Civil Discovery Court Rule Review Special Committee Final Report and Proposal

April 21, 2018

Report

Executive Summary

While discovery is a vital aspect of the civil justice system, there is strong consensus that the discovery process is problematic. Discovery is broadly perceived as too expensive, often abused, the source of time-consuming conflict, an obstacle to utilizing the courts to resolve disputes, and an inefficient use of judicial resources. Michigan is not the first to acknowledge these problems. The consensus that discovery is problematic has resulted in substantial changes to the Federal Rules of Civil Procedure and numerous other state court discovery rules. For example, discovery, when actively employed, has been estimated to account for as much as 90% of litigation costs,[1] and the scope and cost of discovery has been found to significantly undermine the utilization of the civil litigation system.[2]

The 21st Century Practice Task Force Report also recognized the inefficiencies and expense of Michigan's current civil discovery system, recommending many changes contained in this civil discovery proposal, including (a) modifying court rules to reduce the expense and burden of civil discovery; (b) researching whether pretrial discovery and practice should be tailored on a case-by-case basis, taking into consideration the parties' financial resources and other relevant factors; (c) modifying court rules and administrative procedures to better utilize mediation and alternative dispute resolution (ADR); (d) promoting business process analysis, problem-solving court principles, and best practices to courts; and (e) promoting the use of properly trained mediators or special masters to expedite the discovery process.[3]

Based on the extensive work of the Civil Discovery Court Rule Review Special Committee ("Committee") and feedback that the Committee received on its draft proposal from numerous stakeholders, the Committee recommends a number of changes to the Michigan Court Rules that will make the discovery process less expensive and less burdensome and Michigan courts more accessible to all. The State Bar of Michigan Representative Assembly approved the proposal with overwhelming support at its April 21, 2018 meeting, including:

- Requiring parties, counsel, and the court to take the dictates of MCR 1.105 seriously, providing that the rules be construed, administered, and employed by the court and the parties to secure the just, speedy, and economical determination of every action.
- Adopting a proportionality standard in MCR 2.302(B) to determine the appropriate scope of discovery.
- Adopting modest initial disclosure requirements and limits on interrogatories.
- Encouraging early and regular judicial case management and providing judges additional tools to proactively address problem areas.

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[1] Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 FRD 354, 357 (2000).

[2] Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System (March 11, 2009) <http://iaals.du.edu/sites/default/files/documents/publications/actl-iaals_final_report_rev_8-4-10.pdf> (accessed Feb. 27, 2018).

[3] The State Bar of Michigan 21st Century Practice Task Force Report (July 18, 2016) <https://www.michbar.org/file/future/21c_WorkProduct.pdf> (accessed February 26, 2018).

- A number of other best practices implemented in other jurisdictions and changes to the discovery process in specialty areas, including domestic relations, juvenile, and probate proceedings.

I. Procedural Process

a. Committee Work Process

Given the problems litigants, practitioners, and courts have experienced with the civil discovery process, the State Bar of Michigan – under the leadership of then-President Lori A. Buiteweg and with the encouragement of the Michigan Supreme Court[4] – formed the Civil Discovery Court Rule Review Special Committee in 2016.[5] The Committee was specifically tasked with reviewing and proposing revisions to the Michigan Court Rules dealing with the civil discovery process to address the expense and burden of civil discovery, including technology considerations on civil discovery and the organization of the rules.

The Committee consisted of stakeholders with differing perspectives on and roles in the judicial system. Its members included lawyers, judges, and court administrators representing diversity in terms of: areas of practice, nature of practice (large firm, solo, public interest, judiciary, etc.), geography, gender, ethnicity, and years of practice. A list of committee members in included on page 12.

To further expand its diversity and expertise, the Committee invited all members of the Bar – with special outreach to leaders of State Bar sections and committees, affinity bar associations, and stakeholder groups – to nominate volunteers with experience in civil discovery to serve on subcommittees. Based on the numerous nominations received, the Committee formed five subcommittees focusing on (1) e-discovery; (2) expert witness discovery; (3) scope and course of discovery; (4) case management from the court's perspective; and (5) domestic relations, probate, juvenile, and district court discovery. This group of 31 additional volunteers further rounded out the breadth of viewpoints contributing to the Committee's work. A list of subcommittee members is included on page 13.

The rule review and revision process started in November 2016. As a foundation for this project, the Committee considered the current Michigan Court Rules, the revisions that have been made over time to the Federal Rules of Civil Procedure, and discovery innovations implemented or proposed in other states, including Arizona, Iowa, Minnesota, New Hampshire, Utah, and Washington. In addition, the Committee reviewed other resources, including materials from the Federal Judicial Center, the Institute for the Advancement of the American Legal System, the Conference of Chief Justices, and the National Center for State Courts, as well as numerous law review articles. A list of representative materials is included on page 15. Over the course of almost a year, the Committee and subcommittees collaborated to create a draft report and proposal that

[4] Letter from Anne Boomer to Janet Welch, January 7, 2015.

[5] The work of the Committee was first recommended to the Board of Commissioners of the State Bar of Michigan by the Bar's Civil Procedure & Courts Committee in 2013. The Board adopted the committee's recommendation and suggested to the Supreme Court that it appoint a special committee to review and revise the civil discovery rules. In 2015, the Court encouraged the State Bar to proceed with the project, given its expertise in managing similar wide-scale projects and "[i]nsofar as the bar and its practitioners are in the best position to understand the problems associated with civil discovery." *Id.*

addressed improvements to the discovery process in general civil cases, as well as no-fault cases, domestic relations actions, probate proceedings, district court cases, and juvenile proceedings.

b. Stakeholder Outreach and Support

Once the Committee approved the September 25, 2017 draft report and proposal, these materials were distributed to Representative Assembly (RA) members. Committee Chair Dan Quick presented the civil discovery project to the RA at its September 28, 2017 meeting and invited members to review the materials and submit any feedback to the Committee.

After the Committee had presented the draft proposal to the RA, the Committee conducted expansive outreach to relevant stakeholders. The Committee made the draft report and proposal publicly available to all State Bar members and invited them to submit comments and offer feedback. In addition, the Committee requested feedback from almost 50 stakeholder organizations, including relevant State Bar sections and committees, special purpose bars, local bar associations, and other organizations. A list of stakeholder organizations to which the State Bar conducted outreach is included on page 16.

Based on its extensive outreach efforts, the Committee received feedback from a diverse range of perspectives, including solo practitioners, large corporations, law firms, bar associations, State Bar sections and committees, and organizations representing specific components of the judicial system. After a review of the proposal, the following organizations expressed general support for the proposal:

- Michigan District Judges Association
- Michigan Judges Association
- Michigan Creditors Bar Association
- Michigan Defense Trial Counsel
- State Planning Body
- Legal Services Association of Michigan
- SBM Alternative Dispute Resolution Section
- SBM Business Law Section
- SBM Civil Procedure & Courts Committee
- SBM Criminal Jurisprudence & Practice Committee
- SBM Negligence Section

In addition to general support for the proposal, a number of individuals and organizations offered feedback. Although some organizations certainly have differing opinions on aspects of the proposed rules (which are noted in the proposal itself, where applicable), all of the comments were carefully considered by the Committee in drafting the final proposal under consideration by the RA. Notably, no organization, section, or committee voted to oppose the proposal.

On April 21, 2018, the Committee presented the rule proposal to the Representative Assembly, which approved the proposal with only minor amendments by a vote of 91-21.

II. Civil Discovery Reform

a. Current Problems with the Civil Discovery Process in Michigan

The Supreme Court adopted the current Michigan Court Rules in 1985. While incremental changes to the rules governing discovery have been made over the past 33 years, there has not been a systemic evaluation of the rules. The Committee had a simple mission: in light of the issues surrounding discovery in civil litigation: should the Michigan Court Rules be revised and how?

First, is there anything broken that actually needs fixing? As discussed in more detail below, the strong consensus – for many years, from nearly all quarters of the judicial system, and the impetus of change to the Federal Rules of Civil Procedure and rules governing discovery of numerous state courts – is that the manner in which civil discovery is conducted is a problem. Discovery continues to be an important part of the civil justice system. However, discovery is broadly perceived as:

- too expensive;
- too often abused and the source of expensive and time-consuming conflict;
- an obstacle to use of the courts, and thus it limits access to justice and saps vitality from the judicial system; and
- distorting the economical administration of judicial resources.

Second, should the court rules be revised in relation to civil discovery? Changing the rules is not the only means by which to address issues in the judicial system, nor is it a panacea. But the Committee believes that Michigan citizens, lawyers, and judges can all benefit from appropriate rule changes.

Third, how can the rules be modified to improve civil discovery? Here, the Committee was guided by the existing structure and content of the rules, changes made during the past three decades in the federal courts, and various state court initiatives throughout the country. The Committee's vision was to work towards a civil litigation system where:

- litigation is more cost effective;
- courts are more accessible and affordable;
- the rules aid case management and enable judicial officers to be informed and efficient; and
- the system accentuates to parties and lawyers that cooperation and reasonableness are key principles in the course of civil litigation.

In one sense, the proposed changes are incremental in nature. The Committee did not tear down the rules and start with a blank sheet of paper, nor did it elect to simply adopt federal practice. Indeed, a guiding principle of the Committee's work was to do the least amount of violence possible to both the structure and content of the existing rules. Yet, in another way, the proposed changes are extremely significant in both spirit and substance. When the federal rules were revised effective December 2015, Chief Justice Roberts opined that, "[t]he amendments may not look like a big deal

at first glance, but they are."[6] So too, the Committee feels, these changes are, if adopted, a big deal and a positive step for justice in Michigan.

b. Discovery Reform in Other Jurisdictions

The expense and burden of the civil discovery process has been a topic of significant study within the federal courts and some state courts for many years. This has led to perennial calls for discovery reform, contributing to amendments to the Federal Rules of Civil Procedure in 1980, 1983, 1993, 2000, 2006 and 2010. In addition, several states have enacted meaningful amendments to their civil discovery rules.

The Federal Rules of Civil Procedure underwent significant revisions in 1993, including the adoption of initial disclosures under FR Civ P 26(a)(1) and imposing presumptive limits to the length of depositions. After enacting these amendments, however, the Advisory Committee on Civil Rules continued to receive complaints from the bar and the public about the high costs of discovery. A number of organizations – including the American College of Trial Lawyers, the American Bar Association Section of Litigation, and the Judicial Conference of the United States – examined solutions to contain litigation costs by, *inter alia*, limiting the scope and availability of discovery.[7] Based on this activity, in 1996, the Advisory Committee on Civil Rules began focusing on the structure of the discovery rules and whether modest changes could effectuate reduced discovery costs, increased efficiency, uniformity of practice, and active judicial case management.[8] In 1999, the Advisory Committee on Civil Rules reported that discovery accounts for as much as 90% of litigation costs when discovery is actively employed. [9]

In 2008, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States asked the Civil Rules Advisory Committee to hold a conference on the issues of cost and delay in the federal civil litigation system. That conference was held in May 2010 at Duke University (the "Duke Conference"). The revision process was further supported by the Federal Judicial Center, which performed survey work and empirical analysis of the civil discovery process.

In parallel with the work of the Duke Conference, the American College of Trial Lawyers together with the Institute for the Advancement of the American Legal System ("IAALS") conducted their own survey, empirical analysis, and review of the civil litigation process. Their final report, issued on March 11, 2009, concluded that the scope and expense of discovery was significantly undermining the civil litigation system in this country.[10] The major themes that emerged from the survey were:

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[6] Chief Justice John G. Roberts, Jr., 2015 Year-End Report on the Federal Judiciary, at 15 <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> (accessed Feb. 27, 2018).

[7] The American College of Trial Lawyers set forth a proposal, previously advanced by the American Bar Association Section of Litigation and other bar groups, to limit the scope of discovery to address cost concerns. Further, pursuant to directives in the Civil Justice Reform Act, the Judicial Conference examined discovery and initial disclosure issues, including whether local variations of disclosures should continue, whether the scope of discovery should change, and whether specific time limits on discovery should be adopted.

[8] Memorandum from Paul V. Niemeyer, *supra* note 1, at 357.

[9] *Id.* This statistic was later cited by the United States Supreme Court in *Bell Atl Corp v Twombly,* 550 US 544, 559 (2007).

[10] Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System, *supra* note 2.

1. Although the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today's system takes too long and costs too much. Some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test while some other cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them.

2. The existing rules structure does not always lead to early identification of the contested issues to be litigated, which often leads to a lack of focus in discovery. As a result, discovery can cost far too much and can become an end in itself. As one respondent noted: "The discovery rules in particular are impractical in that they promote full discovery as a value above almost everything else." Electronic discovery, in particular, needs a serious overhaul. It was described by one respondent as a "morass." Another respondent stated: "The new rules are a nightmare. The bigger the case the more the abuse and the bigger the nightmare."

3. Judges should have a more active role at the beginning of a case in designing the scope of discovery and the direction and timing of the case all the way to trial. Where abuses occur, judges are perceived not to enforce the rules effectively. According to one Fellow, "Judges need to actively manage each case from the outset to contain costs; nothing else will work."[11]

In June of 2013, the Judicial Conference Standing Committee on Rules of Practice and Procedure approved a package of amendments to the Federal Rules of Civil Procedure for publication and public comment. These changes arose directly from the Duke Conference. They include numerous efforts to directly limit the scope and extent of discovery, both overtly (for example, by further limiting the presumptive number of depositions and written discovery requests) and indirectly, by adopting a "proportionality" standard to assist courts in fashioning an appropriate scope for discovery. After an extended public comment and revision process, the rules were adopted and became effective on December 1, 2015.

It has been said that, "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[12] States have risen to the challenge with regard to their rules governing civil litigation. Several states in particular – Iowa, Arizona, New Hampshire, Minnesota, Utah and Washington – conducted a meaningful review of their civil discovery system (sometimes as part of a broader access to justice review) and proposed court rule changes. The IAALS, the Conference of Chief Justices, and the National Center for State Courts have similarly studied the issues and released reports.

With all of this activity, what about Michigan? The adoption of the Rules in 1985 was the culmination of a process that began in 1973 with recommendations endorsed by the RA.[13] Although

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[11] *Id.* at 2.

[12] *New State Ice Co v Liebmann,* 285 US 262, 311 (1932).

[13] After the RA approved these recommendations and forwarded them to the Supreme Court, the Court formed the Committee to Revise and Consolidate the Court Rules, resulting in a report in 1978 (402A Mich). After additional input, proposals, and revision, the Court ordered a revised draft to be published in 1983 (417A Mich) which was then adopted two years later after additional comments and revisions.

the Rules have been revised many times since 1985, the rules governing civil discovery have not undergone a comprehensive revision. On occasion, there have been revisions across numerous rules with a common topic, such as the changes in 2008 with regard to electronic discovery. But more often there have been discrete changes to particular rules, emanating primarily from the Bar or the Court itself. This Committee has invested the time and resources to conduct a thoughtful and comprehensive review of the civil discovery rules; with the assistance of the feedback received, the Committee believes it has set forth a proposal that will improve the civil discovery practice throughout the state and, in so doing, allow attorneys to better serve their clients, allow our judicial branch to better serve justice and the public, and allow the public better, more cost-efficient access to the courts.

III. Guiding Principles and Overview of Proposed Changes

The major changes proposed by the Committee are discussed in more detail below. The Committee has also included a blackline of proposed rule language, starting on page 17. Please note that the Committee did not attempt to make necessary cross-reference changes throughout most of the rules.

a. As Much as Possible, Preserve Michigan's Existing Court Rules, While Reinforcing Party Autonomy and Avoiding Unnecessary Case Management

Just as much as Committee members agreed that the civil discovery rules needed reform, there was also consensus on what not to do.

