Managing Expert Discovery

By Eric J. Pelton and Julia Turner Baumhart

Managing expert discovery and costs is an essential component to representing clients in litigation. Knowing the rules will ensure you are not surprised by expert testimony at trial. Additionally, working with your opposing counsel to manage expert costs will benefit all parties to the litigation.

Scope of expert discovery

The Michigan Rules of Civil Procedure provide specific regulations on the use of experts and discovery of expert material.[1] Expert discovery is limited to the facts known and opinions held by experts who are expected to testify at trial.[2] Discovery of consulting experts is restricted to special circumstances.[3] For testifying experts, the scope of discoverable information is limited to the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.[4] Although the party proffering the expert testimony often voluntarily produces a report containing this information, the state rules, unlike the federal rules, do not require a report. Rather, discovery is limited to interrogatories and depositions. Separate rules apply to medical and mental health experts.[5]

Interrogatories

Interrogatories may require a party expecting to proffer expert testimony at trial to (1) identify the expert, (2) state the subject matter about which the expert is expected to testify, (3) state the substance of the facts and opinions to which the expert is expected to testify, and (4) provide a summary of the grounds for each opinion.[6] Because a report is not required, it is imperative that a party serve interrogatories that expressly track this rule. The party seeking discovery should insist on thorough answers that will enable the party to prepare for trial. The party's own consulting or testifying expert should review and analyze the sufficiency of the answers.

A party may wish to avoid the cost of an expert deposition or avoid previewing an opposing expert's weaknesses it intends to expose at trial. In such instances, pressing for detailed interrogatory responses becomes even more critical to lock the expert into their specific opinions and basis for their opinions. Where the necessary level of detail is not provided, even with persistent prodding, the discovering party must file a motion to compel or, in the alternative, move to exclude the testimony at trial. Be aware, however, that at least one commentator suggests "that a party's response to interrogatories of this nature should be sufficiently detailed to permit examination and review by another expert, but not necessarily so detailed as to substitute for a deposition a party might consider introducing at trial."[7]

Another challenge presented by reliance on interrogatories is that, in many cases, a party may be seriously considering an expert but may not have concluded during discovery that it will use that expert. While identifying anticipated areas of expert testimony must be provided in initial disclosures,[8] the rule providing for interrogatories, in contrast, is limited to those experts a party expects to call and not necessarily those the party may anticipate calling.[9] In such instances, a party is wise to demand answers to the interrogatories once a witness list is filed under MCR 2.401(I) and demand supplementation in a timely manner.[10] The party should then insist that a proffering party provide complete and thorough answers before discovery closes and in time to take a deposition if necessary. If the party offering the expert equivocates, a motion to compel or to exclude the expert should be considered.[11]

Depositions

Depositions of testifying experts can be taken for the purpose of discovery only.[12]

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Depositions are not admissible at trial except for impeachment purposes. A party need not obtain a protective order under MCR 2.302(C)(7).[13]

The party taking the deposition incurs only the cost of the expert's reasonable fee for time spent in the deposition.[14] The deposing party does not cover time for the expert to prepare or other fees incurred in obtaining facts and opinions from the expert without further order of the court.[15]

A *de bene esse* deposition may be taken any time before trial if the party expects to call the witness at trial.[16] The rule allows for this process, expressly providing that the court does not have to adjourn trial due to the unavailability of an expert witness. This rule applies not only to expert witnesses under MCR 2.302(B)(4), but also to medical experts under MCR 2.311.[17]

Expert reports limited to medical and mental health experts under MCR 2.311

Contrary to the Federal Rules, the general rule under Michigan law is that expert reports are not mandatory. However, the Michigan Rules make a limited exception for medical and mental health experts who examine a party after prevailing on a motion or reaching agreement between the parties to proceed with a forensic examination. Pursuant to MCR 2.311, where the mental or physical condition of a party or person within a party's custody or legal control is in controversy and upon a showing of good cause, a court may order that individual to appear for an examination.[18] If the party or individual being examined requests, the party who sought the examination must produce a detailed written report by the examiner that includes all findings, test results, diagnoses, conclusions, and reports of any earlier examinations for the same condition, and must make available for inspection x-rays and other diagnostic aids.[19]

Upon delivery of the report(s), the party initiating the examination is entitled to request and receive from the party or individual being examined reports, x-rays, and other aids of all earlier and later examinations of the same condition.[20] The sanction afforded to any party denied access to any report is a court-ordered deposition of the examining physician or mental health expert.[21] The Michigan rule, in this and other ways, differs from the parallel federal rule under which the court may preclude the trial testimony of the uncooperative health provider.[22] In addition, an uncooperative party who refuses a request to provide a report may be held in contempt of court under MCR 2.313.[23]

Another critical difference between MCR 2.311 and the federal rule is interpretation of the requirements that a party's condition be "in controversy" and that "good cause" exists for the exam. FR Civ P 35(a) follows the principle that it must be the party who has placed his or her physical or mental health in controversy in order for good cause to exist, which the party usually does when suing for personal injuries or emotional harm.[24] The Michigan Court of Appeals, however, has held that an opposing party may satisfy the "in controversy" and "good cause" requirements merely by alleging "garden variety" emotional distress as opposed to alleging mental health treatment for intentional infliction of emotional distress or some otherwise recognizable mental health diagnosis.[25]

Work product under MCR 2.302(B)(4)(f)

The 2020 amendments to the Michigan Court Rules add subrules (e) and (f) to the historic expert provisions of MCR 2.302(B)(4).[26] These subrules expressly protect drafts of interrogatory answers and communications between a party's attorney and the party's expert witness as attorney work product under MCR 2.302(B)(3)(a). It should also be read to apply to experts under MCR 2.311.[27] Although there are no staff comments, subrule (e) tracks the protection of draft reports under the Federal Rules of Civil Procedure and subrule (f) is identical to the parallel federal rule.[28] The Federal Advisory Committee notes to the 2010 amendments of the Federal Rules of Civil Procedure explain the extent and purpose of these provisions.[29] Subrule (e) extends to all drafts of any interrogatory answer and, like its federal counterpart covering draft expert reports, the protection extends to any form in which the draft is recorded.

