From: Peter Alter
To: ADMcomment
Subject: ADM File No. 2018-19
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Dear Supreme Court Clerk:

Enclosed are comments that I have made to a number of the proposed changes to the Michigan Court Rules. I have not attached the entirety of the Court Rules. Instead, I have attached only those pages which contain rules or subrules about which I have some comments. Each comment follows the rule or subrule to which it applies.

For the most part, I subscribe to the theory that "if it ain't broke, don't fix it." In particular, the so-called "initial disclosures" seem unnecessary and, I believe, are not favored by many lawyers. Certainly, they are not favored by many lawyers with whom I have spoken who practice in the business courts. The same applies to the newly proposed limitations on discovery, interrogatories and deposition time. Not only do these rules seem unnecessary to me, but, I believe, they also are likely to be interpreted literally, with little flexibility, by many judges. In so doing, even in those cases where it is appropriate or necessary to have more discovery – by way of interrogatories or lengthier depositions – such efforts may be stymied. This is not likely to promote the search for the truth—and to provide justice for the parties. In short, while I applaud any effort to update, modernize or simplify court rules, where appropriate, I am not persuaded that many of these rule changes are wise or needed.

Thank you for your consideration and attention.

Very truly yours,

Peter M. Alter

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Order

Michigan Supreme Court Lansing, Michigan

November 28, 2018

ADM File No. 2018-19
Proposed Amendment of Rule 1.105,
2.301, 2.302, 2.305, 2.306, 2.307,
2.309, 2.310, 2.312, 2.313, 2.314, 2.316,
2.401, 2.410, 2.506, 3.201, 2.206, 3.922,
3.973, 3.975, 3.976, 3.977, 5.131 and
Proposed new Rule 3.XXX
of the Michigan Court Rules.

On order of the Court, this is to advise that the Court is considering amendment of MCR 1.105, 2.301, 2.302, 2.305, 2.306, 2.307, 2.309, 2.310, 2.312, 2.313, 2.314, 2.316, 2.401, 2.410, 2.506, 3.201, 3.206, 3.922, 3.973, 3.975, 3.976, 3.977, 5.131 and proposed new Rule 3.XXX. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining
and deleted text is shown by strikeover.]

Rule 1.105 Construction

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.

Rule 2.301 Availability and Timing ~~Completion~~ of Discovery

(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.

~~(A)~~(1) 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).

~~(B)~~(2) 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.

~~(C)~~(3) 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. **COMMENT: THIS IS CONTRARY TO THE EXISTING PROTOCOL THROUGHOUT THE STATE OF MICHIGAN. SIMPLY, "A DATE FOR THE COMPLETION OF DISCOVERY" SHOULD MEAN THAT DISCOVERY MUST BE COMPLETED, NOT SIMPLY INITIATED, BY THAT DATE. MOREOEVER, MERELY "INITIATING" DISCOVERY BY THE DATE SET FOR COMPLETION WILL MEAN THAT THE ACTUAL COMPLETION DATE IS NOT SIMPLY 28 DAYS**

LATER, BUT COULD BE MONTHS LATER BECAUSE OF SCHEDULING DELAYS AND/OR MOTION PRACTICE RELATED TO DISCOVERY AND OTHER ISSUES. I RESPECTFULLY SUGGEST THAT THE STANDARD PROVISION STATE THAT, WHEN "A DATE FOR THE COMPLETION OF DISCOVERY" IS SET, THAT MEANS THAT DISCOVERY MUST BE COMPLETED BY THAT DATE.

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

Rule 2.302 Duty to Disclose; General Rules Governing Discovery

~~(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: **COMMENT: FIRST, SEASONED COMMERCIAL LITIGATION PRACTITIONERS WITH WHOM I HAVE SPOKEN HAVE NOT SUPPORTED THE REQUIREMENT OF SUCH INITIAL DISCLOSURES. THIS INCLUDES SEVERAL GROUPS OF LAWYERS WHO EXAMINED THIS ISSUE FOR THE OAKLAND COUNTY BUSINESS COURT. SECOND, AT THE VERY LEAST, IT IS NOT CLEAR WHY INITIAL DISCLOSURES ARE NEEDED IN BUSINESS COURT CASES. EACH**

PRACTITIONER KNOWS OR SHOULD KNOW WHAT DISCOVERY SHE OR HE NEEDS. THIRD, IT SEEMS INEVITABLE THAT THESE "REQUIRED INITIAL DISCLOSURES" WILL LEAD TO A SUBTANTIAL AMOUNT OF ADDITIONAL MOTION PRACTICE IN THE CIRCUIT COURT. (WHILE THE INITIAL DISCLOSURES REQUIRED BY THE FEDERAL RULES ALSO LEAD TO ADDITIONAL MOTION PRACTICE, FEDERAL JUDGES HAVE THE BENEFIT OF MAGISTRATE JUDGES WHO, IN THE VAST MAJORITY OF CIRCUMSTANCES, ADDRESS THESE ISSUES.)