First, the Committee had little desire to simply scrap Michigan procedure and adopt the federal rules. State and federal courts differ greatly in the types of cases, volume of cases, and available court and administrative resources in terms of court and administrative staff, which made a wholesale adoption of the federal rules simply inadvisable. Which is not to say, of course, that the Committee did not benefit from the federal rule revisions and federal practice, and several elements of federal practice are recommended for adoption in Michigan. But these are surgical borrowings, not wholesale copying.

Second, the Committee was keenly aware that a "one size fits all" set of rules often hurts more than it helps. The cases subject to discovery in Michigan vary tremendously in size, importance, complexity, and consumption of resources. One set of rules with deviations only as approved by the court would simply create inefficiency, frustration, and a bottleneck in the courtroom. Some jurisdictions have adopted formal differentiated case management practices – placing different sorts of cases in tracks with different rules applicable to each.[14] After consideration, the Committee instead elected for a general set of rules but with two key characteristics: (a) the parties' ability to stipulate in to or out of various discovery practices or limitations (so long as not inconsistent with a court order and not affecting scheduling order dates) so they can right-size discovery to their case; and (b) enhanced opportunities for a judicial role in right-sizing the discovery and getting ahead of potentially complex matters (like e-discovery), including improvements to early scheduling

[14] *See*, e.g., Utah Rule of Civil Procedure 26(c)(5), <http://www.utcourts.gov/resources/rules/urcp/urcp026.html> (accessed Feb. 27, 2018); NCSC Civil Justice Initiative Report, "Utah: Impact of the Revisions to Rule 26 on Discovery Practice in Utah District Courts" <https://www.ncsc.org/~/media/Files/PDF/Topics/Civil%20Procedure/Utah%20Rule%2026%20Evaluation%20Final%20Report(2015).ashx> (accessed Feb. 27, 2018).

conferences and final pre-trial practice, adoption of a discovery plan protocol, and allowance for discovery mediators.

b. Modifying Civil Discovery to Avoid Excessive Discovery

i. Reinforcing Parties' obligations under MCR 1.105

MCR 1.105 was originally copied from FR Civ P 1. Chief Justice Roberts noted the following when FR Civ P 1 was amended (along the lines of the Committee's recommendation for MCR 1.105):

> Rule 1 of the Federal Rules of Civil Procedure has been expanded by a mere eight words, but those are words that judges and practitioners must take to heart. Rule 1 directs that the Federal Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." The underscored words make express the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation—an obligation given effect in the amendments that follow. The new passage highlights the point that lawyers—though representing adverse parties—have an affirmative duty to work together, and with the court, to achieve prompt and efficient resolutions of disputes.[15]

Maximum efficacies of most of the proposed rule changes rely upon both parties (independently, and through counsel) and the court taking the dictates of MCR 1.105 seriously, and interpreting the discovery rules consistent with the letter and spirit of both that rule and the other changes proposed. These changes are not a sea change, but are a paradigm shift, one that has already been de facto underway for some time in Michigan courts, and is particularly evident in the business courts. This shift will require time, education, and repeated reinforcement of these principles from the judicial branch, the Bar, and other stakeholders to effectuate change.

ii. Adopting Proportionality in MCR 2.302

Another major change borrowed from the federal rules revisions is the concept of proportionality in the definition of the scope of discovery under MCR 2.302(B)(1). The Committee did not endorse a wholesale adoption of the language from FR Civ P 26, but adapted the federal rules proportionality provisions to its own proposal.

It is worth noting that an express adoption of proportionality is arguably an incremental and even stylistic change more than one of substance. Existing MCR 2.302(C) authorizes issuance of a protective order to protect a party or person from "undue burden or expense" and grants the court broad powers to define the scope and breadth of discovery. Changing the scope of discovery definition, however, is a powerful signal, and allows proportionality to modulate what is discoverable in the first instance, rather than allow proportionality to be only a defensive concept under MCR 2.302(C). The proposed changes will also drive parties to discuss, up front, the appropriate scope of discovery proportional to the matter, aided by a reinforcement of these discussions as part of early case management under MCR 2.401.

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[15] 2015 Year-End Report on the Federal Judiciary, *supra* note 7, at 5-6 (emphasis in original).

iii. Adopting Modest Initial Disclosures and Presumptive Limits on Interrogatories

The Committee proposes changes in the flow of discovery to get more information out sooner and to place presumptive limits on interrogatories, the device deemed the most often abused and many times the least productive. The concept of presumptive limits is not without its detractors, who worry that such limits will handicap their ability to obtain otherwise relevant and necessary discovery. The same concerns were expressed in 1993 ahead of the federal rules' adoption of presumptive limits (and not just for interrogatories) but those concerns proved unwarranted and the system has worked well over the past 15 years. It is also important to recognize that the interrogatory limit may be expanded via stipulation or court order. The Committee considered a 10 deposition limit for depositions but, after receiving feedback, determined that abuse of the depositions process was not wide-spread and did not require a presumptive limit.

Integral to the concept of presumptive limits is initial disclosures and the theory that, if basic information is provided up front and automatically, then the need for written discovery is lessened. The initial disclosures cover only the most basic sets of information, and the Committee was careful to exclude types of cases where initial disclosures would not be productive. In addition, the Committee crafted additional disclosures for no-fault cases, which represent a meaningful number of cases in Michigan civil courts.

iv. Early and Regular Case Management with Additional Tools to Proactively Address Problem Areas

Early case management is generally recognized as critical to keeping discovery appropriately scoped and moving forward expeditiously. It has been a key feature of the business courts. Case management must be balanced against the busy dockets and limited resources of Michigan trial courts and the fact that many cases simply do not require this sort of attention.

The Committee proposes:

- Modification of existing MCR 2.401(B)(2) and (C) to trigger early discussions of discovery scope and limitations.
- Adoption of formalized discovery planning (proposed new MCR 2.401(C)), initiated either by the parties or the court, to force early consultation and assist case management in those cases where it is needed.
- Adoption of an Electronically Stored Information (ESI) Conference protocol (proposed new MCR 2.401(J)) to allow either the parties or the court to focus upon ESI issues with appropriately educated representatives early in the case, which reduces ESI costs and motion practice later in the proceedings.
- Modification of MCR 2.301 to consolidate provisions regarding the timing of discovery and with a new subsection reinforcing the trial court's control over the order and amount of discovery.
- Adoption of new MCR 2.411 to add a discovery mediator to the existing alternative dispute resolution mechanisms in the court rules, a practice already widely utilized in some courts.

IV. Borrowing Best Practices from Other Jurisdictions

The review and revision process provided an opportunity to modify or update several other portions of the rules. For example:

- Adoption of provisions of the federal rules which eliminate discovery disputes over certain communications between counsel and expert witnesses in new proposed MCR 2.302(B)(4)(e)-(f) and have included expert reports as a topic of conversation at the initial scheduling conference under MCR 2.401.[16]
- Adoption of new MCR 2.302(B)(5) and (6) and 2.313(E), among other provisions, to continue the evolution of the rules' attention to ESI issues.
- Modification of MCR 2.305 to clarify and distinguish non-party discovery from party discovery under MCR 2.306, 2.307, and 2.308-310 and to clarify between discovery and non-discovery subpoenas under MCR 2.506.
- Modification of existing MCR 2.306(B)(5) regarding so-called "representative" depositions and adding a mechanism for resolution of objections as to the scope of the notice.
- Modification of MCR 2.312 to require requests for admission to be clearly labelled, given the potential sanction for failing to respond.
- Modification of multiple provisions addressing sanctions in an attempt to utilize common terminology and grant discretion to the trial court as to whether to award sanctions and the appropriate sanction.
- Adoption of a protocol for final pretrial orders and conferences in modified MCR 2.401(H).

V. Discovery in Various Specialty Areas

The discovery rules in subchapter 2.300 apply, in various instances, to domestic relations, juvenile, and probate proceedings. The Committee, relying upon judges and practitioners in these more specialized areas, recommends targeted changes which are crafted to the needs of those particular courts.

Domestic Relations Actions (subchapter 3.200):

- While domestic relations actions are exempt from initial mandatory disclosures under MCR 2.302, parties would be required to submit a financial disclosure form early in the case pursuant to new proposed MCR 3.206(B)(2). Domestic relations cases are also provided a different and higher presumptive interrogatory limit (MCR 2.309(A)(2)) based upon feedback from practitioners.

[16] The Committee considered adopting the use of expert reports as required under the federal rules; however, given the different types of cases in state court compared to federal court, the Committee rejected requiring expert reports and instead recommends the changes in MCR 2.302(B)(4)(e)-(f) and 2.401 to address problems with expert witness discovery.

- Adoption of confidentiality measures in new proposed MCR 3.222 to protect parties and minors from disclosure of private information.

Juveniles (subchapter 3.900):

- Adoption of mandatory disclosure of basic records and reports either via discovery or at least 21 days before a trial or hearing (modified MCR 3.922, 3.973, and 3.975-977).

Probate (subchapter 5.000):

- Adoption of significantly modified MCR 5.131 to address discovery in contested proceedings.

VI. Concluding Remarks

> *As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed.*
> *-- James Madison*

The rules governing discovery are numerous and complex. In envisioning improvement, the Committee worked diligently to try and educate itself as to the problems under the current rule regime, research and consider potential solutions, foresee potential objections and unintended consequences, and make changes only where definite, tangible improvements could be obtained. Of course, different lawyers, left to their own devices, might make different choices on matters both large and small. Should the Representative Assembly endorse this Proposal, the Supreme Court, should it take up the matter, will ultimately determine which portions to advance for consideration. As part of that process, there will be yet another opportunity for comments from practitioners and the public as well as a public hearing. Yet there may be no progress at all unless this august body takes the first step of endorsing these improvements to Michigan's civil discovery regime.

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REFERENCE MATERIALS

Federal Judicial Center: www.fjc.gov

- A good general clearinghouse on federal rule amendment related articles
- See also the annotated "Guidelines and Practices for Implementing The 2015 Discovery Amendments to Achieve Proportionality," which is continuously updated (most recent version March 2017): https://law.duke.edu/sites/default/files/centers/judicialstudies/civil_rules_project-mar.pdf

Institute for the Advancement of the American Legal System: http://iaals.du.edu/

- Reports on various state court initiatives
- State by state map: http://iaals.du.edu/rule-one/projects/action-ground?project_type=state

Conference of Chief Justices:
http://iaals.du.edu/sites/default/files/documents/publications/cji-report.pdf

National Center for State Courts:
http://www.ncsc.org/Topics/Civil/Civil-Procedure/Resource-Guide.aspx

- *The Landscape of Civil Litigation in State Courts*
  http://ncsc.contentdm.oclc.org/cdm/singleitem/collection/civil/id/133
  (includes, *inter alia*, 2013 comparison of state court civil litigation systems).

The New Hampshire Revisions:
https://www.ncsc.org/~/media/Files/PDF/Topics/Civil%20Procedure/12022013-Civil-Justice-Initiative-New-Hampshire.ashx

The Minnesota Revisions:
https://www.leg.state.mn.us/docs/2012/other/120214.pdf

The Iowa Task Force Report:
http://publications.iowa.gov/12732/1/FINAL_03_22_12.pdf

The Arizona Civil Justice Reform Report:
http://www.azcourts.gov/Portals/74/CJRC/Master%20CJRC%20Final%20Report%20and%20Recommendations.pdf

The Utah Revisions:
https://www.ncsc.org/~/media/Files/PDF/Topics/Civil%20Procedure/Utah%20Rule%2026%20Evaluation%20Final%20Report(2015).ashx

The Washington State Task Force Report:
https://www.wsba.org/docs/default-source/legal-community/committees/eccl-task-force/reports/eccl-final-report-06152015.pdf?sfvrsn=3a993cf1_2

THE STATE BAR OF MICHIGAN
CIVIL DISCOVERY COURT RULE REVIEW
STAKEHOLDER OUTREACH

The Committee conducted outreach in an effort to obtain feedback from the following entities:

- SBM Representative Assembly
- Michigan Judges Association
- Michigan District Judges Association
- The Michigan Probate Judges Association
- Michigan Association for Justice
- Michigan Defense Trial Counsel
- Michigan Poverty Law Program
- Association of Defense Trial Counsel
- Michigan Creditors Bar Association
- Michigan Employment Lawyers Association
- American Academy of Matrimonial Lawyers – Michigan Chapter
- Casey Family Program
- Legal Services Association of Michigan
- State Planning Body
- State Court Administrative Office
- Michigan Chambers of Commerce
- SBM Alternative Dispute Resolution Section
- SBM Business Law Section
- SBM Children's Law Section
- SBM Consumer Law Section
- SBM Criminal Law Section
- SBM Family Law Section
- SBM Labor Law Section
- SBM Litigation Section
- SBM Negligence Section
- SBM Probate & Estate Planning Section
- SBM Solo & Small Firm Section
- SBM Access to Justice Committee
- SBM Civil Procedure & Courts Committee
- SBM Criminal Jurisprudence & Practice Committee
- Flint Trial Lawyers Association
- Macomb County Probate Bar Association
- Wayne County Family Law Bar Association
- Wayne County Probate Bar Association
- Detroit Metro Bar Association
- Genesee County Bar Association
- Grand Rapids Bar Association
- Grand Traverse – Leelanau-Antrim Bar Association
- Ingham County Bar Association
- Kalamazoo County Bar Association
- Lakeshore Bar Association
- Macomb County Bar Association
- Oakland County Bar Association
- Saginaw County Bar Association
- Washtenaw County Bar Association
- Michigan State University School of Law
- University of Detroit Mercy School of Law
- University of Michigan Law School
- Wayne State University Law School
- Western Michigan University Cooley Law School

Civil Discovery Court Rule Review Special Committee Rule Proposal

April 21, 2018

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RULE 1.105 CONSTRUCTION

These rules are to be construed, administered, and employed by the parties and the court to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties.

Edited to match changes to Fed.R.Civ.P. 1. The Rule is amended to emphasize that both the court and the parties should construe and administer these rules to secure the just, speedy, and economical determination of every action. Most lawyers and parties cooperate to achieve these ends; however, to improve the administration of civil justice, the rules should be construed to discourage the over-use, misuse, and abuse of procedural tools that result in increased costs and delays. Effective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure.

RULE 2.301 AVAILABILITY AND TIMING OF DISCOVERY

(A) Availability of Discovery.

(1) In a case where initial disclosures are required, a party may seek discovery only after the party serves its initial disclosures under MCR 2.302(A). Otherwise, a party may seek discovery after commencement of the action when authorized by these rules, by stipulation, or by court order.

The last sentence is adapted from FR Civ P 26(d)(1).

(2) In actions in the district court, no discovery is permitted before entry of judgment except by leave of the court or on the stipulation of all parties. A motion for discovery may not be filed unless the discovery sought has previously been requested and refused.

The Committee received input in favor of either allowing discovery in district court or at least stating that leave to conduct discovery should be freely given. The Committee determined not to alter the existing discovery regime in district court and is unconvinced that, overall, the district court system is best served by signaling a change in the presumption of the availability of discovery.

(3) Notwithstanding the provisions of this or any other rule, discovery is not permitted in actions in the small claims division of the district court or in civil infraction actions.

(4) After a post judgment motion is filed ~~pursuant to~~in a domestic relations action as defined by subchapter 3.200 of these rules, parties may obtain discovery by any means provided in subchapter 2.300 of these rules.

(B) Completion of Discovery.

(1) In circuit and probate court, the time for completion of discovery shall be set by an order entered under MCR 2.401(B)~~(2)(a)~~.

(2) In an action in which discovery is available only on leave of the court or by stipulation, the order or stipulation shall set a time for completion of discovery. A time set by stipulation may not delay the scheduling of the action for trial.

