Civil Discovery Court Rule Review Special Committee Report and Draft Proposal

September 25, 2017

THE STATE BAR OF MICHIGAN
CIVIL DISCOVERY COURT RULE REVIEW
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I. INTRODUCTION

The Civil Discovery Court Rule Review Special Committee of the State Bar of Michigan ("Committee") has a simple mission: in light of the issues surrounding discovery in civil litigation, should the Michigan Court Rules be revised and how?

First, what are the issues surrounding civil discovery? 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 throughout the federal court system and numerous state courts – is that the manner in which civil discovery is conducted is a problem. In short, discovery:

- is too expensive;
- is widely reviled by practitioners and judges;
- impedes access to justice; and
- distorts administration of judicial resources.

Second, should the court rules be revised in relation to civil discovery? The Michigan Rules of Court were adopted in 1985 and incrementally updated over the years. There has not been a holistic review of the rules in the intervening 32 years, or even a systematic review of a significant portion of the rules, such as those governing 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, the changes during the past three decades in the federal courts, and various state court initiatives throughout the country. Our 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 reflected in this Report are incremental in nature. The Committee did not tear down the rules and start with a blank sheet of paper, nor did we elect to simply adopt federal practice. Indeed, a guiding principle of our work was to do the least

amount of harm 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, "The amendments may not look like a big deal at first glance, but they are."[1] So too, we feel, these changes are, if adopted, a big deal and a positive step for justice in Michigan.

II. DISCOVERY REFORM IN OTHER JURISDICTIONS

The expense and burden of the civil litigation 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 the imposition of 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.[2] 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.[3] 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.[4]

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.

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[1] 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 August 29, 2017).

[2] The American College of Trial Lawyers set forth a proposal, previously been 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.

[3] 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).

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

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.[5] The major themes that emerged from the survey were:

> 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.
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> 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."
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> 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."[6]

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

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[5] 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 August 24, 2017).

[6] *Id*. at 2.

economic experiments without risk to the rest of the country."[7] 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. (See Section V for citations.)

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. After recommendations forwarded through the Representative Assembly and then the Bar, eventually a Committee to Revise and Consolidate the Court Rules was formed, resulting in a report in 1978 (402A Mich). After additional input, proposals and revision, the Supreme 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. On occasion there have been revisions across numerous rules with a common topic, such as the changes in 2008 with regard to electronic discovery. More often there have been discrete changes to particular rules, emanating primarily from the Bar or the Court itself.

III. THE SCOPE, MAKEUP, AND WORKFLOW OF THE COMMITTEE

The work of the Committee was first recommended to the Board of Commissioners (the "Board") of the State Bar of Michigan by the Bar's Civil Procedure and Courts Committee in 2013. The Board adopted the Committee's recommendation and suggested to the Supreme Court that it participate in a joint review project. In 2015, the Court recommended that the Bar proceed on its own with a review and set of proposed changes.[8] In 2016, as part of the Bar's 21st Century Task Force final report[9], the Board included the following amongst its goals:

- Modify court rules to reduce the expense and burden of civil discovery.
- Research 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.
- Modify court rules and administrative procedures to better utilize mediation and alternative dispute resolution (ADR).
- Promote business process analysis, problem-solving court principles, and best practices to courts, law firms, legal aid programs, and other justice system entities.
- Promote the use of properly trained mediators or special masters to expedite the discovery process.

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

8 Letter from Anne Boomer to Janet Welch, January 7, 2015.

9 The State Bar of Michigan 21st Century Practice Task Force Report (July 18, 2016) <https://www.michbar.org/file/future/21c_WorkProduct.pdf> (accessed August 29, 2017).

Thereafter, then-President Lori Buiteweg formed the Committee.

The Committee consists of stakeholders with differing perspectives on and roles in the judicial system. Its members include 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.

The diversity and breadth of the Committee was then further complemented by wide solicitation of volunteers from various stakeholder groups, which volunteers then served on numerous subcommittees. This group of 30 additional volunteers further rounded out the breadth of viewpoints contributing to the Committee's work.

The Committee's work has been conducted in three stages: (1) review of the issues with regard to civil discovery and invite comment from stakeholders; (2) consideration and drafting of potential revisions; and (3) publication of the draft for comment and input from the public, Bar, and key stakeholder groups. After these steps, the Committee will review all feedback, revise the draft, and submit it to the Representative Assembly at its April 2018 meeting. If approved, the Report will be forwarded to the Michigan Supreme Court for consideration.

