RC ID # 2019-003 i

CONNECTICUT TRIAL LAWYERS ASSOCIATION

January 22, 2021

Rules Committee of the Superior Court
State of Connecticut Judicial Branch
100 Washington Street, Third Floor
Hartford, CT 06106

Re: Proposed Standard Medical Negligence Discovery

Dear Justice McDonald and Committee members:

I write on behalf of Connecticut Trial Lawyers Association in response to the Committee's request for comment on the draft standard discovery for medical negligence cases. Thank you for seeking our thoughts on these proposals. We welcome the opportunity to be involved in the process of formulating and reviewing rules changes generally and these changes especially.

I have spoken with Attorneys Ziotas and Horwitz concerning the extensive work their working group has done. I also listened to Judge Cobb's presentation at the Rules Committee's last meeting concerning the many hours put in by the working group. CTLA recognizes that standardizing basic medical negligence discovery will conserve judicial resources and make preparation of these complex cases simpler, and that the years of work put in by members of the working group will soon be repaid by the efficiencies standard discovery will create.

As you know, our organization's mission is to protect individual rights through fair laws and access to justice. We have reviewed these proposals through the lens of that mission, mindful of the need for full and fair – but not overbroad or invasive – discovery, and of the need to temper efficiency in our procedural rules with flexibility. We hope that the comments we offer through this letter will assist the working group in their efforts to finalize their proposals.

I. Comments Regarding Defendant's Discovery Addressed to Plaintiff

A. Lost Wages/Impaired Earning Capacity Discovery:

Independent of the effort to standardize medical negligence discovery, CTLA has been working internally to address overbreadth in the standard interrogatories generally as they

address lost wages and earning capacity impairment claims. We sent a copy of a proposed revision to CDLA for review earlier this month and will be submitting a proposal to the Committee shortly.

Like the standard discovery in motor vehicle and premises liability cases, the proposed standard medical negligence requests for production are overbroad as they pertain to lost wages claims. Specifically, it is overly burdensome and unduly invasive to require someone claiming a short period of time for lost wages to produce tax returns, given the fact that the return has no bearing on whether that person was working on the date of accident and whether that person in fact missed time. Tax returns do not really provide a basis to cross-examine a lost wages claim. Pay stubs for the period immediately prior are far more relevant. We recognize that lost earning capacity is different from lost wages. Lost earning capacity is a broader claim, and the need for discovery expands accordingly. In lost earning capacity claims, discovery of the portion of income tax returns relating to lost wage income is appropriate; in lost wage claims, discovery of wage records like paystubs is appropriate, but discovery of tax returns will almost always be unnecessary. For these reasons, standard interrogatories should treat lost wages and lost earning capacity differently.

CTLA therefore proposes the following amendments to the proposed defendant's interrogatories #3 and #4 to the plaintiff:

> 3. If a claim of impaired earning capacity ~~or lost wages~~ is being alleged, copies of, or sufficient written authorization to obtain copies of, that part of all income tax returns relating to lost <u>wage</u> income[1] filed by the Plaintiff(s) for a period of three (3) years prior to the date of the negligence alleged in the Complaint and for all years subsequent to the date of the negligence alleged in the Complaint through the time of trial, <u>and the wage and employment records of all employers of the Plaintiff(s) for the same time period</u>.
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> 4. If a claim for lost wages ~~or lost earning capacity~~ is being made, copies of, or sufficient written authorization to inspect and make copies of, the wage and employment records of all employers of the Plaintiff(s) for <u>one (1) year</u> ~~three (3) years~~ prior to the negligence alleged in the Complaint <u>and through one year subsequent to the end of the period for which lost wages are claimed</u> ~~and for all years subsequent to the date of the negligence alleged in the Complaint to and including the date hereof~~ .

