

Civil Discovery

The Guidebook to the New Civil Discovery Rules

Effective January 1, 2020

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SBM
STATE BAR OF MICHIGAN

Foreword



Bridget M. McCormack
Chief Justice
Michigan Supreme Court

This guidebook describes changes to Michigan’s civil discovery rules that are the product of several years of hard work by many attorneys and judges. Dissatisfaction with existing discovery practice—it’s too expensive, too inefficient, too often abused—led the State Bar of Michigan to form the Civil Discovery Court Rule Review Special Committee in 2016. The Committee completed a draft proposal of rule changes, solicited and received comments and feedback from approximately 50 stakeholder organizations and countless individuals, and revised the proposal in response to that feedback. The Michigan Supreme Court submitted it for public comment in November 2018 and later adopted it, effective January 1, 2020. Many thanks are due to everyone involved in this lengthy process, from the members of the Special Committee to those who provided feedback to those providing outreach and education on the new rules. Their work brought sorely needed change.

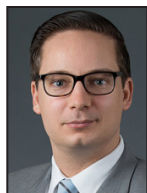
Prior to this effort, the rules governing Michigan’s civil discovery proceedings had not been extensively updated in 35 years. These amendments are a comprehensive change intended to streamline the discovery process to make it less expensive and more efficient. Among the specific changes are provisions governing discovery procedures for electronically stored information, the use of which has grown exponentially since 1985. New disclosure requirements and early, ongoing judicial case management will allow parties to get information and make more informed decisions about how to proceed with their case sooner.

In sum, this guidebook outlines major positive changes to civil litigation rules that have been a long work in progress. I look forward to their implementation, as well as further discussions about how they can be made even better—discussions to which I hope you will add your voice.

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I. INTRODUCTION

When the federal rules were revised effective December 1, 2015, Chief Justice Roberts opined that, “[t]he amendments may not look like a big deal at first glance, but they are.” Roberts, John G., Chief Justice’s Year-End Reports on the Federal Judiciary, p 5 (2015), <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>. So, too, the State Bar of Michigan (“SBM”) Civil Discovery Court Rule Review Committee (“SBM Committee”) felt that its proposed changes to Michigan’s Civil Discovery Rules would be “if adopted, a big deal and positive step for justice in Michigan.” SBM Civil Discovery Court Rule Review Special Committee Final Report and Proposal, p 5 (2018) <https://tinyurl.com/SBM-Civil-Discovery-Final-Repo>. On June 19, 2019, the Michigan Supreme Court adopted the SBM Committee’s proposed rules,¹ marking the broadest changes to the Michigan Court Rules since they were enacted in 1985.

The amendments to twenty-three court rules governing discovery in general civil matters, domestic relations, juvenile, and probate matters, include:

- Mandating that the rules “be construed, administered, and employed by the court and the parties to secure the just, speedy, and economical determination of every action” under MCR 1.105;
- Adopting a proportionality standard in MCR 2.302(B) to determine the appropriate scope of discovery, and giving courts express authority to make discovery of all electronically stored information (“ESI”) subject to cost-shifting under MCR 2.302(B)(6);
- Adopting initial disclosure requirements under MCR 2.302(A) (unless exempt under MCR 2.302(A)(4)), and additional disclosures for no-fault and personal injury cases;
- Adopting a presumptive limit of twenty interrogatories in general civil cases under MCR 2.309(A)(2), and a limit of thirty-five interrogatories for domestic relations actions under MCR 3.201(C);
- Codifying sanctions available for failure to preserve and produce ESI under MCR 2.313(D); and
- Facilitating early and active judicial case management through, *inter alia*, early scheduling conferences and final pre-trial practice, discovery planning and ESI conferences under MCR 2.401(B), (C), (H), and (J).

Just as the proposed changes to Michigan’s Civil Discovery Rules were a collaborative effort between the Michigan bench and its practitioners, so, too, is this Guidebook, which is a collective

¹ The final version of the amendments contains several modifications to the language of the original SBM proposal. The most significant of these changes can be found in MCR 2.302(A)(1)(g), 2.302(A)(2)(b), 2.302(A)(3), 2.305(B)(5), and 2.306(B)(3). These changes are highlighted in the text of each rule set forth herein.

effort by B. Jay Yelton III,² James L. Liggins,³ and Kenneth J. Treece of Warner Norcross + Judd LLP, and Daniel D. Quick,⁴ Scott A. Petz, and Alma Sobo of Dickinson Wright PLLC, with the invaluable insights and expertise of the Honorable Patricia P. Fresard of the 3rd Judicial Circuit Court, the Honorable James M. Alexander of the 6th Judicial Circuit Court,⁵ and the Honorable Christopher P. Yates of the 17th Judicial Circuit Court.⁶ Also, we would be remiss if we did not acknowledge the hard work and dedication of all of the Special Committee and Subcommittee members whose efforts led to the approval of these amendments.⁷

This Guidebook was revised and updated on November 1, 2019 to reflect, among other things, the Michigan Supreme Court's September 18, 2019 adoption of the amendment of the comment to Rule 1.1 of the Michigan Rules of Professional Conduct, effective January 1, 2020.

II. BRIEF HISTORY OF CIVIL DISCOVERY RULE AMENDMENT PROCESS

The SBM Committee was formed in November 2016 based on the recommendation of the SBM's Civil Procedure & Courts Committee and with the encouragement of the Michigan Supreme Court. The impetus behind the SBM Committee's formation? The consensus that civil discovery—due to its inefficiency and expense—undermined access to the civil justice system. Prior to the SBM Committee's formation, the SBM's 21st Century Practice Task Force Report recommended changes to Michigan's Civil Discovery Rules to reduce the expense and burden of discovery.

The recognition of these problems had already led to significant changes to the Federal Rules of Civil Procedure as well as to many other state court civil procedure rules. As a consequence, the SBM Committee devoted substantial time to studying the current Michigan Court Rules, the revisions over time to the Federal Rules of Civil Procedure, recent discovery-related changes and proposed changes to other state court rules, and other materials discussing potential solutions to the acknowledged problems with civil discovery. When the SBM Committee sat down to draft its proposed amendments to Michigan's civil discovery rules, it had a vision to work towards a civil litigation system where:

- litigation is more cost effective;
- courts are more accessible and affordable;

² B. Jay Yelton III served on the State Bar of Michigan Civil Discovery Court Rule Review e-Discovery Subcommittee.

³ James L. Liggins served as the chair of the State Bar of Michigan Civil Discovery Court Rule Expert Witness Discovery Subcommittee.

⁴ Daniel D. Quick served as Chair of the State Bar of Michigan Civil Discovery Court Rule Review Special Committee.

⁵ The Honorable James M. Alexander served on the State Bar of Michigan Civil Discovery Court Rule Review Special Committee.

⁶ The Honorable Christopher P. Yates served on the State Bar of Michigan Civil Discovery Court Rule Review Special Committee.

⁷ Please see Appendix for a list of the Special Committee and Subcommittee members. The Special Committee and Subcommittee are referred to more generally as the SBM Committee in this Guidebook.

- 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.

(State Bar of Michigan’s April 21, 2018 Civil Discovery Court Rule Review Special Committee Final Report and Proposal, p. 4 (“Committee Report”)).

The SBM Committee drafted and approved a proposed set of amendments to the Michigan Court Rules in September 2017. The approved draft was submitted to the SBM Representative Assembly for review and comment. The SBM Representative Assembly solicited feedback on the proposed amendments from a wide range of perspectives within the legal community. The SBM Committee used that feedback to prepare its final draft proposal for approval by the SBM Representative Assembly. On April 21, 2018, the SBM Representative Assembly overwhelmingly voted to approve the SBM Committee’s final proposal and recommended the proposal’s adoption to the Michigan Supreme Court. The Supreme Court solicited public comment and conducted a public hearing to aid in its final consideration prior to approving the amendments on June 19, 2019, setting an effective date of January 1, 2020.

III. GUIDEBOOK FORMAT

Each rule is set forth below showing the changes made along with analysis and practice tips. Since some amendments draw from the Federal Rules of Civil Procedure, the interpretation of Federal Rule counterparts may be instructive.

When Michigan adapts federal law, Michigan courts will turn to federal case law as an interpretive guide. See, e.g., *Brenner v Marathon Oil Co*, 222 Mich App 128, 133 (1997) (“MCR 3.501(E) has not been the subject of apposite analysis by Michigan courts and, in the absence of available Michigan precedents, we turn to federal cases construing the similar federal rule for guidance.”). Although federal interpretation is not binding, it is persuasive. See *Cole v General Motors Corp*, 236 Mich App 452, 456 (1999) (“While Michigan courts are not bound by federal title VII precedent in interpreting Michigan Civil Rights Act cases, such precedent is highly persuasive”) (citing *Victorson v Dep’t of Treasury*, 439 Mich 131, 142 (1992)).

Notwithstanding that the language of a particular amended court rule may be similar (or, in some instances, identical) to its Federal Rule counterpart, or other law, this does not mean that the amended court rule is intended to (or will) be construed by Michigan courts in alignment. Accordingly, the Guidebook’s reference to Federal Rules and federal case law, or other legal authority for that matter, is not intended to express how Michigan courts should or will address the amended court rules.

IV. AMENDMENTS TO MICHIGAN CIVIL DISCOVERY RULES

A. MCR 1.105 CONSTRUCTION

1. TEXT OF AMENDMENT

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.

2. ANALYSIS

The new language, adopted from Federal Rule of Civil Procedure 1, clarifies that it is the duty of both the parties and the courts to achieve the goal of a “just, speedy, and economical determination of every action. . . .” The Committee comment provides that:

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. [(Committee Report, p 19)].

The SBM Committee comments are consistent with the interpretation of Federal Rule 1 by the federal courts. *Johnson Marcraft, Inc v Western Surety Co*, 2016 WL 3655299, at *1 (MD Tenn July 8, 2016) (discovery rules must be interpreted in light of Rule 1); *Updike v Clackamas County*, 2016 WL 111424, at *1 (D Ore Jan 11, 2016) (an appropriate balance must be found between the mandates of Rule 1 and the “broad and liberal” policy of discovery).

PRACTICE TIP:

Let this Rule be your civil litigation North Star. For example, consider this North Star whenever you draft discovery requests, respond or object to discovery requests, or file or oppose discovery-related motions.

B. MCR 2.301 AVAILABILITY AND TIMING OF DISCOVERY

1. TEXT OF AMENDMENT

(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.
- (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 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.

- (~~1A~~) 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).
- (~~2B~~) 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.
- (~~3C~~) 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.
- (4) Unless ordered otherwise, a date for the completion of discovery means the serving party shall initiate the discovery by a time that provides for a response or appearance, per these rules, before the completion date. As may be reasonable under the circumstances, or by leave of court, motions with regard to discovery may be brought after the date for completion of discovery.

(C) Course of Discovery. The court may control the scope, order, and amount of discovery, consistent with these rules.

2. ANALYSIS

a) When a Party May Seek Discovery – 2.301(A)

The addition of subrule (A)(1) emphasizes that if initial disclosures are required under MCR 2.302(A), then a party may not seek discovery until after it serves its required initial disclosures. If the case is exempt from initial disclosures, parties may seek discovery after the action is commenced.

Despite the SBM Committee “receiv[ing] input in favor of either allowing discovery in district court or at least stating that leave to conduct discovery should be freely given[,]” amended MCR 2.301(A)(2) does not permit discovery in district court actions, “except by leave of the court or the stipulation of all parties.” (Committee Report, p. 20).

PRACTICE TIP:

Unless the case is exempt from initial disclosures under MCR 2.302(A)(4)(a)-(j), be sure to initiate discovery only after serving the required initial disclosures under MCR 2.302(A).

b) Deadline to Complete Discovery – 2.301(B)(4)

The addition of subrule (B)(4) is intended to clarify the phrase “completion of discovery,” which some courts construed to mean the date by which discovery has to be initiated, and others as requiring discovery to be completed by that date. (Committee Report, p. 21). Subrule (B)(4) mandates that parties “initiate the discovery by a time that provides for a response or appearance . . . before the completion date.” The subrule allows for motions regarding discovery to be brought after the date of completion “as may be reasonable under the circumstances, or by leave of court.” MCR 2.301(B)(4).

PRACTICE TIP:

Unless the court orders otherwise, be sure to initiate written discovery to parties at least 28 days before the deadline for completion of discovery under MCR 2.301(B)(4).

c) Course of Discovery – 2.301(C)

Subrule (C) reinforces the trial court’s control over the order and amount of discovery under MCR 2.302(C)-(D) and MCR 2.401, and takes into consideration MCR 1.105 and MCR 2.302(B).

C. MCR 2.302 DUTY TO DISCLOSE; GENERAL RULES GOVERNING DISCOVERY

1. TEXT OF AMENDMENT

~~(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;~~
 - ~~(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, ESI, 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, ESI, 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 (or an opportunity to inspect a copy) of pertinent portions 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, including self-insured retention and limitations on coverage, indemnity, or reimbursement for amounts available to satisfy a judgment; and

(h) the anticipated subject areas of expert testimony.

(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) A defendant from whom no-fault benefits are claimed must disclose:

(i) a copy of the first-party claim file and a privilege log for any redactions and

(ii) the payments the insurance company has made on the claim.

(b) The plaintiff must disclose all applicable claims, including all of the following information within the plaintiff's possession, custody, or control:

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

(ii) all provider bills or outstanding balances for which the plaintiff seeks reimbursement.

- (iii) the name, address, and phone number of plaintiff's employers, and
 - (iv) the additional disclosures under subrule (A)(3).
 - (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 in the form approved by the State Court Administrative Office or in a form agreed by the parties for all persons, institutions, hospitals, and other custodians in actual possession of medical information relating to the condition, unless the party asserts privilege pursuant to MCR 2.314(B).
 - (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;
 - (b) an action in district court (see MCR 2.301[A][2]);
 - (c) an action under subchapter 3.200;
 - (d) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;
 - (e) an action to enforce or quash an administrative summons or a subpoena;
 - (f) a proceeding ancillary to a proceeding in another court, including an action for a subpoena under MCR 2.305(E) or (F);
 - (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 under MCR 3.303 and 3.304.
 - (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.
 - (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.
 - (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.
 - (6) Basis for Initial Disclosure; Unacceptable Excuses. A party must serve initial disclosures based on the information then reasonably available to the party. However, 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.
 - (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.
- (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 importance of the issues at stake in the action, 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)-(3) [Unchanged.]

(4) Trial Preparation; Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subrule (B)(1) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(a)-(d) [Unchanged.]

(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.

(5) ~~Electronically Stored Information~~Duty to Preserve 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.~~

- (6) ~~Limitation of Discovery of Electronic Materials~~ESI. 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, and may limit the frequency or extent of discovery of ESI (whether or not the ESI is from a source that is reasonably accessible).
- (7) [Unchanged.]
- (C) [Unchanged.]
- (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.
- (E) ~~Supplementation of~~Supplementing Disclosures and Responses.
- (1) ~~Duty to Supplement~~. ~~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) ~~A party is under a duty seasonably to supplement the response with respect to a question directly addressed to~~
- (i) ~~the identity and location of persons having knowledge of discoverable matters; and~~
- (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.~~
- (a) In General. A party that has made a disclosure under MCR 2.302(A)—or that has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

- (i) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing or
 - (ii) as ordered by the court.
 - ~~(b) — 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) — the response was incorrect when made; or~~
 - ~~(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.~~
 - (be) 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 orders ~~otherwise, the parties may by or written and filed~~ stipulation of the affected parties may:
 - (1) [Unchanged.]
 - (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.~~ change the disclosure requirements in MCR 2.302(A) 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) the disclosure is
 - (i) complete and correct as of the time it is made; and
 - (ii~~a~~) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.
 - (b) the 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;
 - (ii~~b~~) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and
 - (iii~~e~~) 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, 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~~emoval and destruction of~~ disclosure and discovery materials ~~are governed by MCR 2.316.~~

2. ANALYSIS

Rule 2.302 adds the obligation to make disclosures of certain categories of information without awaiting a discovery request. It also changes the scope of discovery by requiring that discovery be both relevant to the claims or defenses at issue *and* proportional to the needs of the case. Below is an analysis of amended MCR 2.302(A)(1)-(7), (B)(1), (B)(4), (B)(6), (D), (E)(1), and (H).

a) Required Initial Disclosures – 2.302(A)

(1) General Duty to Disclose – (A)(1)

The general initial disclosures required by MCR 2.302(A)(1) borrow from both Rule 26(A)(1) of the Federal Rules of Civil Procedure and recently amended Rule 26.1(a) of the Arizona Rules of Civil Procedure. Specifically, subrules (a), (b), and (h) are adapted from the Arizona Rule and subrules (c), (d), and (f) are adapted from the Federal Rule. Subrule (g) is an amalgamation of the Arizona and Federal Rules, adding indemnity and suretyship agreements to the federal disclosure requirement, as provided in subrule (a)(10) of the Arizona Rule, and including revisions to address voluminous and irrelevant portions of policies. (Committee Report, p. 23). Subrule (e), requiring disclosure of documents not in a party's "possession, custody or control," has no source attribution. However, Illinois does have a similar requirement in Illinois Supreme Court Rule 222(d)(9).

