather than trying to anticipate the myriad of possible arguments that could be developed or argued in a different application. This does not, however, automatically indicate that the same principles may not apply or that a similar result would not be appropriate in

another context. It often simply means that the court has not considered its application in another context. We, therefore, do not consider our statement in *Whitten* to suggest that treating physicians would be considered expert witnesses and entitled to compensation in the civil context. The majority of the cases cited in *Whitten* were civil cases. *See, e.g., Davoll v. Webb*, 194 F.3d 1116, 1138 (10th Cir. 1999) ("A treating physician is not considered an expert witness if he or she testifies about observations based on personal knowledge, including the treatment of the party."); *Indem. Ins. Co. of N. Am. v. Am. Eurocopter L.L.C.*, 227 F.R.D. 421, 423-24 (M.D.N.C. 2005) ("When the treating physician goes beyond the observations and opinions obtained by treating the individual and expresses opinions acquired or developed in anticipation of trial, then the treating physician steps into the shoes of an expert . . . ."); *Fisher v. Ford Motor Co.*, 178 F.R.D. 195, 197 (N.D. Ohio 1998) ("Courts consistently have found that treating physicians are not expert witnesses merely by virtue of their expertise in their respective fields."); *Wreath v. United States*, 161 F.R.D. 448, 450 (D. Kan. 1995) ("[A] treating physician requested to review medical records of another health care provider in order to render opinion testimony concerning the appropriateness of the care and treatment of that provider would be specially retained notwithstanding that he also happens to be the treating

physician."); *Schreiber v. Estate of Kiser*, 989 P.2d 720, 723 (Cal. 1999) ("what distinguishes the treating physician from a retained expert is not the content of the testimony, but the context in which he became familiar" with the medical information); *Donovan v. Bowling*, 706 A.2d 937, 941 (R.I. 1998) (testimony by a treating physician is "entirely different from that of an expert retained solely for litigation purposes because a treating physician is like an eyewitness to an event and will be testifying primarily about the situation he or she actually encountered and observed while treating the patient").

¶13 In addition to these cases, many other jurisdictions have reached similar conclusions in civil cases. *See, e.g., McDermott v. FedEx Ground Sys., Inc.*, 247 F.R.D. 58, 60-61 (D. Mass. 2007) (holding that the treating physician is entitled to no more than that provided under the statutory witness compensation scheme); *Mangla v. Univ. of Rochester*, 168 F.R.D. 137, 139 (W.D. N.Y. 1996) (deposition questions concerning treating physicians' opinions based on their examination of a patient are a necessary part of the treatment of a patient and "do not make the treating physicians experts"); *Baker v. Taco Bell Corp.*, 163 F.R.D. 348, 349 (D. Colo. 1995) (treating physician "testimony is based upon their personal knowledge of the treatment of the patient and not information acquired from outside sources for the purpose of giving an opinion in

anticipation of trial"); *Clair v. Perry*, 66 So. 3d 1078, 1079 n.1 (Fla. Dist. Ct. App. 2011) (citing *Frantz v. Golebiewski*, 407 So. 2d 283, 285 (Fla. Dist. Ct. App. 1981)) (a treating physician is not generally an expert witness because "a treating doctor . . . while unquestionably an expert, does not acquire his expert knowledge for the purpose of litigation but rather simply in the course of attempting to make his patient well"); *Brandt v. Med. Def. Assocs.*, 856 S.W.2d 667, 673 (Mo. 1993) ("The treating physician is first and foremost a fact witness, as opposed to an expert witness. In personal injury litigation, the treating physician is likely to be the principal fact witness on the issue of damages; in a medical malpractice case, the treating physician will often also be an important fact witness on liability. Because the treating physician uses medical training and skill both in diagnosing and treating the patient and in describing to the jury the plaintiff's condition and treatment, it is often assumed that the treating physician is automatically an expert witness. Actually, the treating physician only functions as an expert witness to the extent that one or both of the parties ask the witness to use the basic facts to draw conclusions and express opinions on relevant medical issues."); *Nesselbush v. Lockport Energy Assocs., L.P.*, 647 N.Y.S.2d 436, 437 (N.Y. Sup. Ct. 1996) (citing *Sipes v. United States*, 111 F.R.D. 59, 61 (S.D. Cal. 1986)) ("[I]t is

improper to name treating physicians as expert witnesses where the information and opinions possessed by said physicians [were] obtained by virtue of their roles as actors or viewers of the transactions or occurrences giving rise to the litigation . . . .").

¶14 Not all jurisdictions have agreed with this conclusion, however, citing public policy concerns and a physician's specialized training to support the imposition of a "reasonable fee" requirement for testimony from a treating physician who is not technically an expert witness. *See, e.g., Wirtz v. Kan. Farm Bureau Servs., Inc.*, 355 F. Supp.2d 1190, 1211 (D. Kan. 2005) ("[A] treating physician responding to discovery requests and testifying at trial is entitled to his or her 'reasonable fee' because such physician's testimony will necessarily involve scientific knowledge and observations that do not inform the testimony of a simple 'fact' or 'occurrence' witness."); *Mock v. Johnson*, 218 F.R.D. 680, 683 (D. Haw. 2003) ("As opposed to the observations that ordinary fact witnesses provide, the observations and *opinions* that medical professionals provide derive from their highly specialized training."); *Grant v. Otis Elevator Co.*, 199 F.R.D. 673, 676 (N.D. Okla. 2001) ("[T]reating physicians who testify under Fed. R. Evid. 702 as to their diagnoses, treatment and prognoses are experts within the meaning of [Fed. R. Civ. P.] 26(b)(4)(C) and

are entitled to a reasonable fee."); *Coleman v. Dydula*, 190 F.R.D. 320, 323 (W.D. N.Y. 1999) ("Physicians provide invaluable services to the public and should be remunerated for their time when they cannot deliver medical care." (citation omitted)). None of these cases, however, provide any logical explanation as to why physicians and no other class of professional or laborer with "specialized knowledge" should be awarded a "reasonable fee."

¶15 Dr. Hobbs argues that Arizona Rule of Civil Procedure 26(b)(4)(C), which does not apply to criminal cases, is the true governing law regarding this issue and distinguishes civil cases from *Whitten*. Rule 26(b)(4) provides in pertinent part:

> (4) *Trial Preparation: Experts*.
>
> (A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial.
>
> (B) A party may through interrogatories or by deposition discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances . . . .
>
> (C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under

> subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.
>
> (D) In all cases including medical malpractice cases[,] each side shall presumptively be entitled to only one independent expert on an issue, except upon a showing of good cause . . . .

Dr. Hobbs argues that Rule 26(b)(4) identifies and distinguishes between two types of experts – "one whose opinions may be presented at trial and one who has been retained or specially employed and who is not expected to testify at trial." He goes on to state that Rule 26(b)(4) requires reasonable payment to an expert "who is responding to the discovery request – whether it is a treating physician who is testifying under Rule 702 and Rule 703, Arizona Rules of Evidence, or an accident reconstructionist who is not expected to testify at trial." However, Rules of Evidence 702 and 703, which apply in both civil and criminal cases and which we necessarily considered in *Whitten*, deal only with witnesses testifying as experts and not as fact witnesses. Therefore, they do not direct that testifying doctors are necessarily experts; rather, they provide rules applicable to doctors who are engaged as experts.

¶16 Rule 26(b)(4)(A) states that "a party may depose any person who has been identified as an expert whose opinions may

be presented at trial." Dr. Hobbs was not listed as an expert witness in Hernandez's disclosure statement, rather, Injury Chiropractic was identified generically both as witnesses to "testify consistently with their medical records regarding the injuries sustained by Plaintiff and related medical treatment," and as expert witnesses that "will testify as Plaintiff's treating physicians, to the injuries and medical treatment and anticipated medical treatment." To the extent that one may argue that Dr. Hobbs was listed as an expert witness, we hold that the test is not the label given by the disclosing attorney, but the substance of the disclosure under Arizona Rule of Civil Procedure 26.1. *Gomez v. Rivera Rodriguez*, 344 F.3d 103, 113 (1st Cir. 2003) ("[T]he triggering mechanism for application of Rule 26's expert witness requirements is not the status of the witness, but, rather, the essence of the proffered testimony."). Here, the substance of the disclosure was the same. Hernandez listed Injury Chiropractic as treating physicians who would testify to the injuries sustained by Hernandez and her related medical treatment. Our review of Dr. Hobbs's testimony shows that it was almost entirely factual, based on information Dr. Hobbs personally observed independent of the litigation, was not given in response to hypothetical questions and did not require Dr. Hobbs to review the records of another health care provider

involved in a collision was "not an expert retained or specially employed by the party in preparation for trial," and therefore could not refuse to produce his report concerning the incident).

