Public Policy Position
Proposed Amendment to United States District Court for the Eastern District of Michigan Local Rule 37.2

The Negligence Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 1,846 members. The Negligence Law Section is not the State Bar of Michigan and the position expressed herein is that of the Negligence Law Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Negligence Law Section has a public policy decision-making body with 15 members. On November 30, 2022, the Section adopted its position after a discussion and vote at a scheduled meeting. 13 members voted in favor of the Section's position, 0 members voted against this position, 0 members abstained, 2 members did not vote.

Oppose

Explanation:
Introduction

The Negligence Section of the State Bar of Michigan provides this comment regarding the proposed amendment to LR 37.2.

The Negligence Section is not the State Bar of Michigan, but rather a Section whose membership is composed of attorneys who represent plaintiffs and defendants in our courts, both State and Federal. The purpose of the Negligence Section is to preserve the jury system and to promote the fair and just administration of negligence law. Membership in the Section is voluntary. The Section is directed by the Negligence Council, whose officers and members are evenly divided among attorneys representing plaintiffs and those representing defendants.

The position expressed here is that of the Negligence Section through its Council, after deliberation, discussion, and a **unanimous vote**.[1]

Negligence Council Position on the proposed amendment to LR 37.2

The Negligence Section provides this comment in opposition to the proposed amendment to LR 37.2. In the opinion of the Section Council, the proposed amendment creating subsections (b) and (c) is unnecessary, usurps the discretion of the trial court, unwisely interjects obligations that will

[1] The State Bar of Michigan does not appear to have taken a position on the proposed amendment to LR 37.2.

unnecessarily exhaust counsel's time without significantly advantaging the litigants or the court, and will result in unnecessary and costly discovery related motion practice.

Current Version of LR 37.2- Form of Discovery Motions

> Any discovery motion filed pursuant to Fed.R. Civ. P. 26 through 37, shall include, in the motion itself or in an attached memorandum, a verbatim recitation of each interrogatory, request, answer, response, and objection which is the subject of the motion or a copy of the actual discovery document which is the subject of the motion. (Effective January 1, 1992)

Proposed Amendment to LR 37.2- Form and Timeliness of Discovery Motions

> (a) Any discovery motion filed Fed. R. Civ. P. 26 through 37, shall include, in the motion itself or in an attached memorandum, a verbatim recitation of each interrogatory, request, answer, response, and objection which is the subject of the motion or a copy of the actual discovery document which is the subject of the motion.
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> (b) Parties must raise objections timely to both discovery requests and the sufficiency of discovery responses. A motion to compel or other motion in aid of discovery is deemed forfeited if it is not filed within 30 days after the discovery response is due or the discovery response is received unless such failure to file a motion was caused by excusable neglect or by some action of the non-moving party. A discovery response includes any assertion of privilege, whether or not stated in the form of privilege.
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> (c) If no response is filed timely, the court may deem the failure as a forfeiture of opposition to the motion and may consider that forfeiture of opposition as an independent basis to grant the motion.

Summary of the proposed changes to LR 37.2

The proposed LR 37.2(b) requires counsel to file a motion to compel discovery within 30 days from the date the discovery response is due or the answers received. Failure to do so is "deemed (a) forfeit(ure)," absent being able to demonstrate that the failure to file was due to "excusable neglect or … some action of the non-moving party."

The proposed LR 37.2(c) provides that failure to respond to a discovery motion forfeits opposition to the motion and may provide an "independent basis to grant the motion."

The Negligence Law Section's Concerns regarding proposed LR 37.2(b)

The Proposed 30-day Deadline.

In the opinion of the Section Council, this requirement is unnecessary, usurps the court's discretion, and will encourage unnecessary discovery motion practice.

The 30-day deadline is unnecessary given the court's inherent discretion to address discovery delays. See *Trepel v. Roadway Exp., Inc.*, 194 F.3d 708, 716 (6th Cir. 1999) ("Matters of discovery are in the sound discretion of the district court. We should not interfere with a district court's discretionary rulings concerning the scope and timeliness of discovery unless we are convinced that the trial court's

ruling resulted in substantial unfair prejudice to the complaining litigant. *See In re Air Crash Disaster*, 86 F.3d 498, 516 (6th Cir.1996)"); see also *State Farm Mut. Auto. Ins. Co. v. Pointe Physical Therapy, LLC*, 255 F. Supp. 3d 700, 704 (E.D. Mich. 2017) (A court has broad discretion over discovery matters). Case law also specifically supports the court's discretion to determine that a party has waived objections to discovery requests where it has failed to make timely objections. See *AFT Michigan v Project Veritas*, 294 F.Supp. 3d. 693,695 (ED Mich, 2018). That same reasoning supports the conclusion that the court has the discretion to determine that a party has waived the right to *raise* a discovery dispute, unless they do so in a timely manner. As such, the 30-day deadline unnecessary.

