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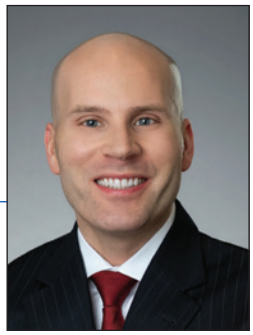
WHAT'S INSIDE

Letter from the Chair

by: R.J. Cronkhite



Now that we are all (mostly) settled into the New Year, I wanted to take this opportunity to introduce myself as the incoming Chair of the Litigation Section.

In 2015, I was first elected to the Governing Council for the Litigation Section. In my role as a Council member, I have been guided by what best serves you, our Litigation Section members. I also paid attention to what brings value to our members and what doesn't. Now as Chair, I am positioned to take an even more active role in ensuring that our members have access not only to meaningful resources but also fun and enjoyable events.

Along those lines, the Council has recently embarked on overhauling our offerings to the Litigation Section membership. This year, we implemented a new quarterly event schedule to ensure that our members have the opportunity to participate in at least one of the Section's marquee events over the course of the year. The Council has also listened to what members want in an event, including more engaging seminars and more interactive networking events.

Speaking of which, our first quarterly Section event, *Bury the Hatchet,* will be held on **March 31, 2020** at Detroit Axe in Ferndale, Michigan. The Council decided to offer this event at no cost to our members, recognizing that it was well past time that our members enjoy a relaxed, high-quality event without worrying about cost. You may easily register here, but please note that space is limited: **https://na.eventscloud.com/lit033120.**

I am also thrilled to announce that the Council will again host the Bench/Bar Mixer at the Detroit Institute of Art in May of 2020. Last year, our inaugural event saw over fifty judges attend and interact with our members in the DIA's beautiful Diego Rivera Courtyard.

As the year progresses, you will hear about additional events and seminars hosted or sponsored by the Litigation Section.

I am proud to say that your Council remains committed to offering valuable experiences to you, and I want to express my thanks for your continued support of the Section as a member. Without your support, the Council could not make all of this happen.

I am excited and honored to be part of this ongoing process, and look forward to seeing you at one of our upcoming events! In the meantime, do not think twice about reaching out to me directly to let us know what else we could be doing to serve you.

With warm regards,

R.J. Cronkhite
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Contributor

R. Rex Parris
PARRIS Law,
Lancaster, CA

R. Rex Parris obtained the first million-dollar verdict in California's Kern County as a young lawyer and, years later, obtained an historic, record-breaking defamation jury verdict in Los Angeles for $370,000,000. In-between, Mr. Parris has obtained dozens of seven-, eight-, and nine-figure verdicts and settlements. He has been profiled on "20/20" and "Nightline"; in "The New York Times"; and many other national media outlets.

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Review of Michigan Appellate 2018-2019 *Decisions Concerning Mediation*

by: Lee Hornberger*

Almost every lawsuit that the parties cannot settle on their own will go to mediation at some point. It is therefore critical that attorneys understand the developing body of law around this important step in the litigation process. This article reviews Michigan Court of Appeals decisions issued in 2018 and 2019 concerning mediation and mediation settlement agreements (MSA). There were no Michigan Supreme Court decisions concerning mediation during this period.

Michigan Court of Appeals Published Decisions

Mediation fee is taxable cost.

Patel v. Patel[1] affirmed the Circuit Court's award of the defendants' mediation expense as a taxable cost under MCR 2.625(A)(1). "The mediator's fee is deemed a cost of the action, and the court may make an appropriate order to enforce the payment of the fee." MCR 2.411(D)(4).

Court of Appeals affirms Circuit Court enforcement of custody MSA.

Rettig v. Rettig[2] is an extremely important case for those attorneys who practice domestic relations law. In *Rettig* the parties signed an MSA concerning custody. Over the objection of one parent that the Circuit Court should have a hearing concerning the Child Custody Act[3] best-interest factors and whether there was an established custodial environment, the Circuit Court entered a judgment incorporating the MSA. The Court of Appeals affirmed. The Court of Appeals held although the Circuit Court is not necessarily required to accept the parties' agreements verbatim, the Circuit Court is permitted to accept them and presume at face value that the parties meant what they signed. The Circuit Court remains obligated to come to an independent conclusion that the parties' agreement is in the child's best interests, but the Circuit Court is permitted to accept that agreement where the dispute was resolved by the parents. The Circuit Court was not required to make a finding of an established custodial environment. In order to help make the MSA more bullet-proof, the MSA stated, **"This memorandum of understanding spells out the agreement that we have reached in mediation. This resolves all disputes between the parties and the parties agree to be bound by this agreement."** *Rettig* overruled *Vial v. Flowers*[4] *sub silentio.*

Rettig was followed by ***Brown v. Brown,***[5] where the Court of Appeals affirmed the Circuit Court's adoption of a custody MSA.

Michigan Court of Appeals Unpublished Decisions

Court of Appeals reverses Circuit Court dismissal for failure to appear at mediation.

In ***Corrales v. Dunn,***[6] after case evaluation, the Circuit Court ordered mediation. Because of a communication glitch, the plaintiff failed to appear at the mediation. Therefore the Circuit Court dismissed the case. The Court of Appeals reversed the Circuit Court's dismissal, stating that dismissal after over two years of litigation under the circumstances was manifest injustice. MCR 2.410(D)(3)(b)(i).

Lesson: Counsel should personally prepare the client before the mediation and personally make sure the client knows the time and place of the mediation.

Unsigned, unrecorded MSA placed on record and agreed to is binding.

In ***Eubanks v. Hendrix,***[7] the plaintiff contended that the Circuit Court forced her to comply with an unenforceable MSA. The terms of the MSA were never reduced to a signed document or recorded by audio or video. MCR 3.216(H)(8). Any purported MSA could not, absent other valid proof of settlement, be a basis for a judgment of divorce. At a hearing, held one day after the mediation, the parties placed a partial agreement on the record. MCR 2.507(G). At that hearing, concerning the purported MSA, the Circuit Court stated its understanding that the "gist" of the agreement was that the parties were to continue with joint physical and legal custody and equal parenting time. The plaintiff agreed on the record with that statement. The Circuit Court found that the arrangement was in best interests of the child. The agreement placed on the record and agreed to by the plaintiff was binding on the plaintiff. **Lesson: All the parties should sign the MSA at the end of the mediation session.**

To settle or not to settle?

Smith v. Hertz Schram, PC,[8] lv app pdg, was a legal malpractice action that arose after a post-judgment divorce proceeding. The malpractice case went to mediation. The mediator also served as a discovery master. The wife did not go to the Family Court to challenge a discovery roadblock. There was discussion at the mediation about the value and future of a business. The wife decided to settle. Based on the post-mediation eventual sale of the business by the ex-husband, the ex-wife sued the defendants, who had represented her in the mediation, for malpractice. The Circuit Court granted summary disposition in favor of the defendants. The Court of Appeals in a split decision affirmed the Circuit Court's ruling dismissing the malpractice case against the defendants. Judge Jansen's dissent said the ex-wife's attorney should have advised the wife to reject the $65,000 offered in mediation and go to Family Court to pursue the discovery matter. Settlement should never have been a serious consideration. With respect to language in the settlement agreement that acknowledged that neither party had relied on any "representation, inducement, or condition not set forth in this agreement," the attorney should never have allowed it. The attorney should have had the wife sign a release, indicating it was her intention to enter into a settlement agreement despite her counsel's advice to the contrary.