(3) After the time for completion of discovery, a deposition of a witness taken solely for the purpose of preservation of testimony may be taken at any time before commencement of trial without leave of court.

(4) Unless ordered otherwise, a date for the completion of discovery means the serving party shall initiate the discovery by a time that provides for a response or appearance, per these rules, before the completion date. As may be reasonable under the circumstances, or by leave of court, motions with regard to discovery may be brought after the date for completion of discovery.

(C) Course of Discovery. The court may control the scope, order, and amount of discovery, consistent with these rules.

Section A(2)-(4) is existing MCR 2.302(A)(2)-(4); Section B is existing MCR 2.301; Section C is new.

The proposed changes to section (B) bring clarity to the term "completion of discovery"; some courts construe that to mean that discovery has to be initiated by that date and others that it be completed by that date.

Section C states plainly what is otherwise scattered throughout the rules – the court has the authority to control the scope, order and amount of discovery – under MCR 2.302(C)-(D) and 2.401 and taking in to consideration MCR 1.105 and MCR 2.302(B). Judges in particular thought a clear statement in the rules was beneficial if they were expected to increase active case management.

RULE 2.302 DUTY TO DISCLOSE; GENERAL RULES GOVERNING DISCOVERY

~~**(A) Availability of Discovery.**~~

~~(1) After commencement of an action, parties may obtain discovery by any means provided in subchapter 2.300 of these rules.~~

~~(2) In actions in the district court, no discovery is permitted before entry of judgment except by leave of the court or on the stipulation of all parties. A motion for discovery may not be filed unless the discovery sought has previously been requested and refused.~~

~~(3) Notwithstanding the provisions of this or any other rule, discovery is not permitted in actions in the small claims division of the district court or in civil infraction actions.~~

~~(4) After a postjudgment motion is filed pursuant to a domestic relations action as defined by subchapter 3.200 of these rules, parties may obtain discovery by any means provided in subchapter 2.300 of these rules.~~

(A) Required Initial Disclosures.

(1) *In General.* Except as exempted by these rules, stipulation, or court order, a party must, without awaiting a discovery request, provide to the other parties:

(a) the factual basis of the party's claims and defenses;

(b) the legal theories on which the party's claims and defenses are based, including, if necessary for a reasonable understanding of the claim or defense, citations to relevant legal authorities;

Subrules (a) and (b) are from Ariz R Civ P 26.1(a)(1) and (2).[1]

(c) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

[1] References to the proposed amendments to the Arizona Rules of Civil Procedure are to the amendments recommended in *A Call to Reform, The Committee on Civil Justice Reform's Report to the Arizona Judicial Council*, October 2016, available at http://www.azcourts.gov/Portals/74/CJRC/Master%20CJRC%20Final%20Report%20and%20Recommendations.pdf.

(d) a copy—or a description by category and location—of all documents, ESI, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

See MCR 2.310(A) for definitions of documents, ESI and tangible things as used in this Subchapter.

(e) a description by category and location of all documents, ESI, and tangible things that are not in the disclosing party's possession, custody, or control that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment. The description must include the name and, if known, the address and telephone number of the person who has possession, custody, or control of the material;

(f) a computation of each category of damages claimed by the disclosing party, who must also make available for inspection and copying as under MCR 2.310 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered;

(g) 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; and

Subrules (c), (d), (f), and (g) are adapted from FR Civ P 26(a)(1)(A). The Oakland County business court case management protocol and Macomb County business court administrative order require the same disclosures.

Some concerns were expressed with regard to the exchange of witness information in subrule (c). The rule does not contemplate a change from existing practice as to party witnesses (where the address is usually "care of" the party and/or its counsel) and any privacy issues are easily mitigated through the use of a protective order, if necessary.

Subrule (e) adds a disclosure requirement for documents in the possession, custody, or control of a person other than the disclosing party. Subrule (f) is modified from the federal rule to clarify that a damage computation applies only to the disclosing party's knowledge at the time of disclosure. Subrule (g) adds indemnity and suretyship agreements to the federal disclosure requirement, as provided in Ariz R Civ P 26.1(a)(10), and includes edits to address concerns with producing voluminous and irrelevant portions of policies. Some feedback suggested only making the declaration sheet available unless more was required, but this two-step process was perceived as likely to lead to additional disputes.

(h) the anticipated subject areas of expert testimony.

Subrule (h) is adapted from proposed Ariz R Civ P 26.1(a)(6).

(2) *Additional Disclosures for No-Fault Cases.* In addition to the disclosures under subrule (A)(1), in a case asserting a first-party claim for benefits under the Michigan no-fault act, MCL 500.3101, *et seq.*, the following disclosures must be made without awaiting a discovery request:

(a) The defendant insurance company 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.

(b) The plaintiff must disclose all applicable claims, including all of the following information within the plaintiff's possession, custody, or control:

(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).

(3) *Additional Disclosures by Claimants for Damages for Personal Injury.* 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 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).

Subrules (2) and (3) are adapted in part from Wayne County Circuit Court's Addendum to Scheduling Order in No-Fault Cases. It also adds disclosure by plaintiff of provider bills for which plaintiff seeks reimbursement. No-fault cases are a significant part of trial court caseloads. These disclosures are intended to expedite resolution of those cases.

(4) *Cases Exempt from Initial Disclosure.* Unless otherwise stipulated or ordered, the following are exempt from initial disclosure under subrule (A)(1)-(3):

(a) an appeal to the circuit court under subchapter 7.100;

Adapted from FR Civ P 26(a)(1)(B)(i). The reference to subchapter 7.100 is to the rules governing circuit court appeals.

(b) an action in district court (see MCR 2.301(A)(2));

The Committee recognizes that discovery is not permitted in district court except by leave of court or on stipulation, MCR 2.302(A)(2) (renumbered to MCR 2.301(A)(2) in this proposal), but for clarity this exception is included here. Some members of the Committee believe that initial disclosures can be useful in certain categories of district court cases and that a blanket exemption may not be desirable. Rather than adopt a blanket rule, the Committee is hopeful that the changes otherwise suggested herein, if implemented, may spur more and earlier discussions in district court about the proper scope of discovery where desirable and appropriate.

(c) an action under subchapter 3.200;

Domestic relations actions are exempt from these disclosure rules; instead, the Committee recommends an automatic financial disclosure. See proposed MCR 3.206(B)(2).

(d) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

From FR Civ P 26(a)(1)(B)(iv).

(e) an action to enforce or quash an administrative summons or a subpoena;

From FR Civ P 26(a)(1)(B)(v).

(f) a proceeding ancillary to a proceeding in another court, including an action for a subpoena under MCR 2.305(E) or (F);

Adapted from FR Civ P 26(a)(1)(B)(viii).

(g) an action to compel or stay arbitration or to confirm, vacate, enforce, modify, or correct an arbitration award;

(h) an action for collection of penalties, fines, forfeitures, or forfeited recognizances under MCR 3.605;

(i) personal protection proceedings under subchapter 3.700; and

(j) an action for habeas corpus under MCR 3.303 and 3.304.

(5) *Time for Initial Disclosures.*

(a) *Application of Time Limits.* These deadlines apply unless a stipulation or order sets a different time.

(b) *In General.*

(i) 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.

When there are multiple defendants, the plaintiff's disclosures are due within 14 days after any one of the defendants files an answer.

(ii) 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.

These deadlines are intended to allow a party against whom a claim is made to see the claimant's disclosures before the answering party must file its disclosures. They are also intended to defer initial disclosures while a pre-answer motion is pending. MCR 2.108(C) extends the time for answering until after the court decides a pre-answer motion (such as a motion for summary disposition).

(iii) A party serving disclosures need only serve parties that have appeared. The party must serve later-appearing parties within 14 days of the appearance.

(c) *Parties Served or Joined Later.* A party first served or otherwise joined after the time for initial disclosures under subrule (A)(5)(a) or (b) must serve its initial disclosures within 14 days after filing the party's first pleading, unless a stipulation or order sets a different time.

Adapted from FR Civ P 26(a)(1)(D). The federal rule requires later-joined parties to make disclosures "30 days after being served or joined." This subrule starts the time running at the filing of the party's first pleading. (See MCR 2.110(A) for the definition of pleadings.) The subrule applies to intervening plaintiffs and other parties that are added after the original parties make their disclosures.

(6) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must serve initial disclosures based on the information then reasonably available to the party. However, a party is not excused from making disclosures because the party has not

fully investigated the case or because the party challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

Adapted from FR Civ P 26(a)(1)(E).

(7) *Form of Disclosures.* Disclosures under subrule (A) are subject to MCR 2.302(G), must be in writing, signed, and served, and a proof of service must be promptly filed.

Adapted from FR Civ P 26(a)(4). The provision for the court to "order otherwise" is omitted.

(B) Scope of Discovery.

(1) *In General.* Parties may obtain discovery regarding any ~~matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things, or electronically stored information and the identity and location of persons having knowledge of a discoverable matter. It is not 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.~~ 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 definition of the scope of discovery is adapted from FR Civ P 26(b)(1). The proposal changes the current definition in MCR 2.302(B)(1) from matters "relevant to the subject matter involved in the pending action" to "matters that are relevant to any party's claims or defenses." This is a more precise and somewhat narrower definition. Relevance must be judged by reference to the claims and defenses in the pleadings.

The most important change is adding language to make clear that proportionality is a guiding factor in deciding what discovery is appropriate. Both the parties and the court should consider this principle. Although the current rules and case law allow the court to limit burdensome discovery, the proportionality considerations deserve more emphasis in the rules. The Federal Rules Advisory Committee notes explain in detail why this emphasis is desirable and should be a guide to the court and parties in applying the revised definition here. We quote some of those comments here, but encourage reference to the extensive notes to the federal rules chronicling over more than three decades the

concerns with discovery abuse and development of proportionality as a limit on discovery.

> Rule 26(b)(1) has been amended to add a sentence to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse.

Advisory Committee Note to 1983 amendment of FR Civ P 26.

> The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.

Advisory Committee Note to 2015 amendment of FR Civ P 26.

The consideration of weighing burden and expense against likely benefit is cited as the first factor because the Committee believes it is the most important proportionality factor.

Although the amount in controversy is one proportionately factor, "the monetary stakes are only one factor, to be balanced against other factors." Advisory Committee Note to 2015 amendment of FR Civ P 26. "Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved." Advisory Committee Note to 1983 amendment of FR Civ P 26.

Minor changes were made to FR Civ P 26, *viz*., the order of the factors, as noted above, and language indicating that the list of factors is not exclusive. In practice, the developing federal case law construing the rule will be instructive to Michigan courts.

The last sentence is from the last sentence of FR Civ P 26(b)(1). This replaces the current language: "It is not 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." This language has been misused to expand the scope of discovery beyond relevance and to argue that discovery of inadmissible and irrelevant evidence is permitted if it could "lead to the discovery of admissible evidence." Relevance, however, is a limit on all discovery. The revised language makes clear that, although discovery of inadmissible evidence is permitted, it must still be "within the scope of discovery"—meaning that it must be both relevant and proportional.

(2)-(3) [No change.]

(4) *Trial Preparation; Experts.* [No change.]

(a)-(d) [No change.]

(e) Subrule (B)(3)(a) protects drafts of any interrogatory answer required under Subrule (B)(4)(a)(i), regardless of the form in which the draft is recorded.

(f) Subrule (B)(3)(a) protects communications between the party's attorney and any expert witness under subrule (B)(4), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

Adopted from Fed.R.Civ.P. 26(b)(4)(B) and (C). These changes clarify application of the work product privilege to certain communications between counsel and expert witnesses, thus eliminating an area of potential conflict and motion practice and making the process of working with experts more efficient.

(5) *Duty to Preserve ESI.* A party has the same obligation to preserve ~~electronically stored information~~ESI as it does for all other types of information. ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~

Delete the second sentence from MCR 2.302(B)(5) as it is redundant to MCR 2.313(E); this redundancy could create confusion if one rule is changed but not the other.

(6) *Limitation of Discovery of ~~Electronic~~ Materials~~ESI~~.* A party need not provide discovery of ~~electronically stored information~~ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery ~~from such sources~~ if the requesting party shows good cause, considering proportionality under subrule (B)(1) and the limitations of ~~MCR 2.302~~subrule (C). The court may specify conditions for the discovery~~.~~, including allocation of the expense, and may limit the frequency or extent of discovery of ESI (whether or not the ESI is from a source that is reasonably accessible).

The majority of the states follow the language as prescribed in Fed.R.Civ.P. 26(b)(2)(B). Michigan also generally follows this rule, with a slight deviation. When considering "the limitations," the federal rule refers back to Rule 26(b)(2)(C). Michigan, on the other hand, refers to the section regarding protective orders, which only allows discovery limitations on a party's motion. There are a few states (Arkansas, Delaware, Massachusetts, and Ohio) that do include separate language actively requiring the court's involvement in limiting discovery. The Committee's modest revision is designed to extend the concepts of proportionality and case management in to this subrule directly.

(7) [No change.]

(C) Protective Orders. [No change.]

(D) Sequence ~~and Timing~~ of Discovery. Unless the court orders otherwise, ~~on motion, for the convenience of parties and witnesses and in the interests of justice,~~ methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay another party's discovery.

The caption of the subrule is changed to make clear that this subrule applies to the sequence of discovery after discovery starts. Proposed MCR 2.301 specifies when discovery may start, and other rules specify when certain discovery is or is not available.

(E) ~~Supplementation of~~ Supplementing Disclosures and Responses.

(1) *Duty to Supplement*. ~~A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information acquired later, except as follows:~~

~~(a) A party is under a duty seasonably to supplement the response with respect to a question directly addressed to~~

~~(i) the identity and location of persons having knowledge of discoverable matters; and~~

~~(ii) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony.~~

(a) *In General.* A party that has made a disclosure under MCR 2.302(A)—or that has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(i) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing or

(ii) as ordered by the court.

Adapted from FR Civ P 26(e)(1)(A). The rule needed to be amended to address supplementation of initial disclosures. The existing supplementation rule applicable to other discovery was modelled on an outdated version of the federal rules.

~~(b) A party is under a duty seasonably to amend a prior response if the party obtains information on the basis of which the party knows that~~

~~(i) the response was incorrect when made; or~~

~~(ii) the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.~~

(b~~c~~) *Order, Agreement, or Request*. A duty to supplement disclosures or responses may be imposed by order of the court, agreement of the parties, or at any time before trial through ~~new~~ requests for supplementation ~~of prior disclosures or responses~~.

(2) *Failure to Supplement*. If the court finds, by way of motion or otherwise, that a party has not ~~seasonably~~ supplemented disclosures or responses as required by this subrule, the court may enter an order as is just, including an order providing the sanctions stated in MCR 2.313(B), and, in particular, MCR 2.313(B)(2)(b).

(F) ~~Stipulations Regarding~~ Changes to Discovery Procedure.

~~Unless the~~ A court order~~s otherwise, the parties may by~~ or written and filed stipulation of the affected parties may:

(1) [No change.]

~~(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.~~

(2) change the disclosure requirements in MCR 2.302(A) and the limits on interrogatories in MCR 2.309(A)(2); and

(3) modify or waive the other procedures of these rules regarding discovery so long as not inconsistent with a court order, but a stipulation may not change scheduling order deadlines without court approval.

(G) Signing of Disclosures, Discovery Requests, Responses, and Objections; Sanctions.

(1) In addition to any other signature required by these rules, every disclosure under MCR 2.302(A), every request for discovery, and every response or objection to such a request made by a party represented by an attorney shall be signed by at least one attorney of record. A party who is not represented by an attorney must sign the disclosure, request, response, or objection.

