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October 29, 2013

Anne Boomer
Administrative Counsel
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909
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RE: ADM File No. 2012-02 (Proposed Amendment of MCR 2.302)

Dear Ms. Boomer:

Mr. Randall Juip and I spoke at the Public Hearing on 09/25/13, on behalf of eighteen medical malpractice defense attorneys opposing the Proposed Amendment to MCR 2.302. The eighteen lawyers previously signed a letter to Mr. Royster dated 09/11/13 voicing their opposition for the same reasons articulated at the Public Hearing. You sent letters to those attorneys on 10/07/13, asking for their input to recommend specific language to be added to the Court Rules to codify the practice of taking discovery only depositions of opposing experts, without the need for a protective order. Rather than send 18 letters with 18 proposals recommending specific language, we are providing a single recommendation as set forth below.

Although the Proposed Amendment was to MCR 2.302(C)(7) - *the provision that a party may seek a protective order that a deposition shall be taken only for the purpose of discovery* - our proposal is to amend **MCR 2.302(B)(4): Trial Preparation; Experts**. The existing Court Rule provides that, absent a motion, the parties may discover facts known and opinions held by experts in two ways: through interrogatory or by taking the deposition of a person whom the other party expects to call as an expert witness at trial. An amendment to this Court Rule will make it unnecessary to change MCR 2.302(C)(7).

MCR 2.302(B)(4) is attached hereto, with the proposed revision to MCR 2.302(B)(4)(a)(ii) in red.

The party seeking discovery under subrule (B)(4)(a)(ii), will still be compelled to pay the expert a reasonable fee for the time spent in deposition, but not preparation, as same is already set forth in MCR 2.302(B)(4)(c)(i). No additional changes need to be made to conform the Court Rules to the long-standing practice regarding discovery-only depositions.

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Clearly, if a party takes the deposition of the opposing expert for "trial preparation" as contemplated by the existing Court Rule, and that deposition is then used by the opposition instead of the witness' presence at trial, that party has not accomplished the "Trial Preparation" which is the very title of the Court Rule in question. All parties need the right to depose the opponent's experts to learn the details of the facts known and opinions held by said experts, including the scientific foundation for said opinions, in order to prepare to effectively cross-examine the witness at trial. Presumably, that is why the authors of the original Court Rule provided the deposition as one of the two tools a party may use to prepare to address the opposing experts' opinions at trial.

Thank you for considering this submission. Please let me know if you have any questions or need additional information.

Very truly yours,



BRIAN W. WHITELAW
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BWW:wlp

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Rule 2.302 General Rules Governing Discovery (Proposed Amendment in red)

(B) Scope of Discovery

(4) Trial Preparation; Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subrule (B)(1) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(a)(i) A party may through interrogatories require another party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter about which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) A party may take the deposition of a person whom the other party expects to call as an expert witness at trial. **The party taking the deposition may notice that the deposition is to be taken for the purpose of discovery only and that it shall not be admissible at trial except for the purpose of impeachment, without the necessity of obtaining a protective order as set forth in MCR 2.302(C)(7).**

(iii) On motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions (pursuant to subrule [B][4][C]) concerning fees and expenses as the court deems appropriate.

(b) A party may not discover the identity of and facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except

(i) as provided in MCR 2.311, or

(ii) where an order has been entered on a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(c) Unless manifest injustice would result

(i) the court shall require that the party seeking discovery under subrules (B)(4)(a)(ii) or (iii) or (B)(4)(b) pay the expert a reasonable fee for time spent in a deposition, but not including preparation time; and

(ii) with respect to discovery obtained under subrule (B)(4)(a)(ii) or (iii), the court may require, and with respect to discovery obtained under subrule (B)(4)(b) the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(d) A party may depose a witness that he or she expects to call as an expert at trial. The deposition may be taken at any time before trial on reasonable notice to the opposite party, and may be offered as evidence at trial as provided in MCR 2.308(A). The court need not adjourn the trial because of the unavailability of expert witnesses or their depositions.