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July 1, 2014

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

Re: Proposed Change to MCR 2.302 ADM File No. 2012-02

Dear Mr. Royster:

As President of Michigan Defense Trial Counsel (MDTC), I am writing in order to comment upon the proposed change to MCR 2.302 ADM File No. 2012-02, and to support Alternative B.

**Statement of Interest**

MDTC is a nonprofit corporation organized and existing to advance the knowledge and improve the skills of civil litigation attorneys, to support improvements in Michigan's civil litigation system, and to broadly address the interests of the legal community in Michigan. Membership in MDTC is limited to members who are in good standing with the State Bar of Michigan and who have as their primary focus the representation of parties in a broad range of civil litigation (including commercial litigation, insurance litigation and the defense of personal injury litigation). Members of MDTC therefore have a substantial interest in the proposed amendment to MCR 2.302, which could adversely impact the ability of counsel to obtain advance disclosure of an opposing expert's opinions, and prepare an effective cross-examination of that expert for purposes of trial.

**Discussion**

Counsel must have the opportunity to take the "discovery only" deposition<sup>1</sup> of an opposing party's experts, so that he or she can adequately prepare for trial. In particular, before counsel can effectively cross-examine the opposing's party's expert, he or she must obtain

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<sup>1</sup> For purposes of this letter, "discovery only" deposition refers to a deposition that can be used solely for purposes of discovery, and possible impeachment of the witness at trial.

**MDTC**

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advance disclosure of that expert's opinions, the factual basis of those opinions, and the data relied upon.

Long ago, the Michigan Court of Appeals recognized that a discovery deposition is a necessary tool in narrowing the issues for trial or ultimate resolution, and in assisting the trial preparation of counsel. In *Roe v Cherry-Burrell Corp*, 28 Mich App 42, 184 NW2d 350 (1970), the Court urged discovery depositions of expert witnesses in the context of a product liability action, stating in part:

". . . both parties, in order properly to prepare for trial, need to know before the trial the bases upon which their opponent's expert witnesses entertain their opinions concerning the defectiveness vel non of the device. And, where personal injuries have been suffered, they need to know the bases upon which their opponent's medical experts entertain their opinions." *Roe v Cherry-Burrell Corp.*, *supra* at 48.

The Court recognized that an attorney must first have the opinions of the expert before he or she can hope to properly prepare to cross-examine the expert. The Court stated:

"It has been observed that 'before an attorney can ever 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 analysis of their own.' " *Roe v Cherry-Burrell Corp.*, *supra* at 48, quoting with approval Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 Stan L Rev 455, 485 (1962).

Again *Roe v Cherry-Burrell Corp*, *supra*, recognized the hazards of such a situation and stated:

"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." *Roe v Cherry-Burrell Corp.*, *supra* at 49.

The Court in *Roe v Cherry-Burrell Corp., supra*, went even further in encouraging advance disclosure of expert opinions stating as follows:

"The more complete advance disclosure the greater the likelihood that the true merits will be hammered out at the trial." *Roe, supra*, at 52.

. . . .

If surprise is eliminated, the trial will better reflect the true strengths of the conflicting claims . . ." *Roe, supra*, at 52.

In *Roe*, the sole issue was whether or not a party had any right at all to depose an adversary's experts. Therefore, there was no need for the Court to explicitly address the permissible uses of those depositions. In particular, the Court did not expressly address the propriety of discovery only depositions. Nonetheless, the Court's rationale presupposes that the expert's discovery deposition would not also serve as the de bene esse deposition of that expert. As explained by the Court in *Roe*, the central goal of discovery depositions of experts is to provide each party with advance disclosure of the opinions of the opposing party's experts. Even more importantly, the purpose of such disclosure is to aid the preparation of an effective cross-examination of the expert. This means not merely that a party be given the opportunity to depose the opponent's experts before trial, but also that: (1) the deposition not be taken for the dual purposes of discovery and trial evidence, and (2) each attorney must be given a reasonable opportunity to discuss any adverse expert testimony with his or her client and experts before the opponent's expert gives testimony for trial purposes. Logically, if the discovery deposition can be read into evidence at the time of trial, in lieu of that expert's personal appearance at trial or a subsequent de bene esse deposition of that expert, the role of the deposition in the preparation of an effective cross-examination will be negated. Counsel would not have an adequate opportunity to discuss that expert's opinions with his or her client and his or her experts, identify fallacies in the opposing expert's opinions, and prepare his or her cross-examination of the expert.

MDTC submits that the "discovery only" deposition of an opposing party's expert is an essential element of discovery in civil litigation. Unless these opinions are obtained in advance of trial, and counsel given the opportunity to discuss those opinions with his or her client and experts, counsel will not have a full and fair opportunity to prepare an effective cross-examination of the expert.

Discovery only depositions do not preclude the opposing party from obtaining expert testimony and do not harm that party's case. The opposing party can bring the expert into trial to testify or take the expert's deposition at a reasonable time subsequent to the discovery only deposition. In the latter situation, the parties or the trial court could allow the trial deposition to proceed after a reasonable period had passed, in order to allow opposing counsel to discuss the expert's opinions and data with his or her client and expert.

Moreover, discovery only depositions do not impose any unfair costs upon the opposing party. As a matter of course, the party requesting the deposition pays for the expert's deposition time. Additionally, if the case is tried, the expert's preparation time is typically assessed as a taxable cost against the losing party. *Haynes v. Monroe Plumbing & Heating*, 48 Mich App 707, 211 NW2d 88 (1973).

By means of discovery only depositions, all parties and their experts have adequate time to review the deposition testimony of the adversary's expert, and identify any incorrect, unsupported, misleading and improper conclusions in that testimony. Surprise is eliminated, and the result of trial will better reflect the true strengths and weaknesses of the conflicting claims. For these reasons, MDTC submits that the truth-seeking function of our civil justice system is better served by a court rule which favors and facilitates discovery only depositions, i.e., Alternative B specified in ADM File No. 2012-02.

Sincerely,



Mark A. Gilchrist