The requirement to make voluntary disclosures of discovery materials without awaiting a discovery request has been a part of federal court practice since 1993, but will be new in Michigan circuit courts, except for the business courts in Oakland and Macomb Counties. These business courts previously adopted case management protocols that set forth mandatory disclosures without awaiting a discovery request.

As the 1993 Comments to the Federal Rule explain, “[a] major purpose of the [rule] is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information.” The SBM Committee comments provide no explanation. However, the Macomb County Business Court provides this rationale for its initial disclosure requirement:

The [initial disclosures] are not intended to preclude or to modify the rights of any party for discovery as provided by the Michigan Court Rules of Civil Procedure and other applicable local rules. The purpose . . . is to encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery. [1993 Comments to Amendments to Federal Rule of Civil Procedure 26].

While not an “official comment,” this comment captures the spirit of the amendment.

PRACTICE TIP:

Don’t let disclosure deadlines creep up on you. Ideally, plaintiffs will have their disclosures ready by the time suit is filed. Defendants and other parties should begin preparing their disclosures as soon as their time starts running under MCR 2.302(A)(5)(b)(i)-(iii) – and sooner if possible.

(2) Additional Disclosures Required in No-Fault and Personal Injury Cases – (A)(2)-(3)

Rule 2.302(A)(2) and (A)(3) impose additional disclosure obligations for parties in cases involving a first-party claim for benefits under Michigan’s No-Fault Act, MCL 500.3101, *et seq.*, and in cases alleging mental or physical personal injury. These provisions, adapted in part from the Wayne County Circuit Court’s Addendum to Scheduling Order in No-Fault Cases, were added in recognition of the significant no-fault caseload in most trial courts. (Committee Report, p. 24). These additional disclosures are intended to expedite the resolution of those cases.

Of note, Rule 2.302(A)(2)(a) requires a defendant insurance company to disclose a copy of the first-party claim file and “a privilege log for any redactions. . .” and disclose provider bills for which plaintiff seeks reimbursement. Under prior Michigan law, there was no obligation absent court order or stipulation of the parties to provide a log of documents withheld under claim of privilege.

MCR 2.302(A)(3) requires disclosure of executed medical record authorizations in SCAO approved form for all parties in actual possession of medical information relating to the plaintiff’s

condition, unless privilege is asserted in the party’s disclosure. Such privileges include the physician-patient privilege, and the privilege must be asserted timely or else it is “waived in that action, but is not waived for the purposes of any other action.” See *Domako v Rowe*, 438 Mich 347, 356-57 (1991) (stating that voluntary disclosure of medical information waives the privilege for that action).

PRACTICE TIP:

Remember these additional disclosure requirements in no-fault and personal injury cases, and remember the obligation to produce a privilege log imposed on defendants in no-fault cases.

(3) Cases Exempt from Initial Disclosures – (A)(4)

Unless otherwise stipulated or ordered, cases set forth in MCR 2.302(A)(4)(a)-(j) are exempt from the initial disclosure requirement. Several of the exemptions have been adapted from the Federal Rules—specifically, (a), (d), (e), and (f).

PRACTICE TIP:

Know the exemptions from the initial disclosure requirement and other rules that may be implicated. For example, although domestic relations actions are exempt from initial disclosures under MCR 2.302(A)(4)(c), MCR 3.206(C)(2) requires a Verified Financial Information Form (as provided by SCAO) to be served “within 28 days following the date of service of defendant’s initial responsive pleading.”

b) Meeting Initial Disclosure Obligations

The initial disclosure obligation covers a wide expanse. This overview will be broken down into: (1) what to disclose; (2) when to disclose; and (3) how to disclose (duty to make reasonable inquiry and certify). The duty to supplement initial disclosures is discussed *infra* in subsection e).

(1) What to Disclose – (A)(1)

The disclosures required by subrule (1)(a)-(h) are straightforward and consist of the “types of information that have been customarily secured early in litigation through formal discovery.” 1993 Comments to Amendments to Federal Rule of Civil Procedure 26. Indeed, the initial disclosures are akin to “contention” discovery requests. Note that the initial disclosure obligation can be modified by court order or by a stipulation of the parties. MCR 2.302(F) provides that a “court order or written and filed stipulation of the affected parties may . . . change the disclosure requirements in MCR 2.302(A). . . ”

A party is not obligated to disclose witnesses or documents whether favorable or unfavorable that it does not intend to use to support its claims or defenses. *McCormick v Brzezinski*, 2008 WL

4371842, at *1 (ED Mich Sept 22, 2008) (citation omitted); see also *Ruddell v Weakley Cty Sherriff's Dept*, 2009 WL 3757705, at *1 (WD Tenn May 22, 2009) (citation omitted). This limitation explains why the rule expressly exempts witnesses and documents used “solely for impeachment” from the initial disclosure requirement. See Fed R Civ P 26(a)(1)(A)(ii).

Legal theories underlying claims and defenses under subrule (b). This requirement is not found within the Federal Rules. It is taken from Arizona Rule of Civil Procedure 26.1(a)(2). (Committee Report, p. 22). Based on Arizona case law, this requirement may be met by simply restating the legal theories underlying a claim or defense, such as “breach of contract” or “estoppel.” *Heimer v Price, Kong & Co*, 2008 WL 5413368, at *7 (Ariz App Dec 30, 2008). In fact, the pleading itself may satisfy this disclosure obligation. *Beninger v Calvin*, 2008 WL 4368204, at *12 (Ariz App Jan 13, 2009).

Exchange of witness information under subrule (c). The SBM Committee comments note that “[t]he rule does not contemplate a change from existing practice as to party witnesses (where the address is usually ‘care of’ the party and/or its counsel)” (Committee Report, p. 23).

Documents within “possession, custody or control” under subrule (d). Michigan case law suggests that this phrase encompasses documents that, while not in the party’s physical possession, the party has some legal right to obtain. *Mitan v New World Television, Inc*, 2003 WL 22871415 at *4 (Mich App Dec 4, 2003) (holding that tax returns seized by the state police were still in plaintiffs’ “possession, custody or control” because plaintiffs could have obtained copies from the IRS and offered no valid reason for failing to do so); see also *Bricklayers Pension Tr Fund-Metro Area v Everlast Masonry, Inc*, 2009 WL 3837147, at *1 (ED Mich Nov 16, 2009).

In the Sixth Circuit, the “legal right” to obtain a document from a non-party primarily arises under a contract or by virtue of a special relationship, such as principal-agent, employer-employee or attorney-client. See, e.g., *Flagg v City of Detroit*, 252 FRD 346, 352 (ED Mich 2008) (holding that city had the legal right to obtain text messages stored by its technology service provider).

Documents beyond “possession, custody or control” under subrule (e). Subrule (A)(1)(e) requires a party to analyze whether any non-parties might possess information relevant to its claims or defenses and whether the party has the legal right to obtain the information. There is no federal counterpart to this subrule, but Illinois does have a similar requirement in its court rules. See Ill S Ct R 229(d)(9).

Computation of damages under subrule (f). Case law interpreting the federal counterpart to subrule (A)(1)(f) (Fed R Civ P 26(a)(1)(A)(iii)) holds that “the ‘computation’ of damages required [] contemplates some analysis” so that the opposing party can “understand the contours of its potential exposure and make informed decisions as to settlement and discovery.” *City & Cty of San Francisco v Tutor-Saliba Corp*, 218 FRD 219, 221 (ND Cal 2003). However, with respect to non-economic damages, “[t]he ‘computation’ required by Rule 26(a)(1)(A)(iii) does not mean that plaintiffs must identify a specific sum to compensate them for injuries that are difficult to categorize, like anxiety or mental distress. The amount of compensation that should be awarded for such an injury may appropriately be left to the jury.” *Wolgast v Richards*, 2011 WL 3426187,

at *4 (ED Mich Aug 5, 2011) (citing *Richardson v Rock City Mech Co*, 2010 WL 711830, at *2-*3 (MD Tenn Feb 24, 2010)).

Anticipated subject areas of expert testimony under subrule (h). Federal Rule 26(a)(2) has an extensive disclosure requirement, but its timing is not the same as for initial disclosures. This requirement is taken from Arizona Rule of Civil Procedure 26.1(a)(6). (Committee Report, p. 24). Based on Arizona case law, the required disclosure is not extensive. *Smith v Benson Hospital*, 2010 WL 1741108, at *2-*3 (Ariz App April 30, 2010)(rejecting argument that “magic words” are required in initial disclosure and finding disclosure sufficient where it stated that the expert would testify about the cause of plaintiff’s injuries); *Berkowitz v Demaine*, 874 A2d 326, 329-30 (Conn App 2005) (holding there was adequate description of subject matter in disclosure when disclosure stated “nature and extent of the injuries” and the expert witness described plaintiff’s condition as “carpal pedal spasm” and noting that it was “inconsequential that the witness used medical terms”).

(2) When to Disclose – (A)(5)

The time to make initial disclosures is set forth in MCR 2.302(A)(5)(b)(i)-(iii). For a party filing a pleading (as defined in MCR 2.110(A)) that requires an answer, the party “must serve its initial disclosures within 14 days after any opposing party files an answer to that pleading.” In cases with multiple defendants, the plaintiff’s disclosures are due within 14 days after any one of the defendants file an answer. A party filing an answer “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.” Only parties that have appeared need be served. “[L]ater-appearing parties” must be served within 14 days of their appearance.

As with the need to file initial disclosures, the timing for doing so is also subject to change via court order or stipulation of the parties. MCR 2.302(A)(5)(a).

(3) How to Disclose (Duty to Make Reasonable Inquiry and Certify) – (A)(6)-(7)

Initial disclosures are “based on the information then reasonably available to the party.” MCR 2.302(A)(6). There is no requirement that parties have perfect knowledge of their case at the initial disclosure stage. Under the Federal Rules, what is “reasonable” is an objective standard dependent on the totality of the circumstances. *TRW Financial Sys, Inc v Unisys Corp*, 1995 WL 545023, at *9 (ED Mich Feb 6, 1995); see also *Bates v Tinajero*, 2015 WL 12681644, at *4 (SD Ohio March 2, 2015). Michigan previously adopted a “reasonableness” standard consistent with that of the Federal Rules under the former version of MCR 2.302(G)(3). See *Brooks v Sciberras*, --NW--, 2000 WL 33415202, at *5-*6 (Mich App July 28, 2000). However, a party’s failure to conduct a full investigation of the case does not relieve the party of its obligations under MCR 2.302(A)(1). Nor may a party argue the insufficiency of another party’s disclosures or the failure of another party to disclose as an excuse for its own failure to disclose.

Under existing Michigan law, “[i]f the inquiry reveals no reason to believe the material in question is false or incomplete, the attorney may affix his or her signature to it. If, however, reasonable cause exists to believe that a factual basis for the response does not exist, or that it is intentionally

deceptive and misleading, the attorney may not certify such a response without violating the provisions of this rule.” *Brooks v Sciberras*, --NW2d--, 2000 WL 33415202, at *5-*6 (Mich App July 28, 2000) (quoting Dean & Longhofer, *Michigan Court Rules Practice*, § 2302.31 (4th ed. 1998)).

Michigan’s interpretation of “reasonable inquiry” is consistent with that under the Federal Rules. Under the Federal Rules, what is “reasonable” is also an objective standard dependent on the totality of the circumstances. *TRW Financial Sys, Inc v Unisys Corp*, 1995 WL 545023, at *9 (ED Mich Feb 6, 1995); see also *Bates v Tinajero*, 2015 WL 12681644, at *4 (SD Ohio March 2, 2015). “In making the inquiry, the attorney may rely on assertions by the client and on communications with other counsel in the case as long as that reliance is appropriate under the circumstances.” Notes, 1983 Amendments to Federal Rule of Civil Procedure 26.

Initial disclosures “must be in writing, signed, and served, and a proof of service must be promptly filed.” MCR 2.302(A)(7); MCR 2.302(H)(2). This requirement renders initial disclosures subject to amended MCR 2.302(G), which turns the signature of the party or attorney into a “certification” that “to the best of the signer’s knowledge, information, and belief formed after a reasonable inquiry” the initial disclosure is “complete and correct as of the time it is made . . .”

Keep in mind that the “duty to disclose” is not synonymous with the “duty to produce.” *Rural Water Dist No 4 v City of Eudora*, 2008 WL 5173109, at *3 (D Kan Dec 10, 2008) (“While Fed. R. Civ. P. 26(a) allows initial disclosures to be made by producing copies of relevant documents, the rule does not require either party to actually produce copies of documents. A party may opt to provide a description of the documents by category and location.”) (emphasis in original). This is consistent with amended MCR 2.302(A)(1). Moreover, initial disclosures themselves, and any attendant disclosure materials, may not be filed unless pursuant to a court order or unless used as an exhibit in a motion or at trial. MCR 2.302(H)(1)(a)-(c).

c) Scope of Discovery – 2.302(B)

Rule 2.302(B) makes several changes to the scope of discovery in civil cases, requiring that discovery must be relevant to any party’s claims or defenses and proportional to the needs of the case.

(1) Relevant to Any Party’s Claims or Defenses – (B)(1)

The SBM Committee adapted the scope of discovery definition from Rule 26(b) of the Federal Rules of Civil Procedure. The change in language from “relevant to the subject matter” to “relevant to any party’s claims or defenses,” is a substantive one. As the SBM Committee comments note,

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. [(Committee Report, p. 27)].

This is a very important change as the current Michigan law regarding the scope of discovery, summarized below, is much broader:

It is well settled that Michigan follows an open, broad discovery policy that permits liberal discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case. Discovery aims to simplify and clarify issues, and the rules should be construed to facilitate trial preparation and to further the ends of justice.

In re Estate of Hill, --NW2d--, 2015 WL 1069429, at *1 (Mich App Mar 10, 2015) (quoting *Reed Dairy Farm v Consumers Powers Co*, 227 Mich App 614, 616 (1998)). While amended MCR 2.302(B)(1) by its language renders this standard obsolete, set standards are sometimes difficult to replace in practice as demonstrated by the experience in federal courts.

The impact of the new definition on the scope of discovery in the federal courts has been a mixed bag. Some courts have recognized the substantive impact of the language change and applied the narrower definition of “relevance.” See, e.g., *Cole’s Wexford Hotel, Inc v Highmark, Inc*, 209 F Supp 3d 810, 812, 817 (WD Pa 2016) (holding that “discovery requests are not relevant simply because there is a possibility that the information may be relevant to the general subject matter of the action” and expressly rejecting the continued applicability of *Oppenheimer Fund, Inc v Sanders*, 437 US 340 (1978), which construed relevancy broadly to encompass “any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case[.]” under amended Rule 26(b)); compare with *Lightsquared Inc v Deere & Co*, 2015 WL 8675377, at *2 (SDNY Dec 10, 2015) (expressly noting that “discovery no longer extends to anything related to the ‘subject matter’ of the litigation,” but holding that the *Oppenheimer* standard of relevance still applies). A recent federal court opinion from the Eastern District of Michigan favorably cites to *Cole’s Wexford Hotel, Inc*. See *Edwards v Scripps Media, Inc*, 331 FRD 116, 122 (ED Mich 2019) (“ . . . Rule 26(b)(1) has been narrowed . . . the rule now allows only discovery of evidence that is relevant to the specific claims and defenses at issue.”).

The language “reasonably calculated to lead to the discovery of admissible evidence” has been deleted from amended MCR 2.302(B)(1). The SBM Committee comments explain:

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. [(Committee Report, p. 28)].

See also *Hemlock Semiconductor Corp v Kyocera Corp*, 2016 WL 1660862, at *3 (ED Mich Apr 27, 2016) (“The rule’s previous language allowing discovery of relevant but inadmissible information that appeared ‘reasonably calculated to lead to the discovery of admissible evidence’ has been deleted from the new rule to address concerns that the exception was swallowing the limitations placed on the scope of discovery.”) (internal citation omitted).

PRACTICE TIP:

Practitioners should make sure to excise language regarding discovery that is “reasonably calculated to lead to the discovery of admissible evidence” from any form objections or other “canned” material used in support or opposition to the scope of discovery requests, as it is no longer applicable.