Given the pending application for leave to appeal, we do not know how this case will end up. **Lesson: There should be good solid language in the MSA to help make the MSA bulletproof.**[9]

Post-MSA surveillance is okay.

In ***Hernandez v. State Automobile Mutual Ins Co,***[10] the Court of Appeals reversed the Circuit Court's grant of plaintiff's motion to enforce a MSA. The MSA was signed by the plaintiff. The claims representative for the defendant indicated he would need approval from his superiors and the Michigan Catastrophic Claims Association (MCCA) before signing the agreement. The MSA stated "[t]his settlement is contingent on the approval of MCCA." MCCA did not approve the MSA. The Circuit Court did not err in concluding there was a meeting of minds on the essential terms of the MSA. The MSA was properly subscribed as required by MCR 2.507(G). MCCA approval of the MSA was a condition precedent to performance of the MSA. The defendant did not waive this condition by conducting surveillance on the plaintiff and submitting reports of this surveillance to MCCA. **Lessons: Be careful of contingencies in the MSA. Remind relevant individuals of the possibility and significance of surveillance.**

Court of Appeals affirms Probate Court non-approval of MSA.

In ***Peterson v. Kolinske,***[11] the Court of Appeals affirmed the Probate Court's non-approval of a

MSA. The MSA stated that only persons who signed it had agreed to its terms. It did not indicate that the Appellant daughter agreed to its terms, agreed that the will was valid, or otherwise agreed to release claims against the estate. If contract language is clear and unambiguous, it must construed according to its plain sense and meaning, without reference to extrinsic evidence. **Lessons: Get everyone's signature. Be careful when necessary people are absent.**

Court of Appeals affirms Circuit Court's enforcement of MSA.

In ***Krake v. Auto Club Ins Assoc,***[12] the plaintiff was present at the mediation. She initially denied she had signed the MSA. She admitted she "pen[ned]" her signature on the MSA. She explained she signed "fake initials," and she had done so because her attorney told her the MSA was not a legally binding document. The plaintiff explained that she did not believe the MSA to be a final resolution of the case and the settlement amount was too low. The Court of Appeals affirmed the Circuit Court's enforcement of the MSA. **Lessons: People are unpredictable. Prepare for the worst.**

Party dies after signed MSA but before judgment.

Estate of James E. Rader, Jr.[13] After there was a signed MSA in a domestic relations case, one of the parties died before the entry of judgment. Because the settlement agreement was to be incorporated into the judgment of divorce, the agreement had no effect, since the decedent died before the judgment could be entered. Entry of judgment was a condition precedent to enforcement of the settlement agreement. Because entry of judgment became impossible following decedent's death, the settlement agreement could not be incorporated or given effect as intended. **Lesson: Act quickly.**

ENDNOTES

1 324 Mich. App. 631 (2018).

2 322 Mich. App. 750 (2018).

3 MCL 722.21 *et seq.*

4 COA No. 332549 (September 22, 2016). In *Vial,* the Court of Appeals held that the Circuit Court failed to adequately consider the child's best interests before it entered a custody judgment of divorce. The Court of Appeals also held that the Circuit Court erred by not considering whether an established custodial environment existed.

5 COA No. 343493 (November 27, 2018).

6 COA No. 343586 (May 30, 2019).

7 COA No. 344102 (May 23, 2019).

8 COA No. 337826 (July 26, 2018), lv app pdg. In *Vittiglio v. Vittiglio,* 297 Mich. App. 391 (2012), lv dn 493 Mich. 936 (2013), the Court of Appeals affirmed the Circuit Court's holding that an audio recorded MSA was binding and stated that a "certain amount of pressure to settle is fundamentally inherent in the mediation process."

9 Bulletproof language for a settlement agreement could include language such as: "... she understood (1) the terms of the settlement, (2) she would be bound by the terms of the settlement if she accepted it, and (3) she had the absolute right to go to trial, where she could get a better or worse result. ... [S]he understood the terms and would be bound by the settlement, and had the right to go to trial. ... [I]t was her own choice and decision to settle ... ." *Roth v. Cronin,* COA No. 329018 (April 25, 2017), lv dn 501 Mich. 910 (2017).

10 COA No. 338242 (April 19, 2018).

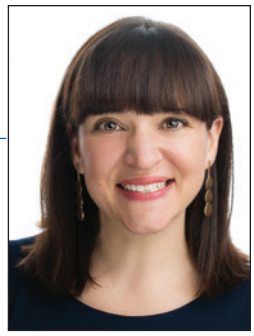
11 COA No. 338327 (April 17, 2018).

12 COA No. 333541 (February 22, 2018), lv dn 915 N.W.2d 356 (2018).

13 COA No. 335980 (February 13, 2018), lv dn 913 N.W.2d 326 (2018).

Lee Hornberger is a former Chair of the State Bar's Alternative Dispute Resolution Section, former Editor of *The Michigan Dispute Resolution Journal,* former member of the State Bar's Representative Assembly, and former President of the Grand Traverse-Leelanau-Antrim Bar Association. He is a member of Professional Resolution Experts of Michigan (PREMi) and a diplomate member of The National Academy of Distinguished Neutrals. He has received the ADR Section's George N. Bashara, Jr. Award. He received a First Tier ranking in Northern Michigan for Arbitration by *U.S. News – Best Lawyers®* Best Law Firms in 2019 and 2020. He is in *The Best Lawyers of America* 2018 and 2019 for arbitration, and 2020 for arbitration and mediation. He is on the 2016, 2017, 2018, and 2019 Michigan Super Lawyers lists for ADR. He holds his B.A. and J.D. cum laude from the University of Michigan and his LL.M. in Labor Law from Wayne State University.

ICLE's Litigation Toolbox



by: Rebekah Page-Gourley,
Staff Lawyer Senior, Institute of Continuing Legal Education (ICLE)

Deposition Skills: *More Essential Than Ever*

The amendments to the Michigan Court Rules governing civil discovery, which went into effect on January 1, 2020, made a number of significant changes to the state court discovery process. Michigan litigators will continue to grapple with mandatory initial disclosures, proportionality considerations, and other new requirements as courts begin to implement the changes. Looking at the amended rules as a whole, one of the most significant takeaways is the heightened importance of depositions in civil practice.

The amendments make some specific changes to deposition procedures and clarify that MCR 2.305 is to be used to subpoena depositions of nonparties, while MCR 2.306 applies to party depositions. Additionally, MCR 2.306(A)(3) limits each individual deposition to "one day of seven hours." However, it's the change to the rule on interrogatories that will arguably make the biggest impact on deposition practice.

MCR 2.309(A)(2) provides that "each separately represented party may serve no more than twenty interrogatories upon each party." This limit requires a major shift in how nearly all Michigan litigators have traditionally approached discovery. Instead of serving numerous interrogatories at the outset of a case, practitioners must now exchange initial disclosures under MCR 2.302(A) before serving any other written discovery requests. Under this new discovery paradigm, depositions will be essential tools for getting answers to questions that may have previously been handled via interrogatories. Interestingly, MCR 2.307 concerning depositions on written questions remains largely unchanged and does not include any numerical limits. As a result, some practitioners have speculated that there may be an uptick in depositions on written questions in the coming years.