IV. GUIDING PRINCIPLES AND OVERVIEW OF PROPOSED CHANGES

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

Just as much as the need for reform was agreed upon by the Committee, there was also consensus on what not to do.

First, there was little desire to simply scrap Michigan procedure and largely adopt the federal rules. Significant differences between federal practice and Michigan practice made cutting-and-pasting inadvisable, including the types of cases litigated, the volume of cases, and disparate resources in terms of court and administrative staff. 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, there was keen awareness 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 bottle-neck 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.[10] After consideration, the

[10] *See*, e.g., Utah Rule of Civil Procedure 26(c)(5)(http://www.utcourts.gov/resources/rules/urcp/urcp026.html) and discussion in the NCSC Civil Justice Initiative

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 enhancements to early scheduling conferences, adoption of a discovery plan protocol, allowance for discovery mediators, and enhanced final pre-trial practice.

B. Modifying Civil Discovery to Avoid Excessive Discovery

1. 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.[11]

Most of the proposed rule changes rely, ultimately, 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 our courts, and is particularly evident in the business courts. It will require time, education, and repeated reinforcement of these principles from the judicial branch, the bar, and other stakeholders to effectuate change.

2. 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

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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).

[11] 2015 Year-End Report on the Federal Judiciary, *supra* note 1, at 5-6 (emphasis in original).

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.

3. Adopting Modest Initial Disclosures and Presumptive Limits on Interrogatories and Depositions

The Committee proposes changes in the flow of discovery to get more information out sooner and to place some presumptive limits on those devices most often abused (interrogatories and depositions). The Committee proposes a 10 deposition limit with each deposition lasting no longer than 7 hours. These restrictions match those set forth in FR Civ P 30. The limits may be set aside through stipulation of the parties or court order. The Committee was more divided over a presumptive 20 interrogatories limit (less than under FR Civ P 33). While the majority of the Committee favored the limit, others favored the status quo, or favored a greater or lesser number of interrogatories. Like the presumptive limit on depositions, the interrogatory limit may be expanded via stipulation or court order.

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 our civil courts.

4. 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 our 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(K)) 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 mechanisms in the court rules, a practice already widely utilized in some courts.

C. Updating Numerous Topics and Borrowing Best Practices, When Advisable, from Other Jurisdictions

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

- While the committee considered and rejected the use of expert reports as under the federal rules (given the different mix of cases in state court), we recommend 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).

- Adoption of new proposed 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 narrow its application to non-party subpoenas, whereas party discovery is governed by MCR 2.306, 2.307, and 2.308-310.

- 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(I).

- Modification of MCR 8.119(I)(4) to allow for the filing of exhibits to motions and briefs under seal without cumbersome motion practice, while preserving both the appellate courts' and the public's appropriate access to judicial records.

D. Attention to Discovery in Various Specialty Areas

The discovery rules in subchapter 2.300 apply, in various instances, to proceedings in domestic relations matters, proceedings involving juveniles and probate court. 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, requirement of an automatic financial disclosure early in the case pursuant to new proposed MCR 3.206(B)(2).

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

Juveniles (subchapter 3.900):

- 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.

V. 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/.../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:
http://www.wsba.org/~/media/Files/Legal%20Community/Committees_Boards_Panels/ECCL%20Task%20Force/Reports/ECCL%20Final%20Report%2006152015.ashx

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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.

(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.

(C) Course of Discovery. The court may control the scope, order and amount of discovery as provided in 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. 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]

[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.

(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;

(d) a copy—or a description by category and location—of all documents, electronically stored information, 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;

(e) a description by category and location of all documents, electronically stored information, 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 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. 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).

(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,

(ii) the payments the insurance company has made on the claim, and

(iii) related claims and litigation.

(b) The plaintiff must disclose:

(i) the identity of those who provided medical, household, and attendant care services to plaintiff,

(ii) all provider bills for which the plaintiff seeks reimbursement, and

(iii) the name, address, and phone number of plaintiff's employers.

(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 for all providers.

Subrules (2) and (3) are adapted in part from Wayne County Circuit Court's Addendum to Scheduling Order in No-Fault Cases. In addition to those requirements, the proposal adds disclosure by the insurance company of payments and related claims and litigation. 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.

(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. 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 issues [or, the public or private importance of the issues[2]], 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.

