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10 **ARIZONA SUPREME COURT**

11 IN RE:

R-13-0042

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

MARICOPA COUNTY ATTORNEY'S
RESPONSE TO PETITION TO AMEND RULE
26(b)(4)(C), ARIZ. R. CIV. P.

15 The Maricopa County Attorney hereby responds to the Petition to Amend Rule
16 26 of the Arizona Rules of Civil Procedure and asks this Court to deny the petition
17 because there is no justification for singling out one type of fact witness for special
18 treatment and the rule change will unnecessarily inflate costs in civil cases
19 exacerbating issues associated with expensive litigation and criminal cases to the
20 detriment of taxpayers.
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22 Respectfully submitted this 31 day of May, 2014.

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25 WILLIAM G. MONTGOMERY
26 MARICOPA COUNTY ATTORNEY

27 By 
28 for MARK FAULL
CHIEF DEPUTY

1 **I. INTRODUCTION**

2 In two separate opinions the Arizona Court of Appeals has clearly held that
3 doctors who are required to testify as fact witnesses in criminal or civil cases are not
4 entitled to receive compensation as expert witnesses. *Montgomery v. Whitten*, 228
5 Ariz. 17, 262 P.3d 238 (App. 2011); *Sanchez v. Gama*, 233 Ariz. 125, 310 P.3d 667
6 (App. 2013). Petitioner now seeks to obtain higher review of these holdings by
7 effecting a rule change to the Arizona Rule of Civil Procedure. Although Petitioner
8 does not discuss the impact of their petition on criminal prosecutions, there is no
9 logical reason to treat civil and criminal trials differently. As the court in *Sanchez*
10 noted, witnesses – including doctors – have a civic duty to provide testimony in both
11 criminal and civil matters. *Sanchez*, 233 Ariz. at ¶ 11. Petitioner’s requested rule
12 change is bad public policy for both civil and criminal cases and it should be denied.
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17 **II. DISCUSSION**

18 **A. Doctors serving as fact witnesses should not be singled out for special**
19 **treatment and payment.**

20 Fact witnesses are an essential part of any trial. These witnesses explain to the
21 fact finder exactly what happened in a given event and the results of those events.
22 These witnesses can be anyone who happens to observe an event or be victimized by
23 the event. These witnesses can be professionals who are called to the scene to
24 determine what happened and why. In the case of an automobile collision, for
25 example, these witnesses might be police officers who are highly trained
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1 professionals and have acquired the expertise to reconstruct a collision to determine
2 what happened and who was at fault. These witnesses may also be doctors who treat
3 victims of crimes or torts. These witnesses might be lawyers explaining how a client
4 was harmed by legal malpractice or they might be accountants who explain how a
5 person used various accounts and methods to hide or misappropriate funds. In short,
6 fact witnesses come from all walks of life and their willingness to provide
7 information to a fact finder is critical to our system of civil and criminal justice. For
8 this reason, fact witnesses have a civic duty to come to court to tell the fact finder the
9 who, what, when, where and why of the case.
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13 Expert witnesses, on the other hand, are used in some trials, but not every case
14 requires expert witnesses. Expert witnesses may give opinions, for example,
15 regarding the appropriate standard of care in a particular case, they might give
16 opinions about what another professional should have done in a given situation, they
17 may review the work of others and give opinions on the adequacy of that work, or
18 they may give opinions about what might have happened in a given case if the facts
19 were different. In sum, expert witnesses are hired by parties to address specific facets
20 of a particular litigation. Because they are hired by a party to work on a particular
21 litigation, expert witnesses are compensated for their time preparing and presenting
22 testimony.
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27 Currently, professionals whose expertise causes them to witness matters that
28 result in litigation in the ordinary course of their business are fact witnesses who are

1 not entitled to compensation for testimony related to their observations. A
2 professional who has no contact with the events related to the litigation, but is who
3 asked after the fact to apply their expertise to provide relevant testimony is an expert
4 witness who is entitled to compensation for their time. Petitioner seeks to change
5 these norms to single out one particular type of fact witness – those who provide
6 medical care – for special treatment under the civil rules. This special treatment
7 would require expert witness compensation even when the doctor is acting as a fact
8 witness by only testifying as to the “who, what, when, where and why” of his or her
9 own patient. *See Whitten*, 228 Ariz. ¶ 15.

