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8 **IN THE SUPREME COURT**  
9 **STATE OF ARIZONA**

10 In the Matter of:

Supreme Court No. R-13-0042

11 **PETITION TO AMEND RULE**  
12 **26(b)(4)(C) OF THE ARIZONA**  
13 **RULES OF CIVIL PROCEDURE**

**COMMENT OF**  
**THE STATE BAR OF ARIZONA**

14 **INTRODUCTION**

15 The Arizona Association for Justice, an association of lawyers representing  
16 consumers, has submitted a Petition to amend Arizona Rule of Civil Procedure  
17 26(b)(4)(C) (“the Amendment”). The Amendment would expand the class of expert  
18 witnesses entitled to a reasonable fee for time spent testifying to include a party’s  
19 treating healthcare provider (“THP”)<sup>1</sup> when testifying as a fact witness. The petition  
20 is a response to *Sanchez v. Gama*, 233 Ariz. 125, 310 P.3d 1 (App. 2013),<sup>2</sup> in which  
21 the Court of Appeals held that “when a treating doctor is testifying only to the injury,  
22 medical treatment, and other first-hand knowledge not obtained for purposes of  
23

24 \_\_\_\_\_  
25 <sup>1</sup> The Petition focuses on treating physicians, but the Amendment applies to all THPs.

1 litigation, the treating doctor is a fact witness and not entitled to compensation as an  
2 expert,” even though it necessarily draws upon his or her skill, training and  
3 experience as a doctor. *Id.* 233 Ariz. at 132, ¶ 19, 310 P.3d at 8. <sup>2</sup>

4 The State Bar believes that *Sanchez* correctly interpreted and applied Rule  
5 26(b)(4)(C), but also recognizes that THPs traditionally have been compensated as  
6 experts, even when testifying about the medical treatment they provided. Because  
7 the Amendment is likely to be controversial and a general consensus is unlikely to  
8 develop, it would be inappropriate for the State Bar to take a position. Nonetheless,  
9 the following comments about the relative advantages and disadvantages of the  
10 Amendment may be helpful.

### 11 12 **COMMENTS SUPPORTING THE PETITION**

13 THPs who are hired to provide medical treatment to injured people, and  
14 consequently may be called to testify about that care based on their professional  
15 medical expertise, should be compensated like any other expert.

#### 16 **THPs Should be Reasonably Compensated When** 17 **Their Testimony is Based Upon Specialized Knowledge**

18 THPs occupy a unique position in litigation because a personal injury plaintiff must  
19 prove, through expert medical testimony, that the past and future medical care was  
20 or will be necessary as a result of an injury and that the cost of such care is  
21 reasonable. *Revised Arizona Jury Instructions (Civil)*, 4<sup>th</sup>, Personal Injury Damages  
22 1, Measure of Damages. THPs are generally called to testify about these issues on

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24 <sup>2</sup> A petition for review is currently pending in *Sanchez*. The State Bar  
25 recommends that the Supreme Court take no action on the Petition until it disposes  
of the *Sanchez* matter.

1 behalf of their patients solely because they have relevant, specialized knowledge  
2 obtained through professional education and work experience. *Id.*; *Sanchez*, 233  
3 Ariz. at 128, ¶ 7, 310 P.3d at 4; *State ex rel. Montgomery v. Whitten*, 228 Ariz. 17,  
4 21, ¶ 12, 262 P.3d 238, 242 (App. 2011). Indeed, the “testimony of a treating  
5 physician is, by its nature, often more relevant, material, and probative than that of  
6 the retained expert who is not only paid for his testimony, but often gleans it from a  
7 cold record.” *Whitten* 228 Ariz. at 22, ¶ 21, 262 P.3d at 243 (citation omitted).

8         The Court of Appeals’ observations in *Whitten* are right on point. Unlike most  
9 lay witnesses, THPs are essentially experts, even when testifying as fact witnesses.  
10 Yet, unlike other medical experts, they have no control over whether they will be  
11 injected into a case and are not reasonably compensated when they are. It makes no  
12 sense to compensate a retained medical expert, but not a similarly qualified THP,  
13 especially when both witnesses testify about the same issues. The act of treating  
14 patients should not expose THPs to the risk of being forced to give essentially free  
15 testimony. The Court of Appeals in *Sanchez* recognized as much when it encouraged  
16 good faith efforts at “compromise” and “cooperation” in addressing this seemingly  
17 inequitable situation. *Sanchez*, 233 Ariz. at 132, ¶ 19, 310 P.3d at 8.