[2] Fed.R.Civ.P. 26 uses the phrase "importance of the issues at stake in the action." The 1983 commentary explains: "The elements of Rule 26(b)(1)(iii) address the problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of the issues at stake in a case seeking damages, the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as measured in philosophic, social, or institutional terms. 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." The committee believed that expressly stating "public or private" might add clarity.

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.

The federal rule includes "the importance of the issues at stake in the action" as a proportionality factor. The subcommittee shortened that language to refer to just "the issues." The subcommittee was concerned that the federal rule language would invite judges to make judgments on what issues were of personal importance to them. See also the alternative phrasing addressed in the footnote above.

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 changes]

(4) Trial Preparation; Experts.

…

(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 Electronically Stored Information ("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.* 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 of discovery. Additionally, the court may limit the frequency or extent of discovery of ESI, whether or not the ESI is from a source that is reasonably accessible, taking in to consideration whether it is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive; and whether the party seeking discovery has had ample opportunity by discovery to obtain the information sought.

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.

Language similar to that used in Delaware is recommended because it is consistent with recent trends that encourage courts to be more involved in case management.

(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) *Disclosures*. A party who has made a disclosure under MCR 2.302(A) must seasonably supplement or correct the disclosure when new or additional information is discovered or revealed, or if the party learns that in some material respect the disclosure was incomplete or incorrect. The duty to supplement under this subrule does not apply if the additional or corrective information has otherwise been made known to the other parties during the discovery process or in writing.

Adapted from FR Civ P 26(e)(1)(A) and proposed Ariz R Civ P 26.1(f)(2). The federal rule language requiring supplementation "in a timely manner" is changed to "seasonably" to conform to the other provisions in the current rule that use the same term. Note that the circumstances triggering supplementation for disclosures is different than the existing trigger for supplementation of discovery responses. While the Committee did not wish to amend existing MCR 2.302(E)(1)'s standard for supplementation of responses, the Committee suggests that the Court consider unifying language applicable to both disclosures and responses, as is the case in FR Civ P 26(e).

(b) *Discovery Responses*. 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)~~(i) A party is under a duty seasonably to supplement the response with respect to a question directly addressed to

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

~~(ii)~~(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.

~~(b)~~(ii) 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)~~(I) the response was incorrect when made; or

~~(ii)~~(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.

(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), the limits on depositions in MCR 2.306(A)(3), 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) a 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; and

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) a 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 or 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 subcommittee 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 SUBPOENA FOR TAKING DEPOSITION OF NON-PARTY

(A) General Provisions.

(1) A represented party may issue a subpoena under MCR 2.506 for a deposition of a non-party ~~Subpoenas shall not be issued except in compliance with MCR 2.306(A)(1)~~upon court order or after all parties have had a reasonable opportunity to obtain an attorney, a 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 deposition subpoenas. MCR 2.306(B)(1)-(2) and (C)-(G) apply to a deposition under this rule. This rule governs a subpoena for a non-party under MCR 2.303(A)(4), 2.307 or 2.315.

(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.~~

(3) A ~~deposition notice and~~ subpoena under this rule may provide that the deposition 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.

(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, 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) condition denial of the motion on prepayment by the person 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. A copy of the subpoena must be served on all other parties ~~in the same manner as the deposition notice~~.

(6) In a 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 subpoena shall be served at least 14 days' prior to the scheduled deposition. Within 10 days of being served with the subpoena, the subpoenaed entity may serve objections, or may 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, 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. The persons designated shall testify to matters known or reasonably available to the organization.

[subrules B-F unchanged]

The existing rules are confusing as to the different procedural aspects of party depositions vs. non-party depositions. 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 and actively in the case, and a later-served party now wants to depose the same witness).

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) Each separately represented party may take no more than a total of ten depositions under this rule, MCR 2.305 and MCR 2.307.

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

The ten-deposition limit applies to the total number of depositions taken orally under MCR 2.305, 2.306 and on written questions under MCR 2.307. It applies to all witnesses, both fact witnesses and experts. These limits can be changed by stipulation or order. See MCR 2.302(D)(1).

There are two possible ways to limit depositions. The federal rule limits the number of depositions. FR Civ P 30(a)(2)(A)(i). The proposed Arizona rule limits the total hours of depositions, not the number of depositions. Proposed Ariz R Civ P 26.2(e). Utah has similar limits. Utah R Civ P 26(c)(5). The subcommittee recommends limiting the number of depositions because that is easier to track.