(2) Proportional to the Needs of the Case – (B)(1)

Additionally, under the redefined scope of discovery, relevance is no longer “good enough,” as one federal court put it, to sustain a discovery request. *Noble Roman’s, Inc v Hattenhauer Dist Co*, 314 FRD 304, 311 (SD Ind 2016) (discussing the “abject disproportionality” of discovery sought, which evidenced a “serious misunderstanding of Rule 26(b).”); see also *State Farm Mut Auto Ins Co v Warren Chiropractic & Rehab Clinic, PC*, 315 FRD 220, 223-24 (ED Mich 2016) (denying motion to quash where plaintiff established that the information sought was relevant and proportional to the needs of the case, and the opposing party made no specific showing that the requested information was unduly burdensome). The requesting party must now demonstrate that its discovery requests are both “relevant and proportional to the needs of the case[.]” MCR 2.302(B)(1). The SBM Committee comments state that the “most important change” to MCR 2.302(B) “is adding language to make clear that proportionality is a guiding factor in deciding what discovery is appropriate.” The comments encourage “both the parties and the court [to] consider this principle” and acknowledge that “the proportionality considerations deserve more emphasis in the rules.” (Committee Report, p. 27).

The Comments to the 2015 Amendment to Federal Rule 26 address the increased need for judicial involvement in reigning in over-discovery resulting from the proliferation of ESI.

The 1993 Committee Note further observed that “[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression.” What seemed an explosion in 1993 has been exacerbated by the advent of e-discovery. The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own. [1993 Committee Note to Amendments to Federal Rule of Civil Procedure 26].

Michigan law currently allows courts to limit discovery “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense” via protective order under MCR 2.302(C). Protective orders are, generally, a *post hoc* tool. But amended MCR 2.302(B) is intended to make the parties mindful of proportionality at the outset. “[T]he revised rule places a

shared responsibility on all the parties to consider the factors bearing on proportionality *before* propounding discovery requests, issuing responses and objections, or raising discovery disputes before the court.” *Salazar v McDonald’s Corp*, 2016 WL 736213, at *2 (ND Cal Feb 25, 2016) (emphasis added); *Knudson v Am Steamship Co*, 2018 WL 2184008, at *1, n 1 (ED Mich March 22, 2018) (instructing counsel to craft discovery proportional to the case).

Discovery requests should be narrowly tailored and targeted to elicit information critical to proving/disproving facts at issue in the case. They should be directed to the most likely individuals, sources and time periods to uncover such information. Discovery requests seeking “all documents” or “all information” from everyone from time immemorial will not pass muster under proportionality analysis. See, e.g., *Rockwell Medical, Inc v Richmond Bros, Inc*, 2017 WL 1361129, at *2-*3 (ED Mich Apr 14, 2017). A court may award attorney fees if it enters a protective order as relief against responding to these types of requests under MCR 2.302(C).

Proportionality Factors – (B)(1)

As for the proportionality factors themselves, Federal Rule 26(b)(1) lists the proportionality factors as follows: (1) *the importance of the issues at stake in the action*, (2) *the amount in controversy*, (3) *the parties’ relative access to relevant information*, (4) *the parties’ resources*, (5) *the importance of the discovery in resolving the issues*, and (6) *whether the burden or expense of the proposed discovery outweighs its likely benefit*.

The italicized factors mimic those in amended MCR 2.302(B)(1). Amended Rule 2.302(B)(1) omits “relative” from factor (3) and omits factor (5) altogether, replacing it with “the complexity of the case,” a factor that appeared in the Federal Rule prior to the 2015 amendments. These factors are not exclusive.

When defending or objecting to discovery requests based on proportionality, both parties “have some stake in addressing the various relevant factors.” *Warrior Sports, Inc v Healy*, 2017 WL 2389967, at *1 (ED Mich May 5, 2017). A responding party still bears the initial burden of explaining why the requested discovery should not be had. *Id.*; *Sobol v Imprimis Pharm*, 2017 WL 5035837, at *2 (ED Mich Oct 26, 2017) (noting that the court ordered defendant to file a supplemental brief to address, *inter alia*, the proportionality factors); *State Farm Mut Auto Ins Co v Pointe Physical Therapy, LLC*, No. 14-11700, 2017 WL 5176403, at *3 (ED Mich Nov 3, 2017) (“[Responding party’s] proportionality analysis is underpinned by an extensive factual development and based on the Court’s prior analysis of the proportionality factors regarding other subpoenas, juxtaposed against [propounding party’s] failure to establish an undue burden or to even address the proportionality factors.”). But, “once that information is presented, both sides are required to address the issue of proportionality.” *Warrior Sports, Inc*, 2017 WL 2389967, at *1. Otherwise, the court may simply decide the issues on the basis of whatever evidence is before it. *Oracle America, Inc v Google Inc*, 2015 WL 7775243, at *2 (ND Cal Dec 3, 2015).

In making the determination of whether requested discovery is proportional to the needs of the case, federal courts apply a “sliding scale.” The more relevant the request, the less proportional it needs to be. *Westfield Ins Co v Icon Legacy Custom Modular Homes*, 321 FRD 107, 118 (MD Pa May 12, 2017) (stating that “demonstrably relevant material ‘should be discoverable in the greatest quantities and for the most varied purposes’; however, less relevant material ‘should be

incrementally less discoverable- and for more limited purposes,’ as the relevancy diminishes.”). One trap parties and courts are warned against is placing undue weight on the “amount in controversy” factor. The SBM Committee comments quote the following from the Comments to Federal Rule 26:

Although the amount in controversy is one proportiona[lity] 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. [(Committee Report, p. 28)].

Federal courts have used this rationale to greenlight what otherwise might be considered disproportionate discovery in small dollar value cases. See, e.g., *Schultz v Sentinel Ins Co, Ltd*, 2016 WL 3149686, at *7 (D SD June 3, 2016) (importance of issues at stake outweigh amount in controversy where plaintiff’s bad faith claim had “the potential to affect [defendant’s] alleged business practices and to remedy the situation for many insureds, not just herself.”)

Magistrate Judge Elizabeth D. Laporte and Jonathan M. Redgrave of Redgrave LLP provide an in-depth look at the federal proportionality factors and provide helpful guidance for their practical application in litigation. They lay out a “proportionality matrix” for use when assessing the applicability of each proportionality factor to the claims and defenses at issue. In support of their matrix, they offer the following “ten best practices” for understanding and applying the factors:

1. Focus on the specific discovery at issue (micro-level analysis) and avoid arguments about discovery in general (macro-level analysis).
2. Recognize that proportionality and relevance are conjoined considerations for civil discovery.
3. Understand that proportionality is a consideration that can support a multi-faceted approach to discovery.
4. Respect that non-parties have greater protections from discovery and that burdens on non-parties will impact the proportionality analysis.
5. Raise discovery scope and proportionality issues early in the litigation and continue to address and revisit them as needed.
6. Do not consider the “amount in controversy” factor to be determinative with respect to the proportionality of discovery requests or responses.
7. Do not approach discovery disputes with the notion that discovery is perfect or that it will result in the production of “any and all” relevant documents or information.
8. Do not address proportionality arguments by citing superseded case law, rotely reciting the rules, or making unsupported assertions of burden.
9. Do not get caught up in an academic dispute regarding the “burden of proving” proportionality as courts will expect that each side of the dispute will have something to contribute, although not necessarily equally, and the most reasonable position will likely prevail.
10. Do not forget that proportionality considerations also apply to preservation decisions and disputes.

Hon. Elizabeth D. Laporte & Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 FED CT L REV 19, 52-71 (2015). This article is recommended reading for practitioners needing to gain an appreciation of how the proportionality factors should work. Also recommended are *Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality*, Duke Law Center for Judicial Studies (Sept 2015) and The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 18 Sedona Conf J 141 (2017)

(3) Expert Discovery – (B)(4)

Amended MCR 2.302(B)(4)(e) explains that the work-product privilege set forth in subrule (B)(3)(a) “protects drafts of any interrogatory answer required under subrule (B)(4)(a)(i).” Under MCR (B)(4)(a)(i), a party seeking

discovery of facts known and opinions held by experts, otherwise discoverable under subrule (B)(1) and acquired or developed in anticipation of litigation or for trial, may . . . through interrogatories require another party to identify each person whom the party expects to call as an expert witness at trial, to state the subject matter about which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

Subrule (B)(4)(e) shields from discovery draft answers to such interrogatories. The Federal Advisory Committee Notes to the 2010 Amendment of the Federal Rules of Civil Procedure explain that the rule applies “regardless of the form in which the draft is recorded, whether written, electronic, or otherwise.” See, e.g., *State Farm Mut Auto Ins Co v Hawkins*, 2010 WL 2813327, at *3 (ED Mich July 14, 2010) (email including draft objections to interrogatories protected under work product doctrine).

Subrule (B)(4)(f), which is substantially similar to Federal Rule 26(b)(4)(C), clarifies that communications between a party’s attorney and expert witness are protected under the work-product privilege regardless of their form. The Federal Advisory Committee Notes to the 2010 Amendment explain the purpose and scope of the Federal Rule:

Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel’s work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery. The protection is limited to communications between an expert witness . . . and the attorney for the party on whose behalf the witness will be testifying, including any “preliminary” expert opinions. Protected “communications” include those between the party’s attorney and assistants of the expert witness. . . . The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

Note that subrule (B)(4)(f) does not shield the following communications between an attorney and expert witness from discovery:

- Communications that “relate to compensation for the expert’s study or testimony”
- Communications that “identify facts or data that the party’s attorney provided and that the expert considered in forming the opinions to be expressed”
- Communications that “identify assumptions that the party’s attorney provided and that the expert relied on in informing the opinions to be expressed”

The Federal Advisory Committee Notes to the 2010 Amendment to Federal Rule 26(b)(4)(C) further explain that the exceptions enumerated above “do not extend beyond those specific topics.” Thus, “when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.” Though the excepted topics are specific, they are interpreted broadly. See, e.g., *Deal Wireless, LLC v Selective Way Insurance Co*, 2016 WL 6651798, at *2 (ED Mich May 4, 2016) (“[C]ontrary to defendant’s argument that disclosure of the expert’s analyses would be premature, plaintiffs are entitled to discover all of the facts and data that the [expert] firm *considered*, including those that do not ultimately underlie the expert’s opinion. . . . The phrase ‘relates to’ means that the matter in question ‘has a connection with or reference to’ the compensation.”) (emphasis added). For instance, under federal law, expert’s notes taken while reviewing documents fall within the “facts or data” exception and must be disclosed. *Wenk v O’Reilly*, 2014 WL 1121920, at *2 (SD Ohio Mar 20, 2014) (“[N]otes made by an expert witness are not work product, and that such notes typically contain ‘factual ingredients’ and are therefore included in the type of ‘facts or data’ an expert has considered in formulating opinions and therefore must disclose.”).

(4) Accessibility of ESI and Cost-Shifting – (B)(6)

Amended MCR 2.302(B)(6) is, in its operative language, identical to Federal Rule 26(c)(1)(B). The amended rule, which concerns discovery of “inaccessible data,” requires a “good cause” showing subject to the proportionality factors in MCR 2.302(B)(1). Courts have held that backup storage used for disaster recovery purposes is presumptively inaccessible. See, e.g., *Solo v UPS*, 2017 WL 85832, at *2 (ED Mich Jan 10, 2017). See also The Sedona Conference, *Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible*, 10 Sedona Conf J 281 (2009). For a case in which the parties stipulated to the types/sources of ESI that would be presumed to be “inaccessible,” see *Martinelli v Johnson & Johnson*, 2016 WL 1458109, at *2 (ED Cal April 13, 2016).

The other notable change is that the court now has express authority to make discovery of all ESI – not just inaccessible ESI – subject to a cost-shifting order. The prior language of the rule allowed for cost-shifting, but was only applied to ESI that was not reasonably accessible. See, e.g., *Burger v Ford Motor Co*, --NW2d--, 2014 WL 132444, at *8-*9 (Mich App Jan 14, 2014). Federal courts

are split as to whether the Federal Rule that allows cost-shifting applies only to ESI that is not reasonably accessible. Compare *US ex rel Guardiola v Renown Health*, 2015 WL 5056726, at *9 (D Nev Aug 25, 2015) (cost-shifting dependent on finding that ESI is not reasonably accessible), with *US ex rel Carter v Bridgepoint Educ, Inc*, 305 FRD 225, 240 (SD Cal 2015) (stating that cost-shifting may be available for accessible ESI).

Where the requested ESI discovery is not proportional to the needs of the case, however, the court should not order cost-shifting—even where the party requesting the data is willing to pay. Principle 13, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF J 1 (2018) (“ . . . [i]f the result of the proportionality analysis clearly demonstrates that the requested discovery is not proportional, and the request is not within the permissible scope of discovery, the request should be denied and cost allocation would not apply. . . . Cost allocation, however, should not be used as a shortcut to resolve difficult proportionality analyses or to ‘buy’ arguably disproportionate discovery.”)

PRACTICE TIP:

Pursue discovery early and narrowly tailor and target discovery requests to elicit information critical to proving/disproving facts at issue in the case by directing them to the most relevant individuals, data sources and time periods—a wider net can be cast later depending on the results. Make specific objections based on proportionality grounds when your opponent fails to adhere to this principle. Federal case law construing the applicable proportionality factors will be useful when formulating objections.

d) Sequence of Discovery – 2.302(D)

Subrule 2.302(D) gives trial courts discretion to control the course and sequence of discovery. See also MCR 2.302(C) (“The court may control the scope, order, and amount of discovery, consistent with these rules.”)

e) Duty to Supplement – 2.302(E)(1)

Initial disclosures are also subject to the duty to supplement. Amended MCR 2.302(E)(1)(a) provides:

A party that has made a disclosure under MCR 2.302(A)—or that has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

- (i) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, *and* if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing or
- (ii) as ordered by the court.

The duty to supplement discovery responses already existed under the prior language of MCR 2.302(E). However, under the amendment, the language is updated to correspond to the current version of its federal counterpart, Federal Rule 26(e)(1)(A).

Supplementation must occur “seasonably” under the previous language of the rule, but “in a timely manner” under the rule as amended—a subtle distinction, if any. And, supplementation was required under the previous language of the rule only if the failure to do so would be a “knowing concealment.” The amended rule eliminates the “knowing concealment” language and requires supplementation where “the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. . . .” This is a substantive change as sanctions for a failure to supplement were not available unless the court found the failure constituted a “knowing concealment.” See *Boyer v Home Depot USA, Inc*, 2010 WL 1254847, at *4 (ED Mich March 26, 2010) (striking supplemental initial disclosures but declining to impose monetary sanctions for failure to timely supplement); *Tucunel v K-Mart Corp*, --NW2d--, 1996 WL 33348842 at *2 (Mich App Nov 12, 1996) (finding plaintiffs’ argument that defendant willfully and wantonly concealed evidence by failing to supplement was meritless).

For a “knowing concealment” there must be “a conscious decision by a party to prevent disclosure of the information requested.” *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 452 (1995). “[I]n light of the possibility of severe sanctions under MCR 2.313(B)(2)(b), an innocent, unintentional failure to . . . supplement. . . should not be considered a knowing concealment.” *Id*. Although sanctions are now available under a wider array of circumstances for failure to supplement, the severity of the sanctions under amended MCR 2.313(C), which only received cosmetic changes, will still depend on the degree of culpability of the party failing to supplement and the prejudice suffered by the aggrieved party.

**f) Filing and Service of Disclosure and
Discovery Materials – 2.302(H)**

Subrule MCR 2.302(H) does not have a federal rule counterpart. Except for the stated exceptions in subrule MCR 2.302(H)(1)(a)-(c), parties may not file discovery materials delineated in this subrule with the court.

D. MCR 2.305 DISCOVERY SUBPOENA TO A NON-PARTY

1. TEXT OF AMENDMENT

(A) General Provisions.

- (1) A represented party may issue a subpoena to a non-party for a deposition, production or inspection of documents, inspection of tangible things, or entry to land upon court order or after all parties have had a reasonable opportunity to obtain an attorney, as determined under MCR 2.306(A). An unrepresented party may move the court for issuance of non-party discovery subpoenas. MCR 2.306(B)(1)-(2) and (C)-(G) apply to a subpoena under this rule. This rule governs discovery from a non-party under MCR 2.303(A)(4), 2.307, 2.310(D) or 2.315. MCR 2.506(A)(2) and (3) apply to any request for production of ESI. A subpoena for hospital records is governed by MCR 2.506(I). Subpoenas shall not be issued except in compliance with MCR 2.306(A)(1). After serving the notice provided for in MCR 2.302(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 party's attorney or 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.
- (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.~~
- (23) A deposition notice and subpoena under this rule may provide that the deposition it 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. Any request for documents shall indicate that the subpoenaing party will pay reasonable copying costs.
- (3) A subpoena shall provide a minimum of 14 days after service of the subpoena (or a shorter time if the court directs) for the requested act. The subpoenaing party may file a motion to compel compliance with the subpoena under MCR 2.313(A). The motion must include a copy of the request and proof of service of the subpoena. The movant must serve the motion on the non-party as provided in MCR 2.105.
- (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 or in which the

subpoena is served, on timely motion made by a party or the subpoenaed non-party before the time specified in the subpoena for compliance, may:

(a)–(b) [Unchanged.]