### 18                   **The Amendment Will Enhance the Quality of Evidence**

19         What witnesses say, and the way they say it, can significantly affect the  
20 outcome of a case. THPs who are not reasonably compensated for their time may  
21 lose interest in providing their best testimony. Even worse, they may express their  
22 dissatisfaction by intentionally trying to harm a party’s position, but there is no way  
23 to know at which party that displeasure might be directed.  
24  
25

1 One might argue that a party can solve this dilemma by compensating THPs  
2 for their testimony, but this raises additional problems. For instance, more often  
3 than not, defendants will choose not to pay THPs, forcing plaintiffs to bear that  
4 expense. Defendants will get a free bite at the apple, while plaintiffs also must pay  
5 defendants' medical witnesses for their testimony. This is inequitable and increases  
6 the cost of litigation on the party usually least able to bear it. Additionally, plaintiffs  
7 must navigate the catch-22 of paying their THPs against the risk of a credibility  
8 attack for doing so when the law does not require it.

9 The Amendment may also encourage lawyers to tiptoe around issues which  
10 could transform THPs into experts in order to avoid paying them as experts. This  
11 would create an artificial bar to full development of the evidence.

12 The rules should promote the development of the best evidence possible. Rule  
13 26(b)(4)(C), as interpreted in *Sanchez*, currently puts plaintiffs in an awkward and  
14 unfairly disadvantaged position and jeopardizes the ability of the jury to do justice.

#### 15 **The Amendment Will Reduce Satellite Litigation over Expert Witness Fees**

16 Questions about which hat a THP wears when testifying likely will be  
17 controversial. A THP's true "expert opinions," those developed independent of  
18 litigation, are often inextricably intertwined with those that are not. *Sanchez* made  
19 clear that it depends on the questions being presented, as interpreted in the trial  
20 court's discretion, and each scenario will be different. *Id.* Additionally, a THP's  
21 time is usually valuable. Therefore, all parties have incentive to litigate the issue of  
22 THP compensation, but well-funded defendants will have the upper hand. The time  
23 spent by parties and the courts dickering over whether a THP is testifying as a fact  
24 witness or an expert, and how the time spent in deposition or trial should be divided  
25

1 between the two, is likely to consume far more resources than simply continuing to  
2 recognize the level playing field which existed in spirit before *Sanchez*, where the  
3 party seeking medical testimony from a THP reasonably compensated the witness.

#### 4 **The Amendment Curbs the Potential for Abuse**

5 Many THPs hold themselves out as treating accident victims. According to  
6 statistics published by the Arizona Supreme Court, 6,348 motor vehicle accident  
7 cases were filed in Arizona Superior Courts in 2012 alone. THPs with accident/  
8 injury practices are likely to be called to testify many times each year. Anecdotal  
9 evidence suggests that Rule 26(b)(4)(C) is already being abused after *Sanchez* by  
10 unscrupulous lawyers and insurers seeking to make it financially difficult for such  
11 providers to treat accident victims. For example, some accident/injury THPs are  
12 being deposed for a full four hours every time, even when only minor injuries are  
13 involved.

14 Defendants also could use *Sanchez* to harass plaintiffs and their THPs by  
15 deposing every THP involved in a patient's care from the intake nurse to the  
16 radiologist to the respiratory technician while paying virtually nothing to do so.

17 While other mechanisms for addressing abuses of the legal system exist,  
18 requiring defendants to pay THPs as experts will curb them, reducing the  
19 consumption of judicial and other resources that otherwise would be necessary.

#### 21 **CONCLUSION TO COMMENTS SUPPORTING THE PETITION**

22 It is reasonable to codify a previously uncontroversial practice which has  
23 worked well for a long time. The Amendment will ensure that parties and witnesses  
24 are treated fairly, conserve judicial resources, and promote the interests of justice,  
25

1 all consistent with the principles set forth in Arizona Rule of Civil Procedure 1.  
2

3  
4 **COMMENTS OPPOSING THE PETITION**

5 THPs who testify as fact witnesses should be compensated as fact witnesses.

6 **All Fact Witnesses Should Be Compensated Equally**

7 A THP has the same civic obligation to serve as a fact witness as every other  
8 citizen, all of whom should be treated equally.<sup>3</sup> *Sanchez* identified the inequitable  
9 nature of singling out one profession for special treatment.

10 Certainly, treating physicians provide great benefits to society and we  
11 do not wish to infringe on their ability to do their important work.  
12 However, other professions and trades also provide great benefit to  
13 society and have specialized knowledge beyond the lay juror. Courts  
14 should not create a special class of fact witnesses who are entitled to  
expert witness fees while excluding others. We have no basis to weigh  
the burdens and costs on one profession as opposed to another.

15 *Sanchez*, 233 Ariz. at 128, ¶ 18, 310 P.3d at 7. Moreover, THPs “suffer no more  
16 inconvenience than many other citizens called forward to be deposed or testify as a  
17 trial witness in a matter in which they have first hand factual knowledge.” *Mangla*  
18 *v. University of Rochester*, 168 F.R.D. 137 (W.D.N.Y. 1996). Therefore, THPs  
19 should be compensated just as any other fact witness when providing fact testimony.  
20

21  
22  
23 <sup>3</sup> Fact witnesses also have the same civic obligation to testify as jurors do to  
24 serve. Like fact witnesses, all jurors are compensated for their time in the same way,  
25 regardless of their professions (Jurors, however, may be compensated for lost  
earnings between \$40.00 and \$300.00 dollars per day when serving for more than  
five days. A.R.S. § 21-221.)