(2) If a disclosure, request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the disclosure, request, response, or objection, and another party need not take any action with respect to it until it is signed.

(3) The signature of the attorney or party constitutes a certification that he or she has read the disclosure, request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry ~~it is~~:

(a) the disclosure is

(i) complete and correct as of the time it is made; and

(ii) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

Subrule (a)(i) is adapted from FR Civ P 26(g)(1)(A). Subrule (a)(ii) makes the current requirement of MCR 2.302(G)(3)(a) applicable to disclosures, since disclosures must include legal theories under proposed MCR 2.302(A)(1)(b).

(b) the discovery request, response, or objection is:

(i) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

~~(b)~~(ii) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

~~(c)~~(iii) not unreasonable or unduly burdensome or expensive, given the needs of the case, the disclosure and discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

(4) If a certification is made in violation of this rule, the court, on the motion of a party or on its own initiative, ~~shall~~ may impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable attorney fees.

(H) Filing and Service of Disclosure and Discovery Materials.

(1) Unless required by a particular rule, ~~requires filing of disclosure or discovery materials,~~ disclosures, requests, responses, depositions, and other discovery materials may not be filed with the court except as follows:

(a) If ~~discovery~~ the materials are to be used in connection with a motion, they must either be filed separately or be attached to the motion, response, or an accompanying affidavit.

(b) If ~~discovery~~ the materials are to be used at trial, they must be made an exhibit ~~pursuant to~~under MCR 2.518 or MCR 3.930.

(c) The court may order disclosure or discovery materials to be filed.

(2) Copies of disclosure and discovery materials served under these rules must be served on all parties ~~to the action,~~ unless the court has entered an order under MCR 2.107(F).

(3) On appeal, only disclosure and discovery materials that were filed or made exhibits are part of the record on appeal.

(4) MCR 2.316 governs ~~R~~removal and destruction of disclosure and discovery materials ~~are governed by MCR 2.316~~.

The Committee considered an informal expedited procedure for resolving disclosure and discovery disputes similar to that in proposed Ariz R Civ P 26(d). Under that procedure, the parties would submit a joint letter to the court describing the dispute and their positions, the court would hold a phone conference at an early time, and the court could enter an order deciding the dispute at the conference or set the matter for formal hearing. The Committee concluded that formalizing such a procedure by rule is not desirable because it would impose additional burdens on trial courts. The Committee supports the current practice of some judges

to encourage informal conferences to resolve discovery disputes without formal motion practice. The Committee concluded this should be left to the discretion of the judge, who can informally direct the parties to follow such a procedure or include the direction in a case management order.

RULE 2.305 DISCOVERY SUBPOENA ~~FOR TAKING DEPOSITION OF~~TO A NON-PARTY

(A) General Provisions.

(1) A represented party may issue a subpoena to a non-party for a deposition, production or inspection of documents, inspection of tangible things, or entry to land upon court order or after all parties have had a reasonable opportunity to obtain an attorney, as determined under MCR 2.306(A). ~~After serving the notice provided for in MCR 2.303(A)(2), 2.306(B), or 2.307(A)(2), a party may have a subpoena issued in the manner provided by MCR 2.506 for the person named or described in the notice. Service on a party or a party's attorney of notice of the taking of the deposition of a party, or of a director, trustee, officer, or employee of a corporate party, is sufficient to require the appearance of the deponent; a subpoena need not be issued.~~ An unrepresented party may move the court for issuance of non-party discovery subpoenas. MCR 2.306(B)(1)-(2) and (C)-(G) apply to a subpoena under this rule. This rule governs discovery from a non-party under MCR 2.303(A)(4), 2.307, 2.310(D) or 2.315. MCR 2.506(A)(2) and (3) apply to any request for production of ESI. A subpoena for hospital records is governed by MCR 2.506(I).

~~(2) The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated documents or other tangible things relevant to the subject matter of the pending action and within the scope of discovery under MCR 2.302(B). The procedures in MCR 2.310 apply to a party deponent.~~

(2~~3~~) A ~~deposition notice and~~ subpoena ~~under this rule~~ may provide that ~~the deposition~~ it is solely for producing documents or other tangible things for inspection and copying, and that the party does not intend to examine the deponent. The subpoena shall specify whether an inspection is requested or whether the subpoena may be satisfied by delivering a copy of the requested documents. Any request for documents shall indicate that the subpoenaing party will pay reasonable copying costs.

(3) A subpoena shall provide a minimum of 14 days after service of the subpoena (or a shorter time if the court directs) for the requested act. The subpoenaing party may file a motion to compel compliance with the subpoena under MCR 2.313(A). The motion must include a copy of the request and proof of service of the subpoena. The movant must serve the motion on the non-party as provided in MCR 2.105.

(4) A subpoena issued under this rule is subject to the provisions of MCR 2.302(C), and the court in which the action is pending or in which the subpoena is served, on timely motion made by a party or the subpoenaed non-party before the time specified in the subpoena for compliance, may:

(a) quash or modify the subpoena if it is unreasonable or oppressive;

(b) enter an order permitted by MCR 2.302(C); or

(c) conditionally deny the motion on prepayment by the ~~person~~ party on whose behalf the subpoena is issued of the reasonable cost of producing ~~books, papers,~~ documents~~,~~ or other tangible things.

The non-party's obligation to respond to the subpoena is stayed until the motion is resolved.

(5) Service of a subpoena on the deponent must be made as provided in MCR 2.506(G). A copy of the subpoena must be served on all other parties ~~in the same manner as the deposition notice~~.

(6) In a subpoena for a non-party deposition, a party may name as the deponent a public or private corporation, partnership, association, or governmental agency and describe with reasonable particularity the matters on which examination is requested. The subpoena shall be served at least 14 days prior to the scheduled deposition. No later than 10 days of being served with the subpoena, the subpoenaed entity may serve objections, or file a motion for protective order, upon which the party seeking discovery may either proceed on topics as to which there was no objection or move to enforce the subpoena. The organization named must designate one or more officers, directors, managing agents, or other persons, who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. The persons designated shall testify to matters known or reasonably available to the organization.

(7) Upon written request from another party and payment of reasonable copying costs, the subpoenaing party shall provide copies of documents received pursuant to a subpoena.

~~(B) Inspection and Copying of Documents. A subpoena issued under subrule (A) may command production of documents or other tangible things, but the following rules apply:~~

~~(1) The subpoena must be served at least 14 days before the time for production. The subpoenaed person may, not later than the time specified in the subpoena for compliance, serve on the party serving the subpoena written objection to inspection or copying of some or all of the designated materials.~~

~~(2) If objection is made, the party serving the subpoena is not entitled to inspect and copy the materials without an order of the court in which the action is pending.~~

~~(3) The party serving the subpoena may, with notice to the deponent, move for an order compelling production of the designated materials. MCR 2.313(A)(5) applies to motions brought under this subrule.~~

(B~~C~~) Place of ~~Examination~~ Compliance.

~~(1)~~ Except for a subpoena for delivery of copies of documents only under subrule (A)(2), a ~~A deponent~~ non-party served with a subpoena in Michigan may be required to ~~attend an examination~~comply with the subpoena only in the county where the deponent resides, is employed, has its principal place of business or transacts relevant business; or at the location of the things to be inspected or land to be entered;~~, in person~~ or at another convenient place specified by order of the court.

~~(2) In an action pending in Michigan, the court may order a nonresident plaintiff or an officer or managing agent of the plaintiff to appear for a deposition at a designated place in Michigan or elsewhere on terms and conditions that are just, including payment by the defendant of the reasonable expenses of travel, meals, and lodging incurred by the deponent in attending.~~

~~(3) If it is shown that the deposition of a nonresident defendant cannot be taken in the state where the defendant resides, the court may order the defendant or an officer or managing agent of the defendant to appear for a deposition at a designated place in Michigan or elsewhere on terms and conditions that are just, including payment by the plaintiff of the reasonable expenses of travel, meals, and lodging incurred by the deponent in attending.~~

(C~~D~~) Petition to Courts Outside Michigan ~~to Compel Testimony~~. When the place of ~~examination~~ compliance is in another state, territory, or country, the subpoenaing party ~~desiring to take the deposition~~ may petition a court of that state, territory, or country for a subpoena or equivalent process ~~to require the deponent to attend the examination~~.

(D~~E~~) Action Pending in Another Country. An officer or a person authorized by the laws of another country to ~~take a deposition~~ issue a subpoena in Michigan, with or without a commission, in an action pending in a court of that country may submit an application to a court of record in the county in which the ~~deponent~~ subpoenaed person resides, is employed, has its principal place of business, transacts relevant business ~~in person~~, or is found, for a subpoena ~~to compel the deponent to give testimony~~. The court may hear and act on the application with or without notice, as the court directs.

The existing rules are confusing as to the different procedural aspects of party discovery vs. non-party discovery and the difference between discovery subpoenas and subpoenas for attendance at hearings. As a notice of deposition is sufficient for a party, a subpoena only applies to a non-party, and the rules are changed accordingly. See also changes to 2.306(B).

The rules are also unclear as to when a plaintiff may start issuing third-party subpoenas; the Committee takes the view that, absent extraordinary circumstances (in which case, a motion is appropriate), all parties should be in the case (consistent with the existing options under MCR 2.406(A)(1)) to eliminate abuse

and the potential for repetition (*e.g.*, if a deposition takes place before all parties are actively in the case, and a later-served party now wants to depose the same witness).

The interplay of MCR 2.305 and 2.506, either under the existing rules or as amended, is not as streamlined as the federal rules wherein Fed R Civ P 45 governs all subpoenas and the other rules apply only to party discovery. The Court is urged to consider additional review of MCR 2.506 and/or consider adoption of provisions analogous to the federal regime. That being said, several practical improvements have been incorporated into this rule which do not exist in the federal rules.

If adopted, the Committee recommends adoption of a new SCAO form subpoena which clearly designates the type of discovery sought and the rights of the non-party.

RULE 2.306 DEPOSITIONS ON ORAL EXAMINATION OF A PARTY

(A) When Depositions May Be Taken; Limits.

(1) Subject to MCR 2.301(A) and these rules, after~~After~~ commencement of the action, a party may take the testimony of ~~a person, including~~a party~~,~~ by deposition on oral examination. Leave of court, granted with or without notice, must be obtained ~~only~~ if the plaintiff seeks to take a deposition before the defendant has had a reasonable time to obtain an attorney. A reasonable time is deemed to have elapsed if:

(a)-(e) [No change.]

(2) [No change.]

(3) A deposition may not exceed one day of seven hours.

The Committee considered adoption of a ten-deposition presumptive limit to the total number of depositions taken orally under MCR 2.305, 2.306, and on written questions under MCR 2.307. The federal rule limits the number of depositions. FR Civ P 30(a)(2)(A)(i). However, the Committee was unconvinced that, overall, abuse of the number of depositions is widespread, and certain categories of cases are particularly not well-suited to presumptive deposition limits. The court may impose limits under its general authority to control the course of discovery, or a party may ask for limits under MCR 2.302(C).

The Committee chose a presumptive seven-hour limit on the duration of a deposition which is to be completed in a single day. In addition to overall limits, both the federal and other rules limit the duration of a deposition. FR Civ P 30(d)(1) (one day of seven hours); Ariz R Civ P 30(d)(1) (one day of four hours); Minn R Civ P 30.04(b) (one day of seven hours). The existing language from MCR 2.306(B)(2) was integrated in to new MCR 2.306(A)(4). Like the other discovery rules, this limit may be changed by stipulation of the parties.

(B) Notice of Examination; ~~Subpoena;~~ Production of Documents and Things.

(1) A party desiring to take the deposition of a ~~person~~ party on oral examination must give reasonable notice in writing to every other party to the action. The notice must state:

(a) the time and place for taking the deposition, and

(b) the name and address of each person to be examined, if known, or, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs.

~~If the subpoena to be served directs the deponent to produce documents or other tangible things, the designation of the materials to be produced as set forth in the subpoena must be attached to or included in the notice.~~

~~(2) On motion for good cause, the court may extend or shorten the time for taking the deposition. The court may regulate the time and order of taking depositions to best serve the convenience of the parties and witnesses and the interests of justice.~~

~~(3) The attendance of witness may be compelled by subpoena as provided in MCR 2.305.~~

(2~~4~~) The notice ~~to a party deponent~~ may be accompanied by a request for the production of documents and tangible things at the taking of the deposition. MCR 2.310 applies to the request.

(3~~5~~) In a notice ~~and subpoena~~, a party may name as the deponent a public or private corporation, partnership, association, or governmental agency and describe with reasonable particularity the matters on which examination is requested. The notice shall be served at least 14 days prior to the scheduled deposition. No later than 10 days after being served with the notice, the noticed entity may serve objections or file a motion for protective order, upon which the party seeking discovery may either proceed on topics as to which there was no objection or motion, or move to enforce the notice. The organization named must designate one or more officers, directors, or managing agents, or other persons, who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. ~~A subpoena must advise a nonparty organization of its duty to make the designation.~~ The persons designated shall testify to matters known or reasonably available to the organization. This subrule does not preclude taking a deposition by another procedure authorized in these rules.

The existing rule governing party designated depositions (here and now also proposed for MCR 2.305) is unclear. Consistent with positions advocated by the American Bar Association's Section of Litigation, the proposal provides for an opportunity to object to the topics listed in a representative deposition (existing subsection (B)(5)) and a mechanism for resolution of same.

(C)-(H) [No change.]

RULE 2.307 DEPOSITIONS ON WRITTEN QUESTIONS

(A) Serving Questions; Notice.

(1) Under the same circumstances and under the same limitations as set out in MCR 2.305(A) and MCR 2.306(A), a party may take the testimony of a person, including a party, by deposition on written questions. The attendance of ~~the~~non-party witnesses may be compelled by the use of a subpoena as provided in MCR 2.305. A deposition on written questions may be taken of a public or private corporation or partnership or association or governmental agency in accordance with the provisions of MCR 2.305(A)(6) or 2.306(B)(3~~5~~).

[No change in remainder of the rule.]

RULE 2.309 INTERROGATORIES TO PARTIES

(A) Availability; Procedure for Service; Limits.

(1) A party may serve on another party written interrogatories to be answered by the party served or, if the party served is a public or private corporation, partnership, association, or governmental agency, by an officer or agent. Subject to MCR 2.302(B), interrogatories ~~Interrogatories~~ may, without leave of court, be served:

~~(1)~~(a) on the plaintiff after commencement of the action or

~~(2)~~(b) on a defendant with or after the service of the summons and complaint on that defendant.

(2) Each separately represented party may serve no more than twenty interrogatories upon each party. A discrete subpart of an interrogatory counts as a separate interrogatory.

The phrase "discrete subparts" is from FR Civ P 33(a)(1), although we suggest more clear phrasing of the concept. Caselaw has developed about counting interrogatories. 8B Wright, Miller & Marcus, Federal Practice & Procedure - Civil, § 2168.1, pp 39-42 (3d ed).

The concept of presumptive limits on interrogatories drew perhaps the most feedback from the bar. On one hand, many feel interrogatories are inefficient and often fail to generate meaningful information without negotiation and perhaps motion practice. Especially given the information called for as part of initial disclosures, presumptive limits are prudent, workable (given the experience in the federal courts), and eliminate use of pre-fabricated sets of interrogatories. On the other hand, it was pointed out that abuse and inefficiency was a flaw with counsels' approach toward discovery, not the discovery device itself, and that interrogatories can, in certain cases, helpfully elucidate issues. Overall, the Committee endorses use of presumptive limits with the understanding that initial disclosures must be taken seriously by the parties and both parties and the court must be open to allowing more interrogatories if truly appropriate for the matter.