B. Discovery of Minor's Records

Request #20 entitles the medical negligence defendant to discover "all educational reports, attendance records, nurses' records, and materials from each day care, preschool, school, or other educational institution the minor Plaintiff has attended (exclusive of any records relating to mental health injuries or conditions) for the last five years to the present." This provision is overbroad, because it entitles the defense to discover materials concerning a child and their

[1] Non-wage income – for example, income from a rental property – is irrelevant and should not be subject to standard production.

parents regardless of relevance. Moreover, because the discovery request is standard, the plaintiff has no ability to object to the overbreadth.

In addition, this provision is intended to be implemented exclusively via an authorization. If the only appropriate response is providing the form authorization, the plaintiff's counsel will have no opportunity to protect "records relating to mental health injuries or conditions," which may be contained in the records released by the authorization.

Due to both these concerns – the overbreadth and the issues inherent in being required to produce an authorization as the only appropriate means of compliance – Request #20 should be altered to more closely resemble requests for production in other areas such as motor vehicle negligence. For example, Form 205, Request for Production #2 of the Defendant's Requests for Production in motor vehicle negligence cases, requires production of medical records "**relating to treatment** allegedly received by the Plaintiff(s) as a result of the alleged incident, and to the injuries, diseases or defects to which reference is made [in other interrogatories]…." as opposed to producing "all" such records. That request for production also permits the plaintiff to respond either by producing records **or** by providing an authorization.

CTLA proposes amending Request for Production #20 to read:

~~Written authorization in the form attached permitting the undersigned to obtain~~ ~~all~~ [E]ducational reports, attendance records, nurses' records, and materials from each day care, preschool, school, or other educational institution the minor Plaintiff has attended (exclusive of any records relating to mental health injuries or conditions) for the last five years to the present relating to treatment received by the minor plaintiff as a result of the alleged incident, and to the injuries, diseases, or defects to which reference is made [in any relevant interrogatory responses], or written authorization, sufficient to comply with the provisions of the Health Insurance Portability and Accountability Act, to inspect and make copies of said documents. Information obtained pursuant to the provisions of HIPAA shall not be used or disclosed by the parties for any purpose other than the litigation of proceeding for which such information is requested.

In addition, any form authorization should require the party obtaining records via authorization to provide copies of any records obtained to the plaintiff's counsel, and should limit the obtaining party's ability to use the records to matters specifically concerning the case at issue, consistent with the underlined language proposed above.

II. Discovery Addressed to Defendant Health Care Provider and Hospital by Plaintiff

A. What is Intended with Regard to Medical Groups?

Medical groups that employ physicians and other providers are frequently defendants in medical negligence actions. We were uncertain whether the working group's intent is that the plaintiff would serve a defendant group with the form discovery for the health care provider, or the form discovery for the Hospital, or both. We suggest that a solution could be to indicate that

the plaintiff may serve both sets of interrogatories and requests for production on a medical group.

B. Affiliation Interrogatories

Interrogatory #14 asks the defendant health care provider to "[s]tate whether at the time of the negligence alleged in the Complaint you were an officer, shareholder, employee, member, partner, or otherwise affiliated with any entity or person involved in the care and treatment of the Plaintiff." Interrogatory #3 asks the defendant hospital a similar question.

These questions are particularly important when agency is disputed. If agency is admitted, they become less important. We have therefore suggested that an answer be required only if agency is disputed as to the co-defendant in issue.

If the answer to either question is yes – in other words, if there is an affiliation between co-defendants – and agency is nonetheless disputed, it becomes very important for the defendant to go on and state the nature of the affiliation and the relevant time period of the affiliation.

CTLA therefore proposes these additions to these interrogatories:

> [to defendant provider]: 14. Unless agency or another vicarious liability relationship is admitted as to such codefendant, [s]tate whether at the time of the negligence alleged in the Complaint to the present[2], you were an officer, shareholder, employee, member, partner, or otherwise affiliated with any entity or person involved in the care and treatment of the Plaintiff. If the answer is yes, describe the nature and time period of the affiliation.
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> [to defendant hospital]: 3. Unless agency or another vicarious liability relationship is admitted as to such codefendant, [s]tate whether from the time of the negligence alleged in the Complaint to the present you were a shareholder, partner, or otherwise affiliated with any codefendant. If the answer is yes, describe the nature and time period of the affiliation.