In any event, it's clear that given the seven-hour time limit on individual depositions, numerical limits on interrogatories, and new proportionality considerations limiting the scope of discovery in each case, careful planning and focused deposition questions will be increasingly critical for effectively establishing a case or defense. ICLE has a wide range of resources to help practitioners prepare for and take the most effective depositions under the new rules:

- The live ***Deposition Skills Workshop*** (next scheduled for December 3-4, 2020, in Plymouth – sign up here: www.icle.org/depskills) gives lawyers hands-on experience and in-person expert feedback.
- ***The Essential Deposition Skills*** online certificate give you expert guidance, video demonstrations, and self-assessments on your own time and at your own pace.
- ***Michigan Civil Procedure*** and ***A Practical Guide to Depositions in Michigan*** will help you strategize and plan your questions, prepare yourself and your witnesses, and draft effective deposition outlines using helpful samples.
- The on-demand seminar ***"Apply the Michigan Discovery Rule Changes to Your Practice"*** gives you insights directly from a Michigan judge and experienced practitioner.

If you are an ICLE Premium Partner, some of these resources are included in your Partnership. To find out more about our litigation resources, or to suggest ideas for new content, contact me at rebekahp@icle.org

Initial Disclosures: *Strategic and Practical Considerations*

by: Emily G. Ladd*

Michigan's new civil discovery rules took effect on January 1 of this year. The revised rules implement many significant changes, including a new requirement that parties serve initial disclosures. Although a similar requirement has been in place in the federal rules since 1993, the new Michigan initial disclosure rule has many practitioners wondering how the requirement will play out in state courts. This article will outline the requirements under the rule, suggest strategic and practical considerations for both plaintiff and defense litigators, and discuss how practitioners can meet their obligations under MCR 2.302.

Background

MCR 2.302(A)(1) requires parties to disclose the following:

a) The factual basis of its claims and defenses;

b) The legal theories supporting its claims and defenses including, if necessary for "a reasonable understanding of the claim or defense," citations to case law;

c) Names and, if known, the address and telephone number of each individual likely to have discoverable information that a party may use to support its claims or defenses;

d) A copy or description by category and location of documents, ESI, and tangible things a party has in its possession, custody, or control that it may use to support claims or defenses;

e) A description by category and location of all documents, ESI, and tangible things not in a party's possession, custody, or control that it may use to support its claims or defenses, unless the use would be solely for impeachment;

f) A computation of each category of damages claimed by the party, along with the non-privileged documents or other evidence on which each computation is based;

g) A copy or opportunity to inspect pertinent portions of any insurance, indemnity, security equivalent, or suretyship agreement under which another person may be liable to pay all or part of a potential judgment; and

h) Anticipated subject areas of expert testimony.

Practitioners familiar with discovery in federal court may be at an advantage, as MCR 2.302 was largely adapted from FRCP 26(1).[1] Similar to the federal rule, the Michigan initial disclosure rule does not excuse a party from making initial 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."[2] It also requires disclosure of several of the same categories of information, including the names of individuals likely to have discoverable information and a copy or description of all documents in the disclosing party's possession, custody, or control that it may use to support its claims or defenses. Michigan case law interpreting the phrase "possession, custody or control" suggests that this extends not only to documents in a party's physical possession, but also those that a party would have a legal right to obtain.[3]

Similar to the federal rule, MCR 2.302 requires disclosures regarding computation of damages. Federal case law interpreting this requirement suggests that enough analysis is required "so as to enable each Defendant[] . . . to understand the contours of its potential exposure and make informed decisions as to settlement and discovery."[4]

The Michigan initial disclosure rule, however, includes several notable additions, including requiring parties to disclose the factual basis of and legal theories supporting its claims and defenses, citations to case law where appropriate, and all anticipated areas of expert testimony. Notably, subrule (e) also requires descriptions of documents a party may use to support its claims or defenses that are not in its possession, custody or control.[5]

MCR 2.302 also requires additional disclosure in no-fault and personal injury cases.[6] This subrule was adapted in part from the Wayne County Circuit Court's standard Addendum to Scheduling Order in No-Fault Cases, which requires that parties disclose certain information within one month of the first scheduling order, including first-party claim files, plaintiff's known service providers and employer information, and executed medical record authorizations.[7] MCR 2.302 adopts these disclosure requirements, with the added requirement that no-fault plaintiffs disclose "all provider bills or outstanding balances for which the plaintiff seeks reimbursement."[8]

Practical and Strategic Considerations for Plaintiffs and Defendants

The Michigan initial disclosure rule places additional pressure on plaintiffs early on in litigation. Under the rule, a plaintiff or any party filing a counterclaim, cross-claim, or third-party complaint must serve initial disclosures "within 14 days after any opposing party files an answer to that pleading."[9] Plaintiffs therefore must think what must be disclosed and establish the factual basis and legal theories in support of their claims before they even file. Parties should also be aware that MCR 2.301(A) now prevents a party from initiating discovery until it has served its initial disclosures and plan accordingly.[10]

The new requirement may not have as many implications for defendants, who likely won't have thought about disclosures until after they've been served with the complaint. Defendants, however, still have tight disclosure deadlines under MCR 2.302(A)(5)(b)(ii) and should begin assembling their disclosures as soon as possible. Parties currently engaged in active discovery should also reexamine what is subject to disclosure under the rule and consider filing a request to produce where a party has not disclosed a piece of information that would have been disclosed under the new civil discovery rules. Both plaintiffs and defendants involved in actions filed prior to January 1, 2020 should, however, be careful in arguing that the new rules apply, as such an argument would trigger other obligations and restrictions under the new rules, including limitations on interrogatories.

Meeting Your Obligations under MCR 2.302

Disclosures should be "based on the information reasonably available to the party."[11] Some have interpreted this to mean that "[t]here is no requirement that parties have a perfect knowledge of their case at the initial disclosure state."[12] The level of reasonableness required under the federal rules is an objective standard "decide[d] on the totality of the circumstances."[13]

Although it is yet to be determined what level of specificity courts will require or the practical result of initial disclosure disputes, parties should keep the intent and general purpose of initial disclosure rules in mind. One court interpreting the requirement that a party disclose the factual basis of its claims and defenses explained that disclosures are the "primary vehicle by which the parties are informed of their opponent's case" and thus it "should fairly expose the facts and issues to be litigated."[14] Disclosure rules "are designed to provide parties a reasonable opportunity to prepare for trial or settlement – nothing more, nothing less."[15] Another court, discussing one party's failure to make timely disclosures, cautioned that "disclosure rules . . . were not meant to . . . encourage[] litigants to lie in wait for their

opponents to miss a deadline and then use that momentary transgression to get a case effectively dismissed."[16] Rather, the intent of disclosure rules is to "eliminate, or at least reduce, hostile and unprofessional conduct in favor of voluntary cooperation and exchange of information."[17] Therefore, litigators should consider the purpose of the rule to encourage settlement, promote cooperation, and increase the exchange of information in determining how to meet their obligations under the new Michigan initial disclosure rule.

ENDNOTES

1 JAMES L. HIGGINS ET AL., CIVIL DISCOVERY: THE GUIDEBOOK TO THE NEW CIVIL DISCOVERY RULES (April 21, 2018).The Guidebook to the New Civil Discovery Rules explains the origin of the new initial disclosure rule as presently in effect: "[S]ubrules (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 . . . and including revisions to address voluminous and irrelevant portions of policies." *Id.* at 15.