The Committee chose a limit of twenty with the view that initial disclosures will provide meaningful information that a party would otherwise seek in interrogatories. Twenty interrogatories is the upper tier limit in the proposed Arizona rules and in the Utah rules. The federal rules limit is 25. FR Civ P 33(a)(1). The proposed Arizona limits are five in tier 1, ten in tier 2, and 20 in tier 3. Proposed Ariz R Civ P 26.2(e). Minnesota's presumptive limit is 50. Minn R Civ P 33.01(a). Under certain special rules for expedited civil litigation, Minnesota limits interrogatories to 15. Special Rules of Practice, First Judicial District, Expedited Civil Litigation Rule 4(b). Utah's limits are zero in tier 1, ten in tier 2, and 20 in tier 3. Utah R Civ P 26(c)(5).

The Committee adopted a different presumptive limit for domestic relations actions where the parties often utilize interrogatories to obtain information on a variety of disparate topics; see MCR 3.201(C).

(B)-(C) [No change.]

(D) Scope; Use at Trial.

(1) [No change except for cross-reference change shown in the table at the end of this document.]

(2)-(6) [No change.]

(E) [No change.]

RULE 2.310 REQUESTS FOR PRODUCTION OF DOCUMENTS AND OTHER THINGS; ENTRY ON LAND FOR INSPECTION AND OTHER PURPOSES

(A) Definitions. For the purpose of this ~~rule~~ subchapter,

(1) "Documents" includes writings, drawings, graphs, charts, photographs, ~~phone records~~ sound recordings, images, and other data or data compilations ~~from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form~~ stored in any medium, including ESI.

(2) "ESI" means electronically stored information, regardless of format, system, or properties.

(3~~2~~) "Entry on land" means entry upon designated land or other property in the possession or control of the person on whom the request is served for the purpose of inspecting, measuring, surveying, photographing, testing, or sampling the property or a designated object or operation on the property, within the scope of MCR 2.302(B).

As originally adopted, MCR 2.310 focused on discovery of "documents" and "things." Since then, the growth in ESI and in the variety of systems for creating and storing such information has been dramatic. Lawyers and judges interpreted the term "documents" to include ESI because it was obviously improper to allow a party to evade discovery obligations on the basis that the label had not kept pace with changes in information technology. But it has become increasingly difficult to say that all forms of ESI, many dynamic in nature and not readily reducible to tangible form, fit within the traditional concept of a "document." ESI may exist in dynamic databases and other forms far different from fixed expression on paper.

MCR 2.310 is amended to clarify that the term "documents" should be understood to encompass ESI. At the same time, these rules often have specific provisions applicable only to ESI. The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of ESI. The rule is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.

References elsewhere in the rules to "ESI" should be understood to invoke this expansive approach. References to "documents" appear in discovery rules that are not amended should be interpreted to include ESI as circumstances warrant.

Like the term "documents," the term "ESI" is broad, but whether material falling within this term should be produced, and in what form, are separate questions that must be addressed under, *e.g.,* MCR 2.302(B), 2.302(C) and 2.310(B).

For purposes of these proposed revisions, electronically stored information is abbreviated as ESI. If adopted, a number of other edits will be required to the rules to conform to this usage.

(B)-(C) [No change.]

~~(D) Request to Nonparty.~~ [A request to a non-party is governed by proposed MCR 2.305.]

~~(1) A request to a nonparty may be served at any time, except that leave of the court is required if the plaintiff seeks to serve a request before the occurrence of one of the events stated in MCR 2.306(A)(1).~~

~~(2) The request must be served on the person to whom it is directed in the manner provided in MCR 2.105, and a copy must be served on the other parties.~~

~~(3) The request must~~

~~(a) list the items to be inspected and tested or sampled, either by individual item or by category, and describe each item and category with reasonable particularity,~~

~~(b) specify a reasonable time, place, and manner of making the inspection and performing the related acts, and~~

~~(c) inform the person to whom it is directed that unless he or she agrees to allow the inspection or entry at a reasonable time and on reasonable conditions, a motion may be filed seeking a court order to require the inspection or entry.~~

~~(4) If the person to whom the request is directed does not permit the inspection or entry within 14 days after service of the request (or a shorter time if the court directs), the party seeking the inspection or entry may file a motion to compel the inspection or entry under MCR 2.313(A). The motion must include a copy of the request and proof of service of the request. The movant must serve the motion on the person from whom discovery is sought as provided in MCR 2.105.~~

~~(5) The court may order the party seeking discovery to pay the reasonable expenses incurred in complying with the request by the person from whom discovery is sought.~~

~~(6) This rule does not preclude an independent action against a nonparty for production of documents and other things and permission to enter on land or a subpoena to a nonparty under MCR 2.305.~~

RULE 2.312 REQUEST FOR ADMISSION

(A) Availability; Scope. Within the time for completion of discovery, a party may serve on another party a written request for the admission of the truth of a matter within the scope of MCR 2.302(B) stated in the request that relates to statements or opinions of fact or the application of law to fact, including the genuineness of documents described in the request. Copies of the documents must be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request must clearly identify in the caption and before each request that it is a Request for Admission. Each matter of which an admission is requested must be stated separately.

[No change in remainder of the rule.]

This rule amendment addresses the problem of attorneys burying requests to admit in interrogatories or document requests, which should be avoided given the severe consequences for failing to timely respond to requests to admit. Failure to abide by this requirement could be taken into account by a court in a deciding a request to withdraw or amend an admission.

RULE 2.313 FAILURE TO SERVE DISCLOSURE OR TO PROVIDE OR TO PERMIT DISCOVERY; SANCTIONS

(A) Motion for Order Compelling Disclosure or Discovery. A party, on reasonable notice to other parties and all persons affected, may apply for an order compelling disclosure or discovery as follows:

(1) *Appropriate Court.* A motion for an order under this rule may be made to the court in which the action is pending, or, as to a matter relating to a deposition in, or non-party subpoena served outside of, the county where the action is pending, to a court in ~~the~~ that county ~~or district where the deposition is being taken~~.

(2) *Motion.*

(a) *To Compel Disclosure.* If a party fails to serve a disclosure required by MCR 2.302(A), another party may move to compel disclosure and for appropriate sanctions.

Adapted from FR Civ P 37(a)(3)(A).

(b) *To Compel ~~a~~ Discovery ~~Response~~.* If

~~(a)~~(i) a deponent fails to answer a question propounded or submitted under MCR ~~2.305,~~ 2.306~~;~~ or 2.307,

~~(b)~~(ii) a corporation or other entity fails to make a designation under MCR 2.306(B)(3~~5~~) or 2.307(A)(1),

~~(c)~~(iii) a party fails to answer an interrogatory submitted under MCR 2.309(A) and (B), ~~or~~

~~(d)~~(iv) in response to a request for inspection submitted under MCR 2.310, a person fails to respond that inspection will be permitted as requested, or

(v) If a party; an officer, director, or managing agent of a party; or a person designated under MCR 2.306(B)(3) or 2.307(A)(1) to testify on behalf of a party fails to appear before the person who is to take his or her deposition, after being served with a proper notice,

the party seeking discovery may move for an order compelling ~~an answer, a designation, or inspection in accordance with the resquest~~ compliance. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(c) *To compel compliance with a non-party discovery subpoena*. If a recipient of a non-party discovery subpoena under MCR 2.305 fails to comply, the issuing party may move to compel compliance. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order. The motion must include a copy of the subpoena and proof of service of the subpoena. The movant must serve the motion on the person from whom discovery is sought as provided in MCR 2.105.

An effort was made to condense within MCR 2.313 all aspects of motions with regard to discovery, including as against non-parties, which currently is addressed under MCR 2.506, but awkwardly. This change follows from the proposed changes to MCR 2.305.

(3) [No change except for cross-reference changes]

(4) *Evasive or Incomplete Disclosure, Answer, or Response.* For purposes of this subrule an evasive or incomplete disclosure, answer, or response ~~is to~~ must be treated as a failure to disclose, answer, or respond.

Adapted from FR Civ P 37(a)(4). The language is expanded to include responses (as distinguished from answers) so as to comprehensively cover discovery responses.

(5) *Award of Expenses of Motion.*

(a) If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—, the court ~~shall~~may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct, or both, to pay to the moving party the reasonable expenses incurred ~~in~~ as a result of the conduct and in ~~obtaining the order~~ making the motion, including attorney fees, unless the court finds that the moving party filed the motion before attempting in good faith to obtain the disclosure or discovery without court action, the opposition to the motion was substantially justified, or ~~that~~ other circumstances make an award ~~of expenses~~unjust.

The added language regarding compliance after the motion is filed is from FR Civ P 37(a)(5)(A). This addresses the situation where the motion becomes moot because the opposing party complies before the hearing. It may be appropriate to award expenses when a motion was necessary to obtain compliance even if the court does not need to rule on the substance of the motion.

The added language requiring a good faith effort to obtain compliance is from FR Civ P 37(a)(5)(A)(i).

(b) If the motion is denied, the court ~~shall~~may, after opportunity for hearing, require the moving party or the attorney advising the motion, or both, to pay to the person who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(c) If the motion is granted in part and denied in part, the court may, after opportunity for hearing, apportion the reasonable expenses incurred in relation to the motion among the parties and other persons in a just manner.

The added language conforms subrule (c) to subrules (a) and (b), which both require an opportunity for a hearing before the court awards expenses.

(6) *Additional Sanctions.* The court in which the action is pending may order such sanctions as are just. Among others, it may take an action authorized under subrule (B)(2)(a), (b), and (c).

The existing subrules are unnecessarily verbose and complicated. An award of expenses is addressed in subrule (A)(5), but other sanctions are not discussed until subrule (D), which repeats much of the language of subrule (A). Accordingly, subrule (D) is deleted and new subrule (A)(6) is proposed.

(B) Failure to Comply With Order.

(1) [No change.]

(2) […]

In lieu of or in addition to the foregoing orders, the court ~~shall~~ may require the party failing to obey the order or the attorney advising the party, or both, to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(C) ~~Expenses on~~ Failure to Disclose, Supplement, or Admit.

(1) *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by MCR 2.302(A) or (E), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(a) may order payment of the reasonable expenses, including attorney fees, caused by the failure;

(b) may inform the jury of the party's failure; and

(c) may impose other appropriate sanctions, including any of the orders listed in MCR 2.313(B)(2)(a)-(c).

Adapted from FR Civ P 37(c)(1).

(2) *Failure to Admit.* If a party denies the genuineness of a document, or the truth of a matter as requested under MCR 2.312, and if the party requesting the admission later proves the genuineness of the document or the truth of the matter, the requesting party may move for an order requiring the other party to pay the expenses incurred in making that proof, including attorney fees. The court shall enter the order unless it finds that

~~(1)~~(a) the request was held objectionable pursuant to MCR 2.312(B),

~~(2)~~(b) the admission sought was of no substantial importance,

~~(3)~~(c) the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or

~~(4)~~(d) there was other good reason for the failure to admit.

~~**(D) Failure of Party to Attend at Own Deposition, to Serve Answers to Interrogatories, or to Respond to Request for Inspection.**~~

~~(1) If a party; an officer, director, or managing agent of a party; or a person designated under MCR 2.306(B)(5) or 2.307(A)(1) to testify on behalf of a party fails~~

~~(a) to appear before the person who is to take his or her deposition, after being served with a proper notice;~~

~~(b) to serve answers or objections to interrogatories submitted under MCR 2.309, after proper service of the interrogatories; or~~

~~(c) to serve a written response to a request for inspection submitted under MCR 2.310, after proper service of the request, on motion, the court in which the action is pending may order such sanctions as are just. Among others, it may take an action authorized under subrule (B)(2)(a), (b), and (c).~~

~~(2) In lieu of or in addition to an order, the court shall require the party failing to act or the attorney advising the party, or both, to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure~~

~~was substantially justified or that other circumstances make an award of expenses unjust.~~

~~(3) A failure to act described in this subrule may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has moved for a protective order as provided by MCR 2.302(C).~~

(D~~E~~) Failure to Preserve ESI. ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.~~ If ESI that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation, may order appropriate remedies, including:

(a) a presumption that the lost information was unfavorable to the party;

(b) a jury instruction directing that the jury may or must presume the information was unfavorable to the party; or

(c) dismissal of the action or entry of a default judgment.

The current language in MCR 2.313(E) also appears in the current version of MCR 2.302(B)(5). The Committee proposes deleting the redundant language from both rules and replacing it with the proposed language set forth in MCR 2.313(E). While most state court discovery rules are consistent with the current Michigan rule (which is also consistent with the former version of FR Civ P 37(e)), the Committee proposes revising the rule to conform closer to the current version of FR Civ P 37(e). The current version of FR Civ P 37(e) provides clearer guidelines for courts reviewing circumstances where a party fails to preserve ESI than Michigan's current rules, which is the goal of this subrule (punishing parties for failing to comply with discovery are addressed in other sections of MCR 2.313). FR Civ P 37(e) focuses on whether the information should have been preserved, the reasonableness of the party's steps to preserve it, and the prejudice suffered by the loss. Additionally, Michigan's current rule's standard of "exceptional circumstances" is not well defined, leading to inconsistent interpretations.

RULE 2.314 DISCOVERY OF MEDICAL INFORMATION CONCERNING PARTY

(A) Scope of Rule. [No change except for cross-reference change shown in the table at the end of this document]

(B) Privilege; Assertion; Waiver; Effects.

(1) A party who has a valid privilege may assert the privilege and prevent discovery of medical information relating to his or her mental or physical condition. The privilege must be asserted in the party's disclosure under 2.302(A), in written response to a request for production of documents under MCR 2.310, in answers to interrogatories under MCR 2.309(B), before or during the taking of a deposition, or by moving for a protective order under MCR 2.302(C). A privilege not timely asserted is waived in that action, but is not waived for the purposes of any other action.

(2) Unless the court orders otherwise, if a party asserts that the medical information is subject to a privilege and the assertion has the effect of preventing discovery of medical information that must be disclosed or is otherwise discoverable under MCR 2.302(B), the party may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or mental or physical condition.

(C) – (E) [No change.]

RULE 2.316 REMOVAL OF DISCLOSURE AND DISCOVERY MATERIALS FROM FILE

(A) Definition. For the purpose of this rule, "disclosure material" means disclosures under MCR 2.302(A) and "discovery material" means deposition transcripts, audio or video recordings of depositions, interrogatories, documents produced during discovery and made a part of the court file, and answers to interrogatories and requests to admit.

(B) Removal From File. In civil actions, disclosure and discovery materials may be removed from files and destroyed in the manner provided in this rule.

(1) *By Stipulation.* If the parties stipulate to the removal of disclosure and discovery materials from the file, the clerk may remove the materials and dispose of them in the manner provided in the stipulation.

(2) *By the Clerk.*

(a) The clerk may initiate the removal of disclosure and discovery materials from the file in the following circumstances.

(i)-(ii) [No change.]

(b) The clerk shall notify the parties and counsel of record, when possible, that disclosure and discovery materials will be removed from the file of the action and destroyed on a specified date at least 28 days after the notice is served unless within that time

(i) the party who filed the disclosure or discovery materials retrieves them from the clerk's office or

(ii) a party files a written objection to removal of disclosure or discovery materials from the file.

If an objection to removal of disclosure or discovery materials is filed, the ~~discovery~~ materials may not be removed unless the court so orders after notice and opportunity for the objecting party to be heard. The clerk shall schedule a hearing and give notice to the parties. The rules governing motion practice apply.

(3) *By Order.* On motion of a party, or on its own initiative after notice and hearing, the court may order disclosure and discovery materials removed at any other time on a finding that the materials are no longer necessary. However, no disclosure or discovery materials may be destroyed by court personnel or the clerk until the periods set forth in subrule (2)(a)(i) or (2)(a)(ii) have passed.

