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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	**NO. R-13-0042** **OPPOSITION TO PETITION TO AMEND RULE 26(b)(4)(C)**

The Arizona Association of Defense Counsel (hereinafter "AADC") respectfully opposes the Petition to Amend Rule 26(b)(4)(C) of the Arizona Rules of Civil Procedure on the grounds set forth below.

I. SUMMARY

The AADC submits that the proposed amendment (1) is not grounded in good public policy, (2) is incompatible with the sound reasoning set forth in the *Sanchez* decision,[1] (3) would at a minimum be constitutionally suspect, (4) would unwisely increase litigation expenses and access to the courts, and (5) would be contrary to the interests of the clients represented by members of the Petitioner organization.

This Court declined to accept the Petition for Review in *Sanchez*, thus presumably evincing an agreement with the *Sanchez* analysis and result. Moreover,

[1] 233 Ariz. 125, 310 P.3d 1 (App. 2013).

the overarching principle underlying Arizona's Rules of Civil Procedure is "to secure the just, speedy, and **inexpensive** determination of every action." (Emphasis added) Ariz. R. Civ. P. 1. However, Petitioner's proposed amendment would do violence to this goal, permitting a select, but common, category of witnesses to charge thousands of dollars just to provide factual testimony during discovery.

The AADC is a non-profit organization that was established in 1965. The AADC is a state-wide organization of defense attorneys who practice primarily in the area of civil defense litigation. Virtually all of AADC's members represent and advise civil defendants of all types – individuals, corporations and other business entities, cities, towns, Arizona's fifteen counties, and the State. The AADC is dedicated to the education of its members and the judiciary. The AADC seeks to increase community awareness of positive aspects of the legal profession and advance the legal profession for the betterment of Arizona attorneys and the public it serves.

The decision to file an opposition to the Petition was made by the board members who considered, discussed, and evaluated the impact of the proposed change to Rule 26(b)(4)(C). As set forth above, for various reasons the proposed amendment is unwarranted and would create harsh and expensive consequences. Because of the far reaching implications of this proposed rule change to all civil litigants in Arizona, the AADC urges this Court to deny the Petition, and allow the correct and well-reasoned *Sanchez* opinion to govern the interpretation of Rule 26(b)(4)(C).

II. EVENTS SUBSEQUENT TO THE FILING OF THE PETITION

The Petition to Amend was filed on or about August 28, 2013, a few days after *Sanchez* was published. Subsequently, Dr. Hobbs filed a Petition for Review with this Court, which was then followed not only by Sanchez's opposition, but by Amici Briefs filed by a chiropractic association and a medical association. On March

21, 2014, this Court denied the Petition for Review.[2] Thus, the *Sanchez* decision stands as law.

III. THRUST OF PROPOSED AMENDMENT

Recognizing that *Sanchez* held that "fact witnesses" from the medical profession should not be singled out for the exclusive and specific privilege of being entitled to fees for attending a deposition, the Petitioner – an organization comprised of attorneys who represent plaintiffs in personal injury cases – seeks to carve out this special privilege via a rule amendment. The proposed language – ". . . give testimony relating to knowledge, information, facts or opinions derived as a result of providing medical care . . . shall be regarded as an expert . . ." – seeks to transform the "fact witness" into an "expert" simply by virtue of the witnesses' stature in society, namely that of a medical professional. As discussed below, that is both illogical and is fraught with policy and constitutional defects.

IV. DISCUSSION

The Petitioners herein essentially make the same arguments that were raised by Hobbs and the Amici but rejected by both the *Sanchez* Court and this Court (when denying the Petition for Review). The AADC briefly addresses those arguments.

A. Amendment Would Establish Bad Public Policy

Petitioner seeks to grant doctors a specific privilege of "expert fees," even when the doctor is only a "fact witness," on the premise that doctors enjoy a unique and special status in society. That is a false premise. As the *Sanchez* Court aptly pointed out (while recognizing the benefits of the medical profession): "other professions and trades also provide great benefit to society and have specialized knowledge beyond the lay juror." (¶18 of Opinion.)