The committee chose a presumptive limit of ten depositions by each separately represented party. The federal rules limit is ten depositions per side. FR Civ P 30(a)(2)(A)(i). The proposed Arizona limits are five hours in tier 1, 15 hours in tier 2, and 30 hours in tier 3. Proposed Ariz R Civ P 26.2(e).

The committee chose a presumptive seven-hour limit on the duration of a deposition. 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).

The limits on the number of depositions apply to "each separately represented party." The committee considered applying the presumptive limits to each "side," as defined in proposed Ariz R Civ P 26.2(e): plaintiffs collectively, defendants

collectively, and third-party defendants collectively. However, the committee thought that different parties on a "side" may have different interests that may make problematic an overall limit on discovery for the "side." The federal rules apply deposition limits to each side and interrogatory limits to each party. FR Civ P 30(a)(2)(A)(i), 33(a)(1). The committee settled on applying the presumptive limits to "each separately represented party." The intent of applying presumptive limits to "each separately represented party" is to apply the limit to multiple parties represented by the same attorney or the same firm.

The committee chose these presumptive limits with the view that they would suffice for a meaningful majority of cases, while still allowing changes in the limits by stipulation or order depending on the nature of the case. The presumptive limit of ten depositions for each separately represented party would allow upwards of at least 20 depositions in a case, which captures most civil cases. Even when the presumptive limits apply, the parties should exercise discretion in determining the number and length of depositions. The rule is not intended to provide an incentive to take the maximum number of depositions allowed or to unnecessarily prolong a deposition to the seven-hour maximum. In this, as in all discovery, the parties should be mindful of the proportionality principles that govern the scope of discovery.

(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. Within 10 days of being served with the notice, the noticed entity may serve objections, or may 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 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.

(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)(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)~~(i) on the plaintiff after commencement of the action;

~~(2)~~(ii) 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 separately represented party. An interrogatory containing discrete subparts counts as a single 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).

Whereas the committee was fairly unified behind the 10 deposition presumptive limit, there was less consensus on whether a limitation of interrogatories was advisable. On one hand, many committee members felt interrogatories were inefficient and often failed to generate meaningful information without negotiation and perhaps motion practice. They were willing to accept a presumptive limit especially given the information called for as part of initial disclosures. 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.

If there is to be a limit, the committee chose this limit with the view that initial disclosures will provide much of the information that a party would otherwise seek in interrogatories. The committee chose a presumptive limit of twenty interrogatories, which 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).

See the comment to proposed MCR 2.306(A)(3) for discussion of applying the limit to "each separately represented party" and general proportionality considerations that should apply to limit discovery even when the presumptive limits apply.

Finally, if there are to be limits, there was some discussion as to whether the limits should apply to domestic relations actions where the parties often utilize interrogatories to obtain information on a variety of disparate topics. This draft does not call for special treatment for domestic relations actions.

(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 2.312 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.* [No change.]

(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)(~~4~~5) or 2.307(A)(1),

~~(c)~~(iii) a party fails to answer an interrogatory submitted under MCR 2.309, 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, the party seeking discovery may move for an order compelling an answer, a designation, or inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(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.

(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 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,

~~(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) [No change.]

(2) A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

This is from FR Civ P 37(d)(1)(B).

~~(2)~~(3) 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)~~(4) 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)~~(E).

(E) Failure to Preserve Electronically Stored 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.~~ If electronically stored information 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:

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

(ii) an order or jury instruction directing that the finder of fact may or must presume the information was unfavorable to the party; or

(iii) 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, 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.

[No change in remainder of the rule.]

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 sub-rule (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 electronically stored information.

(e) the simplification of the issues;

(f) the amount of time necessary for 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, and whether to specify expert disclosure deadlines;

(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);

(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, in 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)~~(D), 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 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 in the limitations on discovery imposed under these rules,

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

~~(iv)~~(vi) the exchange of witness lists under subrule ~~(I)~~(J), 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 electronically stored information, any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production, preserving discoverable information, and the form in which electronically stored information 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 an outstanding 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 appropriate 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.**~~ See MCR 2.401(B)(1) proposal

Existing (D)-(G) – no changes

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

(1) If the court finds at a 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. The conference shall be attended by at least one lead attorney who will conduct the trial for each party and by any unrepresented party. 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 which may provide for:

(a) Scheduling motions in limine;

(b) A concise statement of plaintiff's claim, including legal theories;

