March 1, 2019

Michigan Supreme Court
Office of Administrative Counsel
PO Box 30052
Lansing, MI 48909

RE: Proposed Amendments of the Civil Discovery Rules

Dear Justices:

Please accept this correspondence in comment to the proposed amendments to the Michigan Court Rules as they pertain to Chapter 2, Civil Procedures. I was first admitted to the Michigan Bar in 1995. I began my career practicing medical malpractice defense. I then practiced for 10 years in insurance defense as house counsel for a major automobile and homeowner insurance company. For the past 10 years, I have represented Plaintiffs in personal injury litigation, with a specialty in automobile negligence and No-Fault claims. I have been involved in litigation my entire legal career and have dealt specifically with No-Fault litigation for the past 20 years. As such, I have a solid basis for concern over some of the proposed changes which I have described below and for which I have proposed solutions.

I. Initial Disclosures

Proposed changes to MCR 2.302 provide for Initial Disclosures. MCR 2.302(A)(1) provides general rules for Initial Disclosures, while MCR 2.302(A)(2) provides for additional disclosures for No-Fault cases. Timing of Initial Disclosures is the same for the Initial Disclosures pursuant to MCR 2.302(A)(1) and the additional disclosures for No-Fault cases pursuant to MCR 2.302(A)(2):

- A party that files a complaint, counterclaim, cross-claim, or third-party complaint must serve its initial disclosures within 14 days after any opposing party files an answer to that pleading. MCR 2.302(A)(5)(b)(i)

- A party answering a complaint, counterclaim, cross-claim, or third-party complaint must serve its initial disclosures within the later of 14 days after the opposing party's disclosures are due or 28 days after the party files its answer. MCR 2.302(A(5)(b)(ii)

In addition to general disclosures applicable to all cases, in No-Fault claims, the plaintiff must disclose all applicable claims, including all of the following information within the plaintiff's possession, custody, or control pursuant to MCR 2.302(A)(2)(b):

(i) the identity of those who provided medical, household, and attendant care services to plaintiff,
(ii) all provider bills or outstanding balances for which the plaintiff seeks reimbursement,
(iii) the name, address, and phone number of plaintiff's employers, and
(iv) the additional disclosures under subrule (A)(3).

The "Defendant insurance company" in No-Fault claims must disclose pursuant to MCR 2.302(A)(2)(b):

(i) a copy of the first-party claim file and a privilege log for any redactions and
(ii) the payments the insurance company has made on the claim.

A. Proposed Rule Timing Deficiency and Proposed Solution

Based upon the timing of disclosures, a plaintiff is required to identify all provider bills or outstanding balances for which the plaintiff seeks reimbursement prior to defendant's obligation to produce its No-Fault file. However, the reality of No-Fault claims is that, like in situations where health insurance is responsible for payment, numerous medical bills are submitted directly by the health care provider to the No-Fault insurance company, and not to the plaintiff/patient. While some, or even many of the outstanding bills, may be known to the plaintiff, giving rise to the knowledge that a lawsuit is necessary, not all of the outstanding bills are often known until after the No-Fault claim file is produced. This is particularly true when dealing with plaintiffs who have had treatment in hospitals and surgical centers, where there are separate charges from different corporate billing entities who participated in the treatment. For example, where a plaintiff/patient has undergone a procedure requiring anesthesia in a hospital or surgical center, two or more bills may be generated for that medical service: from the anesthesiologists' and from the certified registered nurse anesthetists' professional corporations. In that situation, the plaintiff/patient would have no knowledge of the identity of these professional corporations prior to receiving the insurance company's claim file.

This is also true where a plaintiff has laboratory testing or is provided with durable medical equipment or medical supplies in physician offices which generates bills from an entity other than the medical doctor who met with his/her patient. As such, without possession of the No-Fault claim file, compiling a comprehensive list of all medical bills is not a "modest" undertaking, as contemplated by the Guiding Principles and Overview of Proposed Changes contained within Section III(b)(iii) of the Civil Discovery Court Rule Review Special Committee Final Report and Proposal.

