

# Discovery Reform and the Family Law Practice

By Mathew Kobliska

*If you dislike change, you're going to dislike irrelevance even more.*

—Gen. Eric Shinseki<sup>1</sup>

In the early 1990s, the U.S. National Aeronautics and Space Administration was grounded in mire. The previous two decades of the agency's projects were unremarkable considering prior accomplishments, and public enthusiasm at the time for expensive space projects was moribund.<sup>2</sup> The \$813 million Mars Observer was a complete bust and a Saturn mission, Cassini/Huygens, while successful, came with an unsustainable price tag of \$3.26 billion.<sup>3</sup>

Enter Daniel S. Goldin, the new agency administrator. Goldin pioneered a “faster, better, cheaper” approach to aerospace programs by cutting development time significantly and rooting out inefficiencies and redundancies in the system. Productivity increased by 40 percent. The agency flew more spacecraft and gathered twice the data for less than half the cost. One project was the Mars Pathfinder lander, which, among other things, did not use a tightly choreographed rocketed landing to set down on Mars, but inflated a giant airbag to cushion its touchdown. The craft bounced down, came to a stop, deflated the airbag, and proceeded on its mission. The project took 38 months to develop and cost \$266 million—less than one-tenth of the inflation-adjusted cost of the twin Viking Mars landers 21 years earlier.<sup>4</sup>

The civil litigation practice—and to a much greater degree, family law practice—is in a similar state of flux. It is estimated that 75 percent of all domestic cases nationwide involved at least one self-represented litigant (SRL).<sup>5</sup> Parties in the top quarter of the socioeconomic strata will invariably retain counsel for representation in their divorce

cases, but the number of SRLs is unmistakably trending upward. While many SRLs are poor and simply unable to afford legal services, solidly middle-class taxpayers are increasingly turning to LegalZoom, Nolo, Rocket Lawyer, and other online, form-based resources. LegalZoom is now a \$2 billion company with four million customers.<sup>6</sup> Can Amazon Legal be far behind?<sup>7</sup>

In my experience, the rapid rise of SRLs has created an unprecedented disruption in court systems management, serving neither the interests of the individual parties nor family law practitioners. Judges are plagued by litigants unfamiliar with court procedures, timetables, and the rules of evidence. Unfamiliarity with the law and a reasonable range of outcome expectations result in more cases proceeding to awkward and exasperating trials, in which the court must temper its role as objective factfinder while discretely doling out bits of much-needed legal direction. The range of results varies widely, and generally in these cases, little to no discovery has been performed.

A greater risk for the SRL is the out-of-court settlement in which the party seeking to gain an advantage convinces the other party that lawyers are unnecessary and will simply add to the cost. Family lawyers continually field inquiries from prospective clients who seek to undo an unfair deal after

the fact. Usually depending largely on the passage of time, the likelihood of getting a consent judgment set aside on objective fairness is remote. Even honest mistakes involving real property or division of retirement assets can be difficult or impossible to rectify.<sup>8</sup>

If the family law bar is to survive and remain relevant to legal services consumers, it must, like NASA, develop a “better, faster, cheaper” approach. The new civil discovery rules, which take effect on January 1, 2020,<sup>9</sup> are aimed to transform Michigan's discovery process—which in my experience is costly, time-consuming, and prone to abuse—to a more efficient system designed to facilitate the flow of relevant information while putting the brakes on unnecessary and abusive discovery. The following points are specifically noteworthy to family law practitioners.

## Fact-based mandatory initial disclosures

The new general civil rules have mandatory initial disclosures, requiring parties to exchange information, including legal theories, bases for claims, description and location of all relevant documents, and computation of damages, early in the case.<sup>10</sup> Because the requirements are not particularly

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sued to domestic cases, these cases are exempt from the requirements in favor of the mutual exchange of a verified financial information form under new MCR 3.206(C)(2).<sup>11</sup> While the State Court Administrative Office is still finalizing the form, it is expected to require disclosure of basic assets, liabilities, income, and expenses.<sup>12</sup> The purpose of the new form is for parties to exchange basic financial information early in the proceeding and then use other discovery tools—depositions, interrogatories, document requests, etc.—to obtain additional information based on the specific needs of the case. Also under the new rules, failure to provide the disclosure is enforceable in the same manner as a motion to compel discovery, and there is similarly a duty to supplement the information provided if “in some material respect the disclosure form is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the action or in writing.”<sup>13</sup>

### Limitations on interrogatories

Under current rules, parties can (and often do) serve hundreds of generic interrogatories with several hundred subparts. There is no incentive to narrowly tailor the inquiries, leading to bizarre questions such as asking a daycare worker about restricted stock units, closely held corporations, aircraft, and use of a company car. Often, the purpose of these interrogatories is to intimidate the other party, and they increase the cost of litigation for both sides.