2 *See* MCR 2.302(A)(6).

3 *Mitan v. New World Television, Inc.,* No. 225530, 2003 WL 22871415, *4 (Mich. Ct. App. 2003) (upholding a sanction against a plaintiff for failing to produce certain financial documents where the plaintiff had copies of the tax documents, but the originals had been seized by the police).

4 *City and County of San Francisco v. Tuto-Saliba Corp.,* 218 F.R.D. 219, 221 (N.D. Cal. 2003).

5 *See* MCR 2.302(A)(1)(e). Although most of the Michigan initial disclosure rule is borrowed from disclosure rules in other jurisdictions, the Guidebook to the New Civil Discovery Rules observed that this rule has "no source attribution," but that Illinois has a similar requirement.

6 *See* MCR 2.302(A)(2) - (3).

7 *See* Wayne County Circuit Court, *Auto Negligence Addendum to Scheduling Order,* **https://www.3rdcc.org/forms.**

8 MCR 2.302(A)(2)(b)(ii).

9 *See* MCR 2.302(A)(5)(b)(i).

10 MCR 2.301(A)(1).

11 MCR 2.302(A)(6).

12 *See supra* note 1 at 19.

13 *TRW Financial Systems, Inc. v. Unisys Corp.,* No. 90-cv-71252, 1995 WL 545023, *9 (E.D. Mich. 1995).

14 *Reyes v. Town of Gilbert,* 247 Ariz. 151, (2019) (denying a plaintiff's motion for a new trial based on defendant's failure to disclose a pre-construction traffic impact study).

15 *Zimmerman v. Shakman,* 204 Ariz. 231, 236 (2003).

16 *Allstate Ins. Co. v. O'Toole,* 182 Ariz. 284, 287 (1995).

17 *Id.*

* Emily G. Ladd is a litigation and dispute resolution associate in Miller Canfield's Ann Arbor office. Emily is a *magna cum laude* graduate of Brigham Young University's J. Reuben Clark Law School, where she served as a senior editor for the BYU Law Review and a board member of BYU Women in Law.

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Michigan's Exciting Experiment: *Discovery Mediation*

by: Jay Yelton*

Both litigation attorneys and judges would agree that over the last several years the discovery process, and the accompanying cost, have gotten out of control. The State Bar of Michigan's Civil Discovery Court Rule Special Committee recently reported: "discovery, when actively employed, has been estimated to account for as much as 90% of litigation costs, and the scope and cost of discovery has been found to significantly undermine the utilization of the civil litigation system."[1] This steep rise in the cost of discovery, and the concomitant rise in the volume and complexity of electronically stored information (ESI), have led the bench and bar to undertake several court rule amendments to control the discovery process.

Amendments to Discovery Court Rules. The 2015 amendments to the Federal Rules of Civil Procedure and now the 2020 amendments to Michigan's Rules of Civil Procedure are "intended to streamline the discovery process to make it less expensive and more efficient."[2] For example, Michigan's recent amendments include many important provisions such as:

- requiring initial disclosures to occur within the first few weeks of a lawsuit (MCR 2.302);
- adding a proportionality limitation on the scope of discovery (MCR 2.302(B));
- adopting a presumptive limit on the number of interrogatories (MCR 2.309(A)(2)); and
- facilitating early and active judicial case and discovery management via discovery plans and ESI conferences (MCR 2.401).

While these amendments represent an important effort to reduce discovery costs and make the courts more accessible, court rule amendments alone will not solve the problem. One continuing concern is that many attorneys and judges lack the technical know-how that is needed to help parties develop and implement a reasonable discovery plan for preserving, collecting and producing ESI.[3] As a consequence, conducting an early ESI Conference or developing an ESI Discovery Plan may be a daunting undertaking for many judges and lawyers.

Discovery Mediation. To address this concern, the Michigan Supreme Court has adopted a relatively novel strategy which expands the scope of issues that can be addressed via mediation. MCR 2.411(H), entitled Mediation of Discovery Disputes, effective January 1, 2020, provides that parties may stipulate to, or the court may order, the mediation of discovery disputes. In the mediation process, a neutral facilitator (who has no authoritative decision-making power) communicates confidentially with the interested parties, assists them in identifying issues and helps them explore solutions to promote a mutually acceptable settlement.[4]

The impetus behind this new amendment is the belief that mediation can provide an early and confidential forum for litigants to explore potential alternatives for cost-effective exchange of information relevant to the underlying dispute. This will allow the parties, with the assistance of an experienced neutral party, to discuss and agree to a reasonable discovery plan or resolution, including the identification and discussion of

data volumes and any concerns regarding its preservation, collection or production. For example, will smartphones be a data source for their case?[5] If so, it is important to understand that these devices can generate and store massive quantities of data, such as video and image files, emails, voicemails, call logs, calendars, address links, web browsing histories, and GPS location data. Because there is no standard format for application data, accessing and retrieving data from a smartphone can be problematic, too. The average party often needs expert advice to preserve and produce smartphone data in litigation. By mediating rather than litigating these types of discovery issues, litigants can control the cost of discovery, maintain confidentiality, and avoid potential adverse results, such as sanctions.

Test Cases in Michigan. Some circuit and business courts in Michigan have been experimenting with discovery mediation. In Oakland County, Judges Wendy Potts and James Alexander began a Discovery Facilitator Program on Wednesday mornings after they received input from their Business Court Advisory Committee.[6] As Judge Alexander explained: "I think it is a tremendous success, both from the standpoint of getting volunteers and resolving disputes and the program is now being discussed with other statewide Business Court Judges."[7]

Wayne County Judge Patricia Fresard is equally excited about the success of the discovery mediation program they created. As Judge Fresard explained: "Our discovery mediation program is funded by a grant to the Detroit Bar Association and staffed by retired judges. Since inception of the program in August, 2017, discovery mediators have resolved discovery disputes in hundreds of cases; they sometimes even facilitate settlements when asked to do so by all participating attorneys. For 2019, 88% of participants were highly satisfied with the program. Judges and attorneys alike appreciate the program because it has streamlined Friday motion calls."[8]

Test Cases in Other States. Several years ago California Superior Courts began adopting comprehensive Discovery Facilitator Programs.[9] For example, in Contra Costa County Superior Court (San Francisco Bay Area), any party wishing to file a discovery motion must first serve a Request for Assignment of Discovery Facilitator to the Alternative Dispute Resolution (ADR) Office. The ADR Office will identify a facilitator from the approved list at the Clerk's Office and the facilitation must occur within 30 days. The Discovery Facilitators are experienced attorneys who volunteer two to four hours of their time (per dispute) to assist in resolving these disputes. After that two- to four-hour time period, the parties can either (a) memorialize their resolution, (b) proceed to file a discovery motion, or (c) retain the Discovery Facilitator to continue conferring with them to resolve the dispute.

Highly Encouraging Results. These California programs have been very successful. According to Marin County Superior Court: "The number of contested discovery and motion hearings has been dramatically reduced ... and parties have reported a high degree of satisfaction from the program."[10] The Bar Association in Marin County California reports that, of the discovery disputes referred to mediation, 95% did not return to the court.[11] Similarly, the Bar Association of Fairfax County, Virginia reports that their Motion Conciliation Program has a 77% resolution rate.[12]

These high success rates are likely due to a few factors. First, discovery disputes often arise from simple misunderstandings or a lack of information concerning the opposing side's information systems. Those issues can readily be resolved with the assistance of an experienced mediator. Second, because the communications that occur during mediation are confidential, parties are more willing to divulge information that they would not in open court. Third, mediating early in the litigation before serious problems have arisen (and before communication between counsels turns hostile) makes negotiating a reasonable discovery plan or resolution more likely.

