Warner Norcross + Judd LLP

OVERVIEW OF 2020 AMENDMENTS TO MICHIGAN'S CIVIL DISCOVERY RULES

TABLE OF CONTENTS

I. INTRODUCTION

When the federal rules were revised effective December 1, 2015, Chief Justice Roberts opined that, "[t]he amendments may not look like a big deal at first glance, but they are." So, too, the State Bar of Michigan ("SBM") Civil Discovery Court Rule Review Committee "("SBM Committee") felt that its proposed changes to Michigan's Civil Discovery Rules would be "if adopted, a big deal and positive step for justice in Michigan." On June 19, 2019, the Michigan Supreme Court adopted the SBM Committee's proposed rules, marking the broadest changes to the Michigan Court Rules since they were enacted in 1985.

II. BRIEF HISTORY OF THE SBM COMMITTEE'S EFFORTS

The SBM Committee was formed in November 2016 based on the recommendation of the SBM's Civil Procedure & Courts Committee and with the encouragement of the Michigan Supreme Court. The impetus behind the SBM Committee's formation? The consensus that civil discovery—due to its inefficiency and expense—undermined access to the civil justice system. Prior to the SBM Committee's formation, the SBM's 21st Century Practice Task Force Report recommended changes to Michigan's Civil Discovery Rules to reduce the expense and burden of discovery.

The recognition of these problems had already led to significant changes to the Federal Rules of Civil Procedure as well as to many other state court civil procedure rules. As a consequence, the SBM Committee devoted substantial time to studying the current Michigan Court Rules, the revisions over time to the Federal Rules of Civil Procedure, recent discovery-related changes and proposed changes to other state court rules, and a plethora of other source materials discussing potential solutions to the acknowledged problems with civil discovery. When the SBM Committee sat down to draft its proposed amendments to Michigan's civil discovery rules, it had a vision. The SBM Committee's vision was to work towards a civil litigation system where:

- litigation is more cost effective;
- courts are more accessible and affordable;
- the rules aid case management and enable judicial officers to be informed and efficient; and
- the system accentuates to parties and lawyers that cooperation and reasonableness are key principles in the course of civil litigation.

The SBM Committee drafted and approved a proposed set of amendments to the Michigan Court Rules in September 2017. The approved draft was submitted to the SBM Representative Assembly for review and comment. The SBM Representative Assembly solicited feedback on the proposed amendments from a wide range of perspectives within the legal community. The SBM Committee used that feedback to prepare its final draft proposal for approval by the SBM Representative Assembly. In April 2018, the SBM Representative Assembly overwhelmingly voted to approve

the SBM Committee's final proposal and recommended the proposal's adoption to the Michigan Supreme Court. The Supreme Court solicited public comment and conducted a public hearing to aid in its final consideration prior to approving the amendments, which will go into effect on January 1, 2020.

These draft amendments include:

1. Reinforcing Parties' Obligations under MCR 1.105
2. Adopting Proportionality in MCR 2.302
3. Adopting Modest Initial Disclosures and Presumptive Limits on Interrogatories
4. Early and Regular Case Management with Additional Tools to Proactively Address Problem Areas

Each of these areas will be explored and the corresponding amendments discussed below. Please note that the discussion will only concern the rules generally applicable to civil cases. Rules governing no-fault cases, probate cases, and other specialty cases are not addressed in this overview.

III. PROPOSED AMENDMENTS TO MICHIGAN CIVIL DISCOVERY RULES

A. JUST, SPEEDY, AND ECONOMICAL

Rule 1.105 Construction.
These rules are to be construed, administered, and employed by the parties and the court to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties.

The new language, adopted from Federal Rule of Civil Procedure 1, clarifies that it is the duty of both the parties and the courts to achieve the goal of "just, speedy, and economical determination of every action..." The Committee comment provides that:

> "To improve the administration of civil justice, the rules should be construed to discourage the over-use, misuse, and abuse of procedural tools that result in increased costs and delays. Effective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure."

The SBM Committee comments are consistent with the interpretation of Rule 1 by the federal courts. *Johnson Marcraft, Inc v Western Surety Co*, 2016 WL 3655299 (MD Tenn July 8, 2016) (discovery rules must be interpreted in light of Rule 1); *Updike v Clackamas County*, 2016 WL 111424 (D Ore Jan 11, 2016)(an appropriate balance must be found between the mandates of Rule 1 and the "broad and liberal" policy of discovery).

