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February 17, 2016

Colorado Department of Labor and Employment
Division of Workers' Compensation
633 17th Street, Suite 400
Denver, CO 80202

sent via email:
jackleen.jackson@state.co.us

RE: Rule 9 Division of Workers' Compensation Dispute Resolution - NAMIC's Written Testimony

Dear Director Paul Tauriello:

Thank you for affording the National Association of Mutual Insurance Companies (NAMIC) an opportunity to submit written testimony to the Department of Labor and Employment, Division of Workers' Compensation (DWC) on the above captioned proposed amendments to Rule 9.

NAMIC is the largest property/casualty insurance trade association in the country, serving regional and local mutual insurance companies on main streets across America as well as many of the country's largest national insurers.

The 1,300 NAMIC member companies serve more than 135 million auto, home and business policyholders and write more than $208 billion in annual premiums, accounting for 48 percent of the automobile/homeowners market and 33 percent of the business insurance market. NAMIC has 160 members who write property/casualty and workers' compensation insurance in the State of Colorado, which represents 44% of the insurance marketplace.

NAMIC respectfully submits the following comments in regard to the proposed amendments to Rule 9:

1) Proposed changes to 9-1(C)(2):

NAMIC believes that the proposed amendments to this provision of the rule are unnecessary and will create overlapping and potentially conflicting procedural due process requirements. Specifically, Rule 45 of the Colorado Rules of Civil Procedure (CRCP) already provides a detailed process for requesting and challenging the issuance of a subpoena for a deposition and other forms of legal discovery.

CRCP Rule 45 also expressly addresses the Court's ability to quash or modify the subpoena for a deposition or request for discovery. Consequently, the proposed amendments to the rule are more likely to confuse deponents about their legal rights and responsibilities, and create needless legal conflict when the proposed amendments conflicts with CRCP Rule 45 and case law interpreting and applying the procedural rules at issue.

NAMIC is concerned that these proposed changes to the rule will hamper insurance defense efforts, delay the resolution of claims, and needlessly increase adjusting and litigation costs resulting from an insurer having to challenge the objection to the deposition made by the non-party deponent in a prehearing conference.

The anticipated inconvenience to workers' compensation parties is greatly outweighed by any additional procedural protections this proposed change in the rule would afford non-parties. A party to a subpoena for a deposition is already provided with significant legal protection against inappropriate or abusive use of discovery by the opposing party. CRCP Rule 45 states:

> *(c) Protecting a Person Subject to a Subpoena.* (1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction, which may include lost earnings and reasonable attorney's fees, on a party or attorney who fails to comply.

2) Proposed changes to Rule 9-4:

NAMIC is concerned that the proposed amendments to the rule are overly-broad in scope, impractical and unworkable in application, and likely to lead to costly legal disputes.

The proposed amendment states, "[i]n *all circumstances* in which a privilege is being asserted (including but not limited to discovery and requests for claim files pursuant to §8-43-203) the party asserting the privilege shall prepare a privilege log . . ." [Emphasis added].

NAMIC is concerned that the phrase "in all circumstances" is unnecessarily over-inclusive and is likely to create expensive and protracted legal conflict between the insurer, injured worker, and DWC. What is the public policy rational and legal basis for applying privilege law, which is clearly and extensively addressed in CRCP and the Colorado Rules of Evidence, to *all* claims practices?

The "in all circumstances" language is also impractical and likely to lead to unreasonable privilege disputes. For example, what if someone requests a copy of an opposing counsel's report during a phone call and a claims representative says that the report is privileged? Pursuant to the proposed amendment, this statement by a claims representative would arguably create an obligation to generate a privilege log. Most claims adjusters are not licensed attorneys, so requiring the claims adjuster to have to create a privilege log, which requires legal training and experience, is impractical and unnecessary. If a discovery request is made for the opposing counsel's report, the attorney's involved in the case may contest the asserted privilege pursuant to well-established law and procedure on privileges and protective orders.

Additionally, NAMIC is concerned that the proposed language is confusing and rife with potential for misunderstanding and disagreement. Specifically, the proposed amendment to the rule states that the privilege log must contain, "a description of the subject matter *sufficient to explain*, without disclosing the substance of the allegedly privileged materials, why the document qualifies for the asserted privilege." [Emphasis added].

This purported "disclosure balancing act" is fraught with potential for legal conflict between the parties, since the insurer and the injured worker may reasonably differ in their legitimate assessment of what "sufficient to explain" means. Legal disagreements over this nebulous standard will likely create new claims and litigation costs for both parties, and could result in the violation of a party's administrative due process rights. Specifically, if a party believes, in good faith, that its privilege log satisfies the "sufficient to explain" standard, but their position is challenged by the other side and the privilege log is determined to be inadequate by the DWC, the party asserting the privilege could be penalized and/or the party's legal privilege could be arguably waived. Since confidential and proprietary information, and work product have historically been recognized as deserving legal protection, NAMIC is concerned that the proposed amendments could adversely impact a party's right to assert and rely upon this long-recognized legal protection.

NAMIC is also concerned that the proposed amendment requires perfunctory disclosure of information in the privilege log that may be an inextricable part of the information or documentation subject to the asserted privilege protection. The proposed amendment requires disclosure of the following:

> 4) THE LEGAL AND *FACTUAL BASIS* FOR THE CLAIM OF PRIVILEGE. [Emphasis added].

Requiring a party to disclose the "factual basis for the claim of privilege" may in effect negate the legal protection the party seeks by asserting the privilege in the first place.

Thank you for your time and consideration of NAMIC's written testimony. Please feel free to contact me at 303.907.0587 or at crataj@namic.org, if you have any questions pertaining to my written testimony.

Respectfully,

Christian J. Rataj, Esq.
NAMIC's Senior Director - State Affairs
Western Region