[2] *See* attached Order.

The Opinion further explains that courts "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," agreeing with reasoning stated in *Denmar v. United States*, 199 F.R.D. 617 (N.D. Ill. 2001) and several other decisions. (¶18 of Opinion.)

The rule change proposed by Petitioner would constitute a repudiation of the maxim – created by legislature – that citizens may be called upon to testify as part of their civic duty without being paid to do so.[3] Why couldn't every professional or tradesman demand a rule that compensates them beyond the statutory fees? Such would make mockery both of the maxim and the statute (A.R.S. § 12-303). What Petitioner argues would pave the way for numerous other professions, whose ability to work and practice is also controlled by statute, to demand the right to expert witness compensation for factual deposition or trial testimony. And, if Petitioner's proposed amendment were adopted, one would be hard pressed to discern a basis for denying such further amendments.

Were this Court to create a special privilege for chiropractors and medical doctors by awarding them expert fees, but not do the same for other professions and trades, arguably those other persons would have their constitutional rights violated (*see* below). AADC can find no rule of procedure which grants special privileges to one particular profession, and AADC respectfully submits that this Court should not create one.

Sanchez recognizes the obvious fact that a myriad of other professions provide great benefits to society, have significant overhead costs and expertise, but courts are

[3] Except for being entitled to statutory witness fee and mileage hereunder. A.R.S. § 12-303.

ill-advised to "create a special class of fact witnesses" by weighing the burdens and costs on one profession as opposed to another. (*See* ¶18 of Opinion.)

Taking the only logical and reasonable position possible, the *Sanchez* Court notes that doctors cannot be treated as expert witnesses just because a "part of their testimony requires specialized knowledge obtained through professional education or work experience." (¶7 of Opinion.) Were this not so, any member of a profession or trade could demand a rule that would entitle them to be paid an expert fee whenever he is called upon to testify regarding an activity or transaction where he applied or used some "specialized knowledge." Consider: Would any of the following, a small sample of a myriad of professions and trades, be entitled to an expert fee when deposed?

- In a construction defect case or building collapse case, an architect who helped design the building;
- In a legal malpractice case, a non-party lawyer who was involved in the legal transaction;
- In financial litigation, an accountant who was involved in some of the financial or evaluations transactions;
- In a trench collapse case, an engineer who designed the specifications for digging and supporting the trench;
- In a product liability case, an engineer or chemist who participated in the design and manufacture of the product; or
- In a construction defect case, a plumber who helped construct the structure.

The Petitioner basically ignores these points. A recent example of a court rejecting the Amici petition is *Jorden v. Steven J. Glass, M.D.*, 2010 WL 3023347 (D.NJ. 2010), wherein the court rejected fees to a treating doctor, reasoning that (1)

there were no rule or statutory exceptions giving doctors special privileges; (2) all witnesses are " inconvenienced" by depositions, but doctors do not get excused from that inconvenience; and (3) there is no logic to singling out the medical profession for payment of fess but for "no other class of professionals . . . with specialized knowledge." The *Jorden* case noted that "[w]hile physicians certainly have significant overhead costs and special expertise, so do a myriad of other professions. . . . This Court declines to set precedent in this jurisdiction that, essentially, singles out physicians for special treatment. Rather, the more prudent course of action is to follow the unambiguous tenets of Fed. R. Civ. P. 26(b)(4)(C) and § 1821 which provide that expert witnesses – *independent of their profession* – obtain compensation at a 'reasonable fee,' while fact witnesses – *independent of their profession* – receive compensation at the statutory fee of $40." (*Id*. at * 3) (*citing Demar*, 199 F.R.D. at 619).

Further, Petitioner's proposed amendment is overly broad, to the point of being unworkable. Under the proposed amendment, <u>any witness</u> giving testimony as a result of "providing medical care" would be entitled to charge an expert witness fee. Although this Petition spawns from the *Sanchez* case, which involved a medical doctor, the proposed amendment is not so limited. Petitioner does not even attempt to define what type of "medical care" would fall within the parameters of the proposed rule. Rather, a "medical" witness of any kind could arguably charge significant fees for testimony, even without the specialized training of medical doctors. Would this include a chiropractor, a nurse, a licensed practical nurse, a nurse practitioner, a medical or chiropractic assistant, a dentist, a dental hygienist, a lab worker or technician, hospital attendant, a radiology technician, an ambulance attendant, a fireman EMT, a dental assistant, an optometrist, an acupuncturist, a naturopath, a massage therapist and the like?