(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; **COMMENT: THIS PROVISION REQUIRING, "IF NECESSARY…CITATIONS TO RELEVANT LEGAL AUTHORITIES," GOES ABOVE AND BEYOND EVEN THE FEDERAL RULES' REQUIREMENT. WHAT THIS RULE NOW DOES IS TO REQUIRE A PARTY TO UNDERTAKE RESEARCH AND TO "EDUCATE" HER OR HIS OPPONENT. SUCH A PROVISION SEEMS UNNECESSARY, PARTICULARLY IN BUSINESS COURT CASES.**

(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.

(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.

(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 informationESI 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 **COMMENT: DOES THIS MEAN THAT IF THE DISCLOSURE WAS CORRECT WHEN MADE AND BASED ON COUNSEL'S BEST KNOWLEDGE AND INFORMATION, FORMED AFTER APPROPRIATE DILIGENCE, SUPPLEMENTATION STILL IS REQUIRED IF LATER INFORMATION CAUSES/MEANS THAT THE INITIAL DISCLOSURE, ALTHOUGH CORRECT AT THE TIME, WAS "INCOMPLETE OR INCORRECT"? IF SO, WHY IS THE BURDEN BEING PLACED ON THE PARTY MAKING THE DISCLOSURE? WHY ISN'T THE OPPOSING PARTY REQUIRED TO ASK FOR ANY ADDITIONAL INFORMATION OR ANSWERS THAT IT WANTS?**

(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~~.

(b~~e~~) 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.~~

RULE 2.305 Discovery Subpoena ~~For Taking Deposition Of~~to A Non-Party

(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). ~~Subpoenas shall not be issued except in compliance with MCR 2.306(A)(1). After serving the notice provided for in MCR 2.303(A)(2), 2.306(B), or 2.307(A)(2), a party may have a subpoena issued in the manner provided by MCR 2.506 for the person named or described in the notice. Service on a party or a party's attorney of notice of the taking of the deposition of a party, or of a director, trustee, officer, or employee of a corporate party, is sufficient to require the appearance of the deponent; a subpoena need not be issued.~~ 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).

~~(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.~~

(2~~3~~) 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) quash or modify the subpoena if it is unreasonable or oppressive;

(b) enter an order permitted by MCR 2.302(C); or

(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. **COMMENT: I SUGGEST THAT, RATHER THAN "CONDITIONALLY DENY[ING] THE MOTION ON PREPAYMENT BY THE PARTY ON WHOSE BEHALF THE SUBPOENA IS ISSUED OF THE REASONABLE COST OF PRODUCING DOCUMENTS…," THE RULE OUGHT TO PROVIDE FOR CONDITIONALLY GRANTING THE MOTION OR GRANTING THE MOTION UPON THE REQUIRED PREPAYMENT BEING MADE. IT SEEMS THAT, OTHERWISE, CIRCUIT COURTS WILL EXPERIENCE ADDITIONAL MOTION PRACTICE WHICH WILL INCLUDE THE REFILING OF A MOTION THAT HAS BEEN "CONDITIONALLY DENIED."**

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 ~~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 **COMMENT: I SUGGEST CHANGING THE WORD "OF" TO "AFTER." I ALSO SUGGEST THAT THE WORD "ORGANIZATION" BE CHANGED TO "ENTITY." IN FACT, IN RULE 2.506, THE REFERENCE IS TO A PERSON OR "ENTITY" SUBPOENAED. FOR CONSISTENCY, I SUGGEST THE USE OF THE WORD "ENTITY" THROUGHOUT THESE RULES WHERE IT IS APPROPRIATE, RATHER THAN THE USE OF THE WORD "ORGANIZATION." IN ANY EVENT, IF THE WORD "ORGANIZATION" IS GOING TO BE USED, THEN THAT WORD SHOULD BE USED THROUGHOUT, INCLUDING IN MCR 2.506.** 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.~~

(B~~C~~) 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.

Rule 2.306 Depositions On Oral Examination Of A Party

(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~~ 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. **COMMENT: WHILE I REALIZE THAT THIS PROVISION IS CONSISTENT WITH THE FEDERAL RULES, IT TRULY IS INAPPROPRIATE AND INSUFFICIENT FOR (MANY) BUSINESS COURT CASES. AT THE VERY LEAST, IT OUGHT TO BE MADE EXPRESS THAT THE COURT MAY INCREASE THE LENGTH OF DEPOSITION UPON MOTION MADE AND GOOD CAUSE SHOWN. FOR THE RECORD, IN MORE THAN FOUR DECADES OF PRACTICING LAW, I CANNOT THINK OF A MAJOR CASE IN WHICH ONE OR MORE DEPOSITIONS DID NOT EXCEED SEVEN HOURS. IN A RECENT CASE, A LIMITATION OF 12 HOURS FOR EACH DEPOSITION WAS IMPOSED. I SUGGEST THAT THE LENGTH OF DEPOSITIONS BE PART OF WHAT EACH JUDGE CONSIDERS AT THE EARLY SCHEDULING CONFERENCE.**

(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) the time and place for taking the deposition, and

(b) the name and address of each person to be examined, if known, or, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs.