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

(d) A statement of any facts or other matters to which the parties have stipulated;

(e) Issues of fact to be litigated;

(f) Issues of law to be litigated;

(g) Evidence problems likely to arise at trial;

(h) Witnesses: Which witnesses will be called in the absence of reasonable notice to opposing counsel to the contrary, and which witnesses may be called, listed by category, as follows:

i. Live lay witnesses;

ii. Lay depositions including resolving objections and identifying portions to be read or played;

iii. Live expert witnesses;

iv. Expert depositions including resolving objections and identifying portions to be read or played;

(i) 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;

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;

(o) Rules governing conduct of trial;

(p) 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 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 changes]

(J) Electronically Stored Information ("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 applications and manner in which the 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, shall be produced;

(h) the time within which the information will be produced;

(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) claw-back or other provisions for privileged or protected ESI;

(m) whether allocation among the parties of the expense of production is appropriate, and,

(n) 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 format by which ESI will be produced; and

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

(3) **ESI Competence**. Attorneys for the parties 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 *sua sponte*.

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 in to 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. 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 on-going 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 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 electronically stored information, 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 emphasis 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., why 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 to produce ~~notes, records,~~ documents ~~, photographs,~~ or other portable tangible things ~~as specified~~. A request for documents 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).

(2) A subpoena may specify the form or forms in which electronically stored information 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 need only produce the same information in one form.

(3) A person responding to a subpoena need not provide discovery of electronically stored information 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.

***

(D) Form of Subpoena. A subpoena must:

[…]

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

(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) stay further proceedings until the order is obeyed;

(2) tax costs to the other party or parties to the action;

(3) strike all or a part of the pleadings of that party;

(4) refuse to allow that party to support or oppose designated claims and defenses;

(5) dismiss the action or any part of it; or

(6) enter judgment by default against that party.

(G) [no change]

(H) Hearing on Subpoena or Order To Attend.

(1) A person served with a subpoena or order to attend 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) The court may direct that a special hearing be held to adjudicate the issue.

(3) For good cause with or without a hearing, the court may excuse a witness from compliance with a subpoena, the directions of the party having it issued, or an order to attend.

(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 the subpoena by motion under MCR 2.302(C) filed before the time specified in the subpoena, 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 3.206 PLEADING

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

(B) Verified Statements.

(1) [No change.]

(2) Verified Financial Information Statement. 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 verified statement of income, assets, and liabilities 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' verified statements of income and financial assets 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. Failing to provide this disclosure may be addressed by the court or by motion consistent with MCR 2.313. This disclosure does not preclude additional discovery.

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.

(~~2~~3) The information in the ~~verified~~ statements 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 that is served on the other party.

(~~3~~4) If any of the information required to be in the ~~verified~~ statements is omitted, the party seeking relief must explain the omission in a sworn affidavit, to be filed with the court.

(C) Attorney Fees and Expenses.

(1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.

(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.

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.

MCR 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 statement under MCR 3.206;

(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;

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

(8) Any other document which, if made public, would intrude upon the privacy interests of a party or minor child.

(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 that 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 in any event shall be produced no less than 21 days before trial ~~provided 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, addresses, and phone numbers 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; and

(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.

(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 (1) and (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.

(B) Discovery 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 but in any event shall be produced no less than 21 days before trial:

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

(b) 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;

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

(d) 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

(e) 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 discover information or evidence that is protected from disclosure by constitution, statute, or privilege, including information or evidence protected by a respondent's right against self-incrimination, except as provided in subrule (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 order 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 documents regarding restitution.

(5) Failure to comply with subrules (1) and (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

Subrules (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.

(65) 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.

Subrules (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) Dispositional Review Hearings. A dispositional review hearing is conducted to permit court review of the progress made to comply with any order of disposition and with the case service plan prepared pursuant to MCL 712A.18f and court evaluation of the continued need and appropriateness for the child to be in foster care.

(B) – (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 comment 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) Procedure. Each permanency planning hearing must be conducted by a judge or a referee. Paper reviews, ex parte hearings, stipulated orders, or other actions that are not open to the participation of (a) the parents of the child, unless parental rights have been terminated; (b) the child, if of appropriate age; and (c) foster parents or preadoptive parents, if any, are not permanency planning hearings.

