Barry D. Halpern (#005441)
BHalpern@swlaw.com
Sara J. Agne (#026950)
SAgne@swlaw.com
Joy L. Isaacs (#030693)
JIsaacs@swlaw.com
SNELL & WILMER L.L.P.
One Arizona Center
400 E. Van Buren
Phoenix, AZ 85004-2202
Telephone: (602) 382-6000
Attorneys for Arizona Medical Association

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of: PETITION TO AMEND RULE 26(b)(4)(C) OF THE ARIZONA RULES OF CIVIL PROCEDURE	R-13-0042 **COMMENT OF ARIZONA MEDICAL ASSOCIATION IN SUPPORT OF PETITION**

After reviewing the Petition, and pursuant to Rule 28(D), Arizona Rules of the Supreme Court, the Arizona Medical Association supports the proposed amendment to Rule 26(b)(4)(C), Ariz. Civ. P., as presented in R-13-0042 for the following reasons.

I. THE PROPOSED AMENDMENT RECOGNIZES THAT A TREATING PHYSICIAN IS AN EXPERT ENTITLED TO REASONABLE COMPENSATION.

In interpreting Rule 26(b)(4), Ariz. Civ. P., in *Sanchez v. Gama*, 233 Ariz. 125, 310 P.3d 1 (App. 2013), the Court of Appeals held that a treating physician[1] need not be compensated as an expert when compelled to give testimony regarding

[1] ArMA is a voluntary membership organization for Arizona physicians. While recognizing that the language of the proposed amendment allows for those "providing medical care" to be compensated, this comment is limited to providing the Court with the perspective of ArMA's 3,700 member physicians.

injury and medical treatment. However, a treating physician testifying about a patient's injury, diagnosis, care, or treatment, is best characterized as an expert under Rule 702, Ariz. R. Evid. (defining expert testimony as evidence provided by an individual whose "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence . . . .").

A treating physician is compelled to testify because of his/her specific expertise and highly specialized knowledge of the relevant medical issues. Unlike a good Samaritan who relates an accident to a police officer, treating physicians only testify on matters they worked on in their field of expertise. Therefore, virtually any treating physician testimony reflects a highly specialized and refined synthesis of medical, observational, and historical data, and goes beyond a mere factual recitation. *See, e.g.*, *Mock v. Johnson*, 218 F.R.D. 680, 683 (D. Haw. 2003) ("[a]s opposed to the observations that ordinary fact witnesses provide, the observations . . . that medical professionals provide derive from their highly specialized training.").

As the Petition remarks, because a treating physician uses this highly specialized training when giving testimony, it is impossible to elicit purely factual testimony without delving into the realm of opinion. (Pet. 7:19–22.) The proposed amendment should be adopted since it rightfully recognizes that a treating physician is an expert and therefore entitled to reasonable compensation for his or

her testimony.

II. THE PROPOSED AMENDMENT REDUCES COSTS AND MINIMIZES COLLATERAL LITIGATION.

The current Rule 26(b)(4), Ariz. Civ. P., as interpreted, potentially increases litigation costs and lengthens the litigation process. The proposed amendment would not materially affect the overall costs to litigants by requiring reasonable fees for treating physicians. Because paying a reasonable fee to a treating physician compelled to testify has been the customary practice in Arizona for decades, the net economic effect of the proposed amendment on parties will be zero. Without the proposed amendment, the same cannot be said for the effect *Sanchez* will have on treating physicians.

Under *Sanchez*, treating physicians must either give away their time and knowledge, or obtain counsel to help advise as to the parameters of their testimony and advocate for a reasonable fee. The *Sanchez* court adopted the reasoning of *State ex rel. Montgomery v. Whitten*, 228 Ariz. 17, 262 P.3d 238 (App. 2011), which attempted to differentiate between fact testimony and expert testimony given by a treating physician. *Sanchez*, at *4. The court in *Whitten* advised that if a treating physician is called as a fact witness and a line of questioning exceeds that scope, then "the witness may simply respond that he or she has not been asked to serve as an expert witness . . . ." *Whitten*, 228 Ariz. at 23, 262 P.3d at 244. That essentially asks treating physicians to serve as their own counsel while on the

stand.

As the Petition details, trying to draw a distinction between fact and expert testimony creates havoc for litigants, trial lawyers, and trial judges. (Pet. 7:10–12.) The *Whitten* court admits that it "is not possible to articulate a bright-line rule for determining when a treating physician crosses the line from fact witness to expert witness." *Id.* at 21. If an appellate court does not know where to draw that line, how can a treating physician, while giving testimony, be expected to do so?

Current Rule 26(b)(4), Ariz. Civ. P., fails to account for what would happen if, for example, in the middle of a treating physician's deposition, questioning switches from that eliciting factual testimony to that designed to elicit opinion testimony. Would the deposition be postponed until a judge could rule on the questions being asked, thereby imposing additional time and costs onto the litigation? If the deposition were to continue without interruption, would the trial court then have to go through the deposition transcript to decide which questions were purely factual? Who collects the fee for the treating physician for the portions of his/her testimony deemed to be "expert" in nature? Would the treating physician need to retain counsel simply to recoup the fee due for the expert testimony elicited?