Federal case law matters because Michigan courts will turn to it as interpretive guide. *Brenner v Marathon Oil Co*, 222 Mich App 128 (1997) ("MCR 3.501(E) has not been the subject of apposite analysis by Michigan courts and, in the absence of available Michigan precedents, we turn to federal cases construing the similar federal rule for guidance.") Not that the federal interpretation

will be binding, but that it will be persuasive. *Cole v General Motors Corp*, 236 Mich App 452 (1999) ("While Michigan courts are not bound by federal title VII precedent in interpreting Michigan Civil Rights Act cases, such precedent is highly persuasive" *citing Victorson v Dep't of Treasury*, 439 Mich 131 (1992)).

B. INITIAL DISCLOSURES

Rule 2.302 Duty to Disclose; General Rules Governing Discovery
(A) Required Initial Disclosures.

(1) *In General.* Except as exempted by these rules, stipulation, or court order, a party must, without awaiting a discovery request, provide to the other parties:

(a) the factual basis of the party's claims and defenses;
(b) the legal theories on which the party's claims and defenses are based, including, if necessary for a reasonable understanding of the claim or defense, citations to relevant legal authorities;
(c) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
(d) a copy—or a description by category and location—of all documents, ESI, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;
(e) a description by category and location of all documents, ESI, and tangible things that are not in the disclosing party's possession, custody, or control that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment. The description must include the name and, if known, the address and telephone number of the person who has possession, custody, or control of the material;
(f) a computation of each category of damages claimed by the disclosing party, who must also make available for inspection and copying as under MCR 2.310 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered;
(g) a copy (or an opportunity to inspect a copy) of pertinent portions any insurance, indemnity, or suretyship agreement under which another person may be liable to satisfy all or

part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment, including self-insured retention and limitations on coverage, indemnity, or reimbursement for amounts available to satisfy a judgment ; and

(h) the anticipated subject areas of expert testimony.

The general initial disclosures required by MCR 2.302(A)(1) borrow from both Rule 26(A)(1) of the Federal Rules of Civil Procedure and recently amended Rule 26.1(a) of the Arizona Rules of Civil Procedure. Specifically, subrules (a), (b), (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, as provided in subrule (a)(10) of the Arizona Rule. Subrule (e), requiring disclosure of documents not in a party's "possession, custody or control," has no source attribution. However, Illinois does have a similar requirement in Illinois Supreme Court Rule 222(d)(9).

The requirement to make voluntary disclosures of discovery materials without awaiting a discovery request has been a part of federal court practice since 1993, but will be new in Michigan circuit courts, except for the business courts in Oakland and Macomb Counties. These business courts previously adopted case management protocols that set forth mandatory disclosures without awaiting a discovery request.

As the 1993 Comments to the Federal Rule explain, "[a] major purpose of the [rule] is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information." The SBM Committee comments provide no explanation. However, the Macomb County Business Court provides this rationale for its initial disclosure requirement:

> The [initial disclosures] are not intended to preclude or to modify the rights of any party for discovery as provided by the Michigan Court Rules of Civil Procedure and other applicable local rules. The purpose...is to encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery.

While not an "official comment," it captures the spirit behind the proposed amendment.

The initial disclosure obligation covers a wide expanse. This overview will be broken down into: (1) duty to make reasonable inquiry; (2) what to disclose; (3) when to disclose; (4) how to disclose; and (5) duty to supplement.

1. Duty to Make Reasonable Inquiry and to Certify.

Initial disclosures are "based on the information then reasonably available to the party." MCR 2.302(A)(6). A party's failure to conduct a "full investigation of the case" does not relieve the party of its obligations under MCR 2.302(A)(1). Nor may a party argue the insufficiency of another party's disclosures or the failure of another party to disclose as an excuse for its own failure to disclose.

Initial disclosures must be in writing and signed. This requirement renders initial disclosures subject to amended MCR 2.302(G), which turns the signature of the party or attorney into a "certification" that "to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry" the initial disclosure is "complete and correct as of the time it is made...."

Under existing Michigan law, "[i]f the inquiry reveals no reason to believe the material in question is false or incomplete, the attorney may affix his or her signature to it. If, however, reasonable cause exists to believe that a factual basis for the response does not exist, or that it is intentionally deceptive and misleading, the attorney may not certify such a response without violating the provisions of this rule." *Brooks v Sciberras*, --NW2d--, 2002 WL 33415202 (Mich App July 28, 2000), *quoting*, Dean & Longhofer, *Michigan Court Rules Practice*, § 2302.31 (4th ed. 1998).