(2) Evidence. The Michigan Rules of Evidence do not apply, other than those with respect to privileges, except to the extent such privileges are abrogated by MCL 722.631. At the permanency planning 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 court must consider any written or oral information concerning the child from the child's parent, guardian, custodian, foster parent, child caring institution, or relative with whom the child is placed, in addition to any other evidence offered at the hearing. The court shall obtain the child's views regarding the permanency plan in a manner appropriate to the child's age. The parties must be afforded an opportunity to examine and controvert written reports received and may be allowed to cross-examine individuals who made the reports when those individuals are reasonably available.

(3) 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.

(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

[Subrule (A) – (G) no changes]

(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) Time.

(a) Filing Petition. The supplemental petition for termination of parental rights may be filed at any time after the initial dispositional review hearing, progress review, or permanency planning hearing, whichever occurs first.

(b) Hearing on Petition. The hearing on a supplemental petition for termination of parental rights under this subrule must 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.

(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) Order. The court must order termination of the parental rights of a respondent and must order that additional efforts for reunification of the child with the respondent must not be made, if the court finds

(a) on the basis of clear and convincing evidence admitted pursuant to subrule (H)(2) that one or more facts alleged in the petition:

(i) are true; and

(ii) come within MCL 712A.19b(3).

(b) that termination of parental rights is in the child's best interests.

(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) The general discovery rules in subchapter 2.300 apply in probate proceedings, except that the initial and other mandatory disclosures under MCR 2.302(A) are required only in a proceeding or matter that is contested. Notwithstanding the time for initial disclosures specified at 2.302(A)(1)(b), initial disclosures in probate proceedings are due within 21 days after a pre-trial conference under MCR 2.401, or within 21 days after the first hearing on the contested petition, whichever is earlier.

(a) Specific Contested Proceedings. Unless otherwise ordered by the court, actions for the following are contested proceedings: remove a fiduciary; surcharge a fiduciary; probate a lost or destroyed will or later-discovered will; determine heirs, devisees, or beneficiaries; construe, reform, or modify a governing instrument; cancel a devise or gift; partition property for the purposes of distribution; determine pretermitted status or pretermitted share; determine amount of elective share and contribution; and revocation of probate of a will.

(b) Declared Contested Proceedings. In addition to matters deemed contested under subrule (a), proceedings are contested if an interested person executes a declaration of contest, serves the declaration on other interested persons, and files the declaration and proof of service with the court. Any declaration of contest must be served and filed within 21 days after the filing of the petition initiating the proceedings, or prior to the first hearing on the petition, whichever is earlier.

(c) Contested Status by Order. The court may determine any proceeding to be a contested proceeding at any time.

(2) For purposes of discovery, an interested person is considered a party under the general discovery rules if that interested person is the petitioner or respondent, files a responsive pleading, or otherwise serves a declaration under MCR 5.120(B). The probate court, on its own motion or a motion filed by an interested

person, may designate an interested person a party for purposes of discovery upon good cause shown.

(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.

Not all probate proceedings are candidates for discovery. This rule change specifies which cases and which parties have access to discovery and are bound by its mandatory disclosure requirements.

As part of the discussion to the amendments to MCR 5.131, some supported limiting mandatory disclosures to contesting parties and thought that the rule should not identify the types of cases that required such a disclosures.

Rule 8.119 Court Records and Reports; Duties of Clerks

[Subrule (A) – (H) no changes]

(I) Sealed Records.

(1)-(3) [no changes]

(4) For purposes of this rule, "court records" includes all documents and records of any nature that are filed with or maintained by the clerk in connection with the action but does not include exhibits to motions and briefs. Nothing in this rule is intended to limit the court's authority to issue protective orders pursuant to MCR 2.302(C), which orders may allow confidential materials under a protective order to be filed under seal if attached to a motion or brief, the filing of a redacted motion or brief which reflects any such confidential materials, and the submission *in camera* (with service on all parties) of an unredacted brief (which brief shall be preserved per subrule (D)(1)(d)). Materials that are subject to a motion to seal a record in whole or in part shall be held under seal pending the court's disposition of the motion.

The existing court rules are confusing and not in conformity with common practice as to the ability of a court to allow parties to file certain materials under seal (which also allows preservation of same as part of the record for purposes of appeal). This is to be distinguished from the sealing of an entire case or an entire docket entry. Rather, this relates only to exhibits to motions and briefs (which in the case of discovery materials, may already be excised from the file by stipulation per MCR 2.316) and related redactions in the motion or brief itself. Moreover, subrule (I)(3) and (6) still allow interested parties to move to set aside any order which allows sealing.