(c) ~~condition denial of conditionally deny~~ the motion on prepayment by the ~~person~~ party 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(G). A copy of the subpoena must be served on all other parties on the date of issuance ~~in the same manner as the deposition notice.~~

(6) In a subpoena for a non-party deposition, 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. No later than 10 days of being served with the subpoena, the subpoenaed entity may serve objections, or 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, 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.

(7) Upon written request from another party and payment of reasonable copying costs, the subpoenaing party shall provide copies of documents received pursuant to a subpoena.

~~(B) Inspection and Copying of Documents. A subpoena issued under subrule (A) may command production of documents or other tangible things, but the following rules apply:~~

~~(1) The subpoena must be served at least 14 days before the time for production. The subpoenaed person may, not later than the time specified in the subpoena for compliance, serve on the party serving the subpoena written objection to inspection or copying of some or all of the designated materials.~~

- ~~(2) If objection is made, the party serving the subpoena is not entitled to inspect and copy the materials without an order of the court in which the action is pending.~~
- ~~(3) The party serving the subpoena may, with notice to the deponent, move for an order compelling production of the designated materials. MCR 2.313(A)(5) applies to motions brought under this subrule.~~

(BE) Place of ~~Examination~~ Compliance.

- ~~(1) Except for a subpoena for delivery of copies of documents only under subrule (A)(2), a ~~A deponent~~ non-party served with a subpoena in Michigan may be required to attend an examination comply with the subpoena only in the county where the deponent resides, is employed, has its principal place of business or transacts relevant business; or at the location of the things to be inspected or land to be entered; in person or at another convenient place specified by order of the court.~~
- ~~(2) In an action pending in Michigan, the court may order a nonresident plaintiff or an officer or managing agent of the plaintiff to appear for a deposition at a designated place in Michigan or elsewhere on terms and conditions that are just, including payment by the defendant of the reasonable expenses of travel, meals, and lodging incurred by the deponent in attending.~~
- ~~(3) If it is shown that the deposition of a nonresident defendant cannot be taken in the state where the defendant resides, the court may order the defendant or an officer or managing agent of the defendant to appear for a deposition at a designated place in Michigan or elsewhere on terms and conditions that are just, including payment by the plaintiff of the reasonable expenses of travel, meals, and lodging incurred by the deponent in attending.~~

(CD) Petition to Courts Outside Michigan to ~~Compel Testimony~~. When the place of ~~examination~~ compliance is in another state, territory, or country, the subpoenaing party ~~desiring to take the deposition~~ may petition a court of that state, territory, or country for a subpoena or equivalent process ~~to require the deponent to attend the examination~~.

(DE) Action Pending in Another Country. An officer or a person authorized by the laws of another country to ~~take a deposition~~ issue a subpoena in Michigan, with or without a commission, in an action pending in a court of that country may submit an application to a court of record in the county in which the ~~deponent-subpoenaed~~ person resides, is employed, has its principal place of business, transacts relevant business ~~in person~~, or is found, for a subpoena ~~to compel the deponent to give~~

~~testimony~~. The court may hear and act on the application with or without notice, as the court directs.

(~~EF~~) [Relettered but otherwise unchanged.]

2. ANALYSIS

Amended MCR 2.305 is intended to clarify the confusion in the prior language of the rules regarding the different procedural aspects of seeking discovery from a party and a non-party, and the difference between discovery subpoenas and subpoenas for attendance. (See Committee Report, p. 37). Amended MCR 2.305(A)(1) applies to subpoenaing non-parties, and amended MCR 2.306(A) applies to deposing parties.

a) Subpoenas to Non-Parties – 2.305(A)(1)-(2)

Represented parties may issue a subpoena on a non-party upon court order or after all parties have had a reasonable opportunity to obtain an attorney. Unrepresented parties, on the other hand, “may move the court for issuance of a non-party discovery subpoena.” MCR 2.305(A)(1). A party can subpoena “a public or private corporation, partnership, association, or governmental agency” as a deponent under MCR 2.305(A)(6). If the subpoena can be satisfied by providing a copy of the requested documents, the requesting party must furnish “reasonable copying costs.” MCR 2.305(A)(2). “Reasonable copying costs” are not defined. In one case, a federal court found a \$2 per page copying charge unreasonable and reduced the charge to twenty-five cents per page. *Verso Paper, LLC v HireRight, Inc*, 2012 WL 2376046, at *6 n 1 (SD Miss June 22, 2012). A court might also look to the Michigan Freedom of Information Act, MCL 15.231 *et seq.*, which places an upper limit of “10 cents per sheet of paper for copies of public records made on 8-1/2- by 11-inch paper or 8-1/2- by 14-inch paper.” MCL §15.234(1)(d).

b) Compliance with Non-Party Subpoena and Enforcement – 2.305(A)(3)-(6), (B)

The subpoena must provide at least 14 days for compliance after service under MCR 2.506(G), unless the court orders compliance within a shorter time. A copy of the subpoena must be served on all other parties to the case on the date it is issued. MCR 2.305(A)(5).

Except for a subpoena commanding delivery of copies of documents under MCR 2.305(A)(2) only, a subpoenaed Michigan non-party must comply with the subpoena in the county where the deponent resides, the county where the deponent is employed, the county where the deponent has its principal place of business or transacts relevant business, the location of the things to be inspected or land to be entered, or another convenient place specified by court order. The Supreme Court defines “principal place of business,” for purposes of diversity jurisdiction as “the place where a corporation’s officers direct, control, and coordinate the corporation’s activities. . . . And in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, i.e., the ‘nerve center,’ and not simply an office where the corporation holds its board meetings (for

example, attended by directors and officers who have traveled there for the occasion).” *Hertz Corp v Friend*, 559 US 77, 93 (2010).

In a subpoena for a non-party deposition where the deponent is a public or private corporation, partnership, association, or governmental agency, the subpoenaed non-party must designate one or more persons to testify on its behalf “to matters known or reasonably available[.]” and may set forth the matters on which the persons will testify. MCR 2.305(A)(6).

Although the phrase “matters known or reasonably available to the organization” appears in amended MCR 2.306(B)(5) (as well as Federal Rule 30(b)(6), which is substantially similar), Michigan courts have not interpreted it. Federal district courts have interpreted this phrase to mean that “the witnesses are not required to have personal knowledge” to testify. See *Ball Corporation v Air Tech of Michigan*, 329 FRD 599, 603-604 (ND Ind 2019) (“A deposition of an individual is not the equivalent of a deposition of an organization . . . [the] witness may ‘testify not only to matters within his personal knowledge but also to matters known or reasonably available to the organization’”).

If the subpoenaed non-party fails to respond in time, the subpoenaing party may move to compel compliance with a subpoena under MCR 2.313(A), and must include a copy of the subpoena and proof of service in the motion, and serve the motion on the non-party under MCR 2.105. MCR 2.305(A)(3).

PRACTICE TIP:

Be sure to provide at least 14 days after service of a subpoena for compliance, unless the court orders a shorter time, even if only a deposition is the subject of the subpoena with no document production request. Be sure to serve a copy of the subpoena on all other parties to the case on the date it is issued. If you are a non-party objecting to a subpoena served under subrule 2.305(A)(6) in part or in whole, you must serve objections, or file a motion for protective order, no later than 10 days after being served with a subpoena. Given this short period of time to object, organizations need to have a procedure in place for promptly analyzing and responding to non-party subpoenas.

c) Compliance and Actions Pending Outside Michigan – 2.305(C)-(D)

A party can petition foreign courts outside of Michigan for a subpoena if the place of compliance under MCR 2.305(B) is outside Michigan.

For actions pending in another country, a court officer or a person can petition the foreign court in the county in which the subpoenaed party resides, works, has its principal place of business, transacts business, or is found, for a subpoena.

E. MCR 2.306 DEPOSITIONS ON ORAL EXAMINATION OF A PARTY

1. TEXT OF AMENDMENT

(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) [Unchanged.]

- (2) [Unchanged.]

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

(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)-(b) [Unchanged.]

~~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 witnesses 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.

- (35) 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. No later than 10 days after being served with the notice, the noticed entity may serve objections or 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 motion, 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. **The deposition of each produced witness may not exceed one day of seven hours.** ~~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)-(G) [Unchanged.]

2. ANALYSIS

Whereas amended MCR 2.305(A)(1) applies to subpoenaing non-parties, amended MCR 2.306(A) applies to deposing parties to an action.

a) **Timing of Examination – (A)(1)**

A party may depose a party to an action after serving its initial disclosures under MCR 2.301(A), where initial disclosures are required, or as authorized by the rules, stipulation, or court order.

b) **Compliance with Notice of Examination and Enforcement – (B)(1)-(3)**

A party seeking to depose a party must serve a notice of deposition (with or without a request for production of documents and tangible things under MCR 2.310), and give reasonable notice of the deposition in writing to every other party to the action. The deposition must be limited to 7 hours and “be completed in a single day,” unless changed by stipulation. This time limit was adopted from similar limits in the Federal Rules along with Arizona’s and Minnesota’s rules. (Committee Report, p. 39). Note, that in the case of a deposition taken under amended subrule 2.306(B)(5), if the responding party designates more than one representative, each may be deposed for the maximum of seven hours.

The 14-day requirement for serving a notice of deposition before the scheduled deposition applies *only* to depositions of representatives of a public or private corporation, partnership, association, or governmental agency (i.e. a party’s corporate representative). The procedure for objecting to such notices of deposition under amended subrule (B)(3) only applies for noticed entities (i.e. a party’s corporate representative). For instance, “no later than 10 days after being served with the notice,” a noticed entity may object on the basis of the apex-deposition rule, which provides that a party seeking to depose a high-ranking corporate officer or executive must make a “preliminary showing” (by affidavit or other testimony) that the officer or executive possesses “superior or unique information relevant to the issues being litigated” and that “the information cannot be

obtained by less intrusive” discovery methods, or “file a motion for protective order[.]” *Alberto v Toyota Motor Corp*, 289 Mich App 328, 334 (2010); see also *I-Fusion Tech, Inc v TRW Auto US, LLC*, --NW 2d--, 2013 WL 2662237, at *1 (Mich App Jun 13, 2013).

The SBM Committee also considered adopting a presumptive limit of 10 depositions, but was unconvinced that a limit would be necessary because the overall abuse of the number of depositions is not widespread “and certain categories of cases are particularly not well-suited to presumptive limits.” Should abuse arise, “[t]he court may impose limits under its general authority to control the course of discovery, or a party may ask for limits under MCR 2.302(C).”

The party whose deposition is being sought may serve objections, in part or in whole, or file a motion for protective order, no later than 10 days after receipt of the notice. The moving party may proceed with the deposition on topics as to which there was no objection or motion, or move to enforce the notice.

PRACTICE TIP:

Be sure to provide a notice of deposition at least 14 days prior to the scheduled deposition, and provide notice in writing to every other party to the action. If you object to a notice under subrule 2.306(B)(3) in part or in whole, you must serve objections, or file a motion for protective order, no later than 10 days after receiving the notice.

F. MCR 2.307 DEPOSITIONS ON WRITTEN QUESTION

1. TEXT OF AMENDMENT

(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)(3).

(2)-(3) [Unchanged.]

(B) [Unchanged.]

2. ANALYSIS

Amended MCR 2.307 includes minimal changes reflecting the limitations in amended MCR 2.305(A) (see *supra* Section D, p. 29), regarding the process for subpoenaing non-parties for depositions, and incorporates the process for the deposition of organizations under amended MCR 2.305(A)(6) and 2.306(B)(3). MCR 2.307 is comparable to Federal Rule 31.

Consistent with MCR 2.302(D), depositions on written questions may be taken at any time, “[u]nless the court orders otherwise[.]”

PRACTICE TIP:

Know the limitations on subpoenas for non-party depositions under amended MCR 2.305(A) and 2.306(B).

G. MCR 2.309 INTERROGATORIES TO PARTIES

1. TEXT OF AMENDMENT

(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 may, without leave of court, be served:

~~(1a)~~ on the plaintiff after commencement of the action;

~~(2b)~~ 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 party. A discrete subpart of an interrogatory counts as a separate interrogatory.

2. ANALYSIS

The reference to MCR 2.302(B) makes the use of interrogatories expressly subject to the “relevant and proportional to the needs of the case” scope of discovery. Additionally, the rule limits the number of interrogatories a party may serve on another party to twenty with “discrete subparts” counting as separate interrogatories. The SBM Committee notes state that “[t]he 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.” (Committee Report, p. 42). This differs from Federal Rule 33(a)(1), which sets an interrogatory limit to each party. Note that a different presumptive limit applies to domestic relations actions (see *infra* Section P, p. 75 and MCR 3.201(C) – limit is 35 interrogatories).

The imposition of a limit on the number of interrogatories ties directly into adoption of the “initial disclosures” requirement in MCR 2.302(A)(1). As the SBM Committee comments explain, the limit was chosen “with the view that initial disclosures will provide meaningful information that a party would otherwise seek in interrogatories” and “with the understanding that initial disclosures must be taken seriously by the parties . . .” (Committee Report, p. 42). The comments further explain that twenty interrogatories is a “presumptive limit” and that “the court must be open to allowing more interrogatories if truly appropriate for the matter.” (*Id.*)

Federal Rule 33(a)(1) presumptively limits the number of interrogatories to twenty-five, including “discrete subparts.” What constitutes a “discrete subpart” is not defined in the Federal Rule. In general, courts have ruled that an interrogatory eliciting information around a common theme counts as one interrogatory despite being broken into subparts. *Harhara v Norville*, 2007 WL 2897845, at *1 (ED Mich Sept 25, 2007) (providing that “[i]f the subparts to an interrogatory are

necessarily related to the ‘primary question,’ the subparts should be counted as one interrogatory rather than as multiple interrogatories.’’) (internal citation omitted); see also *Barkovic v Shelby*, 2010 WL 11541857, at *1 (ED Mich Aug 16, 2010) (ruling that interrogatories requesting information concerning plaintiff’s identity and medical treatment each counted as a single interrogatory regardless of the numerous subparts as the subparts were all “factually and/or logically related to the primary question” and were subsumed by the primary question posed by each interrogatory) (internal citation omitted).

PRACTICE TIP:

Make sure interrogatory subparts have some relation to the primary question in the interrogatory. For example, an interrogatory asking for a party to identify medical treatment received with subparts for doctors seen, locations, times and dates of treatment, types of treatment received and cost of treatments, may be considered one interrogatory since the subparts elicit information around a common theme. But, a “contention interrogatory” with subparts seeking information supporting multiple claims/defenses may be treated as separate interrogatories.

H. MCR 2.310 REQUESTS FOR PRODUCTION OF DOCUMENTS AND OTHER THINGS; ENTRY ON LAND FOR INSPECTION AND OTHER PURPOSES

1. TEXT OF AMENDMENT

(A) Definitions. For the purpose of this ~~rule~~ subchapter,

(1) “Documents” includes writings, drawings, graphs, charts, photographs, ~~phone records~~sound recordings, images, and other data or data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form stored in any medium, including ESI.

(2) “ESI” means electronically stored information, regardless of format, system, or properties.

~~(3)~~ [Renumbered but otherwise unchanged.]

(B)-(C) [Unchanged.]

~~(D)~~ Request to Nonparty.

~~(1) A request to a nonparty may be served at any time, except that leave of the court is required if the plaintiff seeks to serve a request before the occurrence of one of the events stated in MCR 2.306(A)(1).~~

~~(2) The request must be served on the person to whom it is directed in the manner provided in MCR 2.105, and a copy must be served on the other parties.~~

~~(3) The request must~~

~~(a) list the items to be inspected and tested or sampled, either by individual item or by category, and describe each item and category with reasonable particularity;~~

~~(b) specify a reasonable time, place, and manner of making the inspection and performing the related acts, and~~

~~(c) inform the person to whom it is directed that unless he or she agrees to allow the inspection or entry at a reasonable time and on reasonable conditions, a motion may be filed seeking a court order to require the inspection or entry.~~

~~(4) If the person to whom the request is directed does not permit the inspection or entry within 14 days after service of the request (or a shorter time if the court directs), the party seeking the inspection or entry may file a motion to~~

~~compel the inspection or entry under MCR 2.313(A). The motion must include a copy of the request and proof of service of the request. The movant must serve the motion on the person from whom discovery is sought as provided in MCR 2.105.~~

~~(5) The court may order the party seeking discovery to pay the reasonable expenses incurred in complying with the request by the person from whom discovery is sought.~~

~~(6) This rule does not preclude an independent action against a nonparty for production of documents and other things and permission to enter on land or a subpoena to a nonparty under MCR 2.305.~~

2. ANALYSIS

Amended MCR 2.310(A) clarifies that ESI is included in the definition of “documents” and is adapted from Federal Rule 34(a)(1)(A). The SBM Committee comments explain that references to “documents” in discovery rules that are not amended should be interpreted to include ESI as circumstances warrant. (Committee Report, p. 44). And, although the term “ESI” is broad, determining whether ESI should be produced and in what form “must be addressed under, *e.g.*, MCR 2.302(B), 2.302(C), and 2.310(B).” (*Id.*)

Discovery under MCR 2.310 must be initiated at least 28 days before the deadline for completion of discovery under amended MCR 2.301(B)(4). Requests for discovery under MCR 2.310 are subject to the permitted scope of discovery under amended MCR 2.302(B) (*i.e.* requests must seek “non-privileged matter that is relevant to any party’s claims or defenses and proportional to the needs of the case . . .”).