Presumably the proposed amendment is designed to encourage prompt resolution of discovery disputes. The case law cited above demonstrates that the court has the discretion to address discovery issues including any delays that the court determines are unjustified. However, adopting a fixed 30-day deadline for discovery motion practice actually limits the court's discretion to address discovery disputes according to the nature and needs of the particular case, including the potential for prejudice to either party.

Finally, a fixed 30-day deadline will encourage unnecessary motion practice. In practice, the deadline will result in discovery motions being filed in every case where discovery is overdue or where there are less than fully satisfactory responses-- even where discovery would otherwise be forthcoming or where the dispute may otherwise have been resolved—because the alternative is forfeiture. Issues that the parties might be able to address through a series of discussions will, instead, form the basis of unnecessary motion practice. This is particularly true given that the failure to file within 30 days is only pardoned by "excusable neglect or by some action of the non-moving party," neither of which is defined within the rule.

The likelihood that the 30-day deadline prompts unnecessary discovery motion practice is particularly true where the issue is not merely *missing* discovery responses, but *insufficient* discovery responses. In practice, the determination to file a motion in the latter case requires *first*, an assessment that the responses are legally and/or factually inadequate, and *second,* the time to confer as required by LR 7.1. To abide by the joint obligations imposed by LR 7.1 and the amended LR 37.2(b), a party must immediately review whatever discovery was provided, assess the potential deficits, and research the more complex issues, including assertions of privilege. This can be particularly problematic where the discovery responses included substantial document production, or complex ESI issues arise that require consultation among and between the parties and even potential experts. If non-parties are involved in the missing or insufficient discovery responses, the picture is further complicated, and the resulting burdens are enhanced.[2] These obligations become even more burdensome for smaller firms who may not have the staff or resources to address discovery issues within the mandated time frame, and conversely, can create a decided discovery advantage for large, well-staffed and well-funded firms.[3]

[2] The obligation to confer under LR 7.1 extends not just to parties, but to "other persons entitled to be heard on the motion."

[3] The obligation to confer in good faith as mandated by LR 7.1 effectively shortens that 30- day period generally by at least 8 non-business days, leaving approximately 22 business days within which to confer with opposing counsel.

Further, in practice, it may not be clear at the moment of receipt, or even within 30 days thereafter, whether or not the documents produced or the answers provided, are fully responsive to the discovery requests. It is not uncommon for a party's discovery responses to be revisited as a case moves forward, when it only then becomes apparent that the answer previously provided was insufficient, or an objection ill-taken. Conversely, there are times when parties "agree to disagree" and proceed with discovery, intentionally leaving the dispute open, to determine whether or not the discovery is actually necessary. In the first of those circumstances, the 30-day deadline would preclude the party from obtaining proper and meaningful discovery, and in the second circumstance, it would mandate an immediate, and potentially unnecessary, motion filing.

For these reasons, the Negligence Section recommends against adopting proposed LR 37.2(b).

Concerns regarding proposed LR 37.2(c)

The proposed LR 37.2(c) provides that failure to respond to a discovery motion forfeits opposition to the motion and may provide an "independent basis to grant the motion."

Case law already provides the court with this discretion. *See Miles v. Transunion, LLC*, No. 1:22-CV-281, 2022 WL 2342656, at *1 (N.D. Ohio June 29, 2022). ("(T)he Court may interpret the absence of a response to a motion to dismiss as a waiver of opposition. *Ray v. United States*, 2017 WL 2350095, at *2 (E.D. Tenn. May 30, 2017), citing *Notredan, LLC v. Old Republic Exch. Facilitator Co.*, 531 Fed. App'x. 567, 569 (6th Cir. 2013)) (explaining that failure to respond or otherwise oppose a motion to dismiss operates as both a waiver of opposition to, and an independent basis for granting, the unopposed motion); *Demsey v. R.J. Reynolds Tobacco Co.*, No. 1:04CV1942, 2005 WL 1917934, at *2 (N.D. Ohio Aug. 10, 2005) ('The court's authority to grant a motion to dismiss because it is unopposed is well established.'); *see also Humphrey v. U.S. Attorney Gen.'s Office*, 279 F. App'x. 328, 331 (6th Cir. 2008) (citations omitted) ('Thus, where, as here, plaintiff has not raised arguments in the district court by virtue of his failure to oppose defendants' motions to dismiss, the arguments have been waived.')")

In this regard, subsection (c) is unnecessary.

Further, subsection (c) appears to highlight the court's discretion *not* to entertain discovery motions, without incorporating any reference to the discretion the court has to entertain a motion on the merits, despite the lack of response, where appropriate and just to do so.

For these reasons, the Negligence Section recommends against adopting proposed LR 37.2(c).

Contact Person: Chad D. Engelhardt
Email: chad@cmtjustice.com