Michigan's interpretation of "reasonable inquiry" is consistent with that under the Federal Rules. Under the Federal Rules, what is "reasonable" is also an objective standard dependent on the totality of the circumstances. *TRW Financial Sys, Inc v Unisys Corp*, 1995 WL 545023 (ED Mich Feb 6, 1995); *see also Bates v Tinajero*, 2015 WL 12681644 (SD Ohio March 2, 2015). "In making the inquiry, the attorney may rely on assertions by the client and on communications with other counsel in the case as long as that reliance is appropriate under the circumstances." Notes, 1983 Amendments to Federal Rule of Civil Procedure 26.

2. What to Disclose.

The disclosures required by subrules (a)-(h) are straightforward and consist of the "types of information that have been customarily secured early in litigation through formal discovery." 1993 Comments to Amendments to Federal Rule of Civil Procedure 26. Indeed, the initial disclosures are akin to "contention" discovery requests. Note that the initial disclosure obligation can be modified by court order or by a stipulation of the parties. MCR 2.302(F) provides that a "court order or written and filed stipulation of the affected parties may...change the disclosure requirements in MCR 2.302(A)...."

Initial disclosures are "based on the information then reasonably available to the party." MCR 2.302(A)(6). There is no requirement that parties have perfect knowledge of their cases at the initial disclosure stage. Under the Federal Rules, what is "reasonable" is an objective standard dependent on the totality of the circumstances. *TRW Financial Sys, Inc v Unisys Corp*, 1995 WL 545023 (ED Mich Feb 6, 1995); *see also Bates v Tinajero*, 2015 WL 12681644 (SD Ohio March 2, 2015). Michigan previously adopted a "reasonableness" standard consistent with that of the Federal Rules under the current version of MCR 2.302(G)(3). *See Brooks v Sciberras*, --NW--, 2002 WL 33415202 (Mich App July 28, 2000).

A party is not obligated to disclose witnesses or documents whether favorable or unfavorable that it does not intend to use to support its claims or defenses. *McCormick v Brzezinski*, 2008 WL 4371842 (ED Mich Sept 22, 2008); *see also Ruddell v Weakley Cty Sherriff's Dept*, 2009 WL 3757705 (WD Tenn May 22, 2009). This limitation explains why the rule expressly exempts witnesses and documents used "solely for impeachment" from the initial disclosure requirement.

Legal theories underlying claims and defenses. This requirement is not found within the Federal Rules. It is taken from Arizona Rule of Civil Procedure 26.1(a)(2). Based on Arizona case law, this requirement may be met by simply restating the legal theories underlying a claim or defense, such as "breach of contract" or "estoppel." *Heimer v Price, Kong & Co*, 2008 WL 5413368, at * 7 (Ariz App Dec 30, 2008). In fact, the pleading itself may satisfy this disclosure obligation. *Beninger v Calvin*, 2008 WL 4368204, at *12 (Ariz App Jan 13, 2009).

Documents within "possession, custody or control" under subrule (d). Michigan case law suggests that this phrase encompasses documents that, while not in the party's physical possession, the party has some legal right to obtain. *Mitan v New World Television, Inc*, 2003 WL 22871415 at *4 (Mich App Dec 4, 2003)(holding that tax returns seized by the state police were still in plaintiffs' "possession, custody or control" because plaintiffs could have obtained copies from the IRS.) This standard should then also apply to initial disclosures of documents within a party's "possession, custody or control."

In the Sixth Circuit, the "legal right" to obtain a document from a non-party primarily arises under a contract or by virtue of a special relationship, such as principal-agent, employer-employee or attorney-client. *See, e.g., Flagg v City of Detroit*, 252 FRD 346, 352 (ED Mich 2008) (holding that city had the legal right to obtain text messages stored by its technology service provider). Information falling within the "legal right" standard would need to be produced—or described by category and location—under subrule (A)(1)(d).

Documents beyond "possession, custody or control" under subrule (e). These proposed amendments will require a party to analyze whether any non-parties might possess information relevant to its claims or defenses and whether the party has the legal right to obtain the information. Any information in a non-party's possession that the party does not have the legal right to obtain will fall within subrule (A)(1)(e) and the party will need to provide a description "by category and location."