Next Step: Try Discovery Mediation. As attorneys and judges consider utilizing this new approach, the following are questions that will likely arise.

What Issues Can Be Addressed? MCR 2.401(J) (ESI Conference, Plan and Order) provides a list of issues that you might consider addressing as part of your discovery mediation, including:

- the scope of reasonably accessible ESI to be preserved and reviewed;
- the search parameters to be used to locate ESI;
- the method of review to be employed;
- the data format (including metadata fields) for production;
- the time and manner of production (including whether sampling and/or phasing of discovery is appropriate);
- the procedures for handling privileged information (including whether a privilege log and/or a clawback agreement are appropriate);
- the procedures for handling confidential and proprietary information (including whether a protective order is appropriate);
- the methodologies to evaluate compliance with any discovery plan; and
- the mechanism and protocol to enforce any mediated discovery plan.

The outcome of discovery mediation should be reduced to writing and signed by all parties and counsel. Most if not all of the above discovery issues are better resolved through discussion and cooperation than through motion practice.

Who Should Participate? The success of any mediation depends upon the participation of those persons whose input or consent is needed to reach an agreement. This is certainly true of mediations of discovery disputes. In addition to litigation counsel and the decision makers for the respective parties, discovery mediations should include IT personnel or other technical consultants who have knowledge of the parties' ESI.[13] They are often the most familiar with the litigants' electronic systems, and can provide valuable input on topics like estimated data volume and costs, data accessibility, duplicative data sources and practical time frames for the identification and collection of responsive data.

How Should You Prepare? ESI can take many forms, including active data, inactive data, metadata, deleted data, ghost data, legacy data, archived data, and back-up data. In advance of discovery mediation, it is important that counsel becomes familiar with the type of information stored and how it is stored, preserved, retrieved, and produced, as well as the cost of producing it. In addition, counsel should become familiar with the inventory of storage devices used by the client, the location and ownership of those devices, the client's retention policies, and any automatic deletion procedures that may need suspending. As a resource, the Eastern District of Michigan Model Order Relating to the Discovery of ESI provides a thorough checklist for an ESI meet-and-confer or discovery mediation.

Are Mediation Statements Required or Important? Mediation statements are not mandatory, but the mediator may direct the parties to submit in advance, or bring to the mediation, documents or summaries providing information about the case.[14] Most mediators will request the parties to prepare and deliver in advance a confidential mediation statement and that statement should typically include the following:

- the identity of the persons who will attend the mediation, including all IT representatives;
- a candid discussion of potential issues identified by counsel, including potential spoliation issues, cost concerns, timing issues, and specific privilege concerns;

- an assessment of the technological capacity of both the litigant and counsel's law firm together with any proposed solutions to deficiencies in their respective capacities; and
- if the specific purpose of the discovery mediation is to resolve disputes arising from discovery requests already propounded in the litigation, a summary of the specific disputes and copies of the discovery requests, responses and objections.

What are the Benefits? Discovery mediation can be quite beneficial for judges as a means to confirm that attorneys/parties have met their good faith obligations to develop a discovery plan and have attempted to resolve discovery issues in good faith prior to filing a discovery motion.[15] It is equally beneficial for counsel and parties because it provides them with a confidential venue to discuss and control discovery costs. For example, a mediator can help them understand how the same data is typically located in over 10 places within an organization and that the ratio of discovered documents to documents used in trial has been estimated at 1000/1.[16]

Also, if discovery mediation occurs early in a case (i.e., at the discovery planning stage), it provides the parties and their attorneys an opportunity to communicate and cooperate on topics unrelated to the merits of the case.[17] It is generally acknowledged that even unsuccessful mediation of the dispute can have a significant, positive effect on shaping and ultimately resolving a case. Even when mediation does not immediately produce an agreement it can give parties an enhanced understanding of the issues and the opportunity to narrow the scope of discovery.[18]

What are the Downsides? The primary downside is the risk that this will just add an additional layer of delay and cost to the litigation. This can explain why most current discovery mediation programs require mediation to occur quickly and offer two to four hours of free mediation. Afterwards the parties and attorneys should have a much better understanding of whether and to what extent discovery mediation can be valuable for their case.

Conclusion. Michigan is the first state to adopt Discovery Mediation as part of its rules of civil procedure, thus making it applicable to all of our circuit courts. Hopefully attorneys throughout our state will embrace their duty to conduct discovery in good faith and our judges will encourage attorneys to conduct early and effective ESI Conferences and/or Discovery Mediations to develop reasonable discovery plans for cases involving ESI. By doing so, our state can become a model for solving the discovery problems that threaten to derail our civil justice system.

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ENDNOTES

[1] State Bar of Michigan, Civil Discovery Court Rule Review Special Committee Final Report and Proposal (2018), p 1.

[2] *See* State Bar of Michigan, Civil Discovery: The Guidebook to the New Civil Discovery Rules, Forward by Chief Justice Bridget M. McCormack (September 2019).

[3] Hopefully this continuing concern will dissipate over time. In 2012 the American Bar Association adopted an ethical duty of technology competency for lawyers by adding Comment 8 to Rule 1.1 in its Model Rules of Professional Conduct. Effective January 1, 2020, Michigan became the 37th state to amend its Rules of Professional Conduct to include that same standard.

[4] Involving an eDiscovery expert (i.e., under Michigan Rule of Evidence 706), or a Discovery Master as a means to resolve discovery issues is not novel. However, utilizing a Discovery Mediator under MCR 2.411 is quite novel. All these tools can be effective for handling discovery disputes, but they are significantly different in approach. For example, mediation is an informal, flexible process where confidentiality is an essential component and the mediator cannot, without written consent of all the parties, disclose any of the discussions to the judge. MCR 2.411(C)(3) and 2.412. That confidentiality can be of real significance to the parties.

[5] Statistics show that over 80% of Americans own a smartphone and almost 75% own a desktop or laptop. Given these statistics, it is difficult to conceive of many cases that will not involve some amount of ESI. See Ryan P. Newell, *E-Discovery Promised Land: The Use of E-Neutrals To Aid The Court, Counsel, and Parties,* 15 Del. L. Rev. 43, 44 (2014) ("While e-discovery was once associated only with large complex civil cases, the current reality is that ESI is implicated in nearly every case in every court.").

[6] *See* Case Management Protocol, Oakland County Circuit Court, Business Court Cases 2(d)(iii)(11) (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 expediency.").

[7] Email from Hon. James Alexander to Jay Yelton (February 16, 2020).

[8] Email from Hon. Patricia Fresard to Jay Yelton (February 20, 2020).

[9] *See* Marin County Superior Court Local Rule 1.13; Contra Costa County Superior Court Local Rule 3.301; Sonoma County Superior Court Local Rule 4.13; and Monterey County Superior Court Discovery Facilitator Program, **https://www.monterey.courts.ca.gov/mediation/discovery-facilitation**.