¶19 Therefore, we hold that *Whitten* is applicable to physicians in civil litigation. Whether a treating physician is a fact or expert witness depends on the content of the physician's testimony. When a treating doctor is testifying only to the injury, medical treatment, and other first-hand knowledge not obtained for purposes of litigation, the treating doctor is a fact witness and need not be compensated as an expert. However, where expert testimony is solicited, whether the source of the expert's underlying information is from personal observation or the observations of others, but the testimony is developed for purposes of litigation, the doctors must be compensated accordingly. Often it will depend on the questions being presented to the treating physician. We lean on the discretionary powers of the trial court to determine when expert testimony is being solicited. We acknowledge that it is impossible to anticipate all scenarios and we are not attempting to do so. Our holding in no way entitles parties to abuse physicians by compelling them to give uncompensated expert testimony. The *Guidelines for Interprofessional Relationships in Legal Proceedings* was an excellent attempt at compromise, and we encourage similar efforts of cooperation and good faith in

the future. *See* Joint Committee on Interprofessional Relationships et al., *Guidelines on Interprofessional Relationships in Legal Proceedings 1992/1993* (1993).

CONCLUSION

¶20 Based on the foregoing, we accept special action jurisdiction, grant Sanchez relief and vacate the order compelling expert witness payment to Dr. Hobbs for his testimony relating to the care and treatment of the patient. To the extent Dr. Hobbs's deposition testimony is expert testimony, he must be compensated accordingly.

/s/
JON W. THOMPSON, Judge

CONCURRING:

/s/
JOHN C. GEMMILL, Presiding Judge

/s/
DONN KESSLER, Judge

Exhibit 2

Proposed Amendment to Rule 26(b)(4)(C)
of the Arizona Rules of Civil Procedure

(Additions are shown underlined and deletions are shown ~~stricken~~.)

Unless manifest injustice would result, (i) the court shall require the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert. A witness who is not a party or an employee of a party and who is compelled to give testimony relating to knowledge, information, facts or opinions derived as a result of providing medical care to a party shall be regarded as an expert entitled to payment of a reasonable fee for purposes of this rule.

Exhibit 3

MARICOPA COUNTY BAR ASSOCIATION

MARICOPA COUNTY MEDICAL SOCIETY

ARIZONA OSTEOPATHIC MEDICAL ASSOCIATION

Exhibit 3

MEDICAL-LEGAL GUIDELINES FOR COOPERATION

GUIDELINES FOR COOPERATION BETWEEN THE PHYSICIANS AND ATTORNEYS IN MARICOPA COUNTY, ARIZONA

Prepared jointly by
the
Medical-Legal Liaison Committees
of
MARICOPA COUNTY BAR ASSOCIATION
and
MARICOPA COUNTY MEDICAL SOCIETY
and
ARIZONA OSTEOPATHIC MEDICAL ASSOCIATION

Exhibit 3

INTRODUCTION

This statement has been prepared to assist physicians and attorneys in their inter-professional contacts in the hope that misunderstandings may be minimized and meaningful inter-professional relationships based on mutual respect may be engendered.

MEDICAL LIAISON COMMITTEE

Stephen G. Brown, M.D. - Chairman
Gerald F. Schwartzberg, M.D.
Anthony T. Yeung, M.D.

OSTEOPATHIC LIAISON COMMITTEE

Robert S. Barbosa, D.O. - Chairman
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William G. Vose

ISBN 1-879454-02-5

Exhibit 3

TABLE OF CONTENTS

Exhibit 3

I. MEDICAL EXAMINATIONS
(Requested by the Attorney or Representative of the Opposing Party)

1. The law specifically provides for a medical examination if either party to a lawsuit requests it. Many times such an examination is performed by an agreement and even before litigation.

2. The attorney or representative requesting the examination will arrange the time with the physician and notify the patient of the appointment.

3. The attorney or representative motivating this examination should, in writing, request the physician to answer certain pertinent medical questions.

4. The physician should perform those examinations necessary to formulate an informed opinion as to the nature and extent of the party's medical condition, and answer pertinent medical questions.

5. The physician may request plain x-rays and routine laboratory tests. Should more sophisticated x-rays or tests be necessary, such as barium x-rays, myelograms or electromyograms, the physician should make appropriate arrangements with the requesting attorney.

6. Should the party refuse to submit to examination or x-rays or routine laboratory tests, the physician should not persist but notify the attorney or representative requesting the examination.

7. Should the physician desire additional previous medical information, this request should be conveyed to the attorney or representative motivating the examination.

Exhibit 3

II. WRITTEN REPORTS

A. The Attorney

1. The request for the report should be made in writing and must be accompanied by a written authorization signed by the patient or his or her legal guardian.

2. If an examination is pursuant to a stipulation, court order or notice, under Rule 35, Arizona Rules of Civil Procedure, a written authorization to perform the examination or send the report is *not* necessary.

B. The Physician

1. **Medical records.** The physician must keep records adequate to supply a patient's attorney with pertinent information regarding the patient-client's medical history. The physician should remember that the legal aspect of the case may not appear for several years.

2. **X-rays, ECG's, EEG's, etc.** The physician must retain control of his x-rays, ECG's, EEG's, etc. This does not preclude their delivery to another physician provided the permission of the patient is obtained and arrangements are made for their return.

3. **Requests for medical information** should be honored promptly. If there is a court order specifying more than the name of the examining physician and the time of the examination, the attorney should specify the details of the court order.

4. **If a physician is unable to make a complete medical evaluation within the time required,** he should notify the attorney. In this event, a preliminary report clearly designated as such may serve the attorney's needs until an evaluation can be completed.

5. **Content of report.** The following, where applicable, should be included in the report:

a. Date, time and place of first visit.

Exhibit 3

b. An accurate history of the medical condition, including pre-existing disease. The history of the accident or trauma should be confined to those elements necessary to elicit the medical situation. Facts relating to liability are within the province of the attorney.

c. Nature of examination and findings.

d. Results of any laboratory work, x-rays and consultations, including copies of said reports.

e. Where possible, the physician's opinion including diagnosis and prognosis. This opinion should discuss the relationship, if any, of the accident or injury to the patient's symptoms. The opinion should include further disability, necessity for future treatment or surgery, the effect of any pre-existing disease or prior injury, the length of convalescence, and should answer any specific medical questions presented to the physician by the attorney or representative requesting the examination.

In addition, where the report is made by a treating or consulting physician with respect to a patient's condition, it should include:

(i) A statement about whether the patient's condition is stationary or whether the patient was or will be discharged.

(ii) A description of subsequent examinations, including history, findings and impressions, nature of treatment, need for confinement to hospital or home, referrals to other physicians and patient's progress, pertinent laboratory data, and a final diagnosis and prognosis.

(iii) Statement for current physician's charges and medical expenses should be itemized *excluding* charges for medical reports to attorneys which cannot be used as evidence.

(iv) The cost and extent of future medical care should be estimated when possible.

(f) All references to liability insurance or medical insurance should be omitted.

Exhibit 3

III. DEPOSITION
(Testimony Under Oath Outside of Court)

A. Deposition Defined

A deposition is an official proceeding authorized by law whereby a person, such as a physician, may be required to give testimony and be cross-examined under oath outside of court before an official court reporter and in the presence of attorneys representing the parties. Sometimes production of original records will be required. Often, however, copies of the doctor's medical records may suffice for the legal purposes.

B. Time and Place

The time and place of the deposition should be set, by agreement with the physician and, if possible, in the physician's office. Both the physicians and the attorneys should be punctual. Any attorney or physician who is delayed should promptly notify all parties of the delay.