RULE 2.401 PRETRIAL PROCEDURES; CONFERENCES; SCHEDULING ORDERS

(A) Time; Discretion of Court. [No change.]

(B) Early Scheduling Conference and Order.

(1) *Early Scheduling Conference.* The court may direct that an early scheduling conference be held. ~~In addition to those considerations enumerated in subrule (C)(1), d~~During this conference the court should consider any matters that will facilitate the fair and expeditious disposition of the action, including:

(a)-(c) [No change.]

(d) disclosure, discovery, preservation, and claims of privilege of ESI;

(e) the simplification of the issues;

(f) the amount of time necessary for discovery, staging of discovery, and any modification to the extent of discovery;

The last clause is modified language from FR Civ P 16(b)(3)(B)(ii)

(g) the necessity or desirability of amendments to the pleadings;

(h) the possibility of obtaining admissions of fact and of documents to avoid unnecessary proof;

(i) the form and content of the pretrial order;

modified language from FR Civ P 16(c)(2)(J)

(j) the timing of disclosures under MCR 2.302(A);

modified language from FR Civ P 16(b)(3)(B)(i)

(k) the limitation of the number of expert witnesses, whether to have a separate discovery period for experts, whether to require preparation and disclosure of testifying expert reports, and whether to specify expert disclosure deadlines;

The Committee considered and rejected adoption of written expert reports in all cases. However, in certain matters, they are used as a matter of course, and the appropriateness of reports is a proper consideration for the conference, along with other scheduling and disclosure issues related to experts.

(l) the consolidation of actions for trial, the separation of issues, and the order of trial when some issues are to be tried by a jury and some by the court;

(m) the possibility of settlement;

(n) whether mediation, case evaluation, or some other form of alternative dispute resolution would be appropriate for the case, and what mechanisms are available to provide such services;

(o) the identity of the witnesses to testify at trial;

(p) the estimated length of trial;

(q) whether all claims arising out of the transaction or occurrence that is the subject matter of the action have been joined as required by MCR 2.203(A); and

(r) other matters that may aid in the disposition of the action.

The revision deletes existing MCR 2.401(C) and incorporates the factors listed in MCR 2.401(C)(1), with edits to MCR 2.401(B)(1). This structure more clearly delineates between an early scheduling conference (with enhanced focus on early case management) and a final pretrial conference added in new subsection H. MCR 2.401(C)(2) is deleted as unnecessary.

(2) *Scheduling Order.*

(a) At an early scheduling conference under subrule (B)(1) ~~, a pretrial conference under subrule (C)~~, or at such other time as the court concludes that such an order would facilitate the progress of the case, the court shall establish times for events and adopt other provisions the court deems appropriate, including

(i)-(ii) [No change.]

(iii) what, if any, changes should be made in the timing, form, or requirement for disclosures under MCR 2.302(A),

(iv) what, if any, changes should be made to the limitations on discovery imposed under these rules and whether other presumptive limitations should be established,

(~~iii~~v) the completion of discovery,

~~(iv)~~(vi) the exchange of witness lists under subrule ~~(I)~~(H)(2)(h), and

~~(v)~~(vii) the scheduling of a pretrial conference, a settlement conference, or trial.

More than one such order may be entered in a case.

(b) [No change.]

(c) The scheduling order also may include provisions concerning initial disclosure, discovery of ESI, any agreements the parties reach for asserting claims of privilege or for protection as trial-preparation material after production, preserving discoverable information, and the form in which ESI shall be produced.

(d) [No change.]

(C) Discovery Planning.

(1) Upon court order or written request by another party, the parties must confer among themselves and prepare a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared are jointly responsible for arranging the conference and for attempting in good faith to agree on a proposed discovery plan.

Unlike the federal rules, which require the parties to hold a discovery planning conference in most cases, this procedure can be directed by the court or requested by a party. Otherwise, the presumptive disclosure requirements and discovery limits apply, unless the parties otherwise stipulate or the court otherwise orders.

(2) A proposed discovery plan must address all disclosure and discovery matters, including the matters set forth in subrule (B), and propose deadlines for completion of disclosure and discovery. The parties must show good cause to request a change in deadlines set by a scheduling order.

(3) A discovery plan, noting any disagreements between the parties, may be submitted to the court as part of a stipulation or motion. The court may enter an order governing disclosure, discovery, and any other case management matter the court deems appropriate.

(4) If a party or attorney fails to participate in good faith in developing and submitting a proposed discovery plan, the court may enter an appropriate sanction, including payment of attorney fees and costs caused by the failure.

This procedure is adapted from the requirement for the parties to prepare a proposed discovery plan in FR Civ P 26(f)(3). Unlike federal practice, these proposed rules anticipate that the presumptive disclosure requirements and discovery limits will apply in most cases, the parties will stipulate to change them, or the court will do so in a case management order. Preparing a discovery plan—either by court direction or on the initiative of a party—is an alternative for addressing disclosure and discovery issues.

~~(C) Pretrial Conference; Scope.~~ [Current MCR 2.401(C) is moved to Proposed MCR 2.401(B)(1)(e)-(h), (k)-(r) with edits; see comment, p 57.]

~~(1) At a conference under this subrule, in addition to the matters listed in subrule (B)(1), the court and the attorneys for the parties may consider any matters that will facilitate the fair and expeditious disposition of the action, including:~~

~~(a) the simplification of the issues;~~

~~(b) the amount of time necessary for discovery;~~

~~(c) the necessity or desirability of amendments to the pleadings;~~

~~(d) the possibility of obtaining admissions of fact and of documents to avoid unnecessary proof;~~

~~(e) the limitation of the number of expert witnesses;~~

~~(f) the consolidation of actions for trial, the separation of issues, and the order of trial when some issues are to be tried by a jury and some by the court;~~

~~(g) the possibility of settlement;~~

~~(h) whether mediation, case evaluation, or some other form of alternative dispute resolution would be appropriate for the case, and what mechanisms are available to provide such services;~~

~~(i) the identity of the witnesses to testify at trial;~~

~~(j) the estimated length of trial;~~

~~(k) whether all claims arising out of the transaction or occurrence that is the subject matter of the action have been joined as required by MCR 2.203(A);~~

~~(l) other matters that may aid in the disposition of the action.~~

(D)-(G) [No change.]

(H) ~~Conference After Discovery.~~ **Final Pretrial Conference and Order.**

(1) If the court finds at a final pretrial conference ~~held after the completion of discovery~~ that due to a lack of reasonable diligence by a party the action is not ready for trial, the court may enter an appropriate order to facilitate preparation of the action for trial and may require the offending party to pay the reasonable expenses, including attorney fees, caused by the lack of diligence.

(2) The court may hold a final pretrial conference to facilitate preparation of the action for trial and to formulate a trial plan. The conference may be combined with a settlement conference. At least one lead attorney who will conduct the trial for each party and any unrepresented party shall attend the conference. At the conference the parties may discuss the following, and the court may order the parties to prepare, either before or after the conference, a joint final pretrial order that may provide for:

(a) scheduling motions in limine;

(b) a concise statement of plaintiff's claims, including legal theories;

(c) a concise statement of defendant's defenses and claims, including cross-claims and claims of third-party plaintiffs, and defenses of cross defendants or third-party defendants, including legal theories;

(d) a statement of any stipulated facts or other matters;

(e) issues of fact to be litigated;

(f) issues of law to be litigated;

(g) evidence problems likely to arise at trial;

(h) a list of witnesses to be called unless reasonable notice is given that they will not be called, and a list of witnesses that may be called, listed by category as follows:

i. live lay witnesses;

ii. lay deposition transcripts or videos including resolving objections and identifying portions to be read or played;

iii. live expert witnesses; and

iv. expert deposition transcripts or videos including resolving objections and identifying portions to be read or played.

(i) a list of exhibits with stipulations or objections to admissibility;

(j) an itemized statement of damages and stipulations to those items not in dispute;

(k) estimated length of trial:

i. time for plaintiff's proofs;

ii. time for defendant's proofs; and

iii. whether it is a jury or nonjury trial.

(l) trial date and schedule;

(m) whether the parties will agree to arbitration;

(m) a statement that counsel have met, conferred and considered the possibility of settlement and alternative dispute resolution, giving place, time and date and the current status of these negotiations as well as plans for further negotiations;

(n) rules governing conduct of trial;

(o) jury instructions;

(p) trial briefs;

(p) voir dire; and

(r) any other appropriate matter.

While already the practice in many courts, formal pre-trial orders and pre-trial conferences assist parties, counsel, and the court to anticipate issues for trial and avoid ambush or surprise. The option of a formal pre-trial order is also another case management tool available for the court.

(I) [No change.]

(J) ESI Conference, Plan and Order.

(1) *ESI Conference.* Where a case is reasonably likely to include the discovery of ESI, parties may agree to an ESI Conference, the judge may order the parties to hold an ESI Conference, or a party may file a motion requesting an ESI Conference. At the ESI Conference, the parties shall consider:

(a) any issues relating to preservation of discoverable information, including adoption of a preservation plan for potentially relevant ESI;

(b) identification of potentially relevant types, categories, and time frames of ESI;

(c) identification of potentially relevant sources of ESI and whether the ESI is reasonably accessible;

(d) disclosure of the manner in which ESI is maintained;

(e) implementation of a preservation plan for potentially relevant ESI;

(f) the form in which each type of ESI will be produced;

(g) what metadata, if any, will be produced;

(h) the time to produce ESI;

(i) the method for asserting or preserving claims of privilege or protection of trial preparation materials, including whether such claims may be asserted after production;

(j) privilege log format and related issues;

(k) the method for asserting or preserving confidential and proprietary status of information either of a party or a person not a party to the proceeding;

(l) whether allocation among the parties of the expense of production is appropriate; and

(m) any other issue related to the discovery of ESI.

(2) *ESI Discovery Plan.* Within 14 days after an ESI Conference, the parties shall file with the court an ESI discovery plan and a statement concerning any issues upon which the parties cannot agree. Unless the parties agree otherwise, the attorney for the plaintiff shall be responsible for submitting the ESI discovery plan to the court. The ESI discovery plan may include:

(a) a statement of the issues in the case and a brief factual outline;

(b) a schedule of discovery including discovery of ESI;

(c) a defined scope of preservation of information and appropriate conditions for terminating the duty to preserve prior to the final resolution of the case;

(d) the forms in which ESI will be produced; and

(e) the sources of any ESI that are not reasonably accessible because of undue burden or cost.

(3) *ESI Competence.* Attorneys who participate in an ESI Conference or who appear at a conference addressing ESI issues must be sufficiently versed in matters relating to their clients' technological systems to competently address ESI issues; counsel may bring a client representative or outside expert to assist in such discussions.

(4) *ESI Order*. The court may enter an order governing the discovery of ESI pursuant to the parties' ESI discovery plan, upon motion of a party, by stipulation of the parties, or on its own.

ESI can be one of the most expensive areas of discovery, especially if done without careful planning. The option of an ESI conference allows parties or the court to get out ahead of the issues such that ESI is handled as efficiently as possible and with minimal court involvement. An ESI conference with the court can be integrated into a general scheduling conference, ordered in response to discovery disputes, or held on a stand-alone basis.

RULE 2.411 MEDIATION

(A) – (G) [No change.]

(H) Mediation of Discovery Disputes. The parties may stipulate to or the court may order the mediation of discovery disputes (unless precluded by MCR 3.216(C)(3)). The discovery mediator may by agreement of the parties be the same mediator otherwise selected under subrule (B). All other provisions of this rule shall apply to a discovery mediator except:

(1) The order under subrule (C)(1) will specify the scope of issues or motions referred to the discovery mediator, or whether the mediator is appointed on an ongoing basis.

(2) The mediation sessions will be conducted as determined by the mediator, with or without parties, in any manner deemed reasonable and consistent with these rules and any court order.

(3) The court may specify that discovery disputes must first be submitted to the mediator before being filed as a motion unless there is a need for expedited attention by the court. In such cases, the moving party shall certify in the motion that it is filed only after failure to resolve the dispute through mediation or due to a need for immediate attention by the court.

(4) In cases involving complex issues of ESI, the court may appoint an expert under MRE 706. By stipulation of the parties, the court may also designate the expert as a discovery mediator of ESI issues under this rule, in which case the parties should address in the order appointing the mediator whether the restrictions of MCR 2.411(C)(3) and 2.412(D) should be modified to expand the scope of permissible communications with the court.

A small number of cases are particularly complex or otherwise generate an inordinate number of discovery disputes requiring court attention. In order to best serve the parties and the interests of justice, the services of a discovery mediator may provide enhanced case management without causing undue expense, delay or burden, and without prejudice to a party's rights to have all discovery disputes adjudicated by the court. In no circumstance may a court delegate its judicial authority to the discovery mediator.

The existing ability of the court to appoint an expert under MRE 706 is reinforced here to emphasize it as an option when dealing with complex ESI issues outside the normal ken of the court. In certain cases, it may also be efficient and desirable to have the same person serve as a discovery mediator of ESI disputes, but only by consent of the parties. If that process is utilized, the normal rules governing mediator disclosures may need to be relaxed to allow the expert to testify, *e.g.*, she considered both plaintiff's and defendant's proposed search terms and believes a compromise position is reasonable. In all cases, the court remains the sole arbiter of any discovery disputes not otherwise settled.

RULE 2.506 SUBPOENA; ORDER TO ATTEND.

(A) Attendance of Party or Witness.

(1) The court in which a matter is pending may by order or subpoena command a party or witness to appear for the purpose of testifying in open court on a date and time certain and from time to time and day to day thereafter until excused by the court, and/or to produce ~~notes, records,~~ documents ~~, photographs,~~ or other portable tangible things ~~as specified~~. A request for documents or tangible things under this rule must comply with MCR 2.302(B) and any scheduling order. A person or entity subpoenaed under this rule may file written objections to the request for documents before the designated time for appearance; such objections shall be adjudicated under subrule (H). This subrule does not apply to discovery subpoenas (MCR 2.305) or requests for documents to a party where discovery is available (MCR 2.310). A copy of any subpoena for documents or tangible things shall be provided to the opposing party or his/her counsel.

(2) A subpoena may specify the form or forms in which ~~electronically stored information~~ ESI is to be produced, subject to objection. If the subpoena does not so specify, the person responding to the subpoena must produce the information in a form or forms in which the person ordinarily maintains it, or in a form or forms that are reasonably usable. A person producing ~~electronically stored information~~ ESI need only produce the same information in one form.

(3) A person responding to a subpoena need not provide discovery of ~~electronically stored information~~ ESI from sources that the person identifies as not reasonably accessible because of undue burden or cost. In a hearing or submission under subrule (H), the person responding to the subpoena must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of MCR 2.302(C). The court may specify conditions for such discovery, including who bears the cost.

(B) [No change.]

(C) Notice to Witness of Required Attendance.

(1) The signer of a subpoena must issue it for service on the witness sufficiently in advance of the trial or hearing to give the witness reasonable notice of the date and time the witness is to appear. Unless the court orders otherwise, the subpoena must be served at least 2 days before the ~~witness is to~~ appearance or 14 days before the appearance when documents are requested.

(2) [No change.]

(3) [No change.]

(D) Form of Subpoena. A subpoena must:

(1) – (5) [No change.]

(6) state the file number ~~designation~~ assigned by the court;

(7) [No change.]

(E) [No change.]

(F) Failure of Party to Attend. If a party or an officer, director, or managing agent of a party fails to attend or produce documents or other tangible evidence pursuant to a subpoena or an order to attend without having served written objections, the court may:

(1)-(6) [No change.]

(G) [No change.]

