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Via Email (ADMcomment@courts.mi.gov)

Michigan Supreme Court
Office of Administrative Counsel
PO Box 30052
Lansing, MI 48909

Re: *Civil Discovery Court Rule Review Special Committee*
Final Report and Proposal dated April 21, 2018
Comments of Dykema Gossett PLLC

To the Honorable Court:

These comments are submitted on behalf of Dykema Gossett PLLC, one of the largest law firms based in Michigan. I am a member of the firm in the Litigation Practice Group and am the head of the firm's E-Discovery and Discovery Management practice, one of whose functions is to design efficient discovery processes that comply with applicable court rules and law. Our firm represents a diverse group of clients ranging from individuals, to small business owners, up to the largest businesses in Michigan (or the world). Our comments and concerns on the proposed changes to the Michigan Court Rules are similar to those we shared with the Civil Discovery Court Rule Review Special Committee of the State Bar of Michigan (the "Rules Committee") taking into account the updated draft submitted to the Court.

PREFACE TO COMMENTS

1. Efficiency is not the only goal of court rules; rules should also promote the effective administration of justice.

We would open with three general comments regarding goals. First, the Michigan Court Rules should serve their intended audience. State courts are the primary vehicle by which most Michigan residents and businesses interact with the justice system. For many residents – and even many practitioners, it is the only venue of legal redress. The integrity of the Michigan judicial system depends on the reality – as well as the *perception* – that courts reach fair and just results, within a reasonable time frame, at a reasonable cost.

Second, as this Court is aware, rules alone cannot make a system self-regulating, more just, or more efficient. Michigan has traditionally deployed rules that have tracked key features of the Federal Rules of Civil Procedure. If the Michigan system of handling discovery is falling short, it may reflect difficulties experienced by parties and courts in *applying* rules as much as it reflects shortcomings in existing rules.

Finally, the Court should view rules changes with a practical eye. Proportionality should be considered in revisions of the rules. Changes should take into account that Michigan circuit courts address wildly varying permutations of the amount in controversy, the nature of the litigants, the complexity of the proofs, the amount of discovery required, and the sophistication of counsel. Ultimately, the focus should be on what the parties *need* (not want) to prosecute or defend their case and rules that promote unnecessary discovery should be revised.

2. The Court should recognize that the Rules Committee's proposed amendments will require substantial investments to make them effective.

In general, adopting portions of the federal rules, as the proposed amendments do, would be worthwhile. At a minimum, alignment would allow parties and trial courts to draw from well-developed case law interpreting similar federal rules. Historically, Michigan has not generated extensive reported case law on discovery issues, and direct reference to federal case law could jump-start improvements in process. Further, the federal rules themselves are well thought-out and represent the careful consideration of a broad constituency of judges, practitioners, and academics from across the country. They are also a system that produces relatively consistent and predictable results. But the best implementation might require some modifications:

- Federal courts deal with a relatively small volume of cases that must meet requirements for diversity jurisdiction or federal question jurisdiction. Diversity jurisdiction in general filters out cases with low amounts in controversy. State courts, by contrast, routinely handle cases with relatively small damages demands and often cannot give the necessary attention to legitimate discovery disputes due to the sheer volume of motions that are presented to courts each week.

- Federal discovery practice is significantly more nuanced than the federal rules alone might suggest. Federal judges use standing orders and active, "off the books" mechanisms for resolving discovery disputes, such as mandatory meet-and-confer sessions, letter submissions of disputed discovery issues, and informal conferences with judges. Such informal procedures were rejected early on by the Rules Committee, but the Court should consider them. If and when escalated, many federal discovery disputes are referred to magistrate judges who have developed specialized knowledge related to

resolving discovery issues. All of these "gap filler" mechanisms make the federal rules far more functional (and flexible) than they would be in the "off-the-shelf" version.

- Federal discovery periods are longer, and federal discovery motions have considerably longer lead times. Due to *pre-motion* activities that narrow the issues, discovery disputes are often more focused, consolidated, and manageable by the time they reach court. By comparison, the current Michigan rules governing discovery allow motions to be filed essentially at will, on as little as a week's notice (the proposed amendments do not change that). In some instances, this makes sense; in others, it threatens to prioritize quick resolution over correct resolution.

Put another way, the federal court system has the luxury – in time, person-power, and continuity – of making significant investments (both procedurally and in training) to assure the smooth operation of the federal rules. A state court system that is unable to make a similar investment might need more detailed or concrete adaptations of the federal rules.

COMMENTS

We offer the following as our comments on the Rules Committee's report and proposal.