13 Fact witnesses, however, should stand on an equal footing, whether in a civil or
14 a criminal context, and there is no logical reason to single out doctors for special
15 treatment over any other type of professional. As the Court of Appeals wisely noted,
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17 Furthermore, we do not think it is appropriate to carve out, for doctors,
18 an exception to the general rule that fact witnesses are not paid for
19 giving testimony. Certainly, treating physicians provide great benefits to
20 society and we do not wish to infringe on their ability to do their
21 important work. However, other professions and trades also provide
22 great benefit to society and have specialized knowledge beyond the lay
23 juror. Courts should not create a special class of fact witnesses who are
24 entitled to expert witness fees while excluding others.

23 *Sanchez*, 233 Ariz. ¶ 18. After noting some cases from other courts that imposed a
24 “reasonable fee” requirement whenever physicians are called as witnesses, the Court
25 of Appeals noted, “None of these cases, however, provide any logical explanation as
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1 to why physicians and no other class of professional or laborer with ‘specialized
2 knowledge’ should be awarded a ‘reasonable fee.’” *Id.* at ¶ 14.
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4 Petitioner points out the fact that doctors are required to testify more frequently
5 than other witnesses. [Petition at 5]. Of course, some occupations will naturally
6 cause greater likelihood of exposure to some aspect of criminal or tortious behavior
7 than others, but that is simply part and parcel of the chosen occupation.¹ Emergency
8 room physicians and other medical professionals are certainly more likely to observe
9 injuries that ultimately lead to litigation in the ordinary course of business than are
10 other occupations. It is the civic responsibility of all to aid in the pursuit of justice
11 without compensation, not just those who do not hold professional degrees. It is
12 crucial that the law maintain the distinction between fact witnesses and expert
13 witnesses without carving out exceptions for one profession over another.
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17 **B. Treating doctors as any other fact witness will not lead to dire**
18 **consequences or significantly burden attorneys or the courts.**

19 Petitioner cites a parade of horrors that will befall the Arizona legal system if
20 *Whitten* and *Sanchez* are not overruled by this rule change. These horrors include
21 courts burdened by having to decide the difference between fact testimony and expert
22 testimony, depositions that must be constantly refereed by trial courts, constant
23 interruptions at trial, doctors hiring their own lawyers, and ultimately doctors refusing
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26 ¹ Petitioner notes that the AMA imposes an ethical duty on physicians to assist in the administration
27 of justice. [Petition at 6, fn. 2]. The AMA does not suggest that the physician’s level of
28 cooperation should vary depending on whether or not the doctor is being paid and the AMA’s
guidance is really only repeating the civic duty of every citizen.

1 to provide care and treatment to the injured. [Petition at 7-10]. Yet, Arizona is not
2 the only jurisdiction that recognizes the common sense distinction between a treating
3 physician testifying as a fact witness and a physician testifying as an expert witness.
4 The Court of Appeals listed and quoted from numerous cases from other jurisdictions
5 that recognize that treating physicians are fact witnesses not experts. *See Sanchez*,
6 233 Ariz. at ¶ 12-13, 18. Petitioner cites to no examples of ways these other
7 jurisdictions have suffered as a result of not singling out doctors for special treatment
8 under their rules or laws.
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12 Petitioner’s concern that attorneys and judges will struggle to decipher the
13 difference between fact testimony and expert testimony is unrealistic given the clear
14 guidance the court provided in *Whitten*. In that case, the court categorized the types
15 of questions that are factual. The court explained that background questions are
16 merely foundational and do not entail expert testimony. *Whitten*, 228 Ariz. at ¶ 13.
17 The court explained that if the witness is testifying about information that was
18 acquired independently “of the litigation, the parties, or the attorneys” then they are
19 acting as fact witnesses. *Id.* at ¶ 14. If the witness is not required to do additional
20 work beyond reviewing his or her own records the witness is acting as a factual
21 witness. *Id.* In sum, “[a]sking a treating physician the ‘who, what, when, where, and
22 why’ regarding his own patient and medical records will generally elicit fact-based
23 testimony.” *Id.* at ¶ 15. Finally, questions regarding a diagnosis that is developed
24 during the course of treating the patient are appropriate for fact witnesses. *Id.* at ¶ 18.
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1 On the other hand, the court noted that questions that require a doctor to
2 “review records or testimony of another health care provider or to opine regarding the
3 standard of care or treatment given by another provider are generally inconsistent
4 with the role of treating physician as a fact witness.” *Id.* at ¶ 16. Likewise questions
5 that ask a doctor to discuss medical research or literature seek to use the doctor as an
6 expert witness. *Id.* Although there are exceptions, hypothetical questions also
7 indicate that the witness is being used as an expert. *Id.* at ¶ 17. Taken together, these
8 commonsense guidelines provide sufficient, clear guidance for attorneys and judges
9 as to the distinction between fact and expert testimony.
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13 **C. Requiring payment to doctors when they serve as fact witnesses will**
14 **increase litigation costs and ultimately hamper the State’s ability to**
15 **prosecute offenders.**

