

MICHIGAN COURT RULE 2.302 – DISCOVERY ONLY DEPOSITIONS

Issue

Should the State Bar of Michigan support the Civil Procedure & Courts Committee's proposal to amend Michigan Court Rule 2.302 regarding discovery only depositions?

RESOLVED, that the State Bar of Michigan support amendment of the Michigan Court Rules to clarify the provisions regarding discovery only depositions by amending MCR 2.302(B) as follows:

Rule 2.302 General Rules Governing Discovery

(A) [Unchanged.]

(B) Scope of Discovery.

(1) – (3) [Unchanged.]

(4) Trial Preparation; Experts; Fees and Expenses. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subrule (B)(1) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(a) Expert Expected to Testify.

- (i) A party may through interrogatories require another party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter about which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and ~~a summary of~~ the grounds for each opinion.
- (ii) A party may take the deposition of a person whom the other party expects to call as an expert witness at trial. In the absence of a stipulation or an order under this subrule (B)(4)(a)(ii), the deposition may be used for any purpose permitted under the Michigan Rules of Evidence. On written stipulation or on order, the deposition of an expert may be available for limited purposes, including that the deposition is for discovery only and may be used only for impeachment. The stipulation or order must specify the purposes for which the deposition may be used and provide for the allocation of the fees and expenses attributable to the deposition.

- (iii) On motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions (~~pursuant to~~ under subrule [B][4][c]) concerning fees and expenses as the court deems appropriate.
 - (b) Expert Not Expected to Testify. A party may not discover the identity of and facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except
 - (i) as provided in MCR 2.311, or
 - (ii) where an order has been entered on a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.
 - (c) Fees and Expenses. ~~Unless manifest injustice would result~~
 - (i) If a deposition is taken under a stipulation or order under subrule (B)(4)(a)(ii), the stipulation or order controls payment expenses and expert fees. the court shall require that the party seeking discovery under subrules (B)(4)(a)(ii) or (iii) or (B)(4)(b) pay the expert a reasonable fee for time spent in a deposition, but not including preparation time; and
 - (ii) In other cases, with respect to discovery obtained under subrule (B)(4)(a)(ii) or (iii), the court may require, and with respect to discovery obtained under subrule (B)(4)(b) the court shall require, the party seeking discovery to pay the other party a fair portion of the ~~fees and~~ expenses and expert fees reasonably incurred by the latter party in obtaining facts and opinions from the expert. Otherwise, the assessment or allocation of fees and expenses shall be reserved for determination after entry of judgment.
 - (d) Deposition for Use at Trial. A party may depose a witness that he or she expects to call as an expert at trial. The deposition may be taken at any time before trial on reasonable notice to the opposite party, and may be offered as evidence at trial as provided in MCR 2.308(A). The court need not adjourn the trial because of the unavailability of expert witnesses or their depositions.
- (5)-(7) Unchanged.

(C) Protective Orders. On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:

(1) – (6) [Unchanged.]

(7) that, consistent with subrule (B)(4)(a)(ii), a deposition shall be taken only for the purpose of discovery and shall not be admissible in evidence except for the purpose of impeachment;

(8) – (9) [Unchanged.]

If the motion for a protective order is denied in whole or in part, the court may, on terms and conditions as are just, order that a party or person provide or permit discovery. The provisions of MCR 2.313(A)(5) apply to the award of expenses incurred in relation to the motion.

(D) – (E) [Unchanged.]

(F) Stipulations Regarding Discovery Procedure. Unless the court orders otherwise, the parties may by written stipulation: ~~(1) provide that depositions may be taken before any person, at any time or place, on any notice, and in any manner, and when so taken may be used like other depositions; and (2) modify the procedures of these rules for other methods of discovery, except that stipulations extending the time within which discovery may be sought or for responses to discovery may be made only with the approval of the court.~~

(G) - (H) [Unchanged.]

Synopsis

Over the past year, the Civil Procedure and Courts Committee has discussed what a number of its members see as abuse of the procedure of taking “discovery only” depositions, almost always involving expert witnesses. The Committee thinks that serious consideration should be given to court rule amendments to deal with this subject. At its meeting on June 29, 2011, it voted to recommend adoption of the amendment of MCR 2.302 set forth above.

Background

In general, the Michigan Court Rules provide that depositions may be used as permitted by the Michigan Rules of Evidence. MCR 2.308(A). The deposition of an expert is admissible regardless of the witness's unavailability. MRE 803(18). Of course, the rule is otherwise for non-experts; unavailability is a prerequisite to admissibility. MRE 804(b)(5).

The only reference in the rules to discovery only depositions is MCR 2.302(C)(7), which allows the court to order "that a deposition shall be taken only for the purpose of discovery and shall not be admissible in evidence except for the purpose of impeachment". But such an order requires a showing of good cause and is to be issued only to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense." But that requirement is routinely ignored, and the Court of Appeals has allowed the practice of parties simply noticing discovery only depositions without seeking court approval. *Petto v Raymond Corp*, 171 Mich App 688 (1988).

Dealing with this issue involves trying to balance two factors. First, the proponent of an expert is put to considerable expense in producing the expert for a discovery only deposition, but receives little benefit, being pretty much unable to use that deposition. The proponent will have to incur additional expense in producing the expert at trial or taking a *de bene esse* deposition. This is especially problematic in cases in which there is significant disparity in the resources of the parties.

On the other hand, the opposing party would often like to take a discovery only deposition for a couple of reasons. The lawyer may not feel able to do an effective cross examination immediately after hearing the expert's opinions. And even if the lawyer could do so, it may be strategically disadvantageous to do so, as it gives the other side the opportunity to shape the expert's actual testimony in light of the likely cross examination. To some extent that is true of any witness, but non-experts must be unavailable before their regular depositions can be used as trial testimony.

Civil Procedure & Courts Committee's proposal would amend the rules to emphasize that discovery only depositions may be taken only by stipulation or court order. To deal with the potential problems caused by the cost of discovery only depositions, it would also require that the stipulation or order spell out how the costs of such depositions are to be allocated.

Several members of the Civil Procedure and Courts Committee supported adoption of something like the federal procedure that requires an extensive report disclosing information about experts' opinions. See FR Civ P 26(a)(2). But the majority prefers the more limited approach on the ground that requiring the extensive report in all cases would be unduly burdensome.

The draft proposal also includes several minor changes. Some catch lines are added to clarify the quite complex subrule 2.302(B). Changes are made in subrule (B)(4)(c)(ii) to clarify that it is only expert fees (i.e., not attorney fees) that are covered by that provision. And in Subrule (F) unnecessary and confusing language is deleted.

Opposition

None known.

Prior Action by Representative Assembly

None known.

Fiscal and Staffing Impact on State Bar of Michigan

None known.

STATE BAR OF MICHIGAN POSITION

By vote of the Representative Assembly on September 15, 2011

Should the State Bar of Michigan support the Civil Procedure & Courts Committee's proposal to amend Michigan Court Rule 2.302 regarding discovery only depositions?

(a) Yes

or

(b) No