I. MCR 2.312 REQUEST FOR ADMISSION

1. TEXT OF AMENDMENT

(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.

(B)-(F) [Unchanged.]

2. ANALYSIS

Requests for admission may be served once a party serves the required initial disclosures under MCR 2.302(A), and must be served at least 28 days before the deadline for completion of discovery under MCR 2.301(B)(4).

Amended MCR 2.312(A) requires requests for admission to be clearly labeled. This is intended to discourage attorneys from burying requests to admit (which are deemed admitted within 28 days under subrule (B)(1) unless answered or objected to) in interrogatories or requests for production of documents. The SBM Committee comments indicate that “failure to abide by [the] requirement could be taken into account by a court in deciding a request to withdraw or amend an admission.” (Committee Report, p. 46).

PRACTICE TIP:

When drafting discovery requests, be sure to label requests for admission in the caption of the document and before each request.

J. MCR 2.313 FAILURE TO SERVE DISCLOSURE OR TO PROVIDE OR PERMIT DISCOVERY; SANCTIONS

1. TEXT OF AMENDMENT

(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. A motion for an order under this rule may be made to the court in which the action is pending, or, as to a matter relating to a deposition in, or non-party subpoena served outside of, the county where the action is pending, to a court in ~~the~~that county ~~or district where the deposition is being taken.~~

(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.

(b) To Compel Discovery. If

(i~~a~~) a deponent fails to answer a question propounded or submitted under MCR 2.306 or 2.307,

(i~~ib~~) a corporation or other entity fails to make a designation under MCR 2.306(B)(~~3~~5) or 2.307(A)(1),

(i~~ie~~) a party fails to answer an interrogatory submitted under MCR 2.309(A) and (B), ~~or~~

(i~~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, or

(v) If a party; an officer, director, or managing agent of a party; or a person designated under MCR 2.306(B)(3) or 2.307(A)(1) to testify on behalf of a party fails to appear before the person who is to take his or her deposition, after being served with a proper notice, the party seeking discovery may move for an order compelling ~~an answer, a designation, or inspection in accordance with the request~~ compliance. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(c) To compel compliance with a non-party discovery subpoena. If a recipient of a non-party discovery subpoena under MCR 2.305 fails to comply, the issuing party may move to compel compliance. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order. The motion must include a copy of the subpoena and proof of service of the subpoena. The movant must serve the motion on the person from whom discovery is sought as provided in MCR 2.105.

(3) [Unchanged.]

(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.

(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 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.

(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.

(6) Additional Sanctions. The court in which the action is pending may order such sanctions as are just. Among others, it may take an action authorized under subrule (B)(2)(a), (b), and (c).

(B) Failure to Comply With Order.

- (1) [Unchanged.]
- (2) Sanctions by Court in Which Action is Pending.
 - (a)-(e) [Unchanged.]

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, Supplement, 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).

(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)-(4) [Relettered (a)-(d) but otherwise unchanged.]

(D) ~~Failure of Party to Attend at Own Deposition, to Serve Answers to Interrogatories, or to Respond to Request for Inspection.~~

~~(1) If a party; an officer, director, or managing agent of a party; or a person designated under MCR 2.306(B)(5) or 2.307(A)(1) to testify on behalf of a party fails~~

- ~~(a) to appear before the person who is to take his or her deposition, after being served with a proper notice;~~
 - ~~(b) to serve answers or objections to interrogatories submitted under MCR 2.309, after proper service of the interrogatories; or~~
 - ~~(c) to serve a written response to a request for inspection submitted under MCR 2.310, after proper service of the request, on motion, the court in which the action is pending may order such sanctions as are just. Among others, it may take an action authorized under subrule (B)(2)(a), (b), and (c).~~
- (2) 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) 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).
- (DE) Failure to Preserve ESI. 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 ESI 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:
 - (a) a presumption that the lost information was unfavorable to the party;
 - (b) a jury instruction directing that the jury may or must presume the information was unfavorable to the party; or
 - (c) dismissal of the action or entry of a default judgment.

2. ANALYSIS

The rule governs sanctions for failure to participate in good faith in the discovery process, as the discovery rules as a whole mandate. Most of the rule restates the sanctions previously available under its predecessor and makes the rule applicable to initial disclosures now required by MCR 2.302(A). However, there are several notable changes.

With respect to a non-party subpoena served outside the county where the action is pending, Subrule 2.313(A)(1) now allows a motion to compel to be filed in the county where the subpoena was served.

Subrule 2.313(A)(2)(c) is new. It provides that a motion to compel may be filed when a non-party fails to comply with a non-party discovery subpoena served under MCR 2.305. The motion to compel must be served on the individual from whom the discovery is sought in accordance with MCR 2.105, which governs service of process.

The award of expenses provided for in subrule 2.313(A)(5)(a) and (b) are no longer mandatory, but permissive. The same is true for subrule 2.313(B)(2).

Subrule 2.313(A)(6) is new. In the case of motions to compel, this subrule authorizes additional sanctions “as are just,” including those set forth in MCR 2.313(B)(2)(a), (b) and (c). These sanctions, which were previously limited to non-compliance regarding a corporate representative deposition taken under MCR 2.306(B)(5) or MCR 2.307(A)(1), include taking designated facts as established, precluding the disobedient party from supporting a claim or defense or introducing designated matters into evidence, and striking of pleadings, dismissing all or part of an action or entering default judgment.

Subrule 2.313(C)(1) is new. It concerns the failure to disclose or supplement as required by MCR 2.305(A) and (E). A party that fails to comply with its duty to disclose or supplement will not be allowed to use that information or witness to supply evidence on a motion, at a hearing or at trial unless the court finds the failure was substantially justified or harmless. In addition to or instead of that sanction, the court can order other sanctions set forth in MCR 2.313(C)(1)(a)-(c), which includes the sanctions set forth in MCR 2.313(B)(2)(a)-(c).

Subrule 2.313(D) is new and codifies the sanctions available for the failure to preserve and produce ESI. It concerns sanctions for the failure to preserve and produce relevant ESI and is the most significant change to subrule 2.313. It is explored in greater detail below.

a) Scope and Timing of Duty to Preserve

Practitioners should note that amended MCR 2.313 does not create or define the duty to preserve. Instead, it is under Michigan common law that a party has the duty to preserve evidence “in pending or reasonably foreseeable litigation.” *Wood v Cook*, --NW2d--, 2018 WL 341437, at *3 (Mich App Jan 9, 2018) (quoting *Silvestri v Gen Motors Corp*, 271 F3d 583, 590 (4th Cir 2011)). “Even when an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence that it knows or reasonably should know is relevant to the action.” *Brenner v Kolk*, 226 Mich App 149, 162 (1997) (internal citation omitted).

For example, the amended rule does not address what circumstances trigger the duty to preserve before commencement of litigation, i.e., when should a party “reasonably foresee” future litigation. The common law still governs that fact-intensive determination. There is general agreement that certain events trigger the duty to preserve evidence prior to the filing of litigation. See, e.g., *Bagley v Yale University*, 318 FRD 234, 240-41 (D Conn Dec 22, 2016) (finding that the preservation duty arose before filing of suit and arguably when university staff exchanged emails noting plaintiff’s threat of legal action); *Rinkus Consulting Group, Inc v Cammarata*, 688 F Supp 2d 598, 607 (SD Tex 2010) (defendants’ preservation duty arose when they were planning to institute a related legal action); *Jones v Bremen High Sch Dist 228*, 2010 WL 2106640, at *7 (ND Ill May 25, 2010) (defendant’s duty to preserve documents in employment discrimination case arose when it was notified of plaintiff’s EEOC filing); *D’Onofrio v SFX Sports Group, Inc*, 2010 WL 3324964, at *7-*8 (DDC Aug 24, 2010) (duty to preserve evidence triggered on receipt of letter stating that the sender intended to initiate litigation and was requesting preservation of electronic documents); but see *Cache La Poudre Feeds, LLC v Land O’Lakes, Inc*, 244 FRD 614, 621 (D Colo 2007) (no duty to preserve evidence arose where letters regarding dispute did not contain “unequivocal threat” of litigation but instead implied that the plaintiff was willing to explore a negotiated settlement).

b) When Sanctions For Failure to Preserve ESI Are Appropriate (Predicate Elements) – 2.313(D)

Amended MCR 2.313(D) focuses on when sanctions are appropriate and it is virtually identical to Federal Rule 37(e). It only applies to ESI (not tangible/physical evidence) and only to parties to the litigation. While a significant departure from the language of its predecessor MCR 2.313(E), the rule does not depart drastically from the general spoliation standard already applied by Michigan courts. See, e.g., *Brenner v Kolk*, 226 Mich App 149, 157-60 (1997) (requiring a finding that (1) evidence that should have been preserved was lost/destroyed, (2) resulting in prejudice to a party, and (3) the severity of sanction dependent on degree of culpability and degree of prejudice).

Under the Federal Rule, “a Court must determine that four predicate elements are met under Rule 37(e) before turning to the sub-elements of (e)(1) and (e)(2): (a) the existence of ESI of a type that should have been preserved; (b) ESI is lost; (c) the loss results from a party’s failure to take reasonable steps to preserve it; and (d) it cannot be restored or replaced through additional discovery. The Court must make findings on each element” *Konica Minolta Business Solutions, USA v Lowery Corp*, 2016 WL 4537847, at *2 (ED Mich Aug 31, 2016).

Only after these predicates are met will the court then determine the spoliating party’s degree of culpability and the degree of prejudice to the other party. Under Federal Rule 37(e), a court cannot award sanctions under subsection (e)(1) or subsection (e)(2) (i.e. dismissal, judgment, adverse inference, or adverse presumption) unless it finds that the spoliator acted with “intent to deprive another party of the information’s use in the litigation.” *Konica Minolta Business Solutions, USA*, 2016 WL 4537847 at *3. In the Sixth Circuit, neither negligence nor gross negligence rise to this level of culpability. *Applebaum v Target Corp*, 831 F3d 740, 745 (6th Cir 2016). In the absence of a finding of an “intent to deprive,” the court has discretion to issue lesser sanctions, as appropriate. See, e.g., *Estate of Esquivel v Brownsville Ind School Dist*, 2019 WL 219888, at *1-

*2 (SD Tex Jan 16, 2019) (finding preclusion of evidence improper under Rule 37(e)(1) where it would have the practical effect of striking a central defense).

Even when the court finds that the spoliating party has acted with an “intent to deprive,” sanctions under Federal Rule 37(e) are not mandatory. As the Notes to the Federal Rule explain,

[f]inding an intent to deprive another party of the lost information’s use in the litigation does not require a court to adopt any of the measures listed in subdivision [(D)](2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision [(D)](1) would be sufficient to redress the loss.

Current Michigan law comports with this directive. *MASB-SEG Property/Casualty Pool v Metalux*, 231 Mich App 393, 401 (1998) (before ordering dismissal “trial court must consider lesser sanctions . . .”).

PRACTICE TIP:

Be aware of when the duty to preserve arises. When moving for sanctions under MCR 2.213(D), make sure to specifically address the four predicate findings the court must make: (1) party failed to take reasonable steps to preserve ESI; (2) that should have been preserved; (3) resulting in loss of the ESI; and (4) the ESI cannot be restored or replaced through additional discovery. If the court does not find favorably on any of these predicates, it cannot award sanctions under the rule.

Federal courts have also wrestled with the question as to whether a court can still use its “inherent authority” to award sanctions for spoliation outside of the confines of Federal Rule 37(e). See, e.g., *CAT3, LLC v Black Lineage, Inc*, 164 F Supp 3d 488, 502 (SDNY 2016) (holding court retains inherent authority to sanction for spoliation even where an existing rule covers the situation); *Borum v Brentwood Village, LLC*, 2019 WL 3239243, at *4 (DDC July 18, 2019) (finding the rule was “clearly drafted with an eye towards providing clarity and uniformity” and rejecting *CAT3*). Michigan case law suggests that subrule 2.313(D), as amended, may supplant reliance on the court’s inherent authority concerning sanctions for spoliation of ESI. *Schell v Baker Furniture Co*, 461 Mich 502, 511-13 (2000) (holding that the authority of a chief judge set forth in MCR 8.110, known as the “Chief Judge Rule,” mandates the court not take action prohibited by the rule, such as not acting in conformity with the Michigan Court Rules); see also *In re Credit Acceptance Corp*, 273 Mich App 594, 601 (2007) (holding that “[n]othing in *Schell* suggests that the inherent authority of courts to expeditiously manage their own affairs allows them to refuse to take an action mandated by the court rules or to impose requirements not included in those rules before doing so.”)

c) Finding “Intent to Deprive” under MCR 2.313(D)(2)

What constitutes an “intent to deprive another party of the information’s use in the litigation” is not defined within the subrule or its commentary. Some insight can be derived from the

commentary to Federal Rule 37(e). The commentary states that the rule “rejects cases such as *Residential Funding Corp v DeGeorge Financial Corp*, 306 F3d 99 (2d Cir 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.” Where ESI is lost due to negligence or even gross negligence, there is no support for the inference that the evidence was unfavorable to the negligent party. The inference is only supported in cases where the loss is intended to prevent a party from using the evidence in the litigation. There is support for this proposition under Michigan law. *Trupiano v Cully*, 349 Mich 568, 570 (1957) (adverse inference instruction only warranted when “there was ‘intentional conduct indicating fraud and a desire to destroy and thereby suppress the truth[.]’”).

This means acting intentionally to destroy ESI is not enough to support severe sanctions under the rule. A party can intentionally take the steps to delete ESI without necessarily intending to deprive another party of the information’s use in the litigation. *Flores v AT&T Corp*, 2018 WL 6588586, at *8-*9 (WD Tex Nov 8, 2018) (holding that “[e]vidence of destruction as part of a regular course of conduct [pursuant to a document retention schedule] is insufficient to support a finding of intent to deprive . . . because it does not demonstrate bad faith”).

Circumstantial evidence may be sufficient to establish “intent to deprive.” *Paisley Park Enterprises, Inc v Boxill*, 330 FRD 226, 236 (D Minn Mar 3, 2019) (“Intent rarely is proved by direct evidence, and a district court has substantial leeway to determine intent through consideration of circumstantial evidence, witness credibility, motives of the witnesses in a particular case, and other factors,” quoting *Morris v Union Pacific RR*, 373 F3d 896, 901 (8th Cir 2004)). “But there must be evidence of ‘a serious and specific sort of culpability’ regarding the loss of the relevant ESI.” *Id.*

There is a split of authority regarding the evidentiary standard to be met before a finding of “intent to deprive” may be made. Of the courts to expressly address the issue, some hold that “preponderance of the evidence” is sufficient while the others hold that “clear and convincing evidence” is necessary. See, e.g., respectively, *DVComm, LLC v Hotwire Comm’ns, LLC*, 2016 WL 6246824, at *6 (ED Penn Feb 3, 2016); *Lokai Holdings LLC v Twin Tiger USA LLC*, 2018 WL 1512055, at *1 (SDNY Mar 12, 2018). Courts imposing the stricter evidentiary standard argue that the severity of the sanction warrants it. Those imposing the lesser evidentiary standard argue that because these are sanctions in a civil action that do not require a showing of fraud, there is no need for a stricter evidentiary standard—especially where the aggrieved party is already disadvantaged by the loss of evidence. Michigan case law suggests that the “preponderance of evidence” standard should be used. *Townsend v Kasle Steel Corp*, -- NW2d --, 2009 WL 454729, at *13-*14 (Mich App Feb 24, 2009) (citing *Traxler v Ford Motor Co*, 227 Mich App 276, 288-89 (1998)).