(H) Hearing on Subpoena or Order To Attend.

(1) A person served with a subpoena or order to attend under this rule may appear before the court in person or by writing to explain why the person should not be compelled to comply with the subpoena, order to attend, or directions of the party having it issued.

(2)-(3) [No change.]

(4) A person must comply with the command of a subpoena unless relieved by order of the court or written direction of the person who had the subpoena issued except that any obligation to produce documents, if timely written objections are served, is stayed pending resolution under this subrule.

(5) Any party may move to quash or modify a subpoena by motion under MCR 2.302(C) filed before the time specified in the subpoena, and serve same upon the non-party, in which case the non-party's obligation to respond is stayed until the motion is resolved.

Minor changes are recommended to harmonize the rule with MCR 2.305 and to clarify the procedure for objecting to hearing subpoenas for records. There is also a desire to clarify that trial subpoenas should not be utilized to essentially take discovery after the time for discovery has elapsed.

RULE 3.201 APPLICABILITY OF RULES

(A)-(B) [No change.]

(C) Except as otherwise provided in this subchapter, practice and procedure in domestic relations actions is governed by other applicable provisions of the Michigan Court Rules, except the number of interrogatories set forth in MCR 2.309(A)(2) shall be thirty-five.

Given the number of discrete issues and parties in domestic relations actions, the bar felt strongly that the presumptive number of twenty interrogatories as proposed in MCR 2.309 was too low. Rather than simply exempt domestic relations actions, a higher presumptive number recommended by the American Association of Matrimonial Lawyers was adopted.

RULE 3.206 PLEADING

(A) Information in Complaint. [No change.]

(B) Verified Statement and Disclosure Form.

(1) [No change.]

(2) Verified Financial Information Form. Unless waived in writing by the parties, or unless a settlement agreement or consent judgment of divorce or other final order disposing of the case has been signed by both parties at the time of filing, and except as set forth below, each party must serve a Verified Financial Information Form (as provided by SCAO) within 28 days following the date of service of defendant's initial responsive pleading. If a party is self-represented and his or her address is not disclosed due to domestic violence, the parties' disclosure forms will be exchanged at the first scheduled matter involving the parties or in another manner as specified by the court or stipulated to by the parties. A party who is a victim of domestic violence, sexual assault or stalking by another party to the case, may omit any information which might lead to the location of where the victim lives or works, or where a minor child may be found. Failing to provide this disclosure may be addressed by the court or by motion consistent with MCR 2.313. The disclosure form does not preclude other discovery. A proof of service must be filed when disclosure forms are served.

Financial asset and income information is necessary and exchanged in nearly every domestic relations action and is sometimes needed urgently at the beginning of the case in order to establish temporary child support and/or spousal support. The requirement to exchange a financial statement will save litigants money that would otherwise be spent on discovering this information via subpoenas, requests for production of documents, and other discovery methods. Having a uniform financial disclosure form will be helpful to mediators and the courts so they do not have to become familiar with multiple different ways of organizing the information and reduce the risks of missing an asset; a proposed form is attached hereto for consideration by SCAO. Language was added to protect victims and such persons otherwise may resort to an affidavit under subrule (4) or a protective order.

(2~~(~~3) The information in the ~~verified~~ statements and disclosure forms is confidential, and is not to be released other than to the court, the parties, or the attorneys for the parties, except on court order. For good cause, the addresses of a party and minors may be omitted from the copy of the statement or disclosure forms that is served on the other party.

(3~~(~~4) If any of the information required to be in the ~~verified~~ statements or disclosure forms is omitted, the party seeking relief must explain the reasons for the omission in a sworn affidavit, to be filed with the court by the due date of the statement or disclosure form.

(5) A party who has served a disclosure form must supplement or correct its disclosure as ordered by the court or otherwise in a timely manner if the party learns that in some material respect the disclosure form is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the action or in writing.

(C) Attorney Fees and Expenses.

(1) [No change.]

(2) A party who requests attorney fees and expenses must allege facts sufficient to show that:

(a) the party is unable to bear the expense of the action, including the expense of engaging in discovery appropriate for the matter, and that the other party is able to pay or

(b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply, or engaged in discovery practices in violation of these rules.

The purpose of this addition is to bring to the attention of the litigants and courts that discovery, including, for example, the cost of psychological evaluation and business valuations, is grounds for awarding attorney fees. This also helps to put the request for fees into perspective given the complexity of the case.

RULE 3.222 FILING MATERIALS IN COURT [new]

(A) No party or interested party shall file the following items with the court unless in conformity with this rule:

(1) verified statements and disclosure forms under MCR 3.206(B);

(2) child protective services reports;

(3) psychological evaluations;

(4) custody evaluations;

(5) medical, mental health, and academic records of a minor;

(6) any part of a confidential file under MCR 3.903(A)(3);

(7) any item otherwise designated as confidential or barred from filing by these rules; and

(8) any other document which, in the court's discretion, should not be part of the public record.

(B) Any item specified in subrule (A) shall only be filed with the court "under seal" pursuant to an order of the court which shall specify adequate means to prevent unauthorized access.

Certain documents with private information should not be available to the general public; however, these documents must be in the court file or they cannot be considered on appeal. MCR 8.119(I) provides a means for sealing a file but, as to these materials, a presumptive mechanism is appropriate and consistent with MCR 8.119(H)(1), which avoids the need for filing a motion under MCR 8.119(I) and which serves a similar function in juvenile cases per MCR 3.903(A)(3).

RULE 3.922 PRETRIAL PROCEDURES IN DELINQUENCY AND CHILD PROTECTION PROCEEDINGS

(A) Discovery.

(1) The following materials are discoverable as of right in all proceedings and shall be produced no less than 21 days before trial, even without a discovery requestprovided they are requested no later than 21 days before trial unless the interests of justice otherwise dictate:

(a) all written or recorded statements and notes of statements made by the juvenile or respondent that are in possession or control of petitioner or a law enforcement agency, including oral statements if they have been reduced to writing;

(b) all written or recorded nonconfidential statements made by any person with knowledge of the events in possession or control of petitioner or a law enforcement agency, including, but not limited to, police reports, allegations of neglect and/or abuse on Form 3200, and Child Protective Services investigation reports, except that the identity of the reporting person shall be protected in accordance with MCL 722.625;

(c) the names of all prospective witnesses;

(d) a list of all prospective exhibits;

(e) a list of all physical or tangible objects that are prospective evidence that are in the possession or control of petitioner or a law enforcement agency;

(f) the results of all scientific, medical, psychiatric, psychological, or other expert tests, or experiments, or evaluations, including the reports or findings of all experts, that are relevant to the subject matter of the petition;

(g) the results of any lineups or showups, including written reports or lineup sheets; and

(h) all search warrants issued in connection with the matter, including applications for such warrants, affidavits, and returns or inventories.;

(i) any written, video, or recorded statement that pertains to the case and made by a witness whom the party may call at trial;

(j) the curriculum vitae of an expert the party may call at trial and either a report prepared by the expert containing, or a written description of, the substance of the proposed testimony of the expert, the expert's opinion, and the underlying bases of that opinion; and

(k) any criminal record that the party may use at trial to impeach a witness.

(2) On motion of a party, the court may permit discovery of any other materials and evidence, including untimely requested materials and evidence that would have been

discoverable of right under subrule (A)(1) if timely requested. Absent manifest injustice, no motion for discovery will be granted unless the moving party has requested and has not been provided the materials or evidence sought through an order of discovery.

(3) Depositions may only be taken as authorized by the court.

(4) Failure to comply with subrules (A)(1) and (A)(2) may result in such sanctions~~, as applicable, as set forth in~~ in keeping with those assessable under MCR 2.313.

The Committee recommends this amendment as it is consistent with the requirements in other areas of litigation yet meets the specific needs of child abuse and neglect cases. Procedure in these matters is entirely governed by the court rules found in subchapter 3.900. Therefore, specificity within the subchapter is needed in order to facilitate practice. The proposed amendment guarantees that discovery will occur in these cases, many of which go to trial at both adjudication and termination of parental rights stages. Child Protective Services has a great deal of information due to its investigation, including past investigations of a given family that may not have resulted in court action. Adequate representation of parents and children can only be guaranteed if the CPS file is shared through discovery.

Proposed subrule (A)(1)(k) mirrors proposed MCR 3.922(B)(1)(a).

(B) Discovery and Disclosure in Delinquency Matters.

(1) In delinquency matters, in addition to disclosures required by provisions of law and as required or allowed by subrule (A)(1)-(3), a party shall provide all other parties the following, which are discoverable as of right and, even without a discovery request, shall be produced no less than 21 days before trial:

(a) a description or list of criminal convictions, known to the respondent's attorney or prosecuting attorney, of any witness whom the party may call at trial;

(b) any exculpatory information or evidence known to the prosecuting attorney;

(c) any written or recorded statements, including electronically recorded statements, by a defendant, codefendant, or accomplice pertaining to the case even if that person is not a prospective witness at trial; and

(d) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.

(2) In delinquency matters, notwithstanding any other provision of this rule, there is no right to have disclosed or to discover information or evidence that is protected by constitution, statute, or privilege, including information or evidence protected by a respondent's right against self-incrimination, except as provided in subrule (B)(3).

(3) In delinquency matters, if a respondent demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the court shall conduct an in camera inspection of the records.

(a) If the privilege is absolute, and the privilege holder refuses to waive the privilege to permit an in camera inspection, the court shall suppress or strike the privilege holder's testimony.

(b) If the court is satisfied, following an in camera inspection, that the records reveal evidence necessary to the defense, the court shall direct that such evidence as is necessary to the defense be made available to respondent's counsel. If the privilege is absolute and the privilege holder refuses to waive the privilege to permit disclosure, the court shall suppress or strike the privilege holder's testimony.

(c) Regardless of whether the court determines that the records should be made available to the respondent, the court shall make findings sufficient to facilitate meaningful appellate review.

(d) The court shall seal and preserve the records for review in the event of an appeal:

(i) by the respondent, on an interlocutory basis or following conviction, if the court determines that the records should not be made available to the defense or

(ii) by the prosecution, on an interlocutory basis, if the court determines that the records should be made available to the defense.

(e) Records disclosed under this rule shall remain in the exclusive custody of counsel for the parties, shall be used only for the limited purpose approved by the court, and shall be subject to such other terms and conditions as the court may provide.

(f) *Excision*. When some parts of material or information are discoverable and other parts are not discoverable, the party must disclose the discoverable parts and may excise the remainder. The party must inform the other party that nondiscoverable information has been excised and withheld. On motion, the court must conduct a hearing in camera to determine whether the reasons for excision are justifiable. If the court upholds the excision, it must seal and preserve the record of the hearing for review in the event of an appeal.

(4) At delinquency dispositions, reviews, designation hearings, hearings on alleged violation of court orders or probation, and detention hearings, the following shall be provided to the respondent, respondent's counsel, and the prosecuting attorney no less than seven (7) days before the hearing:

(a) assessments and evaluations to be considered by the court during the hearing;

(b) documents including but not limited to police reports, witnesses statements, reports prepared by probation officers, reports prepared by intake officers, and reports

prepared by placement/ detention staff to be considered by the court during the hearing; and

(c) predisposition reports and documentation regarding recommendations in the report including but not limited to documents regarding restitution.

(5) Failure to comply with subrules (B)(1) and (B)(4) may result in sanctions in keeping with those assessable under MCR 2.313.

The Committee recommends this amendment because there are presently few rules for discovery that are specific to delinquency matters. The current rules are inadequate to ensure that juvenile defendants have the information they need to mount a defense.

Privileged documents are presently an area of confusion in delinquency matters, and the amendment clarifies how they can be shared. The privilege review mechanism is borrowed from MCR 6.201(C).

The amendments also ensure that documents that will be submitted to the court during various non-trial hearings are shared in advance. Additionally, since the strict mechanisms of MCR 2.313 do not apply to the Family Division context, the Committee recommends to make sanctions for not following this rules simply "in keeping" with those assessable under MCR 2.313.

[subsections **(B) – (E)** renumbered as **(C) –(F)**]

RULE 3.973 DISPOSITIONAL HEARING

(A) – (D) [No change.]

(E) Evidence; Reports.

(1) – (4) [No change.]

(5) Reports in the Agency's case file, including but not limited to case services plans, treatment plans, substance abuse evaluations, psychological evaluations, therapists' reports, drug and alcohol screening results, contracted service provider reports, and parenting time logs shall be provided to the court and parties no less than seven (7) days before the hearing.

(6~~5~~) The court, upon receipt of a local foster care review board's report, shall include the report in the court's confidential social file. The court shall ensure that all parties have had the opportunity to review the report and file objections before a dispositional order, dispositional review order, or permanency planning order is entered. The court may at its discretion include recommendations from the report in its orders.

(F) – (H) [No change.]

The agency service plan and treatment plan are technically separate documents that always accompany each other. It is common practice for the Agency to submit a "court report" and other documents for a disposition hearing. However, there is currently considerable inconsistency in how and when those reports are shared with counsel for the parent and child. The amendment clarifies what must be shared and the timing of that discovery.

RULE 3.975 POST-DISPOSITIONAL PROCEDURES: CHILD IN FOSTER CARE

(A) – (D) [No change.]

(E) Procedure. Dispositional review hearings must be conducted in accordance with the procedures and rules of evidence applicable to the initial dispositional hearing. The Agency shall provide to all parties all reports in its case file, including but not limited to initial and updated case service plans, treatment plans, psychological evaluations, psychiatric evaluations, substance abuse evaluations, drug and alcohol screens, therapists' reports, contracted service provider reports, and parenting time logs. The reports shall be provided to the parties at least seven (7) days before the hearing. The reports that are filed with the court must be offered into evidence. ~~The report of the agency that is filed with the court must be accessible to the parties and offered into evidence.~~ The court shall consider any written or oral information concerning the child from the child's parent, guardian, legal custodian, foster parent, child caring institution, or relative with whom a child is placed, in addition to any other relevant and material evidence at the hearing. The court, on request of a party or on its own motion, may accelerate the hearing to consider any element of a case service plan. The court, upon receipt of a local foster care review board's report, shall include the report in the court's confidential social file. The court shall ensure that all parties have had the opportunity to review the report and file objections before a dispositional order, dispositional review order, or permanency planning order is entered. The court may at its discretion include recommendations from the report in its orders.

The Committee recommends this amendment because, as with dispositional hearings, it is common practice for the Agency to submit a "court report" and other documents for a dispositional review hearing. However, there is currently considerable inconsistency in how and when those reports are shared with counsel for the parent and the child. The amendment clarifies what must be shared and the timing of that discovery. The same is true for the proposed amendment to MCR 3.976 regarding Permanency Planning Hearings.

(F) – (H) [No change.]

RULE 3.976 PERMANENCY PLANNING HEARINGS

(A) – (C) [No change.]

(D) Hearing Procedure; Evidence.

(1) -(3) [No change.]

(4) Written reports in the Agency case file, including but not limited to case service plans, treatment plans, substance abuse evaluations, psychological evaluations, therapists' reports, drug and alcohol screens, contracted service provider reports, and parenting time logs, shall be provided to the court and parties no less than seven (7) days before the hearing.

See rationale for proposed amendments to MCR 3.973(E)(5).

(E) [No change.]

RULE 3.977 TERMINATION OF PARENTAL RIGHTS

(A) – (E) [No change.]

(F) Termination of Parental Rights on the Basis of Different Circumstances.

(1) [No change.]

(2) Discovery and Time for Disclosures and Hearing on Petition. Parties shall make disclosures as detailed in MCR 3.922(A) at least 21 days prior to the termination hearing and have rights to discovery consistent with that rule. The hearing on a supplemental petition for termination of parental rights under this subrule shall be held within 42 days after the filing of the supplemental petition. The court may, for good cause shown, extend the period for an additional 21 days.