Under the new rules, MCR 3.201(C) provides for a limit of 35 interrogatories for domestic-relations cases and, like the federal rules, each discrete subpart is counted

as a separate interrogatory.<sup>14</sup> According to the staff comment to the new rules, “[g]enerally, subparts are not separately counted if they are logically or factually subsumed within and necessarily related to the primary question.”<sup>15</sup> This conforms with the “related question test” adopted by most federal courts.<sup>16</sup> As a practical matter, interrogatories may be the least efficient manner to acquire information needed to prepare for eventual trial or settlement of a domestic case. New MCR 3.206(B)(2) requires parties to exchange baseline information up front through verified financial information forms; based on this information, parties will be better positioned to tailor their interrogatories to focus on the information they need.

In the early stages of a domestic-relations case, conscientious case management requires information. These inquiries are representative of current interrogatories generally in use:

46. Are you, or have you since your marriage been, employed by any entity with a pension or retirement plan or trust, including, but not limited to, any and all 401(k) plans, annuity plans, tax-deferred savings plan, stock plan, pension plan, profit-sharing plans, or any other form of financial or savings plan? If yes, for each plan:

- a. identify every employer and the trustee and plan administrator of every plan or trust;
- b. state the length of your participation in each plan and trust;
- c. state the amount of money on deposit in your behalf under each plan and trust;
- d. state the annual contributions you have made to each plan and trust for each year you have been a participant;

- e. state the retirement income you expect to receive from each plan or trust and identify any documents regarding projected payments;
  - f. furnish a copy of every plan or trust.
47. For each deferred employee benefit plan, whether defined contribution or defined benefit, and whether qualified or non-qualified, in which you now have or had any interest during the period from [month/day/year], through the present date, please provide:
- a. Each document that describes the plan and the named participant’s interest in it, including any summary plan descriptions updated under ERISA;
  - b. The current account balance(s), including employee contributions and employer contributions;
  - c. The three most recent participant benefit statements or statement of account provided to you;
  - d. Each document that shows the accrued or deferred monthly retirement benefit you would receive upon retirement or separation from employment at various ages;
  - e. Each document that states the beneficiary for the plans you participate in;
  - f. Each document that states the surviving spouse election for any deferred employment benefit plans you participate in;
  - g. Your earliest eligibility for retirement under each of the retirement plans in which you have an interest;
  - h. For each defined contribution plan, indicate whether or not there is an administrative QDRO processing fee, the amount of the fee, and indicate how the fee is allocated between the participant and alternate payee.
48. List all IRA, Keogh, and other individual retirement account, pension, profit-sharing, or employee benefit programs not listed in your answers to prior interrogatories in which you have or had any interest during the marriage, and whether the account is in a U.S. or foreign account. For all items listed provide an accounting of your interest in each. Produce copies of the most current statements prepared by the trustees, directors, or administrators of each plan.

## New MCR 3.229 provides a clearer path for filing sensitive documents without making them part of the public record, similar to the confidential and legal file distinction in abuse and neglect cases.

Assuming satisfactory data was not received in the mandatory initial disclosure, consider the following sample request to produce documents in lieu of the interrogatories above:

1. For any retirement plan or account, including employment plans, IRAs, annuities, or any other form or type of retirement savings or accumulations in which you have or had any claim or interest at any time from the date of your marriage to [Plaintiff/Defendant] through the present, produce copies of the summary plan description and all amendments, copies of statements for the three month periods before and after the date of marriage, copies of statements for the three years immediately preceding your response to these requests for production, and copies of the beneficiary designation and surviving spouse election forms.

Discovery must be tailored to the evidentiary needs of each case, but the above request accomplishes most or all of that of the preceding interrogatory questions, and there is not a similar cap on requests to produce. Similarly structured production requests are more likely to be completely answered than a mind-numbing stack of interrogatories.