Computation of damages under subrule (f). Case law interpreting its federal counterpart (FRCP 26(a)(1)(A)(iii)) holds that "the 'computation' of damages required ...contemplates some analysis" so that the opposing party can "understand the contours of its potential exposure and make informed decisions as to settlement and discovery." *City & Cty of San Francisco v Tutor-Saliba Corp*, 218 FRD 219, 221 (ND Cal 2003). However, with respect to non-economic damages, "[t]he 'computation' required by Rule 26(a)(1)(A)(iii) does not mean that plaintiffs must identify a specific sum to compensate them for injuries that are difficult to categorize, like anxiety or mental distress. The amount of compensation that should be awarded for such an injury may appropriately be left to the jury." *Wolgast v Richards*, 2011 WL 3426187, at *4 (ED Mich Aug 5, 2011) *citing Richardson v Rock City Mech Co*, 2010 WL 711830, at *2–3 (MD Tenn Feb 24, 2010).

Anticipated subject areas of expert testimony. Federal Rule 26(a)(2) has an extensive disclosure requirement, but its timing is not the same as for initial disclosures. This requirement is taken from Arizona Rule of Civil Procedure 26.1(a)(6). Based on Arizona case law, the required disclosure is not extensive. *Smith v. Benson Hospital*, 2010 WL 1741108, at *2-3 (Ariz App April 30, 2010)(disclosure sufficient where it stated that expert would testify about the cause of plaintiff's injuries); *cf. Berkowitz v. Demaine*, 874 A.2d 326, 329-30 (Conn App 2005) (holding there was

adequate description of subject matter in disclosure when disclosure stated " 'nature and extent of the injuries' " and expert witness described plaintiff's condition as " 'carpal pedal spasm' " and noting that it was "inconsequential that the witness used medical terms").

3. When to Disclose.

The time to make initial disclosures is set forth in MCR 2.302(A)(5)(b)(i-iii). For a party filing a pleading that requires an answer, the party "must serve its initial disclosures within 14 days after any opposing party files an answer to that pleading." A party filing an answer "must serve its initial disclosures within the later of 14 days after the opposing party's disclosures are due or 28 days after the party files its answer." Only parties that have appeared need be served. "Late-appearing parties" must be served within 14 days of their appearance.

As with the need to file initial disclosures, the timing for doing so is also subject to change via court order or stipulation of the parties. MCR 2.302(A)(5)(a).

4. How to Disclose.

Initial disclosures "must be in writing, signed, and served, and a proof of service must be promptly filed." Initial disclosures themselves, and any attendant disclosure materials, may not be filed unless pursuant to a court order or unless used in a motion or at trial. MCR 2.302(H)(1)(a)-(c). Keep in mind that the "duty to disclose" is not synonymous with the "duty to produce." *Rural Water Dist No 4 v City of Eudora,* 2008 WL 5173109 (D Kan Dec 10, 2008) ("While Fed. R. Civ. P. 26(a) allows initial disclosures to be made by producing copies of relevant documents, the rule does not require either party to actually produce copies of documents. A party may opt to provide a description of the documents by category and location").

5. Duty to Supplement.

Initial disclosures are also subject to the duty to supplement. Amended MCR 2.302(E)(1)(a) provides:

> A party that has made a disclosure under MCR 2.302(A)—or that has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:
>
> (i) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing or
>
> (ii) as ordered by the court.

The duty to supplement discovery responses already exists under the current version of MCR 2.302(E). However, under the proposed amendment the language is updated to correspond to the current version of its federal counterpart.

Supplementation must occur "seasonably" under the current rule, but "in a timely manner" under the amendment—a subtle distinction, if any. And, supplementation need be made under the current rule only if the failure to do so would be a "knowing concealment." The amended rule eliminates the "knowing concealment" language and requires supplementation where "the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing..." This is a substantive change as sanctions for a failure to supplement were not available unless the court found the failure constituted a "knowing concealment."

For a "knowing concealment" there must be "a conscious decision by a party to prevent disclosure of the information requested." *Richardson v Ryder Truck Rental, Inc,* 213 Mich App 447, 452 (1995). "[I]n light of the possibility of severe sanctions under MCR 2.313(B)(2)(b) , an innocent, unintentional failure to...supplement...should not be considered a knowing concealment." *Id.*

Although sanctions are now available under a wider array of circumstances, the severity of the sanctions under MCR 2.313(C), which only received cosmetic changes, will still depend on the degree of culpability of the party failing to supplement and the prejudice suffered by the aggrieved party. *Tucunel v K-Mart Corp,* --NW2d--, 1996 WL 33348842 at *2 (Mich App Nov 12, 1996).

C. SCOPE OF DISCOVERY.

Rule 2.302 Duty to Disclose; General Rules Governing Discovery
(B) Scope of Discovery.