The greatest concern regarding the timing of discovery requiring identity of all provider bills or outstanding balances for which the plaintiff seeks reimbursement before the No-Fault claim file is produced is the potential for defendants to seek to exclude or deem waived any bill incurred prior to the disclosure if not included within the initial disclosure. MCR 2.302(E)(1) does provide an avenue for supplementation and MCR 2.302(E)(2) provides possible sanctions for failure to supplement. However, the rules need additional safeguards to avoid dismissal of claims that the

defendant knows they received and did not pay, merely because the Plaintiff is unaware before receiving the claim file that the Defendant did not pay the bill.

Proposed Solution: The Rules should include a provision after MCR 2.302(A)(2)(b)(iv) that provides:

> *Any No-Fault claim that has been presented to the Defendant or is otherwise contained within Defendant's No-Fault claim file prior to the initiation of the action is deemed included within Plaintiff's Initial Disclosures.*

B. Proposed MCR 2.302(A)(2)(b) Verbiage Error and Proposed Solution

As quoted above the additional disclosures for No-Fault Cases provide that "The Defendant insurance company" is obligated to make additional disclosures pursuant to MCR 2.302(A)(2)(b). However, the defendant obligated to pay No-Fault benefits is not always an "insurance company." Rather, the obligation to pay benefits may rest on a self-insured retention fund, rather than an insurance company. For example, the City of Detroit may have obligations to pay benefits to passengers of public transportation vehicles. Likewise, due to a failure or refusal of the Michigan Assigned Claims Placement Facility "MAIPF" to assign a No-Fault carrier, the MAIPF is sometimes named as a defendant from whom No-Fault benefits are sought. The current verbiage allows for these non-insurance company No-Fault defendants to claim exemption from the additional disclosures for No-Fault cases because they are not a "Defendant insurance company."

Proposed Solution: "Defendant insurance company" should be changed to a more accurate description to account for any and all potential defendants of No-Fault claims. "*A Defendant from whom No-Fault benefits are claimed*" may be an appropriate alternative.

C. Proposed MCR 2.302(A)(2)(b) Deficiency and Proposed Solution

The Final Report and Proposal from the Special Committee was submitted April 21, 2018. At the time the report was completed *Bahri v IDS Property Cas. Ins. Co.*, 498 Mich 879 (2015) the Supreme Court had only recently denied the plaintiff's Application for Leave to Appeal, and *Bazzi v Sentinal Ins. Co.*, 502 Mich 390 (2018) had not yet been decided. In recent years, these two cases have resulted in a proliferation of litigation in the trial courts regarding misrepresentation issues addressed in the holdings. Indeed, as of February 28, 2019, Westlaw already reports 4 cases and 22 citing references in the seven months since *Bazzi* was decided; there are also 58 cases and 272 citing references to the Court of Appeals decision for *Bahri v IDS Property Cas. Ins. Co.*,308 Mich App 420 (2014).[1]

The additional disclosures for No-Fault Cases for defendants pursuant to MCR 2.302(A)(2)(b) do not place any additional obligation on defendants to make specific disclosures related to defenses based upon claims of misrepresentation. The proposed amendments are intended to work towards a civil litigation system where litigation is more cost effective. The rules

[1] Note that references to the Court of Appeals decision for *Bazzi* include 11 cases and 54 citing references; there are even 20 citing references to the Supreme Court's denial of Appeal in *Bahri*.

aid in case management and enable judicial officers to be informed and accentuate cooperation and reasonableness as key principles. *Civil Discovery Court Rule Review Special Committee Final Report and Proposal, Section II(a).* Considering the additional disclosures placed on No-Fault plaintiffs in MCR 2.302(A)(2)(b), there should be a similar obligation for No-Fault defendants to make specific disclosures regarding defenses to maintain equity, transparency and judicial economy.

Proposed Solution: Amend 2.302(A)(2)(b) as follows:

A Defendant from whom No-Fault benefits are claimed must disclose:

(i) a copy of the first-party claim file and a privilege log for any redactions and
(ii) the payments the insurance company has made on the claim.
(iii) all defenses based upon misrepresentation and/or fraud and/or based upon rescission of the policy of insurance and/or based upon MCL 500.3173a(2), including:
a. the factual basis of the defense.
b. the name, address, and phone number of all witnesses with knowledge in support of the defense.
c. all documents within the Defendant's possession, custody, or control that support the defense.