Attempting to sever a treating physician's factual testimony from his/her expert testimony creates the plethora of practical problems referenced above and

invites collateral litigation to determine the parameters of a treating physician's testimony. The obvious economic impact will be increased costs to determine the same sets of medical facts.

This surely unintended outcome is entirely inconsistent with Arizona's commitment to a "just, speedy, and inexpensive determination of every action." Ariz. R. Civ. P. 1. Waiting for a court to determine the parameters of a physician's testimony both unduly burdens the court and unnecessarily lengthens the litigation process for all parties involved. Shifting that burden and requiring physicians to protect themselves is also untenable. The proposed amendment should be adopted to eliminate confusion, reduce costs, and minimize unnecessary litigation.

III. THE PROPOSED AMENDMENT WOULD PREVENT ABUSE OF TREATING PHYSICIANS DURING JUDICIAL PROCEEDINGS.

The current state of Rule 26(b)(4), as interpreted in *Sanchez*, is a license to tread on the interests and patient care schedules of treating physicians without compensation. The *Sanchez* court recognizes that its ruling could open the door to a treating physician being taken advantage of during the judicial process. *Sanchez*, at *8 ("[o]ur holding in no way entitles parties to abuse physicians by compelling them to give uncompensated expert testimony."). But the ruling created an environment ripe for abuse of treating physicians. Lawyers already routinely demand that subpoenaed doctors review and comment on voluminous records or others' testimony. Subpoenas should not be used as weapons or to intimidate, but

since the testimony of a treating physician is, under the *Sanchez* ruling, now judicially determined to be "free," there is no reasonable protection against the unnecessary subpoenaing of a medical professional. This places a significant burden on licensed health care practitioners who are required to be removed from a hospital or clinic rotation, often wait for long periods of time, and then testify, uncompensated, during a judicial proceeding. All when they could and should be treating patients.[2]

To preemptively curb this potential for abuse, 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* in 1990. The *Guidelines* sought to prevent potential abuse, minimize misunderstandings, and engender inter-professional relationships based on mutual respect. The *Guidelines* specifically discuss compensation of physicians for medical reports, depositions, and court appearances. They reflect prevailing practice in the legal community that ensured both orderly administration of justice and adequate protection of licensed medical practitioners. The proposed amendment should be adopted both to prevent overuse of treating physicians without compensation, and to revive the delicate

[2] This has the potential to exacerbate an already dire physician shortage in Arizona. As of last year, Arizona ranked 43rd for its share of primary care physicians, and the shortage was expected to worsen. *See* Phil Benson, *Doctor Shortage Likely To Get Worse in AZ*, KPHO.COM, June 23, 2013, *available at* http://www.kpho.com/story/22664070/doctor-shortage-likely-to-get-worse-in-az.

balance between the medical and legal professions achieved through the adaptation of the *Guidelines*.

IV. THE PROPOSED AMENDMENT EMBRACES THE FAIRNESS ENVISIONED WHEN THE CORRESPONDING FEDERAL RULE WAS ADOPTED.

The proposed amendment takes into account the underlying fairness envisioned by the Federal Advisory Committee when it implemented Rule 26(b)(4), Fed. Civ. P.[3] The Advisory Committee Notes to Federal Rule of Civil Procedure 26(b)(4) provide that "[t]hese provisions for fees and expenses meet the objection that it is unfair to permit one side to obtain without cost the benefit of an expert's work for which the other side has paid . . . ." Fed. R. Civ. P. 26 advisory committee note (1970). A treating physician compelled to testify has already provided medical care and treatment to an individual whose injury, illness, or condition is at issue. Without adoption of the proposed amendment, an opposing party would be able to obtain the benefit of all of that treating physician's work for $12 per day and 20¢ a mile (one way). *See* A.R.S. § 12-303. This surely would not satisfy the carefully balanced fairness principles embodied in Arizona's rules of evidence and procedure.

[3] Courts in Arizona have recognized that great weight to interpretation should be given to similar federal rules where an Arizona rule of civil procedure is adopted from a federal rule of civil procedure. *See, e.g., Macpherson v. Taglione*, 158 Ariz. 309, 311, 762 P.2d 596, 598 (App. 1988); *Tuscon Gas, Elec. Light & Power Co. v. Board of Supervisors*, 7 Ariz. App. 164, 165, 436 P.2d 942, 943 (App. 1968). Rule 26(b)(4)(E), Fed. Civ. P., is virtually identical to Rule 26(b)(4)(C), Ariz. Civ. P.

V. CONCLUSION

Consistent with the reasons set forth above, the Arizona Medical Association respectfully requests that the Court adopt the proposed rule change as presented in the Petition.

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SNELL & WILMER L.L.P.

By /s/ Joy L. Isaacs
Barry D. Halpern
Sara J. Agne
Joy L. Isaacs
One Arizona Center
400 E. Van Buren
Phoenix, AZ 85004-2202

Attorneys for Arizona Medical Association

19226320