C. Interrogatory #17 to Hospital

Interrogatory #17 concerns the production of relevant hospital policies. This is a very important area of discovery – it may yield documents potentially relevant to proving standard of care, breach, causation, and vicarious liability. Therefore it is critical that this question be formulated appropriately. We propose revising as follows:

> 17. ~~With respect to the negligence alleged in the Complaint,~~ [S]tate whether you had any written or unwritten protocols, manuals, directives, instructions, and/or guidelines related to the treatment of the condition(s) with which the plaintiff presented at the times alleged in the Complaint and/or to the treatments provided to the plaintiff at the times alleged in

[2] The hospital interrogatory time frame is "from the time of the negligence alleged in the Complaint to the present," which is the relevant time frame. This change is made to conform the provider interrogatory to that time frame as well.

the Complaint ~~specific allegations of negligence in the Complaint~~ that were in effect ~~at the office, hospital, or other medical facility where the defendant physician or health care provider practiced~~ [3]at the time of the negligence alleged in the Complaint or to the present concerning:

(a) Care, treatment, monitoring, evaluation, diagnosis, consultation or referral to others, **or the type(s) thereof**[4] ~~at the time of the event(s) that is(are) the subject of this litigation~~[5];
(b) Training requirements and/or protocols for any physician or health care provider, including but not limited to medical staff, caring for, evaluating, diagnosing, consulting or referring patients either in the facility, department, or unit where the care, treatment, evaluation, diagnosis, consultation or referral to others at issue took place; ~~and~~ or
(c) Reporting and/or investigation of adverse events at the facility, department, or unit where the care, treatment, evaluation, diagnosis, consultation or referral to others at issue took place.

In addition, there is presently no corresponding production request. When these materials exist, they are highly relevant and must be produced – which is precisely when production should be standardized. We therefore propose that a corresponding production request be added.

D. Production of Audit Trails

The currently proposed interrogatories recognize that audit trails are important, insofar as they require disclosure of information concerning audit trials, but there is no corresponding request for production. CTLA views it as critically important that a request for production for audit trails to be added to requests for production directed to hospitals, groups, and individual providers.

Medical record-keeping is now significantly, and sometimes exclusively, electronic. In addition, electronic medical records store highly relevant information that was not usually stored in paper records – to name only a few examples: when a provider reviewed records, and for how long; when records were created; and whether records were altered after they were created.[6] For

[3] Since these are interrogatories to the Hospital, and presumably also to the Group, "you" as stated at the beginning of the interrogatory should be sufficient to identify whose policies are to be produced.
[4] We are not sure what this phrase means.
[5] This phrase is unnecessary because the main question already specifies time frame.
[6] Thus, for example, 45 C.F.R. § 170.210(b) requires that "[t]he date, time, patient identification, user identification ... must be recorded when electronic health information is created, modified, accessed, or deleted; and an indication of which action(s) occurred and by whom must be recorded…." 21 C.F.R. § 11.10(e) provides that a hospital shall employ procedures and controls including the "[u]se of secure, computer-generated, time-stamped audit trails to independently record the date and time of operator entries and actions that create, modify, or delete electronic

this reason, document discovery in medical negligence cases must be discovery of electronically stored information.

This is not novel or surprising. It is now a familiar concept that we are in an ESI discovery world, one the Practice Book recognizes in Section 13-1(c)(2), which defines "document" as "any … data … stored in any medium from which information can be obtained…." Audit trails are documents. They are also part of a plaintiff's electronically stored medical record, and the plaintiff is entitled to obtain them, because they are the plaintiff's medical record and because the information they contain is likely to lead to the discovery of admissible evidence. Recognizing the importance of this information and the need for it to be accessible, federal law requires hospitals to maintain electronically stored information in an available format. *E.g.*, 45 C.F.R. § 164.306(a)(1) (requiring a hospital to "[e]nsure the confidentiality, integrity, and availability of all electronic protected health information [that it] creates, receives, maintains, or transmits").