C. Physician-Patient Privilege

Unless the patient waives the privilege, the physician should not testify or release his records. If a written authorization properly and seasonably signed by the patient is presented which waives the privilege, then the physician may proceed with his testimony and/or release of the records. "Seasonably signed" means within one year or less.

D. Subpoenas

If the deposition of a physician cannot be set by agreement, his attendance can be required by subpoena. Even if the deposition is set by agreement, the attorney causing the deposition may nevertheless subpoena the physician. If the privilege has been waived as outlined above in paragraph C., then the physician may proceed to give his deposition testimony and permit his records to be copied. The physician should not be concerned if subpoenaed, for frequently a subpoena is necessary to permit inspection or copying of the records.

E. Preparation and Deportment

Since the testimony given at deposition hearings may be read at the trial, it is important that the physician, prior to deposition, prepare himself as for trial, and that his attitude and deportment at the deposition hearing be similar to that at trial. The attorney should make every effort to assist the physician in this preparation. (See parts IV and V of these Guidelines.)

IV. RELATIONSHIP BETWEEN PHYSICIANS AND ATTORNEYS

A. A Physician May Only Act for One Side

The physician may be engaged only by one side of a lawsuit except by agreement between the attorneys or by order of the court. However, the physician's testimony should *always* remain objective and must not be colored by the opinions of the employing attorney.

B. Informal Conferences Between Physicians and Attorneys

1. When the physician is treating or has treated a patient and that patient's attorney desires a conference with the physician to discuss the patient's condition, or desires a medical report or copies of the physician's office records, the physician must comply with the request at the earliest convenient time. The attorney should present the physician with a release of medical information authorization, signed by the patient or his legal representative.

2. If the lawyer representing the defendant desires to discuss the case with the physician, or obtain a medical report or copies of the physician's records, he should either:

a. Present the physician with a signed release of medical information authorization, or

b. Subpoena the physician for deposition.

3. The physician and the attorney calling the physician on behalf of the patient should confer prior to trial or deposition at which time the medical-legal issues should be discussed.

4. Medical and legal causation are not always the same. For example, an injury may become infected. As a result of the infection, the patient may need to be hospitalized. While medically speaking, the infection is the cause for hospitalization, legally, the trauma necessitated the hospitalization and, therefore, caused it.

Consequently, no physician should be offended by an attorney's conscientious, thorough and diligent inquiry into the physician's

reasoning and analysis concerning the treatment, diagnosis or prognosis of the medical problem. Such terms as "possible", "probable" or "reasonable medical probability" have special legal significance to an attorney who may request that the doctor phrase his opinions using these terms.

5. Attorneys should meet with physicians before depositions or court appearances. Attorneys should determine, before these proceedings take place, the nature and extent of the physician's opinions and conclusions.

Exhibit 3

V. THE PHYSICAN AND THE TRIAL

A. Subpoenas for Trial

Some attorneys will not subpoena a physician they expect to call as a witness, preferring to make personal arrangements with the physician and relying upon his promise to appear. Other attorneys subpoena medical witnesses because:

1. It may be desirable in a particular case for the physician to be able to testify, if asked, that he appears in court pursuant to a subpoena; or

2. It may be essential in order to secure a continuance if for any reason the physician fails to appear as required.

B. Recommended Policy Regarding Subpoenas and Physician's Appearance

1. A physican should not take offense at being served with a subpoena. Whenever possible, the lawyer should give the physican advance notice of the service of the subpoena. The physician should make himself available for such service.

2. To the best of his ability, the attorney should make arrangements with the physician regarding the time the physician will be called to testify.

3. Recognizing the time problems of the medical profession, judges and attorneys should make every effort to avoid unnecessary inconvenience for the physician. Notwithstanding these efforts, the physician's testimony may not occur on schedule. The process of law and the time of other individuals must also be respected by the physician.

4. Many times a trial does not start on schedule. This is the unavoidable result of oversetting trial calendars to keep the judge busy when, as usually happens, many of the cases are settled shortly before trial. However, because no judge can accurately predict the number of settlements, there may be delays.

5. Once the trial has started, the most competent attorney may fail to accurately predict the time of the physician's testimony because of such things as unforeseen trial developments, justifiable inability to predict the number of witnesses called by the opposing attorney or the time consumed by the opposing attorney's examination or cross-examination. During the trial, the attorney should daily, or more often, inform the physician of the expected testimony time.

6. The attorney should, in writing, notify each physician whose testimony he intends to present at trial, of the trial date within thirty days prior to trial, or if trial notification is less than thirty days, immediately thereafter. Within a week prior to the scheduled trial date, the attorney should, orally and in writing, notify each physician of a tentative testimony date and time. The attorney should promptly notify the physician of any delay.

7. If the case is settled, the physician should be immediately notified.

C. Duty to Testify

Our system of justice depends upon being able to require any citizen's attendance at a judicial proceeding and testimony regarding the case. There is no question as to the obligation of a physican to respond to a subpoena except where grave emergency prevents his doing so. This emergency must be of sufficient magnitude to justify his inability to obey the order of the court.

D. The Physician as a Witness

The physician should testify in a dignified, objective manner. He may express his opinion and yet should understand that he is not in the courtroom as an advocate, and should not be argumentative or contentious.

E. Choice of Language by Medical Witness

The physician should use simple language wherever possible. Technical expressions should be followed with simplified explanations or illustrations for the benefit of the jurors who are laymen.

F. The Physician on the Witness Stand

It is proper for opposing counsel to cross-examine the physician with respect to his qualifications, his fees, the accuracy of his memory, his records, the soundness of his diagnosis, prognosis, and other opinions, as well as any other facts bearing on the weight and credibility of his testimony.

The physician should never be discourteous or antagonistic. The physician may be assured that if an attorney examining him exceeds the bounds of propriety, the court or the attorney offering the physician's testimony will ordinarily intervene for his protection.

G. The Province of the Objection

Trials are governed by the rules of evidence. When an attorney makes an objection to a question, he is merely requesting the court to decide the legality of the question. If, after the court makes its ruling, the physican is in doubt whether to answer the question, he should ask the judge.

H. Do Not Refer to Insurance

Witnesses should avoid mentioning liability insurance or medical insurance. The mention of these subjects in a personal injury action may result in a mistrial.

I. Categorical Answers

When a physician feels that "yes" or "no" will not accurately answer a question, he should so state. Permission will usually be given to qualify or explain the answer.

J. Opinions May Differ

A physician should express a medical opinion if he feels he has sufficient knowledge, experience and observation to do so. He should not be reluctant to express such a medical opinion because he is not a specialist in the particular field involved, or because others with more experience have expressed a different conclusion.

A physician is not an advocate. Should he change his mind because of new facts or other evidence, he should not hesitate to express himself accordingly.

Exhibit 3

K. Hypothetical Questions

It is frequently necessary to use hypothetical questions in eliciting testimony from expert witnesses, but these questions can be very troublesome and confusing unless proper care is taken to be sure that all the elements of the question are clearly expressed and are not ambiguous. They further must properly reflect the testimony which has been submitted or which the party expects to submit in support of his contentions. It is therefore recommended that wherever feasible the question should be submitted by the attorney to the physician in advance in written form to eliminate, so far as possible, any misunderstanding that might otherwise arise. If the hypothetical question is lengthy or complicated, it is preferable practice, wherever possible, for the attorney to submit it to the opposing counsel and, if need be, to discuss it with the court in chambers in advance of reading it to the physician on the stand.

The expert witness, in answering the question, must of course, make sure that he understands *all* its medical elements and that it is complete enough so that he can properly predicate an opinion thereon.

The answer to the hypothetical question must be based exclusively on the facts stated in the hypothetical question. No other facts can form the basis for the answer.

Exhibit 3

VI. COMPENSATION FOR MEDICAL REPORTS, DEPOSITIONS AND COURT APPEARANCES

It is difficult to establish precise rules governing physicians' fees for medical reports, depositions and court appearances. However, it is important that fees be reasonable. If fees are discussed and agreed upon in advance by the physician and the attorney, a major cause of possible misunderstanding and dissatisfaction will be eliminated.