MCR 1.105 The proposed rule should be adopted.

The proposed change to MCR 1.105 puts the emphasis in the right place: that everyone has a part in making the court system work – and make it work efficiently.

MCR 2.301 The proposed rule should be adopted with a modification to account for proposed MCR 2.401(C).

We agree with the Rules Committee's suggested changes to MCR 2.301, particularly its explicit recognition that a trial court may control the scope, order, and amount of discovery. We also agree with the clarification regarding when discovery should be served relative to the discovery cutoff date. This eliminates an ambiguity in the existing rules.

As to MCR 2.301(A)(1), the "kickoff" for discovery in the federal discovery system, is the Fed. R. Civ. P. 26(f) conference.[1] The Rules Committee has declined to implement mandatory discovery conferences, *see* proposed MCR 2.401(C), and therefore cannot use that event as a reliable reference point. Arguably, any case sophisticated enough to need substantive disclosures

[1] Under Fed. R. Civ. P. 26(d)(2), a party may serve early document requests, but the deadline is still 30 days after the Rule 26(f) conference. *See* Fed. R. Civ. P. 34(b)(2)(A).

also needs a discovery plan, and in such cases, discovery should be held in abeyance until after *both* the disclosures are made *and* the parties establish their initial discovery plan. This would help control discovery in more complicated cases.

MCR 2.302(A) Initial disclosures should be mandatory in Business Court cases, should be at a judge's discretion in other cases, and in no event should be more extensive than the current federal rules require.

The imposition of mandatory initial disclosures in the proposed revised MCR 2.302(A) is a welcome and appropriate step in Business Court cases, where discovery can stall due to inaction by the parties. It is unclear whether initial disclosures are as beneficial in other situations. Outside of Business Court, the need for disclosures should be actively evaluated by the judge hearing the case and expressly ruled upon.[2] Our other comments relate to aspects of the required disclosures that would go "over and above" what the federal rules generally require.

First, the disclosures in proposed MCR 2.302(A)(1)(a), (b), (e), and (h) *are not required in the overwhelming majority of federal district courts.* We disagree that parties should be forced to disclose (or in some cases re-disclose) specific facts, legal theories, third-party materials, or areas of expert testimony:

- Disclosing legal and factual bases of claims and defenses *in initial disclosures* has little added value in the real world. By the time initial disclosures would be made, the parties would have already put each other on notice of the facts and law that they believe would underlie their case, be it in pleadings, responsive pleadings, or early dispositive motions.[3]

- Little or no discovery on the case would have occurred between the trigger for the disclosures (an answer, for example), and disclosures. As such, disclosures would likely be no more informed than pleadings or responsive pleadings/motions.

[2] To the extent that disclosures are required, we also agree with the Committee's proposal to align MCR 2.313(A) with Fed. R. Civ. P. 37(a)(3)(A) (allowing parties to move to compel disclosures) and to modify MCR 2.316, to allow parties to remove disclosure information from the file on stipulation or court order, just as they are currently allowed to remove *discovery materials.*

[3] Michigan is still technically a fact-pleading state, but there is little functional difference in practice between fact pleading and notice pleading. Even in notice pleading jurisdictions, a complaint still needs to have enough factual information to be *plausible*, as discussed in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

- In practice, information provided in the disclosures might be perfunctory at best and would threaten to impinge on privileged information, as well as material protected by the work product doctrine.

- Disclosing precise expert subject areas at the outset of a case is not a feature of federal law, and in federal courts, expert witness deadlines typically come late in a case, and expert work is informed by fact discovery.

- Any expansion of disclosure obligations should be explicitly subject to the proportionality principles added to MCR 2.302(B).

Second, requiring supplementation of disclosures regarding legal theories is problematic. When should a party disclose a changed legal theory? When its attorney changes his or her mind? Michigan already has a mechanism for dealing with changed legal theories, and it is contained in MCR 2.118, which governs amended pleadings. Requiring supplementation for disclosures when "new or additional information is discovered or revealed" opens the door to additional motion practice with little predictable benefit.

Third, proposed MCR 2.302(A)(2), governing initial disclosures in no-fault cases, presents a different issue. Although the production of claims files is fairly expected in these actions, as is producing information on amounts paid under the policy, requiring a defendant to disclose "related claims and litigation" creates a vague duty that could be interpreted by different parties in different ways and lead to discovery disputes. Additionally, the privilege log requirement injects a requirement that is otherwise absent from Michigan law. We agree with the rest of this proposed rule – requiring plaintiffs to immediately disclose their care providers, their expenses, and their employers.