### Confidential filing for sensitive documents

Currently, there is no ability in domestic cases to file sensitive documents and still have the court consider them and include them in the record for any subsequent appeal. New MCR 3.229 provides a clearer path for filing sensitive documents

without making them part of the public record, similar to the confidential and legal file distinction in abuse and neglect cases. Records such as Child Protective Services reports, psychological evaluations, medical and mental health records, and so on will be considered by the court without public disclosure.<sup>17</sup>

### Conclusion

The new and revised discovery rules represent a sea change in how things have been done. They will require the investment of more mental capital at the beginning of a case to map out a plan, but have the potential to streamline cases for settlement and trial and limit discovery abuse. This article was intended to hit some of the notable points from a family law perspective, but a thorough reading of the new rules is recommended to all attorneys who practice in this area. ■

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### ENDNOTES

1. Dao & Shanker, *No Longer a Soldier, Shinseki Has a New Mission*, The New York Times (November 10, 2009) <<https://www.nytimes.com/2009/11/11/us/politics/11vets.html>> [https://perma.cc/9SRK-92F9]. All websites cited in this article were accessed September 9, 2019.
2. *JPL History, The 90s*, Jet Propulsion Laboratory, California Inst of Technology <<https://www.jpl.nasa.gov/jplhistory/the90/>> [https://perma.cc/8CXS-CAQV]; *Biography of Daniel Saul Goldin*,

*NASA Administrator*, NASA <[https://history.nasa.gov/dan\\_goldin.html](https://history.nasa.gov/dan_goldin.html)> [https://perma.cc/7CW4-2QCA]; Cooper, *Is NASA putting safety at risk to cut costs?*, CQ Researcher (April 25, 1997) <<http://library.cqpress.com/cqresearcher/document.php?id=cqresrre1997042500>> [https://perma.cc/EAB9-B2KM]; Broad, *Scientist at Work: Daniel S. Goldin; Bold Remodel of a Drifting Agency*, The New York Times (December 21, 1993) <<https://www.nytimes.com/1993/12/21/science/scientist-at-work-daniel-s-goldin-bold-remodeler-of-a-drifting-agency.html>> [https://perma.cc/KT9H-UEZB]; and NASA: *Mission Impossible?*, Washington Technology (May 15, 1996) <<https://washingtontechnology.com/articles/1996/05/15/nasa-mission-impossible.aspx>> [https://perma.cc/4VGS-KYRK].

3. Three days before the scheduled orbital insertion, communication with the spacecraft was lost. *Mars Observer*, Wikipedia (August 31, 2019) <[https://en.wikipedia.org/wiki/Mars\\_Observer](https://en.wikipedia.org/wiki/Mars_Observer)> [https://perma.cc/A5EJ-2N5E].
4. Sadeh, *Space Politics and Policy: An Evolutionary Perspective* (Norwell: Kluwer Academic Publishers, 2002).
5. *Introduction*, Self-Represented Litigation Network <<https://www.srln.org/node/21/about-srln>> [https://perma.cc/4HPY-3FAJ].
6. *LegalZoom Announces \$500 Million Investment, Among Largest in Legal Tech History*, LegalTech News (July 31, 2018) <<https://www.legalzoom.com/press/press-mentions/legalzoom-announces-500-million-investment-among-largest-in-legal-tech-history>> [https://perma.cc/S9BM-BBCE].
7. For example, Amazon has recently forayed into the real estate agency business, Soper, *Amazon's new real estate partnership with Realty promises homebuyers up to \$5k in credits*, GeekWire (July 23, 2019) <<https://www.geekwire.com/2019/amazon-moves-real-estate-inks-new-deal-brokerage-conglomerate-reealty/>> [https://perma.cc/Z2GZ-M6CH].
8. One of many examples is when there is a defined benefit plan for which a Qualified Domestic Relations Order is not entered or formally qualified, and the participant in the interim makes an irrevocable election of benefits.
9. Administrative Order No. 2018-19 (2019), available at <[https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Adopted/2018-19\\_2019-06-19\\_FormattedOrder\\_AmendOfDiscoveryRules.pdf](https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Adopted/2018-19_2019-06-19_FormattedOrder_AmendOfDiscoveryRules.pdf)> [https://perma.cc/QCQ2-2MDC].
10. *Id.*
11. New MCR 2.302(A)(4)(c).
12. A proposed disclosure form was prepared by the Domestic Relations Subcommittee of the Discovery Reform Committee for submission to the SCAO Forms Committee at SCAO's request.
13. MCR 3.206(B)(5).
14. Administrative Order No. 2018-19.
15. *Id.*
16. E.g., *Erfindergemeinschaft UroPep GbR v Eli Lilly & Co*, 315 FRD 191, 196 (ED Tex, 2016).
17. Administrative Order No. 2018-19.