A. Compensation Must Not be Contingent Upon Outcome of the Suit

Under no circumstances may a physician charge a fee for an examination or for testimony which is contingent upon the outcome of the lawsuit.

B. Responsibility for Payment of Physician's Charges

An attorney is ethically forbidden to pay debts, medical or otherwise, incurred by a client. However, where the attorney contracts for services on behalf of his client, which expenses are necessary to the proper preparation and presentation of the client's case, he should expect to make payment for the services. Therefore, while the attorney should not (and ethically cannot) pay for or guarantee payment of medical services rendered to the client, he should make payment directly to the physician for medical reports, conferences with the physician, time spent in depositions or in court and then look to his client for repayment of these costs advanced on behalf of the client.

A lawyer must have the permission of his client in order to deduct and pay the doctor's bill from the proceeds of the litigation or settlement. Attached as "Exhibit A" is a recommended form of authorization and agreement to pay a physician's fees. If a doctor desires that a lawyer deduct and pay his fees from the proceeds of the litigation or settlement, he should request that the attorney obtain the client's signature on such an authorization. If such request is made of the attorney and the client refuses to sign the authorization, the attorney should immediately, in writing, notify the doctor so that the doctor can take appropriate action. Any dispute as to the charges should be settled between the physician and his patient, and the patient should be aware of the fact that he is liable for payment of the physician's fees regardless of the outcome of the litigation.

Exhibit 3

The physician should bill the patient and not the attorney for medical services rendered to the patient. The physician should bill the attorney for medical-legal services such as examinations, reports, depositions, etc. The attorney should pay these amounts promptly and as they are billed, and should not await the outcome of litigation or settlement before paying the same.

C. Guideline for Physician's Charges to Lawyer

An attorney should not request or subpoena a physician to testify as an expert witness without making arrangements for compensation. It is important that these charges be fair and reasonable.

While it is recognized that any suggested fee schedule be modified from time to time in order to reflect current medical charges and economic trends, the following is a suggested guideline:

1.	Preparation of medical reports	— Same basis as per hour or unit of time charge to patient for consultation.
2.	Reproduction or copying of any records or reports	— The normal copying charge.
3.	Conferences with lawyer, including preparation for trial or deposition testimony	— Same basis as per hour or unit of time charge to patient for consultation.
4.	Preparation for deposition or trial testimony	— Same basis as per hour or unit of time charge to patient for consultation.
5.	Deposition testimony	— On basis of one to one and one-half times the per hour or unit of time charge to patient for consultation depending upon the complexity of issues.

Exhibit 3

6. Court Testimony — On basis of one to one and one-half times the per hour or unit charge to patient for consultation depending on the complexity of the issues.

   Factors to be considered in determining charges are:

   a. Time away from office necessitated by trial testimony.

   b. The physician's experience in treating the patient's medical problem at issue.

   c. The physician's education and training concerning the medical field or fields affected by the medical problem at issue.

7. Cancellation of deposition or trial appearance — No charge if no financial loss from cancellation; otherwise reasonable charge on the same basis as per hour or unit of time charge to patient for consultation.

8. Delay in trial testimony — No charge if lawyer follows procedure in Section V; otherwise same as 7 above.

COMMITTEE NOTE: The committee recognizes that the basis for hourly charges or units of time may vary with the physician and the specialty. However, the fee charged must be reasonable and fair keeping in mind the fact that the patient must ultimately pay the charges.

Exhibit 3

VII. ARBITRATION COMMITTEE

1. The Medical Legal Liaison Committee shall function as an Arbitration Committee. The members of such committee shall be appointed by the respective associations and shall serve at their pleasure.

2. The purpose of such committee shall to be to arbitrate non-malpractice forensic medicine disputes between members of the two professions, and to educate and advise the participants to the dispute.

3. Since unsolved disputes between members of the medical and legal professions may be harmful to harmonious relationships between the two professions, members of each profession are urged to submit such grievances to the arbitration committee.

4. A grievance may be submitted in writing to the executive director of either association or directly to the Medical Legal Liaison Committee. The Medical Legal Liaison Committee functioning as an arbitration committee shall afford the party complained against an opportunity to respond in writing. Such committee, when it deems appropriate, may make further inquiry into the subject matter of the dispute and may request the participants present themselves at an informal hearing.

5. The arbitration panel shall consist of two lawyers and one physician, through no opinion of such panel shall be the decision of the panel without the consent of the physician.

6. The decision of the panel shall be in writing and addressed to each participant of the dispute.

Exhibit 3

EXHIBIT A — AUTHORIZATION AND AGREEMENT TO PAY PHYSICIAN'S FEES

I, _____, hereby authorize and direct my attorney, _____, to pay promptly to _____, M.D.,/D.O., from my portion of the proceeds of any recovery which may be paid to me through my attorney as a result of the injuries sustained by me (_____) on _____, 19 ____, the unpaid balance of any reasonable charges for professional services rendered by said physician and his associates on my behalf, said professional services to include those for treatment heretofore or hereafter rendered to the time of the settlement or recovery. I understand that this does not relieve me of my personal responsibility for all such charges in the event of an insufficient or no recovery.

I further authorize said physician to furnish said attorney with any reports he may request in reference to said injuries.

DATED: _____

_____
Patient

_____
Attorney

APPROVED AND ACCEPTED:

_____

DATED: _____

Exhibit 4

Published by the State Bar of Arizona

Guidelines for Interprofessional Relationships in Legal Proceedings

1992/93

Thank you to the following organizations and associations without whose input these guidelines could not have been completed.

Maricopa County Bar Association
Maricopa County Medical Association
Maricopa County Osteopathic Association
Arizona Medical Association
Arizona Osteopathic Medical Association
Arizona Psychological Association
Arizona Chiropractic Association

Joint Committee on Interprofessional Relationships

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Atty. Robert Dean Bohm
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Atty. Stanley J. Marks
Atty. Corbin Vandemoer
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Dr. H. Ted Podleski
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Dr. John Zarske

Preface

The Guidelines for Interprofessional Relationships in Legal Proceedings are the work product of the Interprofessional Relationships Committee, which is a multi-disciplinary committee composed of members of the State Bar of Arizona and various health care providers. Just as the "Zlaket Rules" were adopted to help change the "legal climate" of our civil justice system, these guidelines are designed to help improve the relationships between attorneys and health care providers in our system of justice. Many thanks are in order to the hard-working members of the Committee who devoted many long hours to the project. It is hoped that these guidelines will help "bridge the gap" that has unfortunately existed for too long between the health care professions and the bar.

Note

The term "patient/client," as used in this document, refers to physician patients, attorney clients and certain health care provider specialists who refer to their patients as clients.

Table of Contents

Guidelines for Interprofessional Relationships in Legal Proceedings

The approaches of a health care provider when serving a patient and of a lawyer representing a client in legal proceedings differ substantially. Diagnosis and treatment involves decisions made by health care providers through a process of observation, deduction and possibly consultation. Legal proceedings are usually conducted under a system in which two or more contestants present their views to a neutral third person or to persons who weigh the opposing claims and make a decision. Lawyers are obligated to present the client's case as completely and effectively as possible, keeping in mind that they must not start or continue frivolous or groundless litigation. Health care providers are always advocates for their patients' health and well-being. Lawyers are advocates for their clients' legal interests.

Notwithstanding these differences, health care providers and lawyers share a common goal — to further the interests of the patient/client. There should be cooperation between the health care provider and the lawyer, with each assuming appropriate responsibility for the benefit of the patient/client. When appropriately authorized, health care providers and lawyers should communicate with each other about a particular patient/client. They should try to resolve any differences they may have concerning what is best for the patient/client in the circumstances.

A health care provider may advise a patient/client to consult a lawyer but should not discourage the patient/client from seeking legal advice. Health care providers should not advise on legal matters.

A lawyer may advise a client to consult a health care provider but should not discourage the client from seeking treatment or management. Lawyers should not advise on medical treatment or management.

Examinations

General

1. The law provides that a person who brings a lawsuit may be required by the opposing party to undergo a mental or physical examination. Such examination may be by agreement of the lawyers or under a court order.