Courts have found an “intent to deprive” where: a party destroys ESI after receipt of a “preservation demand” letter. *Omnigen Research v Wang*, 321 FRD 367, 372-377 (D Or May 23, 2017); (party’s corporate officer destroyed ESI and directed other employees to destroy ESI after suit was commenced and a litigation hold issued); *GN Netcom, Inc v Plantronics, Inc*, 2016 WL3792833 (D Del July 12, 2016) (party deleted ESI after its production was ordered by the court); *Barrette Outdoor Living, Inc v Michigan Resin Representatives*, 2013 WL 3983230 (ED Mich Apr 26, 2013), Report and Recommendation adopted, 2013 WL 3983230 (ED Mich Aug 1, 2013) (intent to deprive found where party deleted 270,000 files from laptop shortly after the court

ordered party to produce the laptop for imaging and discarded his cell phone). All of these cases show the fact-intensive analysis that courts undertake when considering “intent to deprive” under the rule.

However, even where ESI is destroyed with an “intent to deprive,” sanctions still may not be warranted. If the ESI can be restored or replaced, no sanctions of any kind may be available under the rule. See, e.g., *Marquette Transp Co Gulf Island, LLC v Chembulk Westport M/V*, 2016 WL 930946, at *3 (ED La Mar 11, 2016) (party’s loss of critical video data not sanctionable under Federal Rule 37(e) where it was obtained via subpoena from a third party). Whether intended or not, this may provide protection to the “incompetent spoliator” from being sanctioned under the subrule.

In the federal context, where an “intent to deprive” is found and the ESI cannot be replaced or restored, the aggrieved party need not show that the loss of the ESI resulted in prejudice. The commentary to Federal Rule 37(e) provides that a finding of “intent to deprive” supports both “the inference that the lost information was unfavorable to the party that intentionally destroyed it,” and the “inference that the opposing party was prejudiced by the loss of information that would have favored its position.” However, at least one court has suggested that the presumption of prejudice may be overcome if the spoliating party can present “clear and convincing evidence demonstrating that the spoliated materials were of minimal or little import.” *Estate of Romain v City of Grosse Point Farms*, 2016 WL 7664226, at *5 (ED Mich Nov 22, 2016).

The commentary to Federal Rule 37(e)(2) sets forth the procedures by which the finding of “intent to deprive” can be made.

Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another party of the information’s use in the litigation. This finding may be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to conclude that the intent finding should be made by a jury, the court’s instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information’s use in the litigation. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.

**d) Finding Prejudice Under MCR
2.313(D)(1)**

Subrule 2.313(D)(1) requires a finding of “prejudice to another party from loss of the information” before a court “may order measures no greater than necessary to cure the prejudice.” In the context of Federal Rule 37(e), where the loss of ESI results in little or no prejudice, the court may not impose sanctions. See, e.g., *Snider v Danfoss, LLC*, 2017 WL 2973464, at *7 (ND Ill July 12, 2017) (no prejudice where impact of lost ESI minimized by other information produced during course of discovery); see also *Steves & Sons, Inc v JELD-WEN, Inc*, 327 FRD 96, 110 (ED Va 2018) (prejudice insignificant where other “considerable evidence” amassed in place of lost ESI).

As for proving prejudice, the commentary to Federal Rule 37(e) states:

The rule does not place a burden of proving or disproving prejudice on one party or the other. Determining the content of lost information may be a difficult task in some cases, and placing the burden of proving prejudice on the party that did not lose the information may be unfair. In other situations, however, the content of the lost information may be fairly evident, the information may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties. Requiring the party seeking curative measures to prove prejudice may be reasonable in such situations. The rule leaves judges with discretion to determine how best to assess prejudice in particular cases.

Where the lost ESI is unique and highly relevant, courts have readily found prejudice to the affected party. See, e.g., *Jenkins v Woody*, 2017 WL 362475, at *18 (ED Va Jan 21, 2017) (finding “immense prejudice” where overwritten video recording was the “best and most compelling evidence” and “would have been the only unbiased and dispassionate depiction of events” at issue). Where the significance of the lost ESI is less clear cut, it is incumbent on the affected party to make some showing of the nature of the evidence and its importance to their case. See, e.g., *In re Ethicon*, 2016 WL 5869448, at *4 (SDW Va Oct 6, 2016) (despite agreeing that plaintiff had been burdened by the loss of ESI, court noted that the particular evidence at issue was only “useful in enhancing a case, but . . . generally not necessary to prove” it, and that “plaintiff has not provided the court with any concrete evidence of prejudice to her case as a whole.”); cf. *Sykes v Phoenix Promotions, LLC*, -- Mich App --, 2018 WL 5305232, at *7 (2018) (“[W]hen lost evidence is immaterial, sanctioning the culpable party is inappropriate”); *Martinez v General Motors Corp*, -- NW 2d --, 2007 WL 1429632, at *8 (Mich App May 15, 2007) (holding that the “trial court did not abuse its discretion by declining to sanction GM for the destruction of this superfluous and irrelevant computer evidence”).

PRACTICE TIP:

Expressly address the issue of prejudice in any sanction motion you file, even if you are seeking sanctions under MCR 2.313(D)(2) where prejudice may be presumed upon a finding of “intent to deprive.”

e) Imposition of Sanctions under 2.313(D)(1) and (2)

Regardless of whether sanctions are imposed under subrule (D)(1) or (D)(2), the court should award a curative measure “no greater than necessary to cure the prejudice.” Even in cases where an “intent to deprive” is found, the court need not, and should not, award the sanctions permitted under subrule (D)(2) where lesser sanctions would cure the prejudice to the aggrieved party. See also *Culhane v Wal-Mart Supercenter*, 364 FSupp3d 768, 773 (2019) (“[f]inding an intent to deprive another party of the lost information’s use in the litigation does not require a court to adopt any of the measures listed in subdivision (e)(2)”); *GN Netcom, Inc v Plantronics, Inc*, 2016 WL 3792833, at *12 (D Del July 12, 2016) (“[b]efore contemplating the imposition of sanctions provided for by subsection 2 of Rule 37(e) . . . the Court considers whether ‘lesser measures’ . . . would be ‘sufficient to redress the loss’”).

The court must also avoid awarding sanctions under subrule (D)(1) that have the same effect as sanctions only available upon a finding of “intent to deprive” under subrule (D)(2). This appears to be consistent with the Notes to Federal Rule 37:

Care must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2). . . An example of an inappropriate (e)(1) measure might be an order striking pleadings related to, or precluding a party from offering any evidence in support of, the central or only claim or defense in the case. On the other hand, it may be appropriate to exclude a specific item of evidence to offset prejudice caused by failure to preserve other evidence that might contradict the excluded item of evidence.

**f) Adverse Inference Jury Instructions
2.313(D)(2)**

Adverse inference jury instructions are a permissible sanction under subrule (D)(2)(b) upon a finding of an “intent to deprive.” The adverse inference can either be “permissive” or “mandatory.” Under a permissive adverse inference instruction, the jury may, but is not required, to infer that the missing ESI is unfavorable to the spoliating party. Under a mandatory adverse inference instruction, the jury must infer that the missing ESI is unfavorable to the spoliating party. See, e.g., *EEOC v GMRI, Inc*, 2017 WL 5068372, at *22 (SD Fla Nov 1, 2017). Whether to give a permissive or mandatory adverse inference instruction lies within the court’s discretion, “corresponding in part to the sanctioned party’s degree of fault.” See, e.g., *Culhane v Wal-Mart Supercenter*, 364 FSupp3d 768, 776 (2019). This represents a change in Michigan law with respect to ESI.

There are two types of jury instructions provided for under current Michigan law. Whereas subrule (D)(2)(b) refers to either a permissive or mandatory inference, Michigan case law refers to a “permissive adverse inference” or a “mandatory adverse presumption.” However, the difference may only be one of semantics as Michigan courts acknowledge that “[a]lmost all presumptions are made up of permissible inferences.” *Widmayer v. Leonard*, 422 Mich 280, 289 (1985).

For a Michigan trial court to give a “permissive adverse inference” instruction, the court must first find: (1) the evidence was under the spoliating party’s control and could have been produced by the spoliating party; (2) no reasonable excuse is shown for the failure to produce the evidence; and (3) the evidence would have been material, not merely cumulative, and not equally available to the aggrieved party. M Civ JI 6.01, Failure to Produce Evidence or a Witness. This permissive inference applies to cases where the evidence has been lost or destroyed. *Pugno v Blue Harvest Farms LLC*, 326 Mich App 1, 23-24 (2018).

In addition, if the aggrieved party can establish “intentional conduct indicating fraud and a desire to destroy [evidence] and thereby suppress the truth” on the part of the spoliating party, the trial court could then give a “mandatory adverse presumption” instruction, *Trupiano v Cully*, 349 Mich 568, 570 (1957) (quoting 20 Am. Jur, Evidence, § 185, p 191). The intent for a mandatory adverse presumption closely resembles the “intent to deprive” needed to award sanctions under subrule (D)(2)(b).

The adoption of subrule 2.313(D)(2)(b) then modifies Michigan law with respect to ESI as “intent to deprive,” must be established before the court can award any adverse inference jury instruction. So, with respect to missing ESI, Michigan Model Civil Jury Instruction 6.01 cannot be given unless “intent to deprive” is established. The language of this instruction, which does contain inference language, should be modified as needed in cases of ESI spoliation to meet the requirements of subrule 2.313(D).

In cases where “intent to deprive” cannot be established, a court may still instruct the jury with regard to missing ESI. However, the instruction cannot give the jury the option or the requirement to infer or presume missing ESI was unfavorable to the spoliating party.

[This] subdivision would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under [the previous] subdivision...if no greater than necessary to cure prejudice.

2015 Comments to Federal Rule of Civil Procedure 37(e). See also *Karsch v Blink Health Ltd*, 2019 WL 2708125, at *27 (SDNY June 20, 2019). An example of such an instruction can be found in *EPAC Technologies, Inc v Thomas Nelson, Inc*, 2018 WL 3322305, at *3 (MD Tenn May 14, 2018).

The Court will also permit the parties to present evidence and argument to the jury regarding the loss of the warehouse data. The Court will instruct the jury how to consider that evidence as follows: “Thomas Nelson had a duty to preserve its warehouse data as of April 18, 2011, and negligently failed to do so. Such data, now lost, may have shown whether EPAC-printed books were sold, returned, whether Thomas Nelson received customer complaints about EPAC-printed books, the quantity and timeliness of EPAC's order fulfillment, and from what EPAC facility the books were shipped. You may give this whatever weight you deem appropriate as you consider all of the evidence presented at trial.” Allowing this is “no greater than necessary to cure the prejudice,” and allows Thomas Nelson to present its argument that the data did not prejudice EPAC and EPAC to present its argument that its whole case could be proven by the warehouse data. Ultimately, it leaves the findings of fact to the jury.

K. MCR 2.314 DISCOVERY OF MEDICAL INFORMATION CONCERNING PARTY

1. TEXT OF AMENDMENT

(A) [Unchanged.]

(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 under 2.302(A), 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.

(C)-(E) [Unchanged.]

2. ANALYSIS

A party asserting privilege to prevent the discovery of medical information relating to mental or physical condition must assert privilege in its initial disclosures under amended MCR 2.302(A).

PRACTICE TIP:

If medical information is subject to privilege, do not forget to assert the privilege in initial disclosures. Failure to object results in waiver of privilege in the subject action.

L. MCR 2.316 REMOVAL OF DISCLOSURE AND DISCOVERY MATERIALS FROM FILE

1. TEXT OF AMENDMENT

(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) [Unchanged.]

(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.

2. ANALYSIS

The changes to this subrule provide for removal of disclosure materials from the court file in addition to discovery materials upon stipulation of the parties at any time, by the clerk, or on a motion by a party.

M. MCR 2.401 PRETRIAL PROCEDURES, CONFERENCES, AND ORDERS.

1. TEXT OF AMENDMENT

(A) [Unchanged.]

(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 subrule (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) whether jurisdiction and venue are proper or whether the case is frivolous;;
- (b) whether to refer the case to an alternative dispute resolution procedure under MCR 2.410;;
- (c) the complexity of a particular case and enter a scheduling order setting time limitations for the processing of the case and establishing dates when future actions should begin or be completed in the case;; ~~and~~
- (d) disclosure, discovery, preservation, and claims of privilege of ESI;
- (e) the simplification of the issues;
- (f) the amount of time necessary for discovery, staging of discovery, and any modification to the extent of discovery;
- (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;
- (j) the timing of disclosures under MCR 2.302(A);
- (k) the limitation of the number of expert witnesses, whether to have a separate discovery period for experts, whether to require preparation and disclosure of testifying expert reports, 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); and
- (r) other matters that may aid in the disposition of the action.

(2) Scheduling Order.

- (a) At an early scheduling conference under subrule (B)(1), ~~a pretrial conference under subrule (C)~~, 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 adopt other provisions the court deems appropriate, including
 - (i)-(ii) [Unchanged.]
 - (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 to the limitations on discovery imposed under these rules and whether other presumptive limitations should be established,
 - (~~viii~~) the completion of discovery,
 - (~~vii~~) the exchange of witness lists under subrule ~~(H)~~(H)(2)(h), and
 - (~~vii~~) the scheduling of a pretrial conference, a settlement conference, or trial.

More than one such order may be entered in a case.

- (b) [Unchanged.]
- (c) The scheduling order also may include provisions concerning initial disclosure, discovery of ~~electronically stored information~~ESI, any agreements the parties reach for asserting claims of privilege or for protection as trial-preparation material after production, preserving discoverable information, and the form in which ~~electronically stored information~~ESI shall be produced.
- (d) [Unchanged.]

(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.
- (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 a 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 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.

(C) ~~Pretrial Conference; Scope.~~

- (1) ~~At a conference under this subrule, in addition to the matters listed in subrule (B)(1), the court and the attorneys for the parties may consider any matters that will facilitate the fair and expeditious disposition of the action, including:~~
 - ~~(a) the simplification of the issues;~~
 - ~~(b) the amount of time necessary for discovery;~~
 - ~~(c) the necessity or desirability of amendments to the pleadings;~~

- ~~(d) the possibility of obtaining admissions of fact and of documents to avoid unnecessary proof;~~
 - ~~(e) the limitation of the number of expert witnesses;~~
 - ~~(f) 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;~~
 - ~~(g) the possibility of settlement;~~
 - ~~(h) 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;~~
 - ~~(i) the identity of the witnesses to testify at trial;~~
 - ~~(j) the estimated length of trial;~~
 - ~~(k) 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);~~
 - ~~(l) other matters that may aid in the disposition of the action.~~
- ~~(2) Conference order. If appropriate, the court shall enter an order incorporating agreements reached and decisions made at the conference.~~

(D)-(G) [Unchanged.]

- (H) Conference After Discovery~~Final Pretrial Conference and Order.~~
- (1) If the court finds at a final 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. At least one lead attorney who will conduct the trial for each party and any unrepresented party shall attend the conference. 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 that may provide for:

- (a) scheduling motions in limine;
- (b) a concise statement of plaintiff's claims, including legal theories;
- (c) a concise statement of defendant's defenses and claims, including crossclaims and claims of third-party plaintiffs, and defenses of cross defendants or third-party defendants, including legal theories;
- (d) a statement of any stipulated facts or other matters;
- (e) issues of fact to be litigated;
- (f) issues of law to be litigated;
- (g) evidence problems likely to arise at trial;
- (h) a list of witnesses to be called unless reasonable notice is given that they will not be called, and a list of witnesses that may be called, listed by category as follows:
 - (i) live lay witnesses;
 - (ii) lay deposition transcripts or videos including resolving objections and identifying portions to be read or played;
 - (iii) live expert witnesses; and
 - (iv) expert deposition transcripts or videos including resolving objections and identifying portions to be read or played.
- (i) a 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; and
 - (iii) whether it is a jury or nonjury trial.
- (l) trial date and schedule;

- (m) whether the parties will agree to arbitration;
 - (n) 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) jury instructions;
 - (q) trial briefs;
 - (r) voir dire; and
 - (s) any other appropriate matter.
- (I) [Unchanged.]
- (J) 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 manner in which 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, will be produced;
 - (h) the time to produce ESI;

- (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) whether allocation among the parties of the expense of production is appropriate; and
 - (m) 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 forms in which ESI will be produced; and
 - (e) the sources of any ESI that are not reasonably accessible because of undue burden or cost.
- (3) ESI Competence. Attorneys 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 on its own.

2. ANALYSIS

The rule provides more detailed considerations for the court when holding an early scheduling conference, adding subrules 2.401(B)(1)(e)-(r), which include preservation of ESI, timing of disclosures and staging of discovery. The court is also directed under subrule 2.401(B)(2) to “establish times for events and adopt other provisions the court deems appropriate” including changes to the “timing, form or requirement for disclosures,” and changes to the “limitations on discovery imposed under these rules and whether other presumptive limitations should be established.” The input of the parties will be critical to the court’s ability to enter a scheduling order that sets an efficient course for discovery and other pretrial actions.