(1) *In General.* Parties may obtain discovery regarding any ~~matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things, or electronically stored information and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.~~ non-privileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case, taking into account all pertinent factors, including whether the burden or expense of the proposed discovery outweighs its likely benefit, the complexity of the case, the importance of the issues at stake in the action, the amount in controversy, and the parties' resources and access to relevant information. Information within the scope of discovery need not be admissible in evidence to be discoverable.

***

(6) A party need not provide discovery of ~~electronically stored information~~ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably

accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery ~~from such sources~~ if the requesting party shows good cause, considering proportionality under subrule (B)(1) and the limitations of ~~MCR 2.302~~subrule (C). The court may specify conditions for the discovery~~.~~, including allocation of the expense, and may limit the frequency or extent of discovery of ESI (whether or not the ESI is from a source that is reasonably accessible).

Rule 2.302(B) makes several changes to the scope of discovery in civil cases, including a limitation on relevance to matters related to "any party's claims or defenses." Additionally, discovery is now also limited to matters "proportional to the needs of the case." The amendment also eliminates the language "reasonably calculated to lead to the discovery of admissible evidence," in order to avoid its citation as a reason to expand the scope of discovery.

1. Relevant to Any Party's Claims or Defenses.

The SBM Committee adapted the scope of discovery definition from Rule 26(b) of the Federal Rules of Civil Procedure. The change in language from "relevant to the subject matter" to "relevant to any party's claims or defenses," is a substantive one. As the SBM Committee Comments note,

> The proposal changes the current definition in MCR 2.302(B)(1) from matters "relevant to the subject matter involved in the pending action" to "matters that are relevant to any party's claims or defenses." This is a more precise and somewhat narrower definition. Relevance must be judged by reference to the claims and defenses in the pleadings.

This is a very important change as the current Michigan law regarding the scope of discovery, summarized below, is much broader:

> "It is well settled that Michigan follows an open, broad discovery policy that permits liberal discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case." Discovery aims to simplify and clarify issues, and the rules should be construed to "facilitate trial preparation and to further the ends of justice."

In re Estate of Hill, --NW2d--, 2015 WL 1069429, at *1 (Mich App Mar 10, 2015) (*quoting Reed Dairy Farm v Consumers Powers Co*, 227 Mich App 614, 616 (1998)). While proposed MCR 2.302(B)(1) by its language renders this standard obsolete, set standards are sometimes difficult to replace in practice as the experience in federal courts has demonstrated.

The impact of the new definition on the scope of discovery in the federal courts has been a mixed bag. There are courts that have recognized the substantive impact of the language change and applied the narrower definition of "relevance." *See, e.g., Cole's Wexford Hotel, Inc v Highmark, Inc*, 209 F Supp 3d 810, 812 (WD Pa 2016) (holding that "discovery requests are not relevant simply because there is a possibility that the information may be relevant to the general subject matter of the action" and expressly rejecting the continued applicability of *Oppenheimer Fund, Inc v Sanders*, 437 US 340 (1978) under amended Rule 26(b)); *compare Lightsquared Inc v Deere & Co*, 2015 WL 8675377 (SDNY Dec 10, 2015)(expressly noting that "discovery no longer extends to anything related to the 'subject matter' of the litigation," but holding that the

Oppenheimer standard of relevance still applies). Given that a recent federal court opinion from the Eastern District of Michigan favorably cites to *Cole's Wexford*, Michigan state courts can be expected to follow suit. *Edwards v Scripps Media, Inc*, 2019 WL 1647803 (ED Mich April 16, 2019).

2. Proportional to the Needs of the Case.

Additionally, under the redefined scope of discovery, relevance is no longer "good enough," as one federal court put it, to sustain a discovery request. *Noble Roman's, Inc v Hattenhauer Dist Co*, 314 FRD 304, 311 (SD Ind 2016). The requesting party must now demonstrate that its discovery requests are both "relevant and proportional to the needs of the case." The SBM Committee Comments state that the "most important change" to MCR 2.302(b) "is adding language to make clear that proportionality is a guiding factor in deciding what discovery is appropriate." The comments go on to encourage "both the parties and the court [to] consider this principle" and acknowledge that "the proportionality considerations deserve more emphasis...."

The Comments to the 2015 Amendment to Federal Rule 26 address the increased need for judicial involvement in reigning in over-discovery resulting from the proliferation of ESI.

> The 1993 Committee Note further observed that "[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression." What seemed an explosion in 1993 has been exacerbated by the advent of e-discovery. The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.