1 **Rule 26(b)(4)(C) Will Not Be**  
2 **Financially Devastating to THPs after *Sanchez***

3 Petitioner claims that *Sanchez*' interpretation of Rule 26(b)(4)(C) will be  
4 "financially devastating" to physicians (not THPs generally) whom it believes either  
5 will be forced out of practice or refuse to treat injury victims. Petitioner, however,  
6 offers no evidence to support its alarmist position.

7 According to statistics published on the Arizona Supreme Court website,  
8 9,387 cases filed in Arizona Superior Courts in 2012 were classified as tort – motor  
9 vehicle, tort – non-motor vehicle, or medical malpractice. These are the cases where  
10 a physician is most likely to be called to testify about a patient.<sup>4</sup> During that same  
11 time, there were 306 Superior Court tort and non-tort civil jury trials. The *2011 State*  
12 *Physician Work Force Data Book*, published by the Association of American  
13 Medical Colleges, reported that Arizona had 12,904 treating physicians in 2010.

14 Even though some treating physicians are likely to be called to testify in  
15 personal injury cases more often than others, these statistics cannot reasonably be  
16 interpreted to suggest that any are being called to testify so frequently that failing to  
17 compensate them at their professional rates will appreciably affect their incomes or  
18 reduce the incentive to treat accident victims. Nor does the risk that a few physicians  
19 may be called to testify with more frequency than most justify carving out an  
20 exception for every THP. As the Court of Appeals in *Sanchez* noted, many  
21 jurisdictions do not compensate treating physicians as experts. Yet, there are  
22 seemingly no reports that injury victims' access to health care in those states has  
23

24 <sup>4</sup> A significant number of cases likely were dismissed before any depositions  
25 were taken. A fair number of the tort – non-motor vehicle cases would not have  
involved personal injuries or medical testimony.

1 been radically curtailed. Neither patient health nor the financial security of THPs is  
2 likely to be affected if the Amendment is not enacted.

3 If THPs will be subjected to “undue burden or expense” as a result of being  
4 compelled to testify, Arizona Rules of Civil Procedure 45(e)(1) and 45(e)(2)(iv)  
5 provide a mechanism to raise the issue with the court. Therefore, if THPs risk  
6 suffering “financial devastation” as Petitioner claims, relief can be requested and  
7 courts can remedy the situation when necessary.

8 **The Amendment Infringes upon the**  
9 **Legislature’s Authority to Regulate Witness Compensation**

10 Regulation of witness compensation is the prerogative of the Arizona  
11 Legislature. *See Sanchez*, 233 Ariz. at 128, ¶ 18, 310 P.3d at 7 (quoting *Demar v.*  
12 *United States*, 199 F.R.D. 617, 619–20 (N.D.Ill. 2001)). Fact witnesses are  
13 compensated for their testimony as set forth in A.R.S. § 12-303, which is blind to a  
14 witness’ profession. The Amendment would circumvent the statute by classifying  
15 THPs as experts when offering fact testimony solely because of their professions.  
16 The Court should not infringe upon the Legislature’s right to determine the amount  
17 of compensation to which a witness is entitled.

18 **The Amendment Would Increase**  
19 **the Cost of Litigation and Chill Settlements**

20 Cases often involve treatment by multiple THPs who have relevant factual  
21 information about an injured person. While patients and their lawyers can  
22 communicate with THPs about such information, defendants are prohibited from  
23 doing so. *Duquette v. Superior Court*, 161 Ariz. 269, 778 P.2d 634 (App. 1989).  
24 The Amendment unfairly requires defendants to pay THPs as experts to obtain  
25 factual information to which only the patient has access. Increasing the cost of fact  
discovery only for defendants creates an unlevel playing field. It also impacts the

1 ability of defendants to develop a reasonable appreciation of the risks of proceeding  
2 to trial before beginning expert discovery. Ultimately these issues could affect the  
3 willingness of parties to settle cases early, if at all.  
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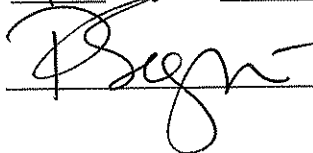
5 **CONCLUSION TO COMMENTS OPPOSING THE PETITION**

6 *Sanchez*' interpretation of Rule 26(b)(4)(C) will not dramatically affect the  
7 financial stability of THPs or access to healthcare. The Amendment, however,  
8 would usurp legislative power and single out THPs to be better compensated than  
9 other fact witnesses while inequitably increasing the costs of litigation for  
10 defendants – all without a reasonable basis for doing so. The Petition should be  
11 denied.  
12

13 RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of May, 2014.  
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17   
18 John Furlong  
19 General Counsel

20 Electronic copy filed with the  
21 Clerk of the Arizona Supreme Court  
22 this 9<sup>th</sup> day of May, 2014.

23 by:   
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