(G) [No change.]

(H) Termination of Parental Rights; Other. If the parental rights of a respondent over the child were not terminated pursuant to subrule (E) at the initial dispositional hearing or pursuant to subrule (F) at a hearing on a supplemental petition on the basis of different circumstances, and the child is within the jurisdiction of the court, the court must, if the child is in foster care, or may, if the child is not in foster care, following a dispositional review hearing under MCR 3.975, a progress review under MCR 3.974, or a permanency planning hearing under MCR 3.976, take action on a supplemental petition that seeks to terminate the parental rights of a respondent over the child on the basis of one or more grounds listed in MCL 712A.19b(3).

(1) [No change.]

(b) [No change.]

(2) ~~Evidence~~Discovery, Prehearing Disclosures, and Evidence. Parties shall make disclosures as detailed in MCR 3.922(A) at least 21 days prior to the termination hearing and have rights to discovery consistent with that rule. The Michigan Rules of Evidence do not apply at the hearing, other than those with respect to privileges, except to the extent such privileges are abrogated by MCL 722.631. At the hearing all relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value. The parties must be afforded an opportunity to examine and controvert written reports received by the court and shall be allowed to cross-examine individuals who made the reports when those individuals are reasonably available.

(3) [No change.]

(I) – (K) [No change.]

The Committee recommends this amendment because a termination of parental rights (TPR) hearing is a critical stage in the proceedings with the court making a permanent decision regarding the relationship between the child and the parent(s). A TPR hearing

is conducted in many respects like a trial. In all TPR proceedings, whether or not the rules of evidence apply, considerable evidence is presented to the trial court. That evidence must be discoverable to ensure fairness, a key element of due process. At present, the court lacks any discovery instructions for TPR hearings. This amendment clarifies the applicability of the discovery rule, MCR 3.922(A), to these hearings.

SUBCHAPTER 5.000 GENERAL PROVISIONS

RULE 5.131 DISCOVERY GENERALLY

~~**(A)** The general discovery rules apply in probate proceedings.~~

~~**(B) Scope of Discovery in Probate Proceedings**. Discovery in a probate proceeding is limited to matters raised in any petitions or objections pending before the court. Discovery for civil actions in probate court is governed by subchapter 2.300.~~

(A) Civil Actions. Discovery for civil actions in probate court is governed by subchapter 2.300.

(B) Proceedings.

(1) Discovery in General. With the exception of mandatory initial disclosures under MCR 2.302(A), the discovery rules in subchapter 2.300 apply in probate proceedings, and, except as otherwise ordered by the court, any interested person in a probate proceeding is considered a party for the purpose of applying discovery rules.

(2) Mandatory Initial Disclosure.

(a) Demand or Objection. Mandatory disclosures under MCR 2.302(A) are required in probate proceedings if, by the time of the first hearing on the petition initiating the proceeding:

(i) an interested person other than the petitioner files a demand for mandatory initial disclosure and properly serves the demand on all interested persons or

(ii) an interested person objects to or otherwise contests the petition, in writing or orally, properly serves any written objection or response on all interested persons, and the judge determines mandatory initial disclosure is appropriate.

When mandatory initial disclosures are required through demand or objection, and except as otherwise ordered by the court, such disclosures must be made by the petitioner and any demandant or objecting interested person.

(b) Court Order. At any time, on its own motion or on a motion filed by an interested person, the court may require:

(i) mandatory disclosures and designate those interested persons who must make disclosures or
(ii) in a proceeding with some parties already making disclosures, an additional interested person or persons to make disclosures.

(c) Time for Initial Disclosures.

(i) The petitioner must serve initial disclosures within 14 days after the first scheduled hearing on the petition subject to a demand or objection.

(ii) The demandant or objecting interested person must serve initial disclosures within the later of 14 days after the petitioner's disclosures are due or 28 days after the demand or objection is filed.

(iii) When mandatory disclosures are ordered pursuant to MCR 5.131(B)(2)(b)(ii), an interested person's disclosures are due within 21 days after the court's order.

(3) Scope of Discovery in Probate Proceedings. Discovery in a probate proceeding is limited to matters raised in any petitions or objections pending before the court.

In addition to civil suits, which involve a plaintiff and a defendant and are clearly governed under Chapter 2 of the Michigan Court Rules, the Probate Court hears several types of petition proceedings that involve a petitioner, a respondent, and typically multiple other interested persons. Some Probate Court proceedings are highly litigated, involve two and potentially more represented interested persons, and are exactly like other highly litigated civil suits that would benefit from the initial disclosure provisions in the recommended revision to MCR 2.302. That being said, most actions in Probate Court involve in pro per litigants and are not in general suitable to initial disclosure.

The challenges posed to our Committee and to the additional probate specialists aiding this Committee's work were to fashion probate court rule amendments in Chapter 5 of the Michigan Court Rules which would (1) carve out the right proceedings and the right interested persons for purposes of initial disclosure and (2) make whatever other changes were necessary to make the use of discovery clearer and more efficient.

Given that MCR 5.131 is the lone court rule in Chapter 5 devoted to discovery in probate matters, and given that our charge was to make the minimal amount of alterations to court rules in order to effectuate needed changes, we focused our efforts on amending that rule. Several versions of a refashioned MCR 5.131 were considered, and provisions discussed included, among others, those that identified specific types of probate proceedings that were by default "contested," required contested proceedings to be subject to initial disclosure, and allowed for a "declaration of contest" to make a case subject to initial disclosure.

Comments on an earlier version of an amended MCR 5.131 were received, and some concerns were raised. The idea of a list of probate proceedings that were by default "contested" was objected

to on the grounds that not all (or even most) of the proceedings listed are typically in fact contested, let alone proper for initial disclosure; it was also pointed out that it would not always be apparent to any given probate court that filed pleadings, given the various ways they may be captioned, did or did not fit within one of the listed proceeding types. Some suggested that a proceeding should be contested, or at least ripe for initial disclosure, only on some kind of triggering event.

Comments were also received on the earlier version of MCR 5.131 suggesting, among other things, that enough time was not being provided to allow for responses by interested persons to trigger initial disclosures, a "declaration of contest" would be duplicative and likely result in more contested matters, and initial disclosures should only be something the judge orders. The final version of recommended changes to MCR 5.131 is proposed to meet the aforementioned challenges as well as properly address comments.

Proposed MCR 5.131(A) [currently the second sentence in MCR 5.131(B)] makes clear that discovery in civil suits filed in probate court are governed completely by subchapter 2.300 of the court rules. As such, each would be subject to the initial disclosure rules proposed at MCR 2.302.

Proposed MCR 5.131(B)(1) clarifies that discovery rules in subchapter 2.300, apart from those mandating initial disclosure, apply in general to probate proceedings. Any interested person has the rights of a "party" under subchapter 2.300.

The basic procedure for invoking mandatory initial disclosure in probate proceedings is laid out in proposed MCR 5.131(B)(2)(a). This subrule identifies the two types of "triggering events" for mandatory initial disclosure: the filing of a demand for mandatory initial disclosure, and the making of an objection with the concurrence from the judge that mandatory initial disclosure is appropriate. The intermediary concept of "contested" is no longer part of the recommended changes; instead, the interested person (through an attorney, we would expect) directly makes a demand for mandatory disclosure. In other cases of contest where the judge feels the parties can use and benefit from mandatory disclosure (mainly those with represented interested persons, we would expect) it can also be ordered. Either triggering event must occur by the time of the first hearing on the relevant petition.

These two triggering events thread the needle between the extremes of the judge controlling all uses of mandatory initial disclosure and any objecting interested person (represented or in pro per) triggering such disclosure. Here, attorneys who want mandatory disclosure will know what to demand in their pleadings, but the judge will be able to weed out the potentially numerous contested matters without a demand (many with unrepresented interested persons) where mandatory disclosure is not necessary.

When mandatory disclosure is required through MCR 5.131(B)(2)(a), not all interested persons are required to make disclosures, but rather, only the petitioner and anyone who demands mandatory initial disclosure or objects to the petition. While this process will typically result in two interested persons having to make initial disclosures (i.e., petitioner and person either demanding or objecting), it is possible that there may be more if there are two or more demandants or objecting interested persons.

Proposed MCR 5.131(B)(2)(b) makes clear that, at any time, the court can, on its own or in response to a request, require mandatory initial disclosure in a proceeding or require such disclosure of an interested person.

Proposed MCR 5.131(B)(2)(c) prescribes that a petitioner's initial disclosures are due within 14 days of the first hearing on the petition, and disclosures from any demandant or objecting interested person follows from this deadline. This gives all relevant interested persons notice of what is required of them and enough time to accomplish it. Interested persons who are later required to make disclosures have 21 days from the order.

Proposed MCR 5.131(B)(3) [currently the first sentence of MCR 5.131(B)] specifies that the scope of discovery in a Probate proceeding is limited to the matters raised under the petition and any objections.

Approved, SCAO

STATE OF MICHIGAN JUDICIAL CIRCUIT COUNTY	DOMESTIC RELATIONS VERIFIED FINANCIAL INFORMATION FORM	CASE NO.

Court address **Court telephone no.**

Plaintiff's name, address, and telephone no.

Defendant's name, address, and telephone no.

Plaintiff's attorney, bar no., address, and telephone no.

Defendant's attorney, bar no., address, and telephone no.

Instructions:

Unless waived in writing by the parties, or if a settlement agreement or consent judgment of divorce or other final order disposing of the case has been signed by both parties at the time of filing, each party must serve a fully completed and executed copy of this form within 28 days following the date of service of defendant's initial responsive pleading. If a party is self represented and his or her address is not disclosed due to domestic violence, the parties will exchange these forms at the first scheduled matter involving the parties or in another manner as specified by the court or stipulated to by the parties. If additional space is required to provide a complete answer to any question, attach additional pages and reference the question number being answered.

Notice: Failure to disclose assets or debts may result in sanctions by the court, including the possible forfeiture of an undisclosed asset.

If you are the victim of domestic violence, sexual assault, or stalking by another party to this case, you may omit disclosure of any information which might lead to the location of where you live or work, or where a minor child may be found.

Do not file this document with the Court. This document may be admissible in evidence.

Identification, income, and expenses

Full Name: _____ Date of Birth: _____

Address: _____

Phone No. _____

Social Security No.: _____ Drivers' License No. or State ID No: _____

E-mail Address: _____

Occupation: _____ Highest education/degree: _____

Name and address of employer and any other sources of income:

_____

Gross income (before taxes and deductions) from *all sources* for last calendar year: $_____

Gross income from all sources year to date: $_____

Employment benefits (for example, car allowance, expense reimbursements, health insurance). Explain:
_____
_____
_____

Attach your two most recent federal tax returns including all schedules, W-2's, 1099's and two most recent pay stubs.

Are there any other court cases involving you, the other party or any of your child(ren)? If so, identify the court and case number:
_____
_____
_____

For case numbers ending in DO, complete Sections 1 and 3
For case numbers ending in DM complete Sections 1, 2 and 3
For case numbers ending in DC, DS, or DP complete Sections 2 and 3.

Section 1: Assets and Debts

If there is not enough space on this form, list and attach the additional information on separate page(s) and state the total value at the bottom of this form.

REAL ESTATE:

Do you own real estate? If so, provide:

Complete Address: _____

Date Purchased: _____ Mortgage Balance: $_____ Mortgage Lender: _____

Monthly Mortgage Payment: _____ Does this include taxes and insurance? Yes____ No _____

Estimated Value: $_____ In whose name(s) is this property titled? _____

Home Equity Loan/Line of Credit Balance: $_____ Equity Loan/Line of Credit Company: _____

Monthly Equity Loan/Line of Credit Payment: _____

Do you own additional real estate? Yes _____ No _____

MOTOR VEHICLES (for example, automobiles, boats, snowmobiles, motorcycles, or recreational vehicles):

Year	Make	Model	Estimated Value	Amount Owed	Lender	Title Holder
			$	-$		
			$	-$		
			$	-$		
			$	-$		
			$	-$		
			$	-$		
			$	-$		
			$	-$		

ALL ACCOUNTS (for example, banking, investment, credit union, checking, savings, certificate of deposit, stock funds, annuities, all types of IRAs, 401(k), 403(b), trust accounts, or health savings accounts):

Name of Institution	Account No	Type of Account	Current Balance (before taxes)	Balance 3 months ago	Name(s) on Account
			$		
			$		
			$		
			$		
			$		
			$		
			$		
			$		
			$		
			$		

PENSIONS (any defined benefit plan which pays a monthly benefit at retirement age):

Company or Employer Name: _____

Lump Sum Value (explain or attach statement): $_____

Estimated Monthly Payment: _____ Earliest Commencement Date: _____

LIFE INSURANCE:

Name of Company	Policy Number	Policy Owner	Beneficiary	Death Benefit	Cash or Surrender Value
					$
					$
					$

OTHER PERSONAL PROPERTY EXCLUDING CLOTHING AND OTHER ITEMS OF NOMINAL VALUE (for example, gold, silver, jewelry, collectibles such as figurines, stamps, coins, guns, tools, furniture, or lawn and garden equipment):

Description	Estimated Value	Date Purchased or Acquired
	$	
	$	
	$	
	$	
	$	
	$	
	$	
	$	
	$	
	$	
	$	
	$	
	$	
	$	
	$	
	$	
	$	

MISCELLANEOUS:

Do you have access to any Safe Deposit Boxes? Yes_____ No_____ If yes, describe the location(s) and contents:
_____

Is anyone holding any money, accounts or assets for your benefit? If so, explain:
_____
_____

Are you named on any accounts or holding or acting as custodian of any asset(s) for the benefit of anyone else? If so, explain:
_____
_____

Do you have any ownership interest in any type of business whatsoever? If so, explain:
_____
_____

Do you have any present or anticipated future ownership interest (or possession of) any other asset(s) or compensation? If so, explain:
_____
_____

Does anyone owe you any money? If so, explain:
_____
_____

Do you claim any assets or debts are separate property? If so, explain:
_____
_____

Is there a prenuptial, mediation, or settlement agreement? _____. If so, please attach.

CREDIT CARDS, OTHER UNSECURED LOANS, OR DEBTS:

Name of Lender	Account Number	Balance Due	Name(s) on Account
		-$	
		-$	
		-$	
		-$	
		-$	
		-$	
		-$	
		-$	
		-$	
		-$	
		-$	

Provide three most recent statements for each account

_____

Total of assets on separate pages: $_____
Total of debts on separate pages: -$_____
Grand total of all disclosed assets, minus debts $_____

Section 2: Matters Relating to Children of the Parties

For each minor child, state:

Name and address of provider of child care services, if applicable:
_____
_____

Average monthly cost of child care: _____

Monthly health care insurance premiums for child(ren) relating to this case only:
_____
_____

Name and address of school(s):
_____
_____
_____

Name and address of pediatrician and all other medical, dental and mental health providers:
_____
_____
_____

Do you have a proposed parenting time plan? If so, please provide:
_____
_____
_____

_____

Section 3: Notarized Verification

The foregoing *Domestic Relations Verified Financial Information Form* and attachments have been carefully completed and reviewed by me, and I swear and affirm that the information provided above is true, complete and accurate to the best of my knowledge, information and belief.

Signed: _____

Printed Name: _____

Dated: _____

_____

_____, Notary Public

_____ County, Michigan

Acting in the County of _____

My Commission Expires: _____

Reviewed as to form, only:

_____

Attorney for _____

FOC __ (__/__) DOMESTIC RELATIONS VERIFIED FINANCIAL INFORMATION FORM MCR 3.206(A)(2)