Michigan law currently allows courts to limit discovery "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" via protective order under MCR 2.302(C). Protective orders are, by necessity, a post hoc tool. But the proposed rule change is intended to make the parties mindful of proportionality beforehand. "[T]he revised rule places a shared responsibility on all the parties to consider the factors bearing on proportionality *before* propounding discovery requests, issuing responses and objections...." *Salazar v McDonald's Corp*, 2016 WL 736213 (ND Cal Feb 25, 2016) (emphasis added.)

Discovery requests should be narrowly tailored and targeted to elicit information critical to proving/disproving facts at issue in the case. They should be directed to the most likely individuals, sources and time periods to uncover such information. Discovery requests seeking "all documents" or "all information" from everyone from time immemorial will not pass muster under proportionality analysis. *Rockwell Medical, Inc v Richmond Bros, Inc*, 2017 WL 1361129 (ED Mich April 14, 2017). A court may award attorney fees if it enters a protective order as relief against responding to these types of requests. MCR 2.302(C).

3. Proportionality Factors.

As for the proportionality factors themselves, Rule 26(b)(1) lists the proportionality factors as follows: (1) *the importance of the issues at stake in the action,* (2) *the amount in controversy,* (3) the parties' relative access to relevant information, (4) *the parties' resources,* (5) the importance of the discovery in resolving the issues, and (6) *whether the burden or expense of the proposed discovery outweighs its likely benefit.*

The italicized factors mimic those in amended MCR 2.302(B)(1)**.** The Michigan proposal omits "relative" from factor (3) and omits factor (5) altogether, replacing it with "the complexity of the case," a factor that appeared in the federal rule prior to the 2015 amendments. These factors are not exclusive.

When defending or objecting to discovery requests based on proportionality, both parties "have some stake in addressing the various relevant factors." *Warrior Sports, Inc v Healy*, 2017 WL 2389967, at *1 (ED Mich May 5, 2017). A responding party still bears the initial burden of explaining why the requested discovery should not be had. But, "once that information is presented, both sides are required to address the issue of proportionality." *Id*. Otherwise, the court may simply decide the issues on the basis of whatever evidence is before it. *Oracle America, Inc v Google Inc*, 2015 WL 7775243, at *2 (ND Cal Dec 3, 2015).

In making the determination of whether requested discovery is proportional to the needs of the case, the courts will apply a "sliding scale." The more relevant the request, the less proportional it needs to be. *Westfield Ins Co v Icon Legacy Custom Modular Homes*, 2017321 F.R.D. 107, 118 (MD Pa May 12, 2017). One trap the parties and the courts are warned against is placing undue weight on the "amount in controversy" factor. The SBM Committee comments quote the following from the Comments to Federal Rule 26:

> Although the amount in controversy is one proportionately factor, "the monetary stakes are only one factor, to be balanced against other factors." Advisory Committee Note to 2015 amendment of FR Civ P 26. "Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved." Advisory Committee Note to 1983 amendment of FR Civ P 26.

Courts have used this rationale to greenlight what otherwise might be considered disproportionate discovery in small dollar value cases. *See, e.g., Schultz v Sentinel Ins Co, Ltd*, 2016 WL 3149686, at *6 (D. SD June 3, 2016)(importance of issues at stake outweigh amount in controversy where plaintiff's bad faith claim had "the potential to affect [defendant's] alleged business practices and to remedy the situation for many insureds, not just herself.")

Magistrate Judge Elizabeth D. Laporte and Jonathan M. Redgrave provide an in-depth look at the federal proportionality factors and provide helpful guidance for their practical application in litigation. They lay out a "proportionality matrix" for use when assessing the applicability of each proportionality factor to the claims and defenses at issue. In support of their matrix, they offer "ten best practices" for understanding and applying the factors. They are:

1. Focus on the specific discovery at issue (micro-level analysis) and avoid arguments about discovery in general (macro-level analysis).

2. Recognize that proportionality and relevance are conjoined considerations for civil discovery.

3. Understand that proportionality is a consideration that can support a multi-faceted approach to discovery.

4. Respect that non-parties have greater protections from discovery and that burdens on non-parties will impact the proportionality analysis.

5. Raise discovery scope and proportionality issues early in the litigation and continue to address and revisit them as needed.

6. Do not consider the "amount in controversy" factor to be determinative with respect to the proportionality of discovery requests or responses.

7. Do not approach discovery disputes with the notion that discovery is perfect or that it will result in the production of "any and all" relevant documents or information.

8. Do not address proportionality arguments by citing superseded case law, rotely reciting the rules, or making unsupported assertions of burden.

9. Do not get caught up in an academic dispute regarding the "burden of proving" proportionality as courts will expect that each side of the dispute will have something to contribute, although not necessarily equally, and the most reasonable position will likely prevail.