Subrule 2.401(H)(2) provides a mechanism for the court to hold a final pretrial conference “to facilitate preparation of the action for trial and to formulate a trial plan.” To that end, the subrule provides a detailed list of items for consideration at the final pretrial conference, all of which are typical items of discussion at pretrial conferences. The court may combine the final pretrial conference with a settlement conference. Any unrepresented party and at least one attorney who will conduct the trial must appear for each represented party at the final pretrial conference.

The subrule also adds highly detailed provisions for discovery planning and an ancillary ESI conference, plan and order. These new provisions are addressed in greater detail below.

a) **Early Scheduling Conference and Order – 2.401(B)(1)-(2)**

The topics to be covered during discovery planning are those listed under MCR 2.401(B)(1)(a)-(r) governing early scheduling conferences, with (e)-(r) being new under the amended rule. Discovery-related items include subparagraph (d) that adds “disclosure” to the list of “discovery, preservation, and claims of privilege of ESI” and subparagraph (f), which adds “the amount of time necessary for discovery, staging of discovery, and any modification to the extent of discovery.” Also, concerning expert witnesses, subparagraph (k) provides, “the limitation of the number of expert witnesses, whether to have a separate discovery period for experts, whether to require preparation and disclosure of testifying expert reports, and whether to specify expert disclosure deadlines[.]”

Subrule (B)(1)(d) states that the court should consider issues related to ESI discovery during the early scheduling conference. MCR 2.401(J) provides that the court may order, or the parties may request, an ESI Conference and prepare an ESI Discovery Plan thereafter.

Under amended subrule (B)(2), the court may change the timing, form, or requirement for initial disclosures under amended MCR 2.302(A), change the limitations on discovery imposed under the rules (e.g., presumptive limit on interrogatories under amended MCR 2.309(A)(2) and MCR 3.201(C)), or establish other presumptive limitations.

b) **Discovery Planning – 2.401(C)(1)-(4)**

Subrule 2.401(C) has no direct federal rule counterpart, but elements of the subrule are derived from Federal Rule 26(f) and 37(f). While the language of MCR 2.401(C) departs from that of the

Federal Rules, the intent and purpose of the subrule is much the same, as the SBM Committee comments make clear.

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.

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. [(Committee Report, p. 56-57)].

One notable difference, the penalty for failing to participate in developing a discovery plan is broader under the subrule than under the Federal Rule. Federal Rule 37(f) allows only monetary sanctions. *Bardfield v Chisolm Prop Circuit Events, LLC*, 2010 WL 2278461, at *6 (ND Fla May 4, 2010) (stating that “the proper sanction for failing to participate in framing a discovery plan is an award of expenses . . .”). The amended subrule allows for monetary sanction or other “appropriate sanction.” MCR 2.401(C)(4). As with newly adopted MCR 2.313(D), the severity of any sanction should depend on the degree of culpability and degree of prejudice and be limited to the least severe sanction necessary under the circumstances.

**c) ESI Conference, Plan and Order –
2.401(J)(1)-(4)**

This subrule is new to Michigan law. It has no counterpart in the Federal Rules. However, many federal district courts have, as part of their local rules, adopted model or standing orders related to ESI discovery. These local orders provide a framework for discussion of ESI-related discovery issues similar to subparagraph 2.401(J)(1). See, e.g., Eastern District of Michigan’s Model Order Relating to the Discovery of Electronically Stored Information (ESI) Checklist for Rule 26(f) Meet and Confer Regarding ESI, which can be found at <https://www.mieb.uscourts.gov/court-info/local-rules-and-orders>. See also Oakland County Case Management Protocol for Business Court Cases, at <https://www.oakgov.com/courts/businesscourt/Documents/ocbc-pro-case-management.pdf>; Macomb County Business Court Discovery Protocols at <https://circuitcourt.macombgov.org/CircuitCourt-SpecializedBusinessDocket>. Many state court rules provide for ESI conferences. Unlike Michigan’s rule, several states, including Arizona, Arkansas and Kansas, require mandatory ESI conferences.

Subparagraph 2.401(J)(1), as noted, does not require the parties or the court to participate in an ESI conference. The permissive nature of the rule recognizes that not all cases will require a specialized conference solely to address ESI discovery. But, in any case “reasonably likely to include the discovery of ESI,” the parties may agree to, the court may order, or a party may request an ESI conference via motion.

If an ESI conference is held, subparagraph 2.401(J)(1) mandates that the parties consider the issues listed in 2.401(J)(1)(a)-(m). Many of the issues relate to each party's common law duty to preserve evidence and duty under the amended rules to make initial disclosures.

Of particular note, though, is subparagraph 2.401(J)(1)(j), "privilege log format and related issues." Currently under Michigan law, there is no requirement to identify to the requesting party responsive documents withheld under claim of privilege. *Koster v June's Trucking, Inc*, 244 Mich App 162, 171 (2000). However, courts may order the production of a privilege log and/or conduct an in camera inspection when a dispute arises over a claim of privilege. See, e.g., *Prendushi v Farmers Ins Exchange*, --NW2d--, 2015 WL 5440200, at *12 (Mich App Sept 15, 2015).

As written, subrule (J)(1)(j) requires parties to "consider" "privilege log format and related issues" during the ESI conference, but it does not create an obligation to provide a privilege log in cases where an ESI conference is held. The subrule also provides no guidance as to a format for privilege logs. In preparation for the ESI conference, practitioners may look to Federal Rule 26(b)(5)(A) and its interpretive case law regarding the content and sufficiency of privilege logs. See, e.g., *Johnson v Ford Motor Co*, 309 FRD 226, 230-34 (SDW Va, 2015) (requiring party to supplement privilege log containing "unsatisfactory document descriptions" which "fail[ed] to provide any concrete facts about the nature or subject matter of the withheld documents . . ." under Federal Rule 26(b)(5)(A)); *Sky Angel US, LLC v Discovery Communications, LLC*, 28 F Supp 3d 465, 483 (D Md 2014) (stating that a party can satisfy Federal Rule 26(b)(5)(A) "through a properly prepared privilege log that identifies each document withheld, and contains information regarding the nature of the privilege/protection claimed, the name of the person making/receiving the communication, the date and place of the communication, and the document's general subject matter."); *Sulaymu-Bey v City of New York*, 372 F Supp 3d 90, 93-4 (EDNY 2019) (party produced "the antithesis of an adequate privilege log" with generic and vague privilege assertions and entries); see also *Great Lakes Concrete Pole Corp v Eash*, 148 Mich App 649, 656 n 6 (1986) (stating that a privilege log should identify "each document by number, date, author, addressee, recipients of copies, and the general nature of the document.").

PRACTICE TIP:

If documents relevant to a party's claims or defenses are withheld on privilege grounds and via stipulated order a privilege log is required, consider whether to incorporate privilege log format requirements from federal law and consider case law analyzing Federal Rule 26(b)(5)(A).

Subparagraph 2.401(J)(2) sets forth the timing and content for the ESI discovery plan. The parties have 14 days after the ESI conference to file the plan with the court. Unless otherwise agreed, it is the plaintiff's responsibility to file the plan. The plan must set forth those items on which the parties have agreed and those left open that require the court's attention. As the topics for discussion at the ESI conference are mandated by subparagraph 2.401(J)(1)(a)-(m), the ESI discovery plan should address each of the items in turn, even if to simply note that the parties agree the item is not applicable to the case.

Subparagraph 2.401(J)(3) concerns ESI competence and requires that attorneys who participate in or appear at an ESI conference “be sufficiently versed in matters relating to their clients’ technological systems to competently address ESI issues.” If an attorney does not feel knowledgeable to address ESI issues, the attorney “may bring a client representative or outside expert to assist in such discussions.” If an ESI conference is to be held, the goal is to make it as fruitful as possible. This requires counsel, with or without assistance, to be able to address all of the mandatory topics for consideration in a meaningful way.

The subrule provides no further guidance as to what an attorney should know in order to feel “sufficiently versed . . . to competently address ESI issues.” MCR 2.301(J)(3). “Technological competence” is a relatively new area of emphasis in legal practice. In 2012, the American Bar Association included specific reference to technological competency within the ambit of the Model Rules of Professional Conduct. See MRPC 1.1, comment 8 (“[A] lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology. . .”). The accompanying ABA Commission on Ethics 20/20 Report explained that the amendment does not impose any new obligations on lawyers, but rather serves as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of lawyers’ general ethical duty to remain competent. Since the amendment, 37 states adopted this version of the Model Rule. On September 18, 2019, the Michigan Supreme Court adopted an amendment to the comment to MRPC 1.1, effective January 1, 2020, which addresses a lawyer’s obligation to maintain competence in relevant technology. The amendment states:

Maintaining Competence. To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education, including the knowledge and skills regarding existing and developing technology that are reasonably necessary to provide competent representation for the client in a particular matter. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

California has not adopted the Model Rule, but its state bar has issued a highly detailed ethics opinion that sets forth what an attorney’s ethical duties are when handling ESI discovery. See The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-193. The opinion states that,

Attorneys handling e-discovery should be able to perform (either by themselves or in association with competent co-counsel or expert consultants) the following:

- initially assess e-discovery needs and issues, if any;
- implement/cause to implement appropriate ESI preservation procedures;
- analyze and understand a client’s ESI systems and storage;
- advise the client on available options for collection and preservation of ESI;
- identify custodians of potentially relevant ESI;
- engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan;
- perform data searches;

- collect responsive ESI in a manner that preserves the integrity of that ESI; and
- produce responsive non-privileged ESI in a recognized and appropriate manner.

Id. at 3-4. In addition, an article by two prominent thought leaders in the field of eDiscovery sets forth in great detail what they believe “technological competency” encompasses, including the need to understand technological issues concerning negotiating the scope of discovery and the identification, preservation, collection, review and production of relevant ESI. See Ronald J. Hedges and Amy Walker Wagner, *Competence with Electronically Stored Information: What Does It Currently Mean in the Context of Litigation and How Can Attorneys Achieve It?*, 16 DDEE 322 (2016).

Subrule 2.401(J)(4) provides the court with the authority to enter an ESI order incorporating the parties’ ESI discovery plan or, in the absence of an ESI discovery plan, to enter an ESI order pursuant to a party’s motion, the parties’ stipulation or on its own. With this authority, a trial court could enter its own model or standing order to handle ESI-related discovery issues in appropriate cases.

PRACTICE TIP:

Cooperation between counsel knowledgeable about the discovery/ESI issues in the case is essential to reap the benefits of the “meet and confer” sessions envisioned by these rules. It is in every stakeholder’s best interest to craft discovery plans focused on what is “relevant and proportional to the needs of the case.”

N. MCR 2.411 MEDIATION

1. TEXT OF AMENDMENT

(A)-(G) [Unchanged.]

(H) Mediation of Discovery Disputes. The parties may stipulate to or the court may order the mediation of discovery disputes (unless precluded by MCR 3.216[C](3)). 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 ongoing 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 a 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 ESI, 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.

2. ANALYSIS

Newly added MCR 2.411(H) has no direct Federal Rules counterpart, but Federal Rule 53 does allow for the appointment of Masters that can be used to oversee all aspects of discovery, including ESI discovery disputes. See, e.g., *Small v University Medical Center*, 2014 WL 3735670, at *1 (D Nev Mar 3, 2014); *HM Compounding Services, LLC v Express Scripts, Inc*, 349 F Supp 3d 794, 797 (ED Mo 2018). In addition, several other states, including California, allow for the appointment of a discovery referee or master either pursuant to agreement of the parties or by court order.

SBM Committee comments to the amended rule provide:

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 emphasize 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.*, 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. [(Committee Report, p. 62)].

While the SBM Committee believes that discovery mediation would be beneficial in "a small number of . . . particularly complex" cases, the subrule provides no limitation on when the parties or the court can invoke mediation. It trusts that decision to the parties and the court. This leaves open the possibility that mediation will be requested or required in cases where it will not be beneficial and will only serve to delay the proceedings and increase costs.

In cases where the court appoints an ESI expert and that person serves in the dual role of mediator, the subrule reminds the parties to consider the limitations placed on mediators by MCR 2.411(C)(3) and MCR 2.412(D) and to include any necessary modifications to those limitations in the court order appointing the mediator.

PRACTICE TIP:

Make sure it makes sense to engage a mediator for your case. Otherwise, you may just be adding an unnecessary layer of delay and cost to the proceedings.

O. MCR 2.506 SUBPOENA; ORDER TO ATTEND.

1. TEXT OF AMENDMENT

(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/or to produce ~~notes, records, documents, photographs,~~ or other portable tangible things as specified. A request for documents or tangible things 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). This subrule does not apply to discovery subpoenas (MCR 2.305) or requests for documents to a party where discovery is available (MCR 2.310). A copy of any subpoena for documents or tangible things shall be provided to the opposing party or his/her counsel.

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

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

(4)-(5) [Unchanged.]

(C) Notice to Witness of Required Attendance.

(1) The signer of a subpoena must issue it for service on the witness sufficiently in advance of the trial or hearing to give the witness reasonable notice of the date and time the witness is to appear. Unless the court orders otherwise, the subpoena must be served at least 2 days before the ~~witness is to~~

appearance or 14 days before the appearance when documents are requested.

(2)-(3) [Unchanged.]

(D) Form of Subpoena. A subpoena must:

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

(7) [Unchanged.]

The state court administrator shall develop and approve a subpoena form for statewide use.

(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)-(6) [Unchanged.]

(G) [Unchanged.]

(H) Hearing on Subpoena or Order To Attend.

(1) A person served with a subpoena or order to attend under this rule 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)-(3) [Unchanged.]

(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 a subpoena by motion under MCR 2.302(C) filed before the time specified in the subpoena, and serve same upon the nonparty, in which case the non-party's obligation to respond is stayed until the motion is resolved.

(I) [Unchanged.]

2. ANALYSIS

Under subrule 2.506(A)(1), a subpoena must comply with the scope of discovery set forth in MCR 2.302(B) and any scheduling order. Compliance with the scheduling order means that pursuant to MCR 2.301(B)(4), the subpoena must be served so that the response can be made by the discovery deadline. And, this subrule only applies to subpoenas served under it and not to those served pursuant to MCR 2.305. This subrule does not apply to discovery requests made under MCR 2.310.

Subrule 2.506(H)(4) and (5) also expressly stays compliance with the subpoena if timely written objections are filed or if a timely motion to quash or modify is filed. Additionally, subrule 2.506(H)(5) expressly gives any party standing to quash or modify a subpoena.

In federal court, generally, “a party has no standing to quash a subpoena served upon a third party, except as to claims of privilege relating to the documents being sought[,]” or “upon a showing that there is a privacy interest applicable.” *Windsor v Martindale*, 175 FRD 665, 668 (D Colo 1997) (citations omitted) (“[a]bsent a specific showing of a privilege or privacy, a court cannot quash a subpoena duces tecum”). Under federal law, “[o]bjections unrelated to a claim of privilege or privacy interests are not proper bases upon which a party may quash a subpoena.” *Cobbler Nevada, LLC v Does*, 2016 WL 300827, at *1 (D Colo Jan 25, 2016) (citations omitted). Subrule 2.506(H)(5) removes this potential issue from consideration.

P. MCR 3.201 APPLICABILITY OF RULES

1. TEXT OF AMENDMENT

(A)-(B) [Unchanged.]

(C) Except as otherwise provided in this subchapter, practice and procedure in domestic relations actions is governed by other applicable provisions of the Michigan Court Rules, except the number of interrogatories set forth in MCR 2.309A(A)(2) shall be thirty-five.

(D) [Unchanged.]

2. ANALYSIS

Given that parties in domestic relations actions often utilize interrogatories to obtain information on a variety of topics, the presumptive number of twenty interrogatories in amended MCR 2.309 was deemed too low, and a higher presumptive number, recommended by the American Association of Matrimonial Lawyers, was adopted. (Committee Report, p. 65).

Q. MCR 3.206 INITIATING A CASE

1. TEXT OF AMENDMENT

(A)-(B) [Unchanged.]

(C) Verified Statement and Disclosure Form.

(1) [Unchanged.]

(2) Verified Financial Information Form. Unless waived in writing by the parties, or unless 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, and except as set forth below, each party must serve a Verified Financial Information Form (as provided by SCAO) 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' disclosure forms 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. A party who is a victim of domestic violence, sexual assault or stalking by another party to the case, may omit any information which might lead to the location of where the victim lives or works, or where a minor child may be found. Failing to provide this disclosure may be addressed by the court or by motion consistent with MCR 2.313. The disclosure form does not preclude other discovery. A proof of service must be filed when disclosure forms are served.

(32) The information in the ~~verified~~ statements and disclosure forms 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 or disclosure forms that is served on the other party.

(43) If any of the information required to be in the ~~verified~~ statements or disclosure forms is omitted, the party seeking relief must explain the reasons for the omission in a sworn affidavit, to be filed with the court by the due date of the statement or disclosure form.