[10] California Courts, Discovery Facilitator Program – Sonoma Superior Court, **https://www.courts.ca.gov/27575.htm** (accessed February 20, 2020).

[11] Louis S. Franecke, *Marin's Discovery Facilitator Program Will Cure Your Dispute,* 45 Marin Law. 2 (2014) ("The discovery disputes were resolved, the motions settled, the cases settled, etc.").

[12] Sonya M. Duchak, *Fairfax Bar Association Conciliation Program, Assisting in the Resolution of Motions* (Fairfax Law Foundation 2013).

[13] *See* MCR 2.401(J)(3) (stating that counsel may bring a client representative or outside expert to assist in ESI discussions).

[14] MCR 2.411(C)(1).

[15] MCR 2.401(C)(4) states that a party or attorney is subject to sanctions if they fail to participate in good faith in developing and submitting a proposed discovery plan. Likewise, MCR 2.313(A)(5)(a) states that a non-prevailing moving party is subject to sanctions if they did not attempt in good faith to resolve the discovery dispute before filing their motion.

[16] Lawyers for Civil Justice et al., *Litigation Cost Survey of Major Companies* 3 (2010 Conf. on Civ. Litig., Duke L. Sch. 2010).

[17] More than 100 federal judges have endorsed the Cooperation Proclamation and its call for a "paradigm shift" in the attitude toward discovery. *See* The Sedona Conference Cooperation Proclamation: Judicial Endorsements, **https://thesedonaconference.org/sites/default/files/judicial_endorsements/Judicial%20Endorsements.pdf** (accessed February 20, 2020).

[18] David Burt, *The DuPont Company's Development of ADR Usage: From Theory to Practice,* Dispute Resol. Mag. 5 (Spring 2014), p. 6.

One Step Forward: *Organizational Depositions in Michigan*

by: Dante Stella*

The Onion's headline would read, "New, Painstakingly Developed Michigan Organizational Deposition Rule Promises Slightly Less Motion Practice." But humor aside (do litigators have a sense of humor?), it is important that practitioners read the recently amended MCR 2.306(B)(3) because it marks a significant change in deposition practice, cuts down on surprises, and incentivizes early resolutions of disputes about the notorious "corporate rep" deposition. The amended rule (effective January 1, 2020) also converges in some ways – and diverges in others – from the equivalent (and soon-to-be-amended) Fed. R. Civ. P. 30(b)(6).

"Corporate Rep" Depositions to Date

The term "corporate rep deposition" is a widely used misnomer; it should really be called an "organizational deposition."The Michigan Court Rules of 1985 (as amended), specifically MCR 2.306(B)(3), historically tracked federal thinking on the subject. Fed. R. Civ. P. 30(b)(6) was added fifty years ago as part of a major rework of civil discovery. Imported from Canada, the organizational deposition rule was intended to be "an added facility for discovery, one which may be advantageous to both sides as well as an improvement to the deposition process."[1] The intent was smooth out wrinkles in the process of examining organizations by:

- Shifting the burden of witness identification to the *responding* party;[2]
- Making sure that there was some witness who could bind the organization;[3]
- Cutting out "bandying," where a responding party might field multiple managerial personnel who might, once in the chair, disclaim knowledge of facts clearly known by someone within the organization; and[4]
- Cutting down on the number of depositions of managerial personnel driven by uncertainty about who precisely should be deposed.[5]

On balance, the organizational deposition procedure is intended to "streamline" discovery.[6] Until very recently, Michigan's rule was functionally identical to Fed. R. Civ. P. 30(b)(6). In both systems, the organizational deposition gives the requesting party the opportunity to understand an *organization's*

- Knowledge of, and (factual) positions on, the subjects in the notice;[7]
- Interpretations of facts, its subjective beliefs, and its opinions; and[8]
- Interpretations of documents and events on behalf of the corporation.[9]

Under both Fed. R. Civ. P. 30(b)(6) and MCR 2.306(B)(3), the responding party must provide someone, or *some people,* who can answer the questions.[10]

Reform of the Organizational Deposition

Michigan's case law does not provide much guidance on the disputes that arise in organizational depositions. This is not surprising; most discovery disputes are decided in circuit courts, which by

virtue of their workload do not typically generate extensive opinions on discovery issues. Nor would such opinions be widely disseminated. Vanishingly few discovery disputes reach the Michigan Court of Appeals. But the case law applying Fed. R. Civ. P. 30(b)(6) – including many decisions from federal courts sitting in Michigan – reflects many of the things that come up on motion days in Michigan courts: the parties' disagreements on how many topics are too many, what happens when time runs out,[11] hat should happen if a designee deposition bleeds into legal theory,[12] whether a deposition is impermissibly wandering outside the topic list,[13] whether a person presented as a designee can be deposed again in a "non-designee" capacity, and what should happen when a designee is unprepared to testify on a topic in the notice, such as putting up another witness, propounding interrogatories, or providing an affidavit.[14] Perhaps the icing on the cake is that like Fed. R. Civ. P. 30(b)(6), MCR 2.306(B)(3) historically did not provide any guidance on dispute resolution. For example, should a party object and wait for the other side to file a motion to compel? How formal need an objection be? Or is the responding party required to file a motion for protective order? What happens if the dispute arises mid-deposition?

The Difference Between the Federal and State "Fixes"

Recently, both the federal and Michigan court systems have recognized that there is *some* problem, especially with the scope of some notices. That said, the two systems disagree on precisely how to solve it. In the federal world, an added perceived problem related to the pre-identification of designees, but a rules-based solution to that was dropped. Instead, the rule that went to the United States Supreme Court only required an early meet and confer on *topics:*

> Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. **Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination.** A subpoena must advise a nonparty organization of its duty **to confer with the serving party and** to designate each person who will testify. The persons designated must testify about information known or reasonably available to the organization....[15]

At roughly the same time, the Michigan Supreme Court solved the problem differently, pushing *directly* to motion practice, allowing parties to proceed on non-controversial topics, and imposing time limits on each person designated under the organizational deposition rule:

> (3) In a notice, 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.** The persons desig-

> nated 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.[16]

The difference between the two approaches is not as surprising as it may seem at first glance. The run-up to motion practice in federal courts is more complicated and time-consuming. In many districts, it involves mandatory meet-and-confer sessions anyway. Michigan discovery motions can be decided in as little as a week, in the context of scheduling orders that can provide as little as 90 days for discovery (and in district courts, virtually no discovery as a matter of right). Michigan's amendment is more proactive and arguably more efficient. The federal amendment essentially reaffirms a "meet and confer" process that many federal courts already required, and it does not force resolutions.

What Are Some Lessons for Practice?

The new rule provides ample things to think about. First and foremost, **attorneys practicing in Michigan state courts should be wary of notice and time for objections.** There could be as little as a four-day window for evaluating and either serving objections or filing a motion for protective orders. This requires promptness in conferring with clients and taking the initiative in getting matters to court.

Second, where the Michigan rules now impose a time limit of 7 hours per witness designated, **responding parties may want to minimize the number of distinct persons designated,** since the new Michigan rule, by its language, "resets the clock" with every new face. Responding parties have the duty to provide one or more designees (knowledgeable or "educated") to cover the notice, and they will have to find a balance between the difficulty of having one witness testify about everything and the expense and risk of multiple days of depositions.

