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Corbin Davis
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

306 Townsend Street

Michael Franck Building

Lansing, MI

48933-2012

**RE: ADM File No. 2007-24
Proposed Amendment of Rules 2.301, 2.302, 2.401 and 2.506 of the Michigan
Court Rules**

Dear Clerk Davis:

The State Bar of Michigan appreciates your consideration and publishing for public comment its proposal to amend Rules 2.301, 2.302, 2.401 and 2.506 of the Michigan Court Rules.

In its original communication to the Court, the State Bar also included a proposal to include a new subrule as MCR 2.313 (E). The proposed language follows:

Electronically Stored Information. A court may not impose sanctions under this rule for the failure to produce information, including electronically stored information, that was destroyed under a reasonable record destruction policy unless the party violates Rule 2.302(B)(5). A party who knows or should know that its record destruction policy will lead to a violation of Rule 2.302(B)(5) must take reasonable steps to alter its policy.

The referenced provision of proposed MCR 2.302(B)(5), reads: “Electronically Stored Information. A party must preserve information, including electronically stored information, that the party knows, or reasonably should know, may lead to the discovery of admissible evidence. A party who wishes to destroy such information may apply to the court for leave to do so upon good cause shown.”

The State Bar believes that this is an important “safe haven” provision for parties who need to rely on reasonable record destruction policies in the normal course of their businesses. This language is similar to based on Federal Rule of Civil Procedure 37(e):

Failure to Provide 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.

The last sentence of the published version, and the related provisions of proposed MCR 2.302(B)(5), impose appropriate obligations on parties to operate their recordkeeping systems so as to protect the discovery process.

While the proposed MCR 2.313(E) was not included in the proposal published for comment, the State Bar respectfully requests your consideration of its inclusion in the final form of the amendments, should the proposal be adopted.

We appreciate the opportunity to offer this position for the Court's consideration. Please contact me with any further questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Janet Welch". The signature is written in a cursive style with a large, looping initial "J".

Janet Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Ronald D. Keefe, President
Frank Greco, Chair, Civil Procedure and Courts Committee