2. The lawyer who arranges for an examination is ordinarily obligated to pay the reasonable charges for the examination. When a lawyer makes an appointment for an examination which is related to litigation, the lawyer for the party to be examined should instruct that party that if he or she has to cancel the appointment, the health care provider should be notified immediately. If the cancellation is not sufficiently in advance of the appointment so that the health care provider can reschedule the time, the health care provider may be justified in charging for the canceled appointment.

Scope of Examination

Before or at the scheduled time of an examination, the lawyer requesting an examination should communicate the nature of the patient's/client's problem with the health care provider. The lawyer should explain any special problems of proof which are part of the burden placed by law on the patient/client. The lawyer should communicate any other information to the health care provider which will help determine the scope of the examination or tests which are contemplated. The lawyer should also determine what other information the health care provider will need. The clearer the questions put to the health care provider, the better the answers will be.

The examination may be limited by lawyer agreement or court order. The health care provider should be given a copy of any written agreement or court order which sets out the limits of an examination. The health care provider may decline to do an examination if he or she thinks these limitations may preclude the formation of a responsible medical opinion.

Subject to the above limitation, health care providers may take a history and do the examination as necessary in their judgment to form an opinion about the nature and extent of the party's condition. If, during the examination, it becomes clear that additional examination or testing not earlier contemplated will be necessary to give an adequate opinion, the health care provider should advise the patient/client, the patient/client's lawyer and the lawyer requesting the examination before trying to extend the scope of examination or testing. Any limitations or restrictions encountered by the examining health care provider should be noted in the report and communicated to the patient/client.

Written Reports

Definitions

Formal Reports. A written, narrative report is one in which the health care provider discusses the nature and extent of the physical or mental condition in enough detail to answer the lawyer's stated questions or as otherwise agreed. The clearer the questions put to the health care provider, the better the answers will be.

Records. The Records as referred to in these guidelines mean all those records in the possession of the health care provider or records custodian, including reports prepared for legal proceedings, as well as reports of other health care providers which may have become part of the record. Records

are prepared by or under the supervision of a health care provider relating to an individual's physical or mental condition, medical history or medical care and treatment.

Proper Authorization. Records and patient/client health care information in the records are confidential and privileged, and generally cannot be discussed with, or released to, anyone without a properly signed authorization by the patient/client or his legally authorized representative; (*i.e.*, parent of minor child, guardian or person appointed under a medical power of attorney). The authorization should include the following:

(1)The name of the patient/client;

(2)The name of the facility, program or person that is to make the disclosure;

(3)The name or title of the person or organization to which the disclosure is to be made;

(4)The purpose or need for disclosure;

(5)The extent or nature of the information to be disclosed;

(6)The expiration date of the authorization;

(7)Specification as to the release of any communicable disease information, or any drug and alcohol counseling information if the facility is covered by federal and state regulations;

(8)Such other information as may be required by law; and

(9)The signature of the patient/client or his/her authorized representative, and date of signature.

There are some situations in which an authorization for release of information is not required. For example, a record may be released to a licensing board for health care providers in connection with an investigation of professional practice. Information may be released in connection with civil or criminal litigation or an administrative proceeding in which a child's neglect, dependency, abuse or abandonment, or a vulnerable or incapacitated adult's exploitation, abuse or neglect is at issue. Information relating to an injury in connection with a worker's compensation claim can be released to an interested party in proceedings before the Industrial Commission. Similarly, information may be released to appropriate authorities for positive results of HIV tests, to third-party payors and professional review organizations (PRO's).

Health Care Provider's Responsibilities

Reports

Timely Compliance. A valid request for a report should be answered within a reasonable time. If the health care provider cannot furnish a report promptly or cannot arrange for the patient/client's examination or necessary testing promptly, the person who made the request should be notified promptly. The health care provider should also let the person requesting a report know if the request cannot be honored because of improper or inadequate authorization for the release of information.

Content. The following, unless otherwise agreed between the health care provider and the individual requesting the report, should be included in the report:

(1)Date, time and place of visit(s);

(2)The history of the injury or condition including pre-existing injury or condition;

(3)Nature of examination and findings;

(4)Results of laboratory work, x-rays, consultations and other tests;

(5)Nature of treatment provided;

(6)The patient's/client's present condition if known;

(7)Diagnosis and prognosis where possible (The opinion should evaluate future impairment or residual effects, the need for future treatment, if any, the effect or aggravation of any pre-existing injury or condition, and projected convalescence.);

(8)In injury cases, a statement saying what, if any, of the patient/client's problems are related to the accident or other occurrence (The lawyer needs the health care provider's opinion within a reasonable probability. To state something to a reasonable probability, the health care provider must believe that, based upon his or her knowledge of his or her discipline and the case facts, the subject of the health care provider's opinion is more likely to be true than not. Put in terms of percentage, the probability must be greater than 50%.);

(9)If requested by the lawyer, a statement as to whether the patient/client's condition meets applicable legal standards (for example, incompetency or incapacity);

(10)A separately enclosed itemized statement of the charges for the services which have been provided up to the date of the report (Charges for reports and lawyer consultations should be submitted separately.); and

(11)An estimate of future care costs, if appropriate.

Charges. The charges for preparing a report should be arranged with the lawyer *before* or at the time the examination is scheduled or the report is requested.

Records

Cooperation. The health care provider should recognize that although the health care provider, or the organizations for which he or she works, own the records, patients/clients have the right to inspect and have access to a copy of the record unless limited by law. If the patient/client authorizes the release of information to his or her lawyer or the insurance company represented by a lawyer, the health care provider must honor the request for copies of the pertinent records in a manner consistent with the health care provider's ethical obligations. If any records are being withheld, the health care provider shall so inform the lawyer(s).

Discussions with Lawyers. A health care provider should not discuss the patient/client or the patient/client's treatment or condition with any lawyer unless the patient/client has authorized such discussions. Many release forms say that no discussion is permitted.

Subpoenas. To make the court system work, the Arizona Supreme Court and the legislature have provided courts with the power to compel someone to appear at a specified time and place to produce documents and other materials and to give testimony at the request of a party to an action. The document which imposes such a requirement is called a "subpoena." A subpoena is issued by the clerk of the court. It must be responded to if it is issued and served in accordance with the court rules. However, it does not override any applicable health care provider privilege. Some of the reasons for using a subpoena are:

(1) When there is a question about the propriety of the witness voluntarily producing documents and materials or testifying. Sometimes this is done at the request of the witness and sometimes it is done on the lawyer's own initiative.

(2) When the person making the arrangements wants to be sure that the documents and materials are produced or that the person appears at the time and place specified to give testimony.

Sometimes a subpoena may be the most practical and best way to meet the need for records. The health care provider or his or her records custodian may be subpoenaed to produce all records relating to the patient/client. Sometimes a subpoena is accompanied by a written authorization for release of the records. If so, the records may be produced at the place designated in the subpoena. Sometimes it may be possible to arrange to provide a copy of the materials being sought without the necessity of having a person produce the materials at the time and place specified in the subpoena. However, if the health care provider or records custodian receives a subpoena requesting records which is not accompanied by a written release, the records should not be released without an order from the judge, unless an exception applies. The health care provider should notify the attorney requesting the subpoena that the health care provider is required to object and assert the privilege. If the lawyer insists on the health care provider's appearance, then the health care provider must appear and object or seek an order of protection from the court.

There is a law in Arizona permitting medical records custodians of *hospitals* to send records under seal to the court instead of objecting in cases in which the hospital is not a party. Hospitals may also file objections with the court as an alternative to submitting the records under seal. *A health care provider may also file a written objection with the court in response to a subpoena seeking records. A copy of the objection must be sent to the patient/client at his or her last known address, to his or her attorney and any other interested parties.*

Charges. In a civil case, all reasonable costs involved in producing documents pursuant to a subpoena issued to a witness who is not a party in the case are charged against the party issuing the subpoena. Reasonable costs means ten cents a page for reproduction and clerical time billed at the rate of $10.00 per hour per person. Reasonable costs may be charged if personal attendance is required in relation to the production of the documents.