Third, and at the same time, **noticing parties should be ready to focus both the scope of the notice and the questioning.** Organizational depositions are frequently used for "wayfinding" and fact witness identification at the outset of the case. Some of that function has been subsumed by new MCR 2.302(A), which presumes there will be federal-style initial disclosures identifying knowledgeable witnesses. The imposition of time limits means that if a responding party fields one witness in response to a massive number of topics, the questioning will at best be a mile wide and an inch deep. The natural reaction would be to focus the use of organizational depositions on narrower topics and/or cause the depositions to occur later in the case when missing data points are more apparent. And if federal case law is any indication, key witnesses that make an initial appearance as a designee may represent the noticing party's one shot at that witness.[17]

Fourth, parties can expect that where both federal and state deposition rules now provide for one deposition and 7-hour time limits (though not described quite identically for organizational depositions), **future legal argumentation will borrow heavily from the vast body of federal law on organizational depositions.**

Finally, if the parties head to court, **they should be ready to hash out all of their disagreements: scope of the notice, documents requested, and overall time limits.** This will prevent issues on the day of the deposition. Parties should bear in mind that the Michigan rules – like Federal ones – are not explicit on what happens when a deposition ends in a blowout.

Conclusion

Although it would be tempting to dismiss the changes to MCR 2.306(B)(3) as trivial, those changes – taken with other changes to the Michigan Court Rules – mark a significant change both to the procedures and game theory of organizational depositions.

ENDNOTES

[1] Advisory Committee Note to 1970 Amendment to Fed. R. Civ. P. 30., cited in 7 Moore's Federal Practice – Civil § 3.03 (Matthew Bender, 2018).

[2] *Id.;* David J. Blair, *A Guide to the New Federal Discovery Practice,* 21 Drake L. Rev. 58, 67-68 (1971).

[3] *Id.*

[4] *Id.; see also Ethypharm SA France v. Abbott Labs.,* 271 F.R.D. 82, 92 (D. Del. 2010).

[5] William B. Jones, *Proposed Amendments to Rules 30, 33, 34 & 37, Federal Rules of Civil Procedures,* 1968 A.B.A. Sec. Ins. Negl. & Comp. L. Proc. 595, 597 (1968).

[6] *Resolution Trust Corp. v. S. Union Co., Inc.,* 985 F.2d 196, 197 (5th Cir. 1993).

[7] *Great Am. Insur. Co. of New York v. Vegas Const. Co., Inc.,* 251 F.R.D. 534, 538 (D. Nev. 2008); *United States v. Mass. Indus. Finance Agency,* 162 F.R.D. 410, 412 (D. Mass. 1995); *Lapenna v. Upjohn Co.,* 110 F.R.D. 15, 21 (E.D. Pa. 1986).

[8] *Lapenna,* 110 F.R.D. at 20.

[9] *Ierardi v. Lorillard, Inc.,* No. 90-7049, 1991 U.S. Dist. LEXIS 11320, at *5 (E.D. Pa. Aug. 13, 1991).

[10] *Newfry LLC v. Burnex Corp.,* No. 07-13029, 2009 U.S. Dist. LEXIS 102932 at *5 (E.D. Mich. November 5, 2009); *QBE Ins. Corp. v. Jorda Enters.,* 277 F.R.D. 676, 688 (S.D. Fla. 2012).

[11] *State Farm Mut. Auto Ins. Co. v. Elite Health Ctrs, Inc.,* No. 2:16-cv-13040 (E.D. Mich. May 10, 2019).

[12] *JPMorgan Chase v. Winget,* No. 08-13845, 2016 U.S. Dist. LEXIS 173206 at *12-13 (E.D. Mich. Dec. 15, 2016).

[13] *Paparelli v. Prudential Ins. Co.,* 108 F.R.D. 727, 729-30 (D. Mass. 1985); *Cabot Corp. v. Yamulla Enters.,* 194 F.R.D. 499, 500 (M.D. Pa. 2000); *Detoy v. City & County of San Francisco,* 196 F.R.D. 362, 367 (N.D. Cal. 2000).

[14] *Newfry,* 2009 U.S. Dist. LEXIS 102932 at *9; *Alexander v. FBI,* 186 F.R.D. 137, 141-42 (D.D.C. 1998).

[15] *Report of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States* (October 23, 2019) at 55-56 (proposed amendments expected to take effect on December 1, 2020) (emphasis added).

[16] MCR 2.306(B)(3) (as amended) (emphasis added).

[17] *E.g., Life for Relief & Development v. Bank of Am. N.A.,* No. 12-13550, 2017 U.S. Dist. LEXIS 134510, at *19-20 (E.D. Mich. Aug. 23, 2017).

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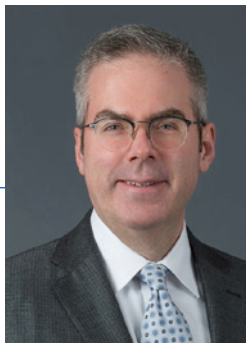
Getting What You Need

(and Sometimes What You Want Under the New Discovery Rules)



by: Daniel D. Quick*

A lot of litigation seems to begin using the "ready, fire, aim" approach. Sure, both the plaintiff and defendant have some high-level goal in mind – monetary damages, a declaratory judgment, a compromise, etc. But too often the parties have not really thought through precisely *how* they will achieve that result.

The new civil discovery rules effective January 1, 2020 present a challenge and an opportunity to litigators. There are three main legs to the stool: (1) proportionality as part of the definition of the scope of discovery under MCR 2.302(B); (2) active case management; and (3) parties', counsels', and the court's joint obligation under MCR 1.105 to administer and employ the rules "to secure the just, speedy, and economical determination of every action." These three core concepts all rely on the other to make the system work better. But like any good system, if for some reason one of those legs is a little wobbly, the rules provide ways to try and compensate. The end goal is hopefully a more efficient and satisfactory experience with our judicial system while achieving better results.

The litigator needs to think about how these rules provide opportunities to do just that. For sure, there will be many cases that are litigated in almost an indistinguishable fashion from past practice. That might or might not be a good thing. But for those unsatisfied with the process, the rules provide abundant opportunities to improve the process or, once the case is floundering, try and right the ship. Each of the three legs of the stool play an important part in the process.

Proportionality

While introducing proportionality expressly into the definition of the scope of discovery is itself significant, it is part of a broader set of changes designed to move from the shotgun to the rifle approach to discovery. A rifle first requires a target and then a good sense of aim. A shotgun needs only the fuzziest notion of a target and little aim; just pull the trigger and mayhem ensues. To enable this shift toward aiming, the rules also adopt mandatory initial disclosures and presumptive limits on some discovery devices.

Regular discovery may not commence until a party serves its initial disclosures. MCR 2.301(A)(1). If a party does a slipshod job with its disclosures, what are the options for the other party? In terms of timing, the disclosures should be received shortly before the initial case management conference scheduled by the court (at least for those courts holding such conferences). This is an ideal time to raise the issue if a previous call to counsel failed to produce a promise of supplementation. MCR 2.301(A)(1) also can be used offensively: simply refuse to respond or comply with other discovery requests until disclosures which comply with the rules are provided. Of course, you can always file a motion.