~~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.

(3~~5~~) In a notice ~~and subpoe~~na, 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. ~~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. **COMMENT: ONCE AGAIN, AS STATED IN THE COMMENT TO MCR 2.305(A)(6), I SUGGEST THAT THE WORD "ORGANIZATION" BE CHANGED TO "ENTITY." IN ADDITION, IS IT THE INTENTION OF THE RULE THAT THE 14-DAY NOTICE REQUIREMENT SET FORTH ABOVE APPLY TO ALL DEPOSITIONS OR ONLY THOSE GOVERNED BY SECTION (5) ABOVE?**

(C)-(G) [Unchanged.]

Rule 2.307 Depositions On Written Questions

(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~~5~~).

(2)-(3)[Unchanged.]

(B) [Unchanged.]

Rule 2.309 Interrogatories To Parties

(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 I~~nterrogatories~~ may, without leave of court, be served:

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

(~~2~~b) 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. **COMMENT: WHILE I REALIZE THAT A SIMILAR PROVISION IS CONTAINED IN THE FEDERAL RULES, I BELIEVE A LIMITATION OF 20 INTERROGATORIES WHERE EACH "DISCRETE SUBPART OF AN INTERROGATORY COUNTS AS A SEPARATE INTERROGATORY" IS MUCH TOO NARROW AND LIMITING. DOES THIS RULE MEAN THAT, IF AN INTERROGATORY IS SUBMITTED ABOUT AN EVENT, ASKING ABOUT THE DATE, LOCATION, AND PERSONS PRESENT AT THE EVENT, THIS CONSTITUTES THREE SEPARATE INTERROGATORIES? SUCH A LIMITATION, PARTICULARLY IN BUSINESS COURT CASES, SEEMS ENTIRELY UNWARRANTED AND UNNECESSARY. I SUGGEST THAT A LIMITATION ON THE NUMBER OF INTERROGATORIES BE PART OF WHAT EACH JUDGE CONSIDERS AT THE EARLY SCHEDULING CONFERENCE.**

(B)-(E) [Unchanged in substance; cross-references would be corrected.]

Rule 2.310 Requests For Production Of Documents And Other Things; Entry On Land For Inspection And Other Purposes

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

(1) "Documents" includes writings, drawings, graphs, charts, photographs, ~~phono 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~~2~~) "Entry on land" means entry upon designated land or other property in the possession or control of the person on whom the request is served for the purpose of inspecting, measuring, surveying, photographing, testing, or sampling the property or a designated object or operation on the property, within the scope of MCR 2.302(B).

(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,~~

Rule 2.401 Pretrial Procedures; Conferences; Scheduling Orders

(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)-(c) [Unchanged.]

(d) disclosure, discovery, preservation, and claims of privilege of ~~electronically stored information~~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. **COMMENT: IS THERE ANY REASON WHY RULE 2.401(B) NEEDS TO LIST 14 NEW/ADDITIONAL MATTERS THAT THE COURT MAY CONSIDER AS PART OF AN EARLY SCHEDULING**

CONFERENCE? ISN'T IT SUFFICIENT TO STATE "ANY MATTERS THAT THE JUDGE OR PARTIES BELIEVE 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,

~~(iii)~~(v) the completion of discovery,

~~(iv)~~(vi)the exchange of witness lists under subrule ~~(I)~~(H)(2)(h), and

~~(v)~~(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. **COMMENT: ONCE AGAIN, IS THERE ANY REASON THAT A PROVISION SPECIFICALLY RELATING TO "SEARCH TERMS" BE ADDED TO PROVIDE A LIST OF**

18 ITEMS THAT MAY BE INCLUDED IN A FINAL PRETRIAL ORDER? ISN'T IT SUFFICIENT TO STATE THAT IT SHALL INCLUDE ANY MATTER THAT IS DEEMED APPROPRIATE BY THE COURT?

(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. **COMMENT: WITH RESPECT TO THE ESI CONFERENCE, AS WELL AS THE ESI DISCOVERY PLAN, I SUGGEST, INCREASINGLY, "SEARCH TERMS" ARE CONSIDERED AND AGREED TO BY THE PARTIES AS A SIGNIFICANT PIECE OF ESI DISCOVERY. THIS HELPS STREAMLINE DISCOVERY. THE RULE DOES NOT MENTION THE USE OF "SEARCH TERMS." INASMUCH AS THIS PART OF THE RULE LISTS NO LESS THAN 13 ITEMS FOR CONSIDERATION, IT WOULD SEEM APPROPRIATE TO MAKE CLEAR THAT THE USE OF "SEARCH TERMS" IS AN APPROPRIATE PART OF THE ESI CONFERENCE.**

(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.

Rule 2.410 Mediation

(A)-(G) [Unchanged.]