Criminal Cases. From time to time records are subpoenaed in criminal cases. Criminal subpoenas are normally required to be issued by a court within Arizona and served upon the health care provider. A criminal subpoena should be accompanied by a written release or authorization for release of the records. If no such authorization accompanies the request, the health care provider should not release the records without a court order. Objections, if any, to the subpoena should be submitted to the court which issued the subpoena.

Lawyer's Responsibilities

Reports. Requests for reports should be made or confirmed in writing. The request should state who the lawyer represents and what area or problems the health care provider is to address. If the lawyer is uncertain about the relevance of certain problems, issues or areas, he or she should inform the health care provider of the uncertainty and request the health care provider's advice about what is or could be pertinent information.

Authorization for Release of Information. Generally the lawyer must secure and include with the request for records the patient/client's written authorization for the release of the patient/client's information. The request should indicate what portions of the patient/client's records are being requested. The lawyer should not request what is not needed. The request should be made in a timely manner.

If the lawyer believes that no authorization is needed to get the records, the lawyer should inform the custodian of the records at the time the request is made of the legal basis for obtaining copies of the records without an authorization. The lawyer should be prepared to furnish evidence of the basis for that belief to the custodian of the records.

Subpoenas. Requesting records through a subpoena places a substantial burden on the health care provider or records custodian. The lawyer should cooperate in trying to work out satisfactory arrangements for providing the material which would be less burdensome than compliance with a subpoena.

Charges. The lawyer has the primary responsibility to arrange for payment in advance for the work requested. The charges for preparing a report should be arranged with the lawyer *before* or at the time the examination is scheduled or the report is requested. If there is to be any limitation on how or when the lawyer will pay, such limitation must be disclosed to the health care provider at the time the report or records are requested.

Depositions

Nature and Purpose

At a deposition, oral testimony is given by a witness in answer to questions asked by the lawyers for the parties in a lawsuit. The deposition is an official proceeding authorized by law to find out what the facts of the case are, to preserve testimony for trial or as a substitute for having the witness testify at the trial. The witness is usually "deposed" in an informal setting, such as a lawyer's or health care provider's office rather than in a courtroom. The proceeding begins by administering the standard oath so the health care provider or other witness is under the same obligation to tell the truth and faces the same penalties of perjury as in a formal courtroom setting. After the oath-taking, a court reporter takes down everything that is said. The lawyers usually want to find out what the health care provider knows about the facts; to learn the health care provider's opinions of cause, treatment and prognosis; and to learn the basis of those opinions. Often one of the purposes of the deposition is to gather background about the case in a process known as "discovery." The discovery process is broad. Questions can be asked at discovery which would not be proper at a trial.

The questions asked and the answers given are transcribed into a permanent record. When the testimony is fully transcribed, it is submitted to the health care provider for examination and reading, unless such examination and reading is waived by the health care provider and the parties. The

attorney requesting that the health care provider read and sign the deposition is responsible for the reasonable charges of reading and signing the deposition. Any changes in form or substance which the health care provider wants to make will be added to the transcript by the court reporter who took the deposition, along with a statement of the reason given by the health care provider for making the changes.

The health care provider then signs the transcript, unless the parties agree that signing is not necessary or the health care provider is ill or cannot be found or refuses to sign. The health care provider should return the transcript to the reporter within 30 days of receiving it. If the health care provider has not returned the transcript within the 30 days, the reporter will sign it and forward it to the parties with an explanation of why the health care provider has not signed, if known. If the health care provider refuses to sign, the reporter will sign the transcript and will also put down any reason given for refusing to sign, if known. The transcript can often be used even if the health care provider has not signed it.

Health Care Provider's Responsibilities

Generally. The health care provider has an obligation as part of his or her civic responsibility to participate in the legal process when there are questions about a patient/client to whom the health care provider has provided treatment. The health care provider may, but does not have to, become involved in a case in which he or she has had no professional relationship with the patient/client.

Time and Place. The lawyer and the health care provider should try to agree on a time and place for the deposition. The health care provider must understand that it is not always possible to arrange a deposition at a time and place which is convenient, but everyone involved should make a reasonable effort to make mutually convenient arrangements. If the deposition is held at the health care provider's office, every effort should be made to assure that the deposition is not interrupted except by a true emergency. If an emergency prevents the health care provider from appearing at the scheduled time, the parties should be given as much notice as possible. If it is necessary to cancel or reschedule the deposition, notice should be given to the lawyer who scheduled the deposition as soon as practicable. Cancellations are very inconvenient for everyone. Mutual courtesy and respect require reasonable notice when cancellation is necessary.

Preparation Before Testifying. Before the deposition, the health care provider should fully review the patient/client's case and record, as well as any appropriate literature. He or she should be fully prepared to respond to questions about the facts and his or her professional opinion. The health care provider should have records present and refer to them as needed. A health care provider cannot be compelled to form a professional opinion. However, if the health care provider has an opinion, he or she can be required to state the substance of the opinion or observations.

Response to Questions by the Lawyer Who Called the Health Care Provider to Testify. The health care provider should give clear answers to the questions asked and use non-technical language whenever possible. If testimony does not explain and clarify thoughts and ideas, it has not served its purpose. Sometimes it may be necessary to follow technical terms with simplified explanations or illustrations. The health care provider should not try to unfairly impress or prejudice the court or allow testimony to be influenced by his or her own or the patient's personal interest. Sometimes the lawyer asking the questions will ask the health care provider to answer the question "yes" or "no." If the health care provider believes that "yes" or "no" does not accurately answer the question, he or she should so inform the questioner. The lawyer will often permit the health care provider to qualify or explain the answer.

Objection to Questions. A lawyer may object to a question which has been asked by another lawyer. The health care provider should not decide legal questions by making up his or her mind that certain questions are improper and either refusing to answer or treating the question as if it were unimportant or insignificant and therefore answering only in part. If the health care provider feels that a question is improper and there is no objection, the health care provider may ask the lawyer who arranged for the testimony whether the question must be answered. If the question is unclear, the health care provider should ask to have it repeated or explained.

Questions Asking for Opinion. The lawyer needs an opinion within a "reasonable probability." To state something to a "reasonable probability," a health care provider must believe that, based upon his or her knowledge of his or her discipline and the case facts, the subject of the opinion is more likely to be true than not. Put in terms of percentage, the probability must be greater than 50%. A health care provider should not be reluctant to express an opinion because other health care providers have expressed different opinions. If new facts or other opinions are brought to a health care provider's attention which cause a change or modification of the opinion, he or she should not hesitate to say so. If the health care provider does not have a professionally adequate basis for an opinion about a patient/client not personally observed, he or she cannot be compelled to offer an opinion. However, if a health care provider is asked for an opinion and he or she has one, it must be stated.

Hypothetical Questions. A health care provider should make sure that all elements of a hypothetical question are understood and that the question is complete enough to be answered. The answer must be based exclusively on the facts stated in the hypothetical question. If the health care provider can answer such a question, he or she must do so. On the other hand, if the health care provider cannot answer the question without special study or the question does not contain sufficient facts to form an answer, the health care provider should say so.

Cross Examination. The lawyer's job is to present the facts for his or her client. To do this, the lawyer must place before the court all admissible evidence favorable to client's cause. The lawyer's questions are intended to show facts bearing on the weight and credibility of the health care provider's testimony. Cross examination is intended to test a health care provider's qualifications, competence, credibility, bias, memory, diagnosis, prognosis and opinions within the framework of appropriate legal procedure. If the lawyer asking the health care provider questions goes beyond the bounds of propriety, the lawyer who called the health care provider as a witness may intervene.

Exhibit 4

Subpoenas

Attendance. If a deposition cannot be scheduled by agreement, attendance can be compelled by subpoena. Usually the arrangements for a deposition, including the time and place, should be worked out between the health care provider and the lawyer. Sometimes, even when the health care provider and lawyer agree, there are reasons for using a subpoena. Under Arizona law, any lawyer who is representing one of the parties in a case may issue a subpoena that requires a witness to attend a deposition, hearing or trial.

Attendance is not required unless the standard witness fees are paid or tendered in cash or by check, together with travel fees. A health care provider may be entitled to additional fees if testifying as an expert witness; however, these fees do not need to be paid or tendered at the time of service of the subpoena. Fees and mileage are not required to be tendered when a subpoena is issued on behalf of the state, or an officer or agency thereof. Standard witness fees are set by the state legislature, but expert witness fees are to be agreed upon by the health care provider and the lawyer who requests the opinion. Failure of any person without adequate excuse to obey a subpoena may be deemed contempt of the court from which the subpoena issued.