10. Do not forget that proportionality considerations also apply to preservation decisions and disputes.

Hon. Elizabeth D. Laporte & Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 Fed. Ct. L. Rev. 19 (2015). This article is recommended reading for practitioner's needing to gain an appreciation of how the proportionality factors work. Also recommended is *Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality*, Duke Law Center for Judicial Studies (Sept 2015).

4. Reasonably Calculated to Lead to the Discovery of Admissible Evidence.

The language "reasonably calculated to lead to the discovery of admissible evidence" has been deleted from the rule. The SBM Committee comments explain:

> This language has been misused to expand the scope of discovery beyond relevance and to argue that discovery of inadmissible and irrelevant evidence is permitted if it could 'lead to the discovery of admissible evidence.' Relevance, however, is a limit on all discovery.

See also Hemlock Semiconductor Corp v Kyocera Corp, 2016 WL 1660862 (ED Mich Apr 27, 2016) ("The rule's previous language allowing discovery of relevant but inadmissible information that appeared 'reasonably calculated to lead to the discovery of admissible evidence' has been deleted from the new rule to address concerns that the exception was swallowing the limitations placed on the scope of discovery"). Practitioners will want to make sure to excise the deleted

language from any form objections or other "canned" material used in support or opposition to the scope of discovery requests.

5. Inaccessible ESI and Cost-Shifting.

Amended MCR 2.302(B)(6) is, in its operative language, identical to Fed. R. Civ. P. 26(a)(1)(E). The proposed rule, which concerns discovery of "inaccessible data" makes a "good cause" showing subject to the newly proposed proportionality factors.

The other notable change is that the court now has express authority to make discovery of all ESI-not just inaccessible ESI--subject to a cost-shifting order. The current version allows for cost-shifting, but has only been applied to inaccessible ESI. *Burger v Ford Motor Co*, --NW2d--, 2014 WL 132444, at *8-9 (Mich App Jan 14, 2014). Federal courts are split as to whether the Federal Rule that allows cost-shifting applies only to inaccessible ESI. *US ex rel Guardiola v Renown Health*, 2015 WL 5056726, at *9 (D Nev Aug 25, 2015) (cost-shifting dependent on finding that ESI is inaccessible); *compare US ex rel Carter v Bridgepoint Educ, Inc,* 305 FRD 225, 240 (SD Cal 2015) (cost-shifting available for accessible ESI).

Where the requested ESI discovery is not proportional to the needs of the case, however, the court should not order cost-shifting—even where the party requesting the data is willing to pay. Principle 13, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 Sedona Conf. J. 1 (2018) ("...[i]f the result of the proportionality analysis clearly demonstrates that the requested discovery is not proportional, and the request is not within the permissible scope of discovery, the request should be denied and cost allocation would not apply. *** Cost allocation, however, should not be used as a shortcut to resolve difficult proportionality analyses or to "buy" arguably disproportionate discovery.")

D. LIMITS ON INTERROGATORIES

Rule 2.309 Interrogatories to Parties

(A) Availability; Procedure for Service; Limits.

(1) A party may serve on another party written interrogatories to be answered by the party served or, if the party served is a public or private corporation, partnership, association, or governmental agency, by an officer or agent. Subject to MCR 2.302(B), interrogatories may, without leave of court, be served:

(1a) on the plaintiff after commencement of the action;

(2b) on a defendant with or after the service of the summons and complaint on that defendant.

(2) Each separately represented party may serve no more than twenty interrogatories upon each party. A discrete subpart of an interrogatory counts as a separate interrogatory.

The reference to MCR 2.302(B) makes the use of interrogatories expressly subject to the "relevant and proportional to the needs of the case" scope of discovery. Additionally, the rule limits the number of interrogatories a party may serve on another party to twenty with "discrete subparts" counting as separate interrogatories.

The imposition of a limit on the number of interrogatories ties directly into adoption of the "initial disclosures" requirement in MCR 2.302(A)(1). As the SBM Committee comments explain, the limit was chosen "with the view that initial disclosures will provide meaningful information that a party would otherwise seek in interrogatories" and "with the understanding that initial disclosures must be taken seriously by the parties...." The comments further explain that twenty interrogatories is a "presumptive limit" and that "the court must be open to allowing more interrogatories if truly appropriate for the matter."