In sum, CTLA views it as critical that the standard requests for production directed to hospitals, groups, and individual providers be expanded to include audit trails.

E. Discovery of Insurance Policies

The Requests for Production to both health care providers and hospitals (for example, #4 to health care providers) contemplate that only declaration pages of policies will be produced, unless there has been a disclaimer of coverage by the carrier or the policies are self-eroding.

We recognize this is the approach taken in standard motor vehicle negligence and premises liability cases. CTLA believes, however, that it is not appropriate here. Unlike motor vehicle negligence and premises liability cases, there are barriers to bringing medical negligence cases that involve minor or modest injuries. The expenses associated with comply with General Statutes Section 52-190(a), and the costs associated with preparing and producing experts make it very difficult to bring medical negligence cases.

As a result, medical negligence cases typically involve serious injuries and often present questions about the extent of available coverage. For example, questions frequently arise concerning the coverage available for a defendant physician and the physician's group, which will also be a defendant. Are both policies available or is only one? To answer this question, the plaintiff's counsel must review the policy language. The need to review the policies themselves arises constantly -- in order to conduct settlement discussions, advise clients and prepare offers of compromise, plaintiff's counsel need to be familiar not just with the amount of coverage, but with the terms of coverage. In addition, the Practice Book already provides that discovery of policies themselves is permitted. Section 13-12 requires disclosure of the amount "and Provisions" of liability policies. These standard requests for production should require production of policies in all instances, both to be consistent with the requirements of Section 13-12 and because production of policies is necessary to the resolution of these cases.

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records" and that "[s]uch audit trail documentation shall be retained for a period at least as long as that required for the subject electronic records....".

F. Comments Regarding Proposed Changes to General Provisions (13-6 and 13-9)

There are a number of situations in which the standard medical malpractice discovery as proposed will be inadequate – for example, in informed consent cases, cases alleging actual agency (which requires discovery of contractual relationships, as well as more extensive discovery of department policies), joint venture or partnership. These are claims on which the plaintiff has the burden of proof; the plaintiff must have discovery or the claim will fail.

CTLA's view is that the standard for obtaining such discovery should be the standard set forth in Section 13-2, which applies to discovery generally. Section 13-2 provides in relevant part:

> Discovery shall be permitted if the disclosure sought would be of assistance in the prosecution or defense of the action and if it can be provided by the disclosing party or person with substantially greater facility than it could otherwise be obtained by the party seeking disclosure. It shall not be ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

CTLA is concerned, however, that the broad scope of the standard medical malpractice discovery now proposed suggests that additional discovery is likely unnecessary. This is of particular concern because medical negligence cases – as the drafting subcommittee knows – are anything but standard, given the serious injuries at issue, and the complexity of relationships among health care providers. CTLA believes it is important that the new provisions underscore that the essential principle regarding discovery in this area remains that articulated in § 13-2. We therefore propose that new § 13-6(c) be amended as underlined: "shall permit <u>it consistent with Practice Book Section 13-2 and</u> if it determines that the interrogatories filed to date are inappropriate or inadequate in the particular action."

Alternatively, new subsection (d) could be amended as underlined: "The standard interrogatories are intended to address discovery needs in most cases in which their use is mandated, but they do not preclude any party from moving for permission to serve ~~such~~ additional discovery<u>, and such discovery shall be permitted consistent with Practice Book Section 13-2</u>~~ as may be necessary in any particular case~~."

These comments also pertain to changes to Section 13-9 concerning requests for production.

Again, we thank Committee for the opportunity to present our thoughts and concerns. We hope the Committee or the working group will call on us if we can be of any further assistance.

Sincerely,

Alinor C. Sterling
Chair, CTLA Rules Committee