

PROPOSED AMENDMENTS TO MICHIGAN COURT RULES 2.301, 2.302, 2.313, 2.401, 2.506 (ELECTRONIC DISCOVERY RULES)

Issue

Should the Michigan Court Rules be amended to address the discovery of electronically stored information in a manner similar to the recently adopted Federal Rules of Civil Procedure pertaining to electronic discovery?

Synopsis

Currently, the Michigan Court Rules do not specifically address the discovery of electronically stored information. Such information presents unique challenges to the litigation process that have been addressed by recent amendments to the Federal Rules of Civil Procedure. The Civil Procedure and Courts Committee proposes the following parallel amendments to the Michigan Court Rules.

Suggested Changes

Additions are underlined.

Deletions are ~~stricken~~.

RULE 2.301 COMPLETION OF DISCOVERY

2.301(A) 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), and issues relating to the discovery, preservation, and claims of privilege of electronically stored information shall be dealt with by an order entered under 2.401(B)(2)(c).

RULE 2.302 GENERAL RULES GOVERNING DISCOVERY

2.302(B) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as provided by this subrule.

(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.

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(5) *Electronically Stored Information.* A party must preserve information, including electronically stored information, that the party knows, or reasonably should know, may lead to the discovery of admissible evidence. A party who wishes to destroy such information may apply to the court for leave to do so upon good cause shown.

(6) *Limitation of Discovery of Electronic Materials.* A party need not provide discovery of electronically stored information 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 the limitations of MCR 2.302(C). The court may specify conditions for the discovery.

(7) *Information Inadvertently Produced.* If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

RULE 2.313 FAILURE TO PROVIDE OR TO PERMIT DISCOVERY; SANCTIONS

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

RULE 2.401 PRETRIAL PROCEDURES; CONFERENCES; SCHEDULING ORDERS

(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), during this conference the court should consider:

(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, ~~and~~

(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) discovery, preservation and claims of privilege of electronically stored information.

(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 the court deems appropriate, including

- (i) the initiation or completion of an ADR process,
- (ii) the amendment of pleadings, adding of parties, or filing of motions,
- (iii) the completion of discovery,
- (iv) the exchange of witness lists under subrule (I), and
- (v) the scheduling of a pretrial conference, a settlement conference, or trial.

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

(b) The scheduling of events under this subrule shall take into consideration the nature and complexity of the case, including the issues involved, the number and location of parties and potential witnesses, including experts, the extent of expected and necessary discovery, and the availability of reasonably certain trial dates.

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

~~(d)~~ (d) Whenever reasonably practical, the scheduling of events under this subrule shall be made after meaningful consultation with all counsel of record.

RULE 2.506 SUBPOENA; ORDER TO ATTEND

(A) Attendance of Party or Witness.

(1) The court in which a matter is pending may by order or subpoena command a party or witness to appear for the purpose of testifying in open court on a date and time certain and from time to time and day to day thereafter until excused by the court, and to produce notes, records, documents, photographs, electronically stored information, or other portable tangible things as specified.

(2) A subpoena may specify the form or forms in which electronically stored information is to be produced. If the subpoena does not so specify, the person responding to the subpoena must produce the information in a form or forms in which the person ordinarily maintains it, or in a form or forms that are reasonably usable. A person producing electronically stored information need only produce the same information in one form.

(3) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. In a hearing or submission under subrule (H), the person responding to the subpoena must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of MCR 2.302(C). The court may specify conditions for such discovery.

~~(2)~~ (4) The court may require a party and a representative of an insurance carrier for a party with information and authority adequate for responsible and effective participation in settlement discussions to be present or immediately available at trial.

~~(3)~~ (5) A subpoena may be issued only in accordance with this rule or MCR 2.305, 2.621(C), 9.112(D), 9.115(I)(1), or 9.212.

Opposition

None known.

Prior Action by Representative Assembly

None known.

Fiscal and Staffing Impact on State Bar of Michigan

None known.

STATE BAR OF MICHIGAN POSITION

By vote of the Representative Assembly on April 21, 2007

The above electronic discovery amendments to the Michigan Court Rules should be adopted.

(a) Yes

or

(b) No