Fourth, we support proposed MCR 2.302(A)(3) and its requirement that personal injury plaintiffs provide an executed medical records authorization at the outset of a case.

Finally, aside from the discussion above, we would urge the Court to revisit the Rules Committee's rejection of requiring formal expert reports under MCR 2.302(A), for three reasons. First, in the federal system, this is self-executing discovery that proceeds with little court intervention. Second, the burden of disclosing expert testimony should be on the proponent of the testimony. Finally, a formal expert report procedure would obviate motion practice related to expert interrogatories and document requests.

MCR 2.302(B) **The proposed rule should be adopted with modifications to make judicial control of discovery apply to all sources of information.**

Proposed Rule 2.302(B) brings the sweep of discovery into line with Fed. R. Civ. P. 26(b)(1), imposing a more focused, *proportional* scope. We have three comments on this. First, current MCR 2.302(B)(6) appropriately allows a court to allocate the costs of discovery from certain electronic data sources, bearing in mind that this operates within - "not reasonably accessible data" – a context in which the party seeking discovery already has to demonstrate an extraordinary need for the information. This same principle should apply to all forms of information, for example, uncatalogued collections of paper records.

Second, we would note that the limitations identified in 2.302(B)(6) (frequency, extent, etc.) are duplicative of the proposed MCR 2.301(C), and it is not necessary to add language specifically allowing a court to impose limits on reasonably accessible information because – as has been borne out in federal cases under the current Fed. R. Civ. P. 26(b)(1) – proportionality acts as an outer limit for everything.

Finally, making "the public or private importance of the issue" a factor in discovery seems to be an unnecessary (and potentially undesirable) departure from the language of Fed. R. Civ. P. 26(b)(1) ("importance of the issues at stake in the action"). We note that the Rules Committee's stated intent was "clarity;" however, this does not obviously advance that goal. The importance of an issue to the *action* is paramount – because the court is there to adjudicate a specific action. Whether that action implicates matters of public importance is a secondary issue most frequently driven by legal and public policy concerns, not the extent of fact discovery in a typical case.

MCR 2.305 **The proposed rule is beneficial but should be modified to liberalize enforcement of subpoenas and refine corporate representative deposition practice.**

Proposed MCR 2.305 goes a long way toward rationalizing subpoena practice, especially in providing explicit notice periods for corporate representatives. That said, we believe that three items still need attention. First, under proposed 2.305(A)(4), the rule should be enacted with a proviso that if a party files a motion to compel compliance within the discovery period, based on a subpoena served and due within the period, the court may grant relief notwithstanding that the hearing may occur after the discovery period. The purpose of such a proviso would be to prevent foot-dragging by non-party deponents from impacting cases with short discovery schedules.

Second, regarding MCR 2.305(A)(6), the 14-day minimum notice period is an excellent idea for a third-party corporate representative deposition, particularly where the topic list is extensive. It is also worthwhile to have a response/objection deadline, though it would make more sense to

key it to the return date on the subpoena, not the service date – simply because the return date is the deadline for objections to subpoenas directed to *parties*. The Court should also consider constraints on the scope of third-party corporate representative depositions. One such limit might be the number of distinct topics that can be noticed. The preparation of corporate representatives is a burdensome activity, and in many instances, parties use corporate representative depositions as a proxy for *all* discovery. Non-parties should receive the same protection.

Finally, the proposed deletion of current MCR 2.305(B) threatens to *increase* confusion with regard to how non-parties should seek relief. Relief from a subpoena for production should either be addressed in 2.305(A)(6) (currently limited to depositions) or in an updated 2.305(B). Burdens on non-parties should be both clearly defined and minimized. Ultimately, like document requests served on a party, a non-party's obligation to comply with a document subpoena should be stayed (or terminated) by making timely and proper written objections.

MCR 2.306 The proposed rule should impose more definite limits on depositions.

A limit of ten (10) depositions, limited to seven (7) hours apiece, as originally proposed for MCR 2.306(A)(3)-(4), is a sensible limit for depositions. The limitation of ten depositions was removed in the most current draft of the amendments to the Michigan rules. We believe a presumptive limit on the number of depositions is entirely appropriate, prevents abusive discovery tactics and would be useful in the vast majority of cases. If ten depositions is a valid presumptive limit in federal cases, then it would seem an appropriate starting point for state court cases.

Further, as to the number of hours for a deposition, the proposed revision does not resolve the longstanding issue of how corporate representative depositions interact with deposition limits. If a 2.306(B)(5) [proposed (B)(3)] notice names an extensive list of topics requiring three party representatives to fulfill, does that mean that the corporate representative deposition is limited to seven hours in the aggregate? This question should be resolved in a comprehensive fashion that sets presumptive limits.