(5) A party who has served a disclosure form must supplement or correct its disclosure as ordered by the court or otherwise in a timely manner if the party learns that 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.

(D) Attorney Fees and Expenses.

- (1) [Unchanged.]
- (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, or engaged in discovery practices in violation of these rules.

2. ANALYSIS

The requirement that parties exchange a SCAO Verified Financial Information Form is intended to streamline disclosures in domestic relations cases and conserve resources that would be spent on eliciting financial information through costly discovery. (Committee Report, p. 66). Amended subrule (B)(2) contemplates that a party can omit certain information to protect its safety, or the safety of others.

The Committee comments state that the purpose of amended MCR 3.206 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.” (Committee Report, p. 67).

R. MCR 3.229 FILING CONFIDENTIAL MATERIALS

1. TEXT OF AMENDMENT

- (A) If a party or interested party files any of the following items with the court, the items shall be served on the other parties in the case and maintained in a nonpublic file in accordance with subrule (B):
- (1) verified statements and disclosure forms under MCR 3.206(B);
 - (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(A)(3);
 - (7) any item designated as confidential or nonpublic by statute or court rule; and
 - (8) any other document which, in the court’s discretion, should not be part of the public record.

Any item filed under subrule (A) is nonpublic and must be maintained separately from the legal file. The nonpublic file must be made available for any appellate review.

2. ANALYSIS

This rule falls within the “Domestic Relations Actions” section of the Chapter 3 of the Michigan Court Rules, which govern Special Actions and Proceedings. The Committee comment provides that MCR 3.229 is newly added to address the fact that “[c]ertain documents with private information should not be available to the general public; however, these documents must be in the court file or they cannot be considered on appeal.” (Committee Report, p. 68). See also MCR 2.302(H)(3) (“On appeal, only disclosure and discovery materials that were filed or made exhibits are part of the record on appeal.”)

Subrule 3.229(A)(6) incorporates the definition of “confidential file” found in MCR 3.903(A)(3), found within the “Proceedings Involving Juveniles” section of Chapter 3 of the Michigan Court Rules. “Confidential files” include the following:

- (a) that part of a file made confidential by statute or court rule, including, but not limited to,
 - (i) the diversion record of a minor pursuant to the Juvenile Diversion Act, MCL 722.821 et seq.;

- (ii) the separate statement about known victims of juvenile offenses, as required by the Crime Victim's Rights Act, MCL 780.751 et seq.;
- (iii) the testimony taken during a closed proceeding pursuant to MCR 3.925(A)(2) and MCL 712A.17(7);
- (iv) the dispositional reports pursuant to MCR 3.943(C)(3) and 3.973(E)(4);
- (v) biometric data required to be maintained pursuant to MCL 28.243;
- (vi) reports of sexually motivated crimes, MCL 28.247;
- (vii) test results of those charged with certain sexual offenses or substance abuse offenses, MCL 333.5129;

(b) the contents of a social file maintained by the court, including materials such as:

- (i) youth and family record fact sheet;
- (ii) social study;
- (iii) reports (such as dispositional, investigative, laboratory, medical, observation, psychological, psychiatric, progress, treatment, school, and police reports);
- (iv) Department of Human Services records;
- (v) correspondence;
- (vi) victim statements;
- (vii) information regarding the identity or location of a foster parent, preadoptive parent, or relative caregiver.

S. MCR 3.922 PRETRIAL PROCEDURES IN DELINQUENCY AND CHILD PROTECTION PROCEEDINGS

1. TEXT OF AMENDMENT

(A) Discovery.

(1) The following materials are discoverable as of right in all proceedings and shall be produced no less than 21 days before trial, even without a discovery request provided they are requested no later than 21 days before trial unless the interests of justice otherwise dictate:

(a) [Unchanged.]

(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 included on a complaint submitted to Child Protective Services, 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 of all prospective witnesses;

(d)-(e) [Unchanged.]

(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;

(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; and

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

(2)-(3) [Unchanged.]

(4) Failure to comply with subrules (A)(1) and (A)(2) may result in such sanctions, ~~as applicable, as set forth in~~ in keeping with those assessable under MCR 2.313.

(B) Discovery and Disclosure 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 and, even without a discovery request, shall be produced no less than 21 days before trial:

(a) 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;

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

(c) 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

(d) 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 have disclosed or to discover information or evidence that is protected by constitution, statute, or privilege, including information or evidence protected by a respondent's right against self-incrimination, except as provided in subrule (B)(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 orders 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 to documents regarding restitution.

- (5) Failure to comply with subrules (B)(1) and (B)(4) may result in sanctions in keeping with those assessable under MCR 2.313.

(B)-(E) [Relettered (C)-(F) but otherwise unchanged.]

2. ANALYSIS

Since federal courts do not adjudicate delinquency or other related “family court” matters, these rules have no Federal Rule counterpart. The SBM Committee makes no reference to any other source material for the rules in these particularized proceedings, either. They were added because the Committee recognized that these proceedings suffered from a lack of adequate discovery, which jeopardized the important rights at stake. (See Committee Report, p. 70).

The rule makes discovery available in delinquency proceedings, which are governed by MCL 3.900, *et seq.* Delinquency proceedings frequently go to trial at the adjudication and termination of parental rights stages. Mandatory disclosures, rather than a right to discovery via request, are now required by subrule 3.922(A)(1)-(3), and additional mandatory disclosures are required by subrule 3.922(B)(1). Oftentimes, Child Protective Services (“CPS”) has relevant information due to past investigations, including investigations that did not result in court proceedings. The rule requires that the CPS file is shared during discovery in order to ensure adequate representation of parents and children. (Committee Report, p. 70).

Subrule 3.922(B)(3) provides a mechanism for privilege review when a “respondent demonstrates a good-faith belief, grounded in articulable fact” that there is a “reasonable probability” that privileged records “contain material information necessary to the defense” If the privilege is “absolute” and privilege holder will not waive the privilege to allow an *in camera* inspection, the privilege holder’s testimony shall be suppressed or stricken. The same result is required where the court is allowed to conduct the inspection, determines that the information should be disclosed to the respondent’s counsel, but the privilege holder refuses to waive the privilege. Specifically, under subrule 3.922(B)(3)(c), regardless of how the court rules on making the records at issue available, the court must make “findings sufficient to facilitate meaningful appellate review.”

Also, subrule 3.922(B)(3)(f), provides a mechanism for “excision” of materials that are only partially discoverable. “Excision” is what most practitioners would refer to as “redaction.” The

language is identical to that found in MCR 6.201, a discovery rule applicable to criminal proceedings. The party excising material must inform the other parties “nondiscoverable information has been excised and withheld.” On motion, the court must hold an in camera hearing to determine if the excisions are justifiable. If the court upholds the excisions, the hearing record must be preserved under seal for appeal. There is no mention in the rule as to the need to preserve the record or the right to appeal from a court ruling overruling the excisions.

Sanctions “in keeping with MCR 2.313” may be assessed for failure to comply with the disclosure requirements of subrule 3.922(B)(1) and for failing to make certain prescribed records available to respondent, respondent’s counsel and the prosecuting attorney prior to disposition hearings and other related proceedings pursuant to subrule 3.922(B)(4). As MCR 2.313 does not apply in the Family Division context, its formal mechanisms will not apply, but the types of sanctions allowed under MCR 2.313 are now available in those proceedings. (Committee Report, pp. 71-72).

T. MCR 3.973 DISPOSITIONAL HEARINGS

1. TEXT OF AMENDMENT

(A)-(D) [Unchanged.]

(E) Evidence; Reports.

(1)-(4) [Unchanged.]

(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.

~~(6)~~ [Renumbered but otherwise unchanged.]

(F)-(J) [Unchanged.]

2. ANALYSIS

With regard to dispositional hearings and the reports of the agency responsible for the child’s care and supervision (e.g. “case services plans” and “treatment plans”), the SBM Committee noted that “there is currently considerable inconsistency in how and when those reports are shared with counsel for the parent and child.” (Committee Report, p. 73). This amendment clarifies what materials must be shared and by when.

U. MCR 3.975 POST-DISPOSITIONAL PROCEDURES; CHILD IN FOSTER CARE

1. TEXT OF AMENDMENT

(A)-(D) [Unchanged.]

(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.

2. ANALYSIS

With regard to post-dispositional hearings and the reports of the agency responsible for the child's care and supervision (e.g. "court reports" and other documents for a dispositional review hearing), the SBM Committee noted that "there is currently considerable inconsistency in how and when those reports are shared with counsel for the parent and child." (Committee Report, p. 74). This amendment clarifies what materials must be shared and by when.

V. MCR 3.976 PERMANENCY PLANNING HEARINGS

1. TEXT OF AMENDMENT

(A)-(C) [Unchanged.]

(D) Hearing Procedure; Evidence.

(1)-(3) [Unchanged.]

(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.

(E) [Unchanged.]

2. ANALYSIS

With regard to permanency planning hearings and the reports of the agency responsible for the child's care and supervision, the SBM Committee noted that "there is currently considerable inconsistency in how and when those reports are shared with counsel for the parent and child." (See Committee Report, pp. 73-74). This amendment clarifies what materials must be shared and by when.

W. MCR 3.977 TERMINATION OF PARENTAL RIGHTS

1. TEXT OF AMENDMENT

(A)-(E) [Unchanged.]

(F) Termination of Parental Rights on the Basis of Different Circumstances. The court may take action on a supplemental petition that seeks to terminate the parental rights of a respondent over a child already within the jurisdiction of the court on the basis of one or more circumstances new or different from the offense that led the court to take jurisdiction.

(1) [Unchanged.]

(2) Discovery and Time for Disclosures and Hearing on Petition. 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 hearing on a supplemental petition for termination of parental rights under this subrule shall 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.

(G) [Unchanged.]

(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) [Unchanged.]

(2) 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) [Unchanged.]

(I)-(K) [Unchanged.]

2. ANALYSIS

With regard to termination of parental rights (“TPR”) hearings, the SBM Committee noted that these hearings are conducted similarly to trials with a considerable amount of evidence presented to the court. However, despite the importance of the rights being adjudicated, there was no discovery process for TPR hearings. To ensure fairness of the proceedings and ameliorate due process concerns, MCR 3.977 makes the mandatory disclosure requirements of MCR 3.922(A) applicable to TPR hearings. (Committee Report, pp. 76-77).

X. MCR 5.131 DISCOVERY GENERALLY

1. TEXT OF AMENDMENT

- (A) Civil Actions. ~~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.

(B) Proceedings.

(1) Discovery in General. With the exception of mandatory initial disclosures under MCR 2.302(A), the discovery rules in subchapter 2.300 apply in probate proceedings, and, except as otherwise ordered by the court, any interested person in a probate proceeding is considered a party for the purpose of applying discovery rules.

(2) Mandatory Initial Disclosure.

(a) Demand or Objection. Mandatory disclosures under MCR 2.302(A) are required in probate proceedings if, by the time of the first hearing on the petition initiating the proceeding:

(i) an interested person other than the petitioner files a demand for mandatory initial disclosure and properly serves the demand on all interested persons or

(ii) an interested person objects to or otherwise contests the petition, in writing or orally, properly serves any written objection or response on all interested persons, and the judge determines mandatory initial disclosure is appropriate.

When mandatory initial disclosures are required through demand or objection, and except as otherwise ordered by the court, such disclosures must be made by the petitioner and any demandant or objecting interested person.

(b) Court Order. At any time, on its own motion or on a motion filed by an interested person, the court may require:

(i) mandatory disclosures and designate those interested persons who must make disclosures or

(ii) in a proceeding with some parties already making disclosures, an additional interested person or persons to make disclosures.

(c) Time for Initial Disclosures.

(i) The petitioner must serve initial disclosures within 14 days after the first hearing on the petition subject to a demand or objection.

(ii) The demandant or objecting interested person must serve initial disclosures within the later of 14 days after the petitioner's disclosures are due or 28 days after the demand or objection is filed.

(iii) When mandatory disclosures are ordered pursuant to MCR 5.131(B)(2)(b)(ii), an interested person's disclosures are due within 21 days after the court's order.

(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.

2. ANALYSIS

As in the case of juvenile proceedings, there is no federal counterpart for this rule which applies to probate proceedings. Nor did the SBM Committee refer to any source material behind the development of this rule.

The SBM provided a thorough explanation of the design and purpose of MCR 5.131:

In addition to civil suits, which involve a plaintiff and a defendant and are clearly governed under Chapter 2 of the Michigan Court Rules, the Probate Court hears several types of petition proceedings that involve a petitioner, a respondent, and typically multiple other interested persons. Some Probate Court proceedings are highly litigated, involve two and potentially more represented interested persons, and are exactly like other highly litigated civil suits that would benefit from the initial disclosure provisions in the recommended revision to MCR 2.302. That being said, most actions in Probate Court involve in pro per litigants and are not in general suitable to initial disclosure.

The challenges posed to our Committee and to the additional probate specialists aiding this Committee's work were to fashion probate court rule amendments in Chapter 5 of the Michigan Court Rules which would (1) carve out the right proceedings and the right interested persons for purposes of initial disclosure and (2) make whatever other changes were necessary to make the use of discovery clearer and more efficient.

Given that MCR 5.131 is the lone court rule in Chapter 5 devoted to discovery in probate matters, and given that our charge was to make the minimal amount of alterations to court rules in order to effectuate needed changes, we focused our efforts on amending that rule. Several versions of a refashioned MCR 5.131 were considered, and provisions discussed included, among others, those that identified specific types of probate proceedings that

were by default “contested,” required contested proceedings to be subject to initial disclosure, and allowed for a “declaration of contest” to make a case subject to initial disclosure.

Comments on an earlier version of an amended MCR 5.131 were received, and some concerns were raised. The idea of a list of probate proceedings that were by default “contested” was objected to on the grounds that not all (or even most) of the proceedings listed are typically in fact contested, let alone proper for initial disclosure; it was also pointed out that it would not always be apparent to any given probate court that filed pleadings, given the various ways they may be captioned, did or did not fit within one of the listed proceeding types. Some suggested that a proceeding should be contested, or at least ripe for initial disclosure, only on some kind of triggering event.

Comments were also received on the earlier version of MCR 5.131 suggesting, among other things, that enough time was not being provided to allow for responses by interested persons to trigger initial disclosures, a “declaration of contest” would be duplicative and likely result in more contested matters, and initial disclosures should only be something the judge orders. The final version of recommended changes to MCR 5.131 is proposed to meet the aforementioned challenges as well as properly address comments.

Proposed MCR 5.131(A) [currently the second sentence in MCR 5.131(B)] makes clear that discovery in civil suits filed in probate court are governed completely by subchapter 2.300 of the court rules. As such, each would be subject to the initial disclosure rules proposed at MCR 2.302.

Proposed MCR 5.131(B)(1) clarifies that discovery rules in subchapter 2.300, apart from those mandating initial disclosure, apply in general to probate proceedings. Any interested person has the rights of a “party” under subchapter 2.300.

The basic procedure for invoking mandatory initial disclosure in probate proceedings is laid out in proposed MCR 5.131(B)(2)(a). This subrule identifies the two types of “triggering events” for mandatory initial disclosure: the filing of a demand for mandatory initial disclosure, and the making of an objection with the concurrence from the judge that mandatory initial disclosure is appropriate. The intermediary concept of “contested” is no longer part of the recommended changes; instead, the interested person (through an attorney, we would expect) directly makes a demand for mandatory disclosure. In other cases of contest where the judge feels the parties can use and benefit from mandatory disclosure (mainly those with represented interested persons, we would expect) it can also be ordered. Either triggering event must occur by the time of the first hearing on the relevant petition.

These two triggering events thread the needle between the extremes of the judge controlling all uses of mandatory initial disclosure and any objecting interested person (represented or in pro per) triggering such disclosure. Here, attorneys who want mandatory disclosure will know what to demand in their pleadings, but the judge will be able to weed out the potentially numerous contested matters without a demand (many with unrepresented interested persons) where mandatory disclosure is not necessary.

When mandatory disclosure is required through MCR 5.131(B)(2)(a), not all interested persons are required to make disclosures, but rather, only the petitioner and anyone who demands mandatory initial disclosure or objects to the petition. While this process will typically result in two interested persons having to make initial disclosures (i.e., petitioner and person either demanding or objecting), it is possible that there may be more if there are two or more demandants or objecting interested persons.

Proposed MCR 5.131(B)(2)(b) makes clear that, at any time, the court can, on its own or in response to a request, require mandatory initial disclosure in a proceeding or require such disclosure of an interested person.

Proposed MCR 5.131(B)(2)(c) prescribes that a petitioner's initial disclosures are due within 14 days of the first hearing on the petition, and disclosures from any demandant or objecting interested person follows from this deadline. This gives all relevant interested persons notice of what is required of them and enough time to accomplish it. Interested persons who are later required to make disclosures have 21 days from the order. [(Committee Report, pp. 79-81).

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