Petitioner offers no justification for creating a privilege for such witnesses to charge expert witness fees to give testimony, let alone testimony on such typically routine issues as type of care provided, timing of care provided, translating handwritten notes, laying foundation for records, etc. Notwithstanding the impropriety of giving special treatment to medical doctors testifying as fact witnesses, the proposed amendment would go even further to extend this special treatment beyond any reasonable bounds. The *Sanchez* case already provides the appropriate framework, and should not be disturbed.

B. Present Rule, As Interpreted by *Sanchez*, is Workable and Will Not Overburden Judges

Petitioner argues a parade of horrors to the effect of Judges being overburdened by the application of *Sanchez*. Not so.

First, the test enunciated by *Sanchez* for distinguishing between a "fact witness" and an "expert witness" is applicable to all professions and trades – it is not restricted to doctors. Thus, courts will have to engage in that process even when a doctor is not involved – and the proposed amendment will not eliminate that.

Second, the *Sanchez* test is clearly workable, as this Court appeared to recognize when it denied the Petition for Review. A review of the substance of a proper Rule 26.1 disclosure will reveal the scope of the doctor's expected testimony. If the disclosure reveals that the doctor is not a retained expert who has formed new opinions after the patient was discharged, and that the doctor will only testify regarding past factual matters, he is a "fact witness."

Succinctly, the *Sanchez* Court stated the test as:

> "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 treatments, and other first-hand knowledge not obtained for the purposes of litigation, the treating doctor is a fact witness and need not be compensated as an expert." (¶19 of Opinion.)

Fact 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." (¶8 of Opinion.)

Petitioner incorrectly asserts that it is "nearly impossible to elicit purely factual testimony from [a doctor]". To the contrary, as *Sanchez* points out, a treating doctor's testimony about his *past* examinations, diagnosis, treatment recommendations, prognosis, or opinions as to causation, are all factual matters about the past![4] Moreover, judges have no excessive burden if there is a dispute. The judge need only look at the Rule 26.1 Disclosure Statement to determine whether the doctor is a treating doctor, or one who qualifies for an expert fee because he was retained for litigation, (reviewed new information after being retained and subsequently formed new opinions). That is a rather simple task.

Even when a doctor is disclosed as both a past treating doctor and a retained expert with new opinions reached subsequent to the patient's discharge, the opposing attorney desiring to take the deposition can decide to question the doctor on one or both areas, and if on both, will compensate the doctor accordingly. Judges will typically not get involved whatsoever.

C. Doctors and Patients Are Not Significantly Impacted by *Sanchez*

Without any factual basis whatsoever, Petitioner asserts that doctors' professional lives will be affected and that they will be prone to refuse to treat certain persons. The AADC submits that this is specious, as is the argument that litigation costs will increase.

[4] *Sanchez* correctly points out that questions relating to experience, education, training, terms, procedures, what was seen, felt, heard, medical diagnosis, etc., are all factual inquiries.

First, *Sanchez*, if anything, will result in a decrease in litigation costs, not an increase. Moreover: (a) the patients (*i.e.*, the personal injury plaintiffs) will no longer be exposed to having to pay their own doctor's deposition expert fees as taxable costs, should they lose the litigation (*see* below); and (b) defendants and plaintiffs in litigation will no longer have the huge financial burden connected to taking depositions of treating doctors. This in turn, brings greater access to the court system. As *Sanchez* states:

> Requiring parties to pay for the testimony of all treating physicians that are essential to the case but who only testify to the facts would increase the cost of litigation, and in some cases would limit access to the legal system to those most affluent. (¶17 of Opinion.)

