

MEMORANDUM

TO: AzHHA
FROM: Scott Bennett, Coppersmith Schermer & Brockelman PLC
DATE: July 29, 2011
SUBJECT: Court opinion regarding compensating providers for testimony in criminal cases

Last week, the Arizona Court of Appeals issued a decision that is important for all physicians and other healthcare providers who might be called to testify in criminal cases. The decision is also important for the hospitals that contract with or employ those physicians, because testifying in court takes providers away from their normal work.

The case at issue was a murder prosecution. A 7-week-old girl was admitted to Maricopa Medical Center (MMC) with skull fractures and a massive brain injury. Before she died, the girl was treated by more than two dozen physicians and other providers.

The State charged the girl's father with murder and child abuse. The prosecutor disclosed that he intended to call, as witnesses at trial, eight of the physicians who had treated the girl at MMC. The doctors asked the judge to order the State to pay them \$350 per hour for the time they had to give up to testify. The judge ordered the State to pay six of the doctors. The State appealed the trial judge's decision.

The Court of Appeals noted that treating physicians and other providers are entitled to compensation when they testify as expert witnesses, but not when they testify as fact witnesses. The Court stated that there is no firm line that determines when factual testimony by a provider crosses the line to expert testimony. But the court offered some general guidance:

- Questions about a provider's background, experience, training, and specialization are proper for both fact and expert witnesses. These types of questions do not mean that the attorney is going to ask for expert testimony.
- Providers are generally fact witnesses when they testify about their own medical records, and their own treatment of the patient. Fact testimony includes answering questions about the "who, what, when, where, how, and why" of the patient and treatment. Questions about what the provider personally observed also constitute fact testimony. And questions about opinions that the provider formed while treating the patient generally call for fact testimony as well.
- Providers are generally acting as expert witnesses when they testify about the treatment provided by someone else. That would include reviewing the medical records or testimony of another provider, or testifying about whether another provider met the standard of care. Testimony about medical research or literature generally also falls within the realm of an expert witness. Hypothetical questions often indicate that the lawyer is seeking expert testimony. A witness asked to form an opinion for the purpose of testifying is generally providing expert testimony.

The decision is *Montgomery v. Whitten*, No. 1 CA-SA 11-0127, (Ariz. Ct. App. July 21, 2011).
The full text is available at <http://azcourts.gov/Portals/89/opinionfiles/SA/SA110127.pdf>.