Finally, we would make the same comment for proposed MCR 2.306(A)(3) as we did for 2.305(A)(6) – that the response deadline for a corporate representative deposition notice should be keyed to the date of appearance or production, not the date of initial service.

MCR 2.309 **The proposed limits on interrogatories should be enacted, but the rules should define "discrete subparts" and eliminate contention interrogatories.**

Interrogatories are arguably on their way to obsolescence where the proposed Michigan rules would impose a duty to disclose specific factual and legal theories and where provision is made for formal expert reports.

Limiting interrogatories to twenty (20) is a positive step in a court system where litigants often propound *hundreds*. The proposed revisions to MCR 2.309, however, do not solve the age-old issue in federal courts of what might be a "discrete subpart." This should be addressed.

The revised rules could make truly meaningful changes in discovery – and discovery disputes – if they defined what an interrogatory is supposed to be – or take explicit steps to curb abusive applications of "contention interrogatories." These interrogatories are onerous, expensive, and time-consuming to answer, and they frequently call for legal conclusions that are the province of pleadings and motions, not discovery. Parties rarely answer these completely on the first try; they are frequent subjects of discovery motions, and even the rules – *see* MCR 2.309(D) – allow judges to push off compliance until just before trial. In point of fact, the "application of law to fact" – the entire focus of contention interrogatories – is redundant in every case, for five reasons that exist under the current rules plus two more that would be created by other proposed rule amendments:

1. To survive dismissal, party must state in its complaint how the law applies to the facts under MCR 2.119(B)(1) ("a statement of the facts, without repetition, on which the pleader relies…. With specific allegations necessary reasonably to inform the adverse party of the nature of the claims…").

2. In the proposed disclosures under MCR 2.302(A), a party would be required to disclose – and update – its factual and legal theories.

3. In an early dispositive motion under MCR 2.116(C)(8), a party states how the law applies to allegations assumed to be true.

4. In discovery, a party has the opportunity to learn all of the discoverable facts known to its adversary.

5. In a dispositive motion under 2.116(C)(10), the facts in the record are tested against the law.

6. At case evaluation, each side presents to the panel the application of the law to the facts.

7. In the pretrial order – proposed MCR 2.401(H) - a party would lay out "a concise statement of [its claim or defense], including legal theories," "issues of fact to be litigated," and "issues of law to be litigated."

In sum, the enactment of the updated rules presents an excellent opportunity to focus interrogatories on their best and highest use – getting preliminary information so as to know what to ask in depositions or what documents to request.

MCR 2.313 The proposed rule should be enacted as proposed, with slight modifications to MCR 2.313(A), (C), and (E).

We agree with the change in MCR 2.313(B) (that a court "may" rather than "must" assess fees and costs on a motion to compel) on grounds that it (a) reflects the reality that courts only infrequently impose sanctions and (b) de-emphasizes the idea that discovery motions are subject to the "British Rule."

We also support the proposed MCR 2.313(C) (punishing failures to disclose or supplement), which mirrors Fed. R. Civ. P. 37(c)(1), though allowance should be made for situations where parties resolve their disputes prior to the hearing on a motion.

As to MCR 2.313(D), we support the imposition of the federal standard for spoliation sanctions, *i.e.*, adopting Fed. R. Civ. 37(e), with two notes. First, some federal courts continue to issue sanctions based on the inherent powers doctrine (which the proposed language was intended to supplant in the federal rules) – and the inherent powers doctrine still covers cases involving tangible evidence, for example, the subject matter of an insurance claim.[4] It may well be time to go further than the federal rules and bring both categories of evidence under a single, rules-based doctrine.

Second, the proposed MCR 2.313(D) is based upon federal language that has caused some interpretational difficulties in the "incompetent spoliator" context: can a party be subjected to terminating sanctions if it intends to destroy evidence but fails to actually create prejudice? This question has seemed to linger among federal practitioners, and whether prejudice under proposed MCR 2.313(E)(1) is a *prerequisite* to moving to 2.313(E)(2) will undoubtedly be litigated in

[4] *See, e.g.*, Joseph, Gregory P. "Rule 37(e): the New Law of Electronic Spoliation." *Judicature*, 99:3 at p. 36 (Duke, Winter 2015); *Bagley v. Yale*, 318 F.R.D. 234, 237 (D. Conn. 2016).

