

ANSWER TO QUESTION NO. 2

Discovery is available in circuit courts after the commencement of an action. MCR 2.302(A)(1). A civil action commences with the filing of a complaint. MCR 2.101(B). Additionally, interrogatories and requests for the production of documents may be served on a civil defendant with service of the summons and complaint. MCR 2.309 (A) (2) and MCR 2.310(C)(1).

The general rule governing discovery is that a party may obtain discovery on any matter as long as it is (a) not privileged and (b) relevant to the subject matter involved in the pending action. MCR 2.302(B) (1). Materials are discoverable even if they are not themselves admissible in court, as long as the information sought "appears reasonably calculated to lead to the discovery of admissible evidence." MRE 2.302(B)(1).

Peter's own medical records are discoverable. Although medical records are ordinarily privileged under the statutory physician-patient privilege, MCR 600.23157, the privilege belongs to the patient, not the doctor. Accordingly, Peter may intentionally and voluntarily waive his physician-patient privilege. *Kelly v Allegan Circuit Judge*, 382 Mich 425 (1969). As Peter's physician, Duck is a "custodian" of Peter's medical records, as the term is used in MCR 2.314(D) (1). As such, he must "comply with a properly authorized request for the medical information within 28 days after the receipt of the request" for a patient's medical information. *Id.*

Although relevant to whether Duck was unprepared to practice medicine on the day in question, Duck can, however, assert the physician-patient privilege to prevent discovery of the medical records of his other (nonparty) patients. The names and records of nonparty patients are protected by the physician-patient privilege. *Dorris v Detroit Osteopathic Hosp*, 460 Mich 26, 34 (1999).

The existence and terms of Duck's personal medical malpractice insurance policy are discoverable under express provision of MCR 2.302(B) (2). Even though MCL 500.3030 specifically precludes any reference to liability insurance during trial, the amount or extent of insurance coverage is a matter that affects the way a case may be prosecuted or defended, and so is relevant to the cause of action. Accordingly, MCR 2.302(B) (2) specifically allows a party to obtain discovery "of the existence and contents of an insurance

agreement under which a person carrying on an insurance business may be liable to satisfy part or all of a judgment".

Duck's personal finances are not discoverable. *Bauroth v Hammoud*, 465 Mich 375 (2001), held that the financial status of a defendant physician (beyond insurance) is not relevant in a medical malpractice action. Moreover, the request is not reasonably calculated to lead to the discovery of admissible evidence.

The existence of previous medical malpractice lawsuits is discoverable. It is relevant because it may show that Duck has a habit of being negligent in certain material ways (such as practicing medicine without his contact lenses in place). Furthermore, it is not covered by any recognized privilege of Michigan law. The physician-patient privilege, MCL 600.2157, applies only to "information that [a] person has acquired in attending a patient in a professional character". Accordingly, it does not apply to the mere existence of other medical malpractice lawsuits.