Parties will only take initial disclosures as serious as the court does. The federal practice, albeit operating under a somewhat different rule, has fallen into a nearly rote act due to at least two factors: federal court motion practice takes far too long for discovery motions (usually at least a

month from filing to hearing) and federal courts have not strictly or consistently enforced the rules. But this is a new rule in Michigan; judges are writing on a blank slate, and the terms of the rules are intentionally clear. Consider MCR 2.302(A)(1)(d): a party must produce "a copy – or a description by category and location – of all documents ... that the disclosing party has ... and may use to support its claims or defenses...." Lawyers often cheat out of this rule in federal court by relying on the word "category." Their disclosure contains categories such as, "emails between the parties" and "financial records." This level of generalization makes a mockery of the rule. The rules are intended to signal a major paradigm change which requires significant, material work early in the case. The disclosures – along with less deposition time and less interrogatories – are critical to that process.

Proportionality is also an area where a diligent, thoughtful lawyer should be able to help steer the process. Proportionality does not mean everybody's arbitrary vision of how much discovery should be allowed, resulting in the judge simply putting his or her finger in the air and making capricious rulings or split-the-baby resolutions. Here the federal court practice, and resulting body of academic literature, should be accessed. In addition the resources offered by the State Bar of Michigan,[1] there are excellent guidebooks on proportionality that can help you put some meat around the bones of your proportionality argument.[2] Important to the process is the reality that "both parties have some stake in addressing the various relevant factors."[3] Thus, the propounding party must defend the discovery as much as the responding party must explain – with detail – why responding is not proportional to the needs of the case.

Case Management

Even better than fighting about things in written objections and motion practice is coming to some agreement about the scope of discovery with the court even before discovery commences in earnest. The court controls the scope, order, and amount of discovery. MCR 2.301(C). The early case management conference is ideal for this purpose. While not all courts will hold conferences in all cases, where they are held they will fall shortly after initial disclosures are produced, thus giving both sides some meaningful substance to talk through how the rest of the case will go. MCR 2.401(B)(1) should be read as a creative checklist. Might the staging of discovery be useful (subrule (f))? How about expert reports (subrule (k))? This conference is the time for you to partner with the judge (whether or not opposing counsel is on-board) to get the type of discovery period you want and need for your client.

What if the court does not hold a conference in your case? MCR 2.401(C) allows one party to officially begin a dialog with opposing counsel on a discovery plan and then bring issues where there is not agreement to the court.

Or maybe your case has particularly thorny ESI issues. Under MCR 2.401(J), parties can agree to hold (or the court can order, or one party may move for) an ESI planning conference. At that conference, people actually knowledgeable in the data systems must be present. Once again, there is a helpful list of topics built in to the rule for consideration, such as whether to provide for a privilege log.

What if it is just "one of those cases" where you can't agree with counsel on what day it is? There is something to be said for having the judge involved in such cases to witness the obstreperousness of opposing counsel; credibility always matters. But perhaps you'd rather have a discovery facilitator involved. MCR 2.401(H) allows this if the parties stipulate or the court orders it. Moreover, the parties can agree to have that same person – who through all of that trench warfare, will become familiar with the case – then facilitate it as part of ADR. And if there are particularly technical issues in your case, the court can combine a court-appointed expert under MRE 706 with the discovery facilitator role.

MCR 1.105: "All for one and one for all"

Jaded counsel may scoff at the hortatory rhetoric of MCR 1.105: the rules are to be applied "by the parties and the court" to secure the "just, speedy, and economical determination of every action." Isn't this an adversarial system? Surely. But when this same change was made to Federal Rule of Civil Procedure 1, Chief Justice John Roberts focused on it in his year-end report on the federal judiciary: "The [new] words make express the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation – an obligation given effect in the amendments that follow. The new passage highlights the point that lawyers – though representing adverse parties – have an affirmative duty to work together, and with the court, to achieve prompt and efficient resolutions of disputes."[4]

The language of MCR 1.105 is the guiding spirit which makes the other two legs of the stool, proportionality and case management, meaningful. The overall goal is dispute resolution, but while honoring our judicial system. That means using the court system – which can be frustrating, byzantine, slow and subject to abuse – consistent with our pledge as attorneys – "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[5]

It is not always easy to apply such principles in practice; everyone will try and claim the high ground. One way to use the rules is to use them to bolster common sense. For example, if you have a meritorious initial dispositive motion, does it make sense for the parties to charge into discovery? Federal courts, citing Federal Rule of Civil Procedure 1, have held that sometimes it does not.[6]

Other Tools in the Toolbox

While proportionality and mandatory disclosures have gotten the most attention, the new rules contain a number of lesser known changes that smart attorneys can use to their advantage.

- MCR 2.301(B)(4) is a trap for the unwary. Discovery must be served so it may be responded to within the time for discovery set by the court. So that means if you have a January 1 discovery cutoff, written discovery must be issued at least 28 days before then.
- Most fights about whether communications between counsel and testifying experts has been eliminated by the changes to MCR 2.302(B)(4)(e) and (f).
- In heavy ESI cases, the Court may now allocate expenses between the parties in all instances. MCR 2.302(B)(6). Requestors of broad ESI need to be ready to pay for what they ask for.
- Procedure related to non-party (MCR 2.305) vs. party depositions (MCR 2.306) is now more clearly delineated. In both rules, there are enhanced procedures for taking and resolving objections to representative depositions. Also, motions regarding third-party subpoenas must be resolved before the third party has any production obligation. MCR 2.305(A)(4).
- For purposes of the 20 interrogatories, know what a "discrete subpart" is. The Staff Comment to the amendment of MCR 2.309(A)(2) addresses this very issue: "the rule's reference to 'a discrete subpart' is intended to draw guidance from federal courts construing [Federal Rule of Civil Procedure] 30(a)(1). Generally, subparts are not separately counted if they are logically or factually subsumed within and necessarily related to the primary question. In upholding the limit, parties and courts should also pragmatically balance the overall goals of discovery and the admonition of MCR 1.105."[7]
- Be careful before requesting sanctions. No sanctions are mandatory any longer, and most provisions are designed to apply only where prejudice or truly wrongful conduct occurred.[8]

ENDNOTES

1 *See* JAMES L. HIGGINS ET AL., CIVIL DISCOVERY: THE GUIDEBOOK TO THE NEW CIVIL DISCOVERY RULES (APRIL 21, 2018) (including treatment of federal court practice), available at michbar.org/civildiscovery.

2 *See, e.g.,* BOLCH JUDICIAL INSTITUTE, GUIDELINES AND BEST PRACTICES FOR IMPLEMENTING THE 2015 DISCOVERY AMENDMENTS TO ACHIEVE PROPORTIONALITY (2d Ed.), available at https://judicialstudies.duke.edu/wp-content/uploads/2018/09/Final-Proportionality-Guidelines-and-Best-Practices-2nd-edition.pdf.

3 *State Farm Mutual Automobile Ins. Co. v. Pointe Physical Therapy,* LLC, 255 F. Supp. 3d 700, 704 (E.D. Mich. 2017).

4 https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf

5 Preamble to MRPC 1.

6 *Konica Minolta Business Solutions, U.S.A., Inc. v. Lowery Corp.,* 2018 WL 8807179 (E.D.Mich.), 2 (E.D.Mich., 2018)

7 Order, ADM File No. 2018-19, at (June 19, 2019) (adopting revised rules), available at https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Adopted/2018-19_2019-06-19_FormattedOrder_AmendtOfDiscoveryRules.pdf.

8 *See, e.g.,* MCR 2.313(D) (regarding loss of ESI).

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