Michigan appellate courts. The interaction of these provisions could be more explicit, just as it could be in federal practice.[5]

MCR 2.401 The proposed rule should be enacted but require mandatory content for pretrial orders and eliminate the ESI conference, plan, and order.

We support the proposed revisions to MCR 2.401, with two notes. First, pretrial orders should *require* ("shall include") the information listed in 2.401(H) in Business Court cases, and possibly all cases. Final pretrial orders are very helpful in defining the course of a trial – and in encouraging non-judicial resolutions.

Second, cases often benefit from structure where there is discovery of (or searches through) massive amounts of data. But proposed MCR 2.401(J) should be omitted pending a demonstrated and quantifiable need to create a system that is both more complicated and less flexible than the one in the federal rules. The proposed rule does not account for the widely varying role of ESI in cases – nor does it present a complete or practical solution.

- Subsection (J)(1) assumes that all ESI is created equal. It is not, it comes in an almost infinite variety of forms, and there is no "one size fits all" solution. The mere presence of "ESI" is not a proportional test for whether detailed procedures are in order; the nature of that information should determine whether E-Discovery is a limited issue or whether it requires a more detailed process. If this proposed change were adopted, we would suggest making the change from "the parties shall consider" to "the parties may consider."[6]

- Subsection (J)(1)(j) proposes to add a privilege log requirement to situations where parties choose to use an ESI protocol. Privilege logs are not required at all under current Michigan law, and they are particularly burdensome where ESI is involved. It does not

[5] *See, e.g.*, Advisory Committee Notes to Rule 37; *see also Global Material v. Dazheng Metal Fibre*, No. 12 CV 1851, 2016 U.S. Dist. LEXIS 123780, at *36-37 (N.D. Ill. Sept. 13, 2016) (allowing (e)(2) sanctions regardless of prejudice), *but see Horn v. Tuscola Country*, No. 13-cv-1462, 2017 U.S. Dist. LEXIS 44107 at *12-13 (E.D. Mich. Mar. 27, 2017) (denying adverse inference due to lack of relevance, not lack of intent) and *BMG Rights Mgt. v. Cox Comms.*, 199 F. Supp. 3d 958, 986 (E.D. Va. 2016) (if lesser sanctions under (e)(1) suffice to redress a violation, (e)(2) does not apply).

[6] Even among the line items in the proposed rule, preservation requirements appear twice – in proposed MCR 2.401(J)(1)(a) and (e) – and are not actually necessary given proposed MCR 2.313(e).

make sense to impose a privilege log requirement in some cases — those where an ESI Conference is held — and only for certain type of documents (*i.e.*, ESI).

- Subsection (J)(2) is a "may include" provision for an ESI plan that does not capture all of the negotiation and discussion that would have taken place in a (J)(1) conference (assuming all of those data points remain mandatory). This opens the door to further conflict down the road. It also means that (J)(4) could result in the entry of an order that does not definitively incorporate all of the information discussed and negotiated by the parties.

- Subsection (J)(3)'s purpose is well-intentioned, but competence is more appropriately addressed by the Michigan Rules of Professional Conduct. Further, the proposed representative structure could inject considerable cost into cases merely because there is *some* ESI, not because specialized subject matter knowledge is actually required to address that particular data.

MCR 2.411(H) **The court rules should allow the use of court-appointed discovery mediators, but the use of such mediators should be regulated.**

Moderating discovery disputes is a *procedural* activity and a core function of Michigan trial courts. Because mediation of discovery disputes under proposed MCR 2.411(H) is essentially the outsourcing of a judicial function, its use should be regulated. In our experience, Business Court cases – particularly high-value ones – tend to have more complex discovery, and the thoughtful involvement of a mediator could be valuable. But in other contexts, the unqualified ability of a court to appoint a discovery mediator might impose an additional layer of cost and complication. A rule permitting the appointment of a mediator should include guidance on the circumstances under which a court can appoint one, which potentially could be defined as "good cause" or perhaps some more stringent standard for cases outside the Business Court context.

MCR 2.506 **The proposed updated rule should be enacted, with one change to improve the effectiveness of relief.**

We support the proposed new MCR 2.506 (governing subpoenas in hearings and at trial) but suggest that a new 2.506(H)(5) also require that any motion to quash or for protective order be made sufficiently in advance to allow meaningful resolution.

CONCLUSION

As noted above, the Rules Committee has done an excellent job in suggesting improvements to the Michigan Court Rules. With relatively minor modifications – and appropriate commitment

by Michigan's litigant, attorney, and judicial stakeholders – the proposed changes will greatly further the cause of efficient and effective adjudication.

Sincerely,

DYKEMA GOSSETT PLLC

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