Second, there is no evidence that a person will not seek healthcare simply because their doctors will not be paid an expert fee for depositions. Common sense and experience dictates the conclusion that people typically seek healthcare before litigation starts and without having any knowledge or giving the slightest thought regarding the expert fee issue. The patient simply is not concerned about the issue. And, the notion that doctors will not treat people because the doctor may later have to attend a deposition without being paid a fee, has no evidentiary support. In fact, any doctors engaged in such thought processes, and refused to give care only because they may not later to be able to charge hundreds or thousands of dollars for testimony, such would be a black eye on the doctor and his profession. By and large, doctors do not think that way. Simply put, *Sanchez* will have no impact on a doctor's decision to treat a person.

Third, the Petitioner laments that *Sanchez* will significantly cause doctors financial harm. *Sanchez* submits that the Petitioners exaggerate the impact. Several factors need to be pointed out:

(a) There is no evidence that any one doctor has ever been significantly harmed by not being paid an expert fee for a fact-based deposition. Indeed, it can be reasonably argued that it is a well-known fact that doctors are among the most affluent in society. It strains credibility to assert that the occasional spending of a few hours (at most) of their time to give depositions will have a significant financial impact. To the contrary, the time (and the relatively few dollars lost by not being at the office and having patients) is *de minimis* compared to the time they actually charge for the care and treatment of patients.

(b) There is no evidence that any one doctor has been or will be required to give many, many depositions. In fact, the vast majority of doctors either never give any depositions, or give only a relatively few over a many year period of time. For those doctors, the actual time spent in depositions is *de minimis*.

(c) As to the relatively few doctors who routinely treat personal injury plaintiffs, namely those to whom lawyers regularly refer their clients, those doctors voluntarily get involved with persons who have claims and/or lawsuits pending. They know that their deposition may be required, and accept that reality. Even so, that deposition process should never be used as a money making tool or source of income for those doctors.

D. <u>The Amendment Would Be Constitutionally Defective</u>

The AADC submits that if promulgated, the amended rule would be challenged on constitutional grounds, with such a constitutional challenge carrying a strong likelihood of success. The creation of a special privilege for those in the medical profession[5] would deny members of other professions and trades of their

[5] Again, Petitioner does not in any way define or limit what types of "medical" witnesses would be entitled to charge expert witness fees for giving testimony. *See* discussion, *supra*, pp. 6-7, ll. 13-7.

constitutional right to equal protection and due process. Consider:

The Arizona Constitution contains an equal protection clause which provides as follows:

> No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.

Ariz. Const. Art. II § 13.

The Fourteenth Amendment to the United States Constitution also contains an equal protection clause which provides as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amdmt. XIV, § 1.

Amendments to new rules have been challenged on constitutional grounds in the past, including in very recent times. *See Thiele v. City of Phoenix*, 232 Ariz. 40, 42, 301 P.3d 206, 208 (App. 2013) (holding that Ariz. R. Civ. P. 67 cost bond provisions do not violate the equal protection clause of the Arizona constitution). Hence, a challenge to any amendment to the rule would most likely come swiftly.

The challenge probably would be based on a violation of equal protection, namely that under the strict scrutiny standard, there is no compelling state interest to grant this special privilege to the medical profession. A rule that grants such a privilege would be upheld only if it is necessary to carry out a compelling state interest. *See Thiele, supra,* and *Kenyon v. Hammer*, 142 Ariz. 69, 688 P.2d 961 (1984). In *Kenyon,* this Court observed that:

> ". . . we believe that the state has neither a compelling nor legitimate interest in providing economic relief to one segment of society by depriving those who have been wronged of access to, and remedy by,

> the judicial system. If such a hypothesis were once approved, any profession, business or industry experiencing difficulty could be made the beneficiary of special legislation designed to ameliorate its economic adversity by limiting access to the courts by those who have been damaged. Under such a system, our constitutional guarantees would be gradually eroded, until this state became no more than a playground for the privileged and influential . . . . Special privileges and immunities are not favored by Arizona law."

Id. at 84, 976 (citing *Ryan v. State*, 134 Ariz. 308, 656 P.2d 597 (1982)).