Production of Documents. A subpoena can require a health care provider to bring documents or other materials to the deposition unless other arrangements have been made with the lawyer who issued the subpoena. If there is any doubt about what materials are covered by the subpoena, the health care provider should consult with the lawyer who issued the subpoena, and his or her lawyer, or the court.

Questions About Validity of a Subpoena. A health care provider should consult with the lawyer who issued the subpoena, and his or her lawyer, or the court if there is any doubt about the force and effect of a subpoena.

Abuse of Subpoena. If a health care provider, after discussion with the attorney responsible for issuing the subpoena, believes that a lawyer is using the subpoena to harass, objection should be made to the court within ten days of service or before the return date if the return date is less than ten days after service. If the court agrees with the health care provider, it may order that the deposition stop or may limit the scope and manner of the taking of the deposition. Objections to inspection or copying should be made to the lawyer responsible for issuing the subpoena.

Attendance a Hardship. If the time and place described in the subpoena for the deposition creates a substantial hardship for a health care provider's patients/clients, he or she should immediately bring this fact to the attention of the lawyer who issued the subpoena. If no solution can be worked out with that lawyer, a health care provider should discuss the problem with his or her own attorney or the court.

Charges. A health care provider should discuss compensation with the lawyer who makes arrangements for the testimony or issues the subpoena. Except for the situation where a health care provider is a party to the action, he or she is entitled to reasonable compensation for time spent concerning the matter. In determining what is reasonable compensation, consideration may be given to what income the health care provider would have earned if the health care provider had been doing his or her usual work. Charges for time spent in preparation to testify and travel to the place of the deposition as well as the actual time spent at the deposition should be discussed and agreed upon in advance. The amount of money a person is trying to recover should not be a consideration in determining charges. If a health care provider is testifying as an expert witness, giving opinions on matters which require analysis beyond the treatment record, consideration may also be given to:

(1)the difficulty of the work done in preparation to testify;

(2)any special level of expertise the health care provider has in the area; and

(3)the extensiveness of any required research.

Lawyer's Responsibilities

Time and Place. A lawyer should contact the health care provider whose testimony is desired as far in advance as is practical to try to agree on a time and place for the deposition. A reasonable effort should be made to accommodate the health care provider and the other parties. If the arrangements are oral, they should be confirmed in writing. Cancellations are very inconvenient for everyone. If it is necessary to cancel or reschedule the deposition, mutual courtesy and respect require notifying the health care provider and the parties as soon as practicable. When the health care provider does not have a reasonable opportunity to fill the time, it is reasonable to expect that the health care provider will charge for the time lost.

Purpose, Scope and Duration. A reasonable period of time before the deposition, the lawyer on whose behalf the health care provider is going to testify should contact the health care provider and discuss the purpose, scope and possible duration of the deposition examination with him or her.

Subpoenas

Attendance. If the lawyer believes that it is necessary or advisable to use a subpoena, the health care provider should be told that a subpoena will be issued and the reason for its use. If possible, agreement on the time and place of the deposition should be reached with the health care provider.

Production of Documents. The lawyer should let the health care provider know in advance what, if any, materials in addition to the patient/client file the health care provider should bring to the deposition. Care should be taken to describe the materials in enough detail so there is no doubt about what materials are to be produced.

Attendance a Hardship. The lawyer should make reasonable efforts to accommodate the health care provider whose patients/clients will suffer a substantial hardship if the deposition is held at the time and place scheduled.

Review of Deposition. The lawyer should tell the health care provider of his or her right to review the transcript. If the health care provider is expected to testify again in the matter, a copy of the transcript should be furnished to the health care provider far enough in advance of the date for the health care provider's testimony to allow full review of the transcript.

Charges. The lawyer should discuss compensation with the health care provider before the deposition. The health care provider is entitled to reasonable compensation for the time spent concerning the matter except in the case where the health care provider is a party to the action.

Relationship of Health Care Provider and Lawyer Before Trial

Conflict of Interest

Treating Health Care Providers. When a health care provider has treated a patient/client, the health care provider should not discuss the case or release any information without a court order or a release signed by the patient/client. If the health care provider has consulted with or obtained information from a lawyer representing one side of the case, the health care provider should neither discuss the case nor give any information to anyone from the other side of the case without the express consent of the patient/client and/or first consulting the lawyer.

Consultants and Experts. A lawyer who wishes to consult with or retain a health care provider as an expert witness should first determine whether the health care provider has consulted with or been retained by the opposing attorney. If so, the lawyer should not discuss the case or the patient without the express consent of the opposing attorney. The lawyer should also advise the opposing attorney of the contact so there is no appearance of impropriety.

Conferences Between Health Care Providers and Lawyers

Necessity for Conferences. Health care providers and lawyers must fairly and adequately present the information relating to a legal controversy. For that reason, and because mistakes or omissions may be impossible to correct, a conference between the health care provider and the lawyer well in advance of any depositions, trials or other proceedings is crucial.

Preparation for Conferences. The responsibility for scheduling a conference rests with the lawyer. Sufficient time should be allowed by both parties for full discussion of the case. Both parties should review all pertinent records before the conference, and should be prepared to discuss the issues involved.

Fees. The health care provider should receive a reasonable fee for conferences, which may include telephone conferences. Unless other arrangements have been made, the lawyer who has arranged for the conference is responsible for paying the health care provider's charge for the conference. The amount of the fee should be discussed and agreed upon at the time that the conference is arranged by the attorney. In determining what is reasonable compensation, health care providers may consider what their income would have been for the time had they been doing their usual work. The health care provider may include time spent in preparation for the conference, as well as the actual time spent in conference. If the health care provider is going to be testifying as an expert witness (giving opinions in medical matters which require analysis beyond the treatment record), the health care provider may also consider the difficulty of work to be done in preparation of his or her testimony, any special level of expertise the health care provider has in his or her specialty, and the extensiveness of any required research.

Relationship of Health Care Provider and Lawyer During Trial

General

While the conduct of the business of the courts cannot depend upon the convenience of litigants, lawyers or witnesses, arrangements can and should be made for the attendance of the health care provider as a witness which consider the professional demands upon the health care provider's time. As soon as it is practicable, the health care provider is entitled to notice of the intention to call him or her as a witness. The health care provider should be advised by telephone of the approximate time to be at the court house. The health care provider should be notified by phone as soon as practicable of any postponement or settlement of the case.

Attendance at Trial

Health Care Provider's Duties. A health care provider has the same duty as any other citizen to testify at a trial. Our system of justice depends upon being able to require any citizen's attendance at a judicial proceeding and to give testimony regarding the case. Except when prevented by emergency, a health care provider should be punctual. An emergency must always involve the genuine professional needs of a patient/client. If a health care provider has received a subpoena, he or she takes the risk of convincing the court that the emergency was of sufficient gravity to justify the failure to appear at the proper time.

Lawyer's Duties. A lawyer must give the health care provider timely notice that his or her testimony will be needed at trial. The health care provider should be notified of the anticipated trial date as soon as it is known. The lawyer should make every effort to arrange the time the health care provider will be called to testify. The lawyer should not subpoena a health care provider without prior notice. The lawyer should notify the health care provider promptly if the case is postponed or if the health care provider will not be needed to testify.

Conduct in Court

Lawyers and health care provider witnesses perform an important function in the administration of justice. The conduct of each should be dignified and respectful of the position of the other. Mutual courtesy and consideration are highly desirable. The health care provider should realize, however, that under the "adversary system," it is permissible and not unusual for the lawyer to take a partisan attitude toward

the testimony being elicited from the health care provider.

Health Care Provider's Duties.

Generally. All witnesses should testify impartially. The health care provider's duty is to testify without regard to whether the testimony will be favorable to one party or the other. The health care provider should not be concerned with how the testimony will affect the result of the lawsuit. The function of the health care provider is to enlighten the court as an impartial witness.

