

PROPOSED AMENDMENT TO MCR 2.305(A)(1) [Subpoena for Taking Deposition]

Issue

Should the Representative Assembly recommend the adoption of the following amendment to Michigan Court Rule 2.305(A)(1):

Rule 2.305 Subpoena for Taking Deposition

(A) General Provisions.

- (1) Subpoenas should not be issued except in compliance with MCR 2.306(A)(1). 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.

Synopsis

A proposal to modify MCR 2.305 (A)(1) to clarify the earliest time a third party discovery subpoena may be issued.

Background

A party may serve subpoenas on third parties for the production of documents under MCR 2.305(A)(3). Such a subpoena requires a notice under 2.306(B). MCR 2.305(A)(1), (3). MCR 2.306(A)(1) provides that no notice may be issued until such time as a defendant has a reasonable time to obtain an attorney. (A separate rule, MCR 2.506, addresses subpoenas issued for attendance at hearings.)

Despite this provision, some attorneys take the view that a subpoena for the production of documents may be issued at any time, including immediately upon the filing of a complaint. This reading of the rule permits “rambo” discovery upon the filing of a complaint, imposing burdens upon third parties, and at a time when the defendant(s) may not have counsel and are not fully prepared to object to the discovery sought. There is no known reason to allow a plaintiff to take this sort of early discovery.

The Civil Procedure & Courts Committee believes that the current rules are less than clear as to the interplay between MCR 2.305 and MCR 2.306. The proposed language clarifies that issuance of a subpoena under MCR 2.305 must comply with MCR 2.306(A), which parallels the existing MCR 2.305 references to compliance with MCR 2.306(B). Endorsement of this rule clarification will decrease early discovery disputes and unnecessary costs and smooth the adjudication of cases.

Opposition

None known.

Prior Action by Representative Assembly

None known.

Fiscal and Staffing Impact on State Bar of Michigan

None known.

**STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 26, 2014**

Should the Representative Assembly recommend the adoption of the above amendment to Michigan Court Rule 2.305(A)(1)?

(a) Yes

or

(b) No