September 11, 2013

Larry Royster, Clerk
Michigan Supreme Court
925 W. Ottawa St.
Lansing, Michigan 48913

Re: **Michigan Court Rules Lobbying**
Proposed Change to MCR 2.302. ADM File No. 2012-02

Dear Mr. Royster:

We are a group of medical malpractice defense attorneys who have recently learned of this Court's April 3, 2013 proposal regarding amendment of MCR 2.302 dealing with "discovery-only" expert depositions. The proposed amendment represents a sea-change in the way medical malpractice cases are litigated on a daily basis in lawyers' offices and in the trial courts. We are writing to explain why the current practice is needed and why the proposed amendment should be scuttled.

We are aware that the formal comment period expired on August 1, 2013 and we thank you for the opportunity to be heard.

Standard of care and causation experts in medical malpractice cases, quite unlike experts in other fields, do not prepare written reports. A medical malpractice case will be filed with an affidavit of merit, following a notice of intent to sue, but both documents are typically written by lawyers with input from experts. They are only rarely the expert's final opinions in a case. A doctor who is sued for malpractice will not be positioned to know all the theories, and particularly the support for those theories, just from the NOI and the affidavit of merit. Although interrogatories can be propounded asking for the particulars, those answers are typically also written by lawyers and experience in the "trenches" shows: (1) it can take a series of motions to compel more specific answers to interrogatories before the answers are refined to the point where doctors and their lawyers can understand the claims, and (2) when experts testify they do not necessarily see themselves as being bound by the answers.

The current practice of permitting "discovery-only" depositions of experts allows any party to learn of his or her opponent's experts' theories before testimony is preserved for use at trial or is presented "live" at trial.

The practice that has evolved is that the depositions of standard of care or causation experts are noticed by the defense as "discovery-only" depositions. A deposition that is not "for all purposes" is crucial to the defense because:

- Knowing that the deposition testimony cannot be presented at trial, except for impeachment purposes, allows a thorough exploration of the experts' theories.

- Such a thorough exploration assures that there will be no trial "by surprise," regardless of whether a plaintiff decides to present the expert via a later video deposition or live.

- A discovery-only deposition eliminates the need for motions to compel more specific answers to expert interrogatories to probe as to the experts' theories. Instead, the experts fully explain their theories at discovery depositions.

- Discovery-only depositions allow experts to be thoroughly probed on the basis for their opinions. This reveals those situations that require *Daubert* motions to test the scientific bases of an expert's opinions in advance of trial and sometimes supports the filing of defense summary disposition motions.

- Discovery-only depositions permit defense attorneys to consult with their client and defense experts to understand how the opposing experts' theories are faulty and to plan an effective cross-examination at trial. Without a discovery-only deposition, there is no time to prepare for experts' cross-examination.

- If the jury is going to be read the experts' deposition, the defense examination must be focused on the effect on the jury. Less information will be revealed. In some cases this will mean that cases that ought to be settled won't be, because the defense isn't convinced that the experts' views are sound or will stand up even under intense cross-examination.

The State Bar Representative Assembly's rule change proposal, which originated with the Civil Procedure Committee, is a bad idea. And it runs afoul of governing case law.

The importance of conducting an expert's discovery deposition as part of trial preparation was recognized in both *Roe v Cherry-Burrell*, 28 Mich App 42 (1971) and *Petto v Raymond Corp*, 171 Mich App 688 (1988). *Roe*, a product liability case under the prior court rules, focused on work-product privilege issues. The panel ordered that the expert's discovery deposition be permitted. It quoted from the advisory committee note from the federal discovery rules and emphasized that without discovery depositions there could be no effective cross examination at trial:

> Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. * * * Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. *Roe* at 47, quoting and editing Advisory Committee Note, reprinted 48 FRD 487, 503, 504.

Although the *Roe* panel wrote in the context of deciding if an expert's discovery deposition should be allowed at all, it identified many reasons why discovering the opposing experts' views before trial is a necessity:

- "Before an attorney can even hope to deal on cross-examination with an unfavorable expert opinion he must have some idea of the basis of that opinion and the data relied upon. If the attorney is required to await examination at trial to get this information, he often will have too little time to recognize and expose vulnerable spots in the testimony. He may need advice of his own experts to do so and, indeed, in certain cases, his experts might require time to make further inspections and analyses of their own." *Roe* at 48-49, quoting Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 Stan L Rev 455, 485 (1962).