Subrule (f) protects communications between the party's attorney and expert witness with three exceptions: those related to compensation for the expert's study or testimony; the identity of facts or data provided by the party's attorney; and those assumptions provided by the party's attorney upon which the expert relied in forming opinions.[30] The Federal Advisory Committee notes state that these exceptions "do not extend beyond those specific topics." Although the topics are interpreted broadly, an expert's notes do not fall within an exception and must be disclosed.[31]

Managing costs

Generally, the biggest expense in managing expert discovery falls squarely on expert depositions. As previously mentioned, when a party deposes an opposing expert, the expert fees charged to the opposing party are limited under MCR 2.302 to the time the witness spends giving deposition testimony. They are limited to the ordinary witness fees unless a higher fee is set by the court. To pay or accept a higher fee without being awarded such higher fee by the court subjects both the witness and the paying

party to contempt of court and sanctions.[32] Unfortunately, some experts inflate fees for deposition testimony, which necessitates a motion to set a reasonable fee in order to convince the court to set a fee that is both reasonable to the paying party and for the expert witness. Such fee should arguably be limited to their usual fee for time expended rendering services.[33]

Another way to keep expert deposition costs to a minimum is to seek agreement among the parties and the court to defer non-liability expert discovery until after the court has ruled on any dispositive motions. Because civil cases often involve only damages experts, expert discovery may prove wholly unnecessary if the plaintiff cannot raise a fact question warranting a trial. We've found that many courts have proved receptive to such an agreement, although others at both the state and federal level have refused to allow this arrangement.

Expert testimony is, in many instances, the most critical and potentially most expensive component of litigation. Maximizing the benefits of such evidence while controlling the costs requires counsel's thorough knowledge of what the controlling state and federal rules allow or make mandatory. To be effective, counsel will need to work with opposing counsel to abide by the requirements and manage expert costs while challenging opposing counsel when necessary to best represent the client's interests. ■

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ENDNOTES

1. MCR 2.302(B)(4) and MCR 2.311.
2. MCR 2.302(B)(4).
3. MCR 2.302(B)(4)(b) and Longhofer & Quick, *Michigan Court Rules Practice (7th Ed)* (Eagen: West Publishing, 2018), § 2302.18. Such instances may include changing conditions after an expert's inspection.
4. MCR 2.302(B)(4)(a)(i).
5. MCR 2.311.
6. MCR 2.302(B)(4)(a)(i).
7. *Michigan Court Rules Practice*, § 2302.16.
8. MCR 2.302(A)(1)(h).
9. MCR 2.302(B)(4)(a)(i).
10. MCR 2.302(E)(1).
11. *Beach v State Farm Mutual Ins Co*, 216 Mich App 612, 618–620; 550 NW2d 580 (1996).
12. MCR 2.302(B)(4)(a)(ii).
13. *Id.*
14. MCR 2.302(B)(4)(c).
15. *Id.*
16. MCR 2.302(B)(4)(d).
17. *Kristin v Salo*, 428 Mich 889; 403 NW2d 806 (1987).
18. MCR 2.311(A).
19. MCR 2.311(B)(1).
20. MCR 2.311(B)(2).
21. MCR 2.311(B)(3).
22. FR Civ P 35(b)(5).
23. *Sanders v Westin Hotel, Inc*, 172 Mich App 161, 165; 431 NW2d 414 (1988).
24. *Schlagenhauf v Holder*, 379 US 104, 119; 85 S Ct 234; 13 L Ed 2d 152 (1964).
25. *LeGendre v Monroe Co*, 234 Mich App 708, 726; 600 NW2d 78 (1999), following *Hyde v University of Michigan Regents*, 226 Mich App 511; 575 NW2d 36 (1997).
26. MCR 2.302(B)(4)(e) and (f).
27. *Michigan Court Rules Practice*, § 2311.11.
28. FR Civ P 26(b)(4)(B) and (C).
29. For a detailed explanation, see Liggins et al, *Civil Discovery: The Guidebook to the New Civil Discovery Rules*, SBM (January 1, 2020), p 26 <https://www.michbar.org/file/generalinfo/civildiscovery/civildiscovery_guidebook.pdf> [https://perma.cc/F2DG-RRDQ]. Website was accessed September 11, 2020.
30. MCR 2.302(B)(4)(f)(ii)–(iii).
31. *Civil Discovery: The Guidebook*, p 26, citing *Deal Wireless, LLC v Selective Way Ins Co*, unpublished order of the United States District Court for the Eastern District of Michigan, signed May 4, 2016 (Civ No. 15-14280), p 2 and *Wenk v O'Reilly*, unpublished opinion and order of the United States District Court for the Southern District of Ohio, issued March 20, 2014 (No. 2:12-cv-474), p 2.
32. MCL 600.2164(1).
33. *Id.*