16 Changing the rule to require the payment of expert witness fees to every
17 testifying doctor will unnecessarily inflate the costs associated with civil litigation.
18 In most civil cases, where the cost of litigation is already substantial, these additional
19 costs will fall on defendants. Because these defendants are frequently insurance
20 companies, it is easy to forget that those additional litigation costs are ultimately
21 borne by customers who must pay higher costs for medical treatment and insurance.
22 Unnecessarily increasing the cost of civil litigation to pay a witness for fact testimony
23 is bad public policy.
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27 Additionally, Petitioner’s rule change will likely impact the criminal system
28 and force taxpayers to bear the increased costs of prosecuting offenders. Although

1 the petition only seeks a change to the civil rules of procedure, the criminal rules are
2 silent as to the payment of witness fees. As the court in *Sanchez* noted, witnesses
3 have the same civic duties whether the case is civil or criminal so there is little reason
4 to treat testifying fact witnesses differently in civil and criminal cases. *See Sanchez*,
5 233 Ariz. at ¶ 11. The end result of this logic is that Petitioner's proposed change to
6 the civil rules will ultimately overrule *Whitten* as well as *Sanchez* and criminal
7 prosecutions will suffer as a result.
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10 While requiring payment to doctors who testify as fact witnesses is
11 unnecessary in the civil system, the impacts in the criminal system will be even
12 greater. In many criminal prosecutions doctors are needed to prove essential
13 elements of the crime and to describe to the jury the extent of the injuries a victim
14 suffered. The facts of the case in *Whitten* are one such example, but in a large
15 number of criminal prosecutions across Arizona, the factual testimony of treating
16 doctors is required for successful prosecutions. Requiring the State to pay all of these
17 doctors expert witness fees each time they are needed for trial would significantly
18 burden a criminal justice system that is already starved for resources. Prior to
19 *Whitten* an increasing number of treating physicians were refusing to honor their
20 subpoenas unless they were assured of compensation for their time to prepare for trial
21 and to testify. *See Whitten*, 228 Ariz. at ¶ 7. Litigation over doctors' motions to
22 quash subpoenas eventually led to the Special Action in *Whitten* that finally resolved
23 the issue. If Petitioner is successful in changing the civil rules, doctors will, no
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1 doubt, again object to testifying as fact witnesses in criminal trials without expert fees
2 citing the civil rule change as evidence that they should be paid as experts regardless
3 of the nature of the litigation. If they are successful, prosecution agencies will have
4 to weigh the costs associated with paying witnesses fees in determining how to
5 prosecute or resolve criminal matters. When the State decides to go forward and
6 present the doctor's testimony, the taxpayers will bear the increased costs. Worse, in
7 some cases, the State will be forced to dismiss criminal charges because the
8 prosecution agency does not have the necessary funds to pay the doctor to prove the
9 necessary elements. Criminal prosecutions should be based on the conduct of the
10 offender not on a given prosecutorial agency's ability to pay treating physicians to
11 testify about the injuries a victim suffered. Forcing the State to pay doctors to testify
12 as fact witness will do nothing to secure public safety, justice, or peace for those
13 victimized by criminals. Petitioner's proposed rule change is simply poor public
14 policy.

20 **III. CONCLUSION**

21 For the justice system to function effectively and efficiently, it is imperative
22 that all citizens who witness some aspect of events that lead to litigation be willing to
23 assist in proceedings to hold responsible parties accountable without expectation of
24 compensation for their time in doing so. Such cooperation is a civic responsibility
25 and an important part of the social compact that is observed in a free society. There
26 is no logical reason to single out doctors for special treatment under the rules and
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1 doing so, particularly in the criminal arena, would place an untenable burden on
2 taxpayers and government resources. The Court of Appeals addressed these issues
3 logically and reasonably in their opinions in *Whitten* and *Sanchez* and Petitioner's
4 attempt to overrule these opinions by rule change should be denied.
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6 Respectfully submitted this 20th of May, 2014.
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