The proposed rule falls squarely within the foregoing, namely that an "influential" and "privileged" class of persons – i.e., the medical profession – cannot be afforded "special privileges and immunities."

E. Petitioner's Clients Would Be Harmed by the Amendment

It is perplexing that Petitioner has filed this Petition. It describes itself as "an organization consisting of about 700 Arizona attorneys . . . dedicated to protecting the rights of tort victims . . ." (*i.e.*, plaintiffs in personal injury litigation). IF Petitioner truly wants to protect the rights of the members' clients, then it should applaud *Sanchez* – not condemn it. Under *Sanchez*, when the plaintiff's treating doctor is deposed – and no expert fee is paid – the plaintiff has no exposure for paying defendant the fee as a taxable cost should the plaintiff lose the suit. Expert fees paid to the adverse party's expert for a deposition are "taxable" costs, which a defendant can recover against plaintiffs, if defendant is the prevailing party. *Rabe v. Cut and Curl of Plaza 75, Inc.*, 148 Ariz. 552, 715 P.2d 1240 (1986); *cf Schritter v. State Farm Mut. Auto. Ins. Co.*, 201 Ariz. 391, 36 P.3d 739 (2001). In short, Petitioner ought not to complain about the effect of *Sanchez*. Indeed, the proposed amendment, which would expose plaintiffs to those taxable costs, seemingly is in conflict with Petitioner members clients' best interests.

F. Interaction of Rule 26(b)(4) and Rule 30(a)

Rule 26(b)(4) and Rule 30(a) are perfectly consistent and compatible under *Sanchez*. When qualifying as an "expert" witness under Rule 26(b)(4), the physician

witness will be entitled to an expert fee and under Rule 30(a) can be deposed without a stipulation or court order. When the treating doctor cannot qualify as a Rule 26(b)(4) expert witness, he nevertheless can be deposed under Rule 30(a) without a stipulation or court order. This Court obviously concluded long ago that even though a doctor is only a fact witness, the justification for a deposition is so obvious that no attorney could rightfully object to it, hence removing the need for a stipulation or court order. Thus, there is no conflict between the two rules and the *Sanchez* court correctly observed that Rule 30 "has no impact on . . .[Rule] 26(b)(4)."

G. So-Called Cooperation Guidelines

Petitioner asserts that cooperation guidelines that were developed between the legal and medical professions compel the proposed amendment. The reasoning used for this argument is that the guidelines "[recognize] the essential role of physicians in the administration of justice." While no one disputes the assertion that doctors provide essential benefits for society, it is a stretch to assert that they are essential to the administration of justice to the extent that they should enjoy a special privilege of compensation – at the exclusion of other professions and trades. While the good intentions underlying the cooperation guidelines are not in doubt, they cannot trump logic, constitutional law, and sound public policy on this issue.

Moreover, the Maricopa County "Medical-Legal Guidelines for Cooperation" address only a patient's payment of fees to his own doctor for the doctor's time spent; it does not address the issue of payment for the patient's opposing party for deposition time. In short, *Sanchez* did not affect those guidelines. And, as to the State Bar's so-called guidelines, they do not expressly address the issue as to whether an opposing party should pay an expert fee. Even if the broad language on point were construed to implicitly cover a deposition taken by an adverse party, that broad language was ill-advised.

V. CONCLUSION

Over time, the cost of paying doctors hefty fees for depositions dramatically increased the cost of litigation. This Court has on a number of occasions taken steps to decrease the cost. Consistent with the directive and policy embodied in Rule 1, *Sanchez* has decreased the costs. This Court should not amend the Rule and reverse the effect of *Sanchez*. Therefore, this Court should not grant the Petition.

Dated this 19th day of May, 2014.

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CERTIFICATE OF SERVICE

Charles M. Callahan being first duly sworn upon oath, states that on the 19th day of May 2014, he caused the original of the foregoing Opposition to Petition to Amend Rule 26(b)(4)(C) to be electronically filed through AZTurboCourt and that he caused a copy of the foregoing to be emailed to:

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