D. Proposed MCR 2.302(A)(1)(g) Deficiencies and Proposed Solution

Proposed MCR 2.302(A)(1)(g) provides for initial disclosure of:

> a copy (or an opportunity to inspect a copy) of pertinent portions of any insurance, indemnity, or suretyship agreement under which another person may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment;

In third-party automobile litigation, defendants may maintain self-insurance or security equivalent pursuant to MCLA 500.3101(4). Under these circumstances, the duty to disclose funds available to satisfy a judgment do not fall within the initial disclosure obligations. Policies of insurance can also have large self-insurance provisions or deductibles that may be relevant during discussions attempting to amicably resolve disputes. The Rule should make clear that these provisions are "pertinent portions."

Proposed Solution: Amend MCR 2.302(A)(1)(g) as follows:

> a copy (or an opportunity to inspect a copy) of pertinent portions of any insurance, indemnity, *security equivalent,* or suretyship agreement under which another person may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment. *Pertinent portions shall include, but are not limited to, any self-insured retentions,*

deductibles, and limitations on indemnity or reimbursement for payments made to satisfy a judgment.

E. Proposed MCR 2.302(A)(3) Deficiency and Proposed Solution

MCR 2.302(A)(3) provides for medical records authorizations to be provided in the form approved by the State Court Administrative Office. In the practice of personal injury litigation, the parties most often obtain medical records through a third-party vendor who maintains its own medical authorization forms. Likewise, there are several medical institutions in Michigan that will only accept their own authorizations to be executed before they release medical records. The Rule should specifically allow for the parties to agree to an alternate medical authorization forms to ensure that medical records authorizations are accepted expeditiously by the recipient as well as any third-party vendors.

Proposed Solution: Amend MCR 2.302(A)(3) as follows:

> A party claiming damages for injury arising from a mental or physical condition must provide the other parties with executed medical record authorizations in the form approved by the State Court Administrative Office, *or in a form agreed by the parties,* for all persons, institutions, hospitals, and other custodians in actual possession of medical information relating to the condition, unless the party asserts privilege pursuant to MCR 2.314(B).

F. Proposed MCR 2.302(B) Deficiency and Proposed Solution

MCR 2.302(B) would redefine the Scope of discovery as follows:

> Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case, taking into account all pertinent factors, including whether the burden or expense of the proposed discovery outweighs its likely benefit, the complexity of the case, the importance of the issues at stake in the action, the amount in controversy, and the parties' resources and access to relevant information. Information within the scope of discovery need not be admissible in evidence to be discoverable.

The proposed new scope has removed the prior "reasonably calculated to lead to the discovery of admissible evidence" standard. While factors to weigh have been added, the prior language has been adjudicated to a point where the standard is well-understood. Including the prior language subject to the new standards would not detract from the intent of proportionality articulated in the committee comments, while making clear that relevancy includes peripherally relevant information that could lead to admissible evidence.

Proposed Solution: Amend 2.302(B) as follows:

> Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case, taking

into account all pertinent factors, including whether the burden or expense of the proposed discovery outweighs its likely benefit, the complexity of the case, the importance of the issues at stake in the action, the amount in controversy, and the parties' resources and access to relevant information. Information within the scope of discovery need not be admissible in evidence to be discoverable *if the information sought appears reasonably calculated to lead to the discovery of admissible evidence and is proportional to the needs of the case.*

II. Concluding Remarks

The spirit and intent of the proposed amendments to the Michigan Court Rules as they pertain to Chapter 2, Civil Procedures, are admirable. Efforts to ensure plurality and adherence to MCR 1.105 mirror MRPC 3.3 & 3.4 that speak to candor towards the tribunal and fairness to opposing counsel. The intent of this comment on the proposed amendments is to reinforce the rules to these altruistic efforts and to return our profession to one of zealous representation within the bounds of decorum, mutual respect and common decency.

Thank you for your consideration of this comment.

Very truly yours,

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