- "Pretrial disclosure of an opponent's experts is necessary 'if the parties are to fairly evaluate their respective claims for settlement purposes, determine the real areas of dispute, narrow the actual issues, avoid surprise, and prepare adequately for cross-examination and rebuttal'." *Roe* at 49, quoting *United States v Meyer*, 398 F2d 66, 69 (CA9, 1968).

- "Nothing is to be gained by shielding experts from pretrial discovery except surprise of the adversary and delay at the trial as the attorney for the adversary seeks, hurriedly under trial pressure, to prepare his response." *Roe* at 49.

Petto is another product liability case. The defense took the plaintiff's expert's deposition under a "discovery purposes only" notice. The trial court denied plaintiff's request to read the deposition at trial. The trial court was affirmed. The defense asserted that it had conducted extensive preparation to cross-examine the witness based on what it learned from the discovery deposition. The panel accepted that "defendant would obviously have been deprived of this cross-examination had [the expert's] deposition been admitted at trial." *Petto* at 692. The argument that the defendant was required to secure a stipulation or a protective order to establish that a deposition was for discovery purposes only was rejected. Routinely in the twenty-five years since *Petto* was decided, trial courts reject similar arguments.

The State Bar Representative Assembly, after a very brief discussion (see attached), approved the proposed change that originated with the Civil Procedure and Courts Committee. The State Bar's December 22, 2011 letter to the Clerk of the Court requesting the amendment mentioned the *Petto* case as if it were an aberration instead of what it is: a sound guide for practice in the trial courts.

The State Bar correctly identified what the competing interests are: experts charge for their discovery-only depositions vs. lawyers "may not feel able to do an effective cross-examination immediately after hearing the expert's opinions." Balancing the interests is an easy matter. We must attach a high value on the fair presentation of proofs at trial; the costs of a discovery deposition cannot matter as much even by half.

The State Bar contends that the costs are especially problematic if there is "significant disparity in resources" between the parties. But the party noticing up the deposition always pays for the expert's deposition time. And, if the case is tried, the expert's preparation time typically also shifts to the losing party as a taxable cost.

The State Bar understates the risk to fairness. It writes that lawyers may not "*feel* able" to immediately cross examine an expert. Lawyers are not doctors. They *are* unable to conduct effective cross examination on the medicine without consulting with their clients and with their own experts. As for the idea that the defense is merely purposely avoiding an effective cross-examination because it is "strategically disadvantageous" and "gives the other side the opportunity to shape the expert's actual testimony in light of the likely cross examination" at trial—that idea is wrong and without any documentation.

The proposed amendment of MCR 2.302 tries to fix something that is not broken. The State Bar is wrong to urge that litigation should be made minimally less expensive at the cost of making it much less fair.

Very truly yours,

Brian W. Whitelaw

Brian W. Whitelaw
Aardema Whitelaw, PLLC

Brett J. Bean

Brett J. Bean
Hackney Grover Hoover &Bean, PLC

Carol Carlson

Carol Carlson
Smith Haughey Rice & Roegge, PC

Wilson A. Copeland

Wilson A. Copeland
Grier Copeland & Williams, PC

James L. Dalton

James L. Dalton
Willingham & Coté, PC

Mark E. Fatum

Mark E. Fatum
Rhoades McKee, PC

Keith P. Felty

Keith P. Felty
Sullivan Ward Asher & Patton, PC

Charles H. Gano

Charles H. Gano
Plunkett Cooney

Richard A. Joslin

Richard A. Joslin
Collins Einhorn Farrell, PC

Randall A. Juip

Randall A. Juip
Foley Baron Metzger & Juip, PLLC

John M. Kruis

John M. Kruis
Smith Haughey Rice & Roegge, PC

Paul J. Manion

Paul J. Manion
Rutledge Manion Rabaut Terry & Thomas, PC

Marcy R. Matson

Marcy R. Matson
Hall Matson, PLC

David M. Ottenwess

David M. Ottenwess
Ottenwess Allman & Taweel, PLC

Stephanie P. Ottenwess

Stephanie P. Ottenwess
Ottenwess Allman & Taweel, PLC

Noreen L. Slank

Noreen L. Slank
Collins Einhorn Farrell, PC

Laurie M. Strong

Laurie M. Strong
Rhoades McKee, PC

John M. Toth

John M. Toth
Sullivan Ward Asher Valitutti & Sherbrook