Preparation Before Testifying. The health care provider should have fully reviewed the patient/client's case and record, any deposition that he or she gave, as well as any literature that is warranted before coming to court. The health care provider should be fully prepared to respond to questions about the facts or asking for professional opinions. Records may be taken to the stand when the health care provider testifies and may be used as necessary to answer questions. A health care provider cannot be compelled to form a professional opinion. However, if he or she has an opinion, the health care provider can be required to state its substance or his or her observations if the health care provider did observe the patient.

Response to Questions by the Lawyer Who Called the Health Care Provider to Testify. The health care provider should give clear answers to the questions asked. Non-technical language should be used whenever possible. If testimony does not explain and clarify ideas, it has not served its purpose. Sometimes it may be necessary to follow technical terms with simplified explanations or illustrations. The health care provider should try not to unfairly impress or prejudice the court. He or she must not allow testimony to be influenced by his or her own or the patient/client's personal interest. Sometimes the lawyer asking the questions or the judge will ask a witness to answer the question, "yes" or "no." If the health care provider believes that "yes" or "no" will not accurately answer the question, he or she should tell the court. The judge will usually permit a witness to qualify or explain the answer.

Objection to Questions. Trials are governed by the rules of evidence, which may limit the questions which can properly be asked or limit the answers given. A lawyer may object to a question which has been asked by another lawyer or the judge. A witness should not answer the question until the court has ruled on the objection. If the court overrules the objection, the health care provider may answer the question. The health care provider should not decide legal questions by making up his or her mind that certain questions are improper and either refuse to answer or treat the question as if it were unimportant or insignificant and, therefore, answering only in part. If a witness feels that a question is improper and there is no objection, he or she may ask the court whether the question must be answered. If the question is unclear, the health care provider may ask to have it repeated or explained.

Questions Asking for the Health Care Provider's Opinion. The lawyer needs a health care provider's opinion to be within "reasonable probability." To state something to a "reasonable probability," the health care provider must believe that, based upon his or her knowledge and the case facts, the subject of the opinion is more likely to be true than not. Put in terms of percentage, the probability must be greater than 50%. The health care provider should not be reluctant to express his or her opinion because other health care providers have expressed different opinions. If new facts or other opinions are brought to the health care provider's attention which cause him or her to change or modify an opinion, the health care provider should not hesitate to say so. If there is a professionally adequate basis for an opinion about a patient/client that the health care provider did not observe, the health care provider cannot be compelled to offer an opinion. However, if asked for an opinion, the health care provider must state it, if he or she has one.

Hypothetical Questions. The answer to a hypothetical question must be based exclusively on the facts stated in the hypothetical question. It is essential that the health care provider understands all the elements and that the question is complete enough so that the health care provider can properly express an opinion. If the question can be answered, the health care provider must give an answer. If the question cannot be answered without special study, or the question does not contain sufficient facts, the health care provider should say so.

Cross Examination. The lawyer's job is to present the facts for his or her client. To do this, the lawyer must place all admissible evidence favorable to his or her cause before the court. The lawyer's questions are intended to show facts bearing on the weight and credibility of the health care provider's testimony. Cross examination is intended to test the health care provider's qualifications, competence, credibility, bias, memory, diagnosis, prognosis and opinions within the framework of appropriate legal procedure. If the lawyer asking the questions goes beyond the bounds of propriety, the court or the lawyer who called the health care provider as a witness may intervene.

Charges. The health care provider should discuss compensation with the lawyer who made arrangements for the testimony or issued the subpoena. Except for the situation where the health care provider is a party to the action, he or she is entitled to reasonable compensation for time spent concerning the matter. In determining what is reasonable compensation, the health care provider may consider what his or her income would have been for the time if the health care provider had been doing his or her usual work. The health care provider may include time spent in preparation to testify and travel to court, as well as the actual time spent at the trial or hearing. If testifying as an expert witness, giving opinions on matters which require analysis beyond the treatment record, the health care provider may also consider:

(1) the difficulty of the work done in preparation to testify;

(2) any special level of expertise the health care provider has in the area; and

(3) the extensiveness of any required research.

Lawyer's Duties

Generally. The health care provider should be treated with courtesy and tact on the stand. There is no justification to abuse, badger or browbeat any witness, including a health care provider witness.

Questions to be Asked. A reasonable time before the date the health care provider is to testify, the lawyer should review the material he or she expects to ask the health care provider with the health care provider. It may be necessary to use hypothetical questions. It is a good idea to pose these questions to the health care provider in advance, in writing, to eliminate any misunderstanding. The lawyer should also go over the areas

that may be covered on cross examination and share any insights the lawyer may have of the techniques or personality of the lawyer(s) who will be doing the cross examination.

Charges. Compensation should be discussed with the health care provider before the trial or hearing. The health care provider is entitled to reasonable compensation for the time spent concerning the matter, except in the case where the health care provider is a party to the action. In determining what is reasonable compensation, the health care provider may consider what his or her income would have been for the time if they had been doing their usual work. The health care provider may include time spent in preparation to testify and travel to court, as well as the actual time spent at the trial or hearing. If the health care provider is testifying as an expert witness; giving opinions on matters which require analysis beyond the treatment record, the health care provider may also consider:

(1) the difficulty of the work done in preparation to testify;

(2) any special level of expertise the health care provider has in the area; and

(3) the extensiveness of any required research.

Arbitration Panel

From time to time, disputes arise between lawyers and health care providers which cannot be resolved informally. In an effort to provide a mechanism to resolve such disputes in a timely and cost-effective manner, arbitration is strongly encouraged.

1. The Interprofessional Relationships Committee will establish an Arbitration Panel. Members of the panel will be appointed by the respective member associations and serve at their pleasure.

2. The purpose of the panel will be to arbitrate disputes between health care providers and attorneys, not including malpractice.

3. Since unresolved disputes between health care providers and attorneys may be harmful to harmonious relationships between the professions, members of each profession are urged, but not required, to submit such disputes to the Arbitration Panel.

4. A dispute may be submitted in writing to the executive director of a member association or directly to the Interprofessional Relationships Committee. The complaint will immediately be submitted to the Arbitration Panel for decision.

5. The Arbitration Panel shall consist of a lawyer, a health care provider and a third arbitrator mutually agreed upon by the other two arbitrators. If at all possible, the health care provider arbitrator shall be of the same profession and specialty involved in the dispute.

6. The decision of the Panel shall be in writing and addressed to each participant of the dispute.

7. The decision shall be binding.

Interprofessional Relationships Committee

Exhibit 5

Opinion 9.07 - Medical Testimony

In various legal and administrative proceedings, medical evidence is critical. As citizens and as professionals with specialized knowledge and experience, physicians have an obligation to assist in the administration of justice.

When a legal claim pertains to a patient the physician has treated, the physician must hold the patient's medical interests paramount, including the confidentiality of the patient's health information, unless the physician is authorized or legally compelled to disclose the information.

Physicians who serve as fact witnesses must deliver honest testimony. This requires that they engage in continuous self-examination to ensure that their testimony represents the facts of the case. When treating physicians are called upon to testify in matters that could adversely impact their patients' medical interests, they should decline to testify unless the patient consents or unless ordered to do so by legally constituted authority. If, as a result of legal proceedings, the patient and the physician are placed in adversarial positions it may be appropriate for a treating physician to transfer the care of the patient to another physician.

When physicians choose to provide expert testimony, they should have recent and substantive experience or knowledge in the area in which they testify, and be committed to evaluating cases objectively and to providing an independent opinion. Their testimony should reflect current scientific thought and standards of care that have gained acceptance among peers in the relevant field. If a medical witness knowingly provides testimony based on a theory not widely accepted in the profession, the witness should characterize the theory as such. Also, testimony pertinent to a standard of care must consider standards that prevailed at the time the event under review occurred.

All physicians must accurately represent their qualifications and must testify honestly. Physician testimony must not be influenced by financial compensation; for example, it is unethical for a physician to accept compensation that is contingent upon the outcome of litigation.

Organized medicine, including state and specialty societies, and medical licensing boards can help maintain high standards fo medical witnesses by assessing claims of false or misleading testimony and issuing disciplinary sanctions as appropriate. (II, IV, V, VII)

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