Federal Rule 33(a)(1) presumptively limits the number of interrogatories to twenty-five, including "discrete subparts." What constitutes a "discrete subpart" is not defined in the rule. In general, courts have ruled that an interrogatory eliciting information around a common theme counts as one interrogatory despite being broken into subparts. *Harhara v Norville*, 2007 WL 2897845, at *1 (ED Mich Sept 25, 2007) (providing that "[i]f the subparts to an interrogatory are necessarily related to the 'primary question,' the subparts should be counted as one interrogatory rather than as multiple interrogatories"); *see also Barkovic v Shelby*, 2010 WL 11541857, at *1 (ED Mich Aug 16, 2010) (ruling that interrogatories requesting information concerning plaintiff's identity and medical treatment each counted as a single interrogatory regardless of the numerous subparts as the subparts were all related and were subsumed by the primary question posed by each interrogatory).

E. SANCTIONS FOR "LOST" ESI.

Rule 2.313 Failure to Serve Disclosure or To Provide or To Permit Discovery; Sanctions

(D~~E~~) Failure to Preserve ESI. ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.~~ If ESI that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation, may order appropriate remedies, including:

(a) a presumption that the lost information was unfavorable to the party;

(b) a jury instruction directing that the jury may or must presume the information was unfavorable to the party; or

(c) dismissal of the action or entry of a default judgment.

1. Scope and Timing of Duty to Preserve.

The rule governs sanctions for failure to participate in good faith in the discovery process as the discovery rules as a whole mandate. Most of the rule restates the sanctions previously available under its predecessor. Subrule 2.313(D), however, is new and codifies the sanctions available for the failure to preserve and produce ESI and will be explored below.

1. Scope and Timing of Duty to Preserve.

Practitioners should note that the amended rule does not create or define the duty to preserve. Instead, it is under Michigan common law that a party has the duty to preserve evidence "in pending or reasonably foreseeable litigation." *Wood v Cook*, --NW2d--, 2018 WL 341437 (Mich App Jan 9, 2018) (*quoting Silvestri v Gen Motors Corp*, 271 F3d 583, 590 (4th Cir 2011)). "Even when an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence that it knows or reasonably should know is relevant to the action." *Brenner v Kolk*, 226 Mich App 149, 162 (1997).

For example, the amended rule does not address what circumstances trigger the duty prior to the commencement of litigation, i.e., when should a party "reasonably foresee" future litigation. The common law will still govern that fact-intensive determination. There is general agreement that certain events trigger the duty to preserve evidence prior to the filing of litigation. *See, e.g., Bagley v Yale University*, Civ. No. 3:13-CV-1890 (D Conn Dec 22, 2016) (duty arose before filing of suit and arguably when university staff exchanged emails noting plaintiff's threat of legal action); *Rimkus Consulting Group, Inc v Cammarata*, 688 F Supp 2d 598, 612-613 n 7 (SD Tex 2010) (duty arose for defendants when they were planning to institute a related legal action); *Jones v Bremen High Sch Dist 228*, No. 08-CV-3548 (ND Ill May 25, 2010) (duty to preserve documents arose when party received EEOC charges); *D'Onofrio v SFZ Sports Group, Inc*, No. 06-687 (DDC Aug 24, 2010) (duty to preserve evidence triggered on receipt of letter stating that sender intended to initiate litigation and requesting preservation of electronic documents); *but cf. Cache La Poudre Feeds, LLC v Land O'Lakes, Inc*, 244 FRD 614 (D Colo 2007) (no duty to preserve evidence where letters regarding dispute did not contain "unequivocal threat" of litigation).

2. When are Sanctions Appropriate (Predicate Elements).

The rule focuses on when sanctions are appropriate and it is virtually identical to Federal Rule 37(e). It only applies to ESI and not tangible/physical evidence and only to parties to the litigation. While a significant departure from the current version of MCR 2.313(E), the rule does not depart drastically from the general spoliation standard already applied by Michigan courts. *See, e.g., Brenner v Kolk*, 226 Mich App 149 (1997) (requiring a finding that (1) evidence that should have

been preserved was lost/destroyed, (2) resulting in prejudice to a party, and (3) the severity of sanction dependent on degree of culpability and degree of prejudice.))

Under the Federal Rule, "a Court must determine that four predicate elements are met.... before turning to the sub-elements of (e)(1) and (e)(2): (a) the existence of ESI of a type that should have been preserved; (b) ESI is lost; (c) the loss results from a party's failure to take reasonable steps to preserve it; and (d) it cannot be restored or replaced through additional discovery. The Court must make findings on each element...." *Konica Minolta Business Solutions, USA v Lowery Corp*, 2016 WL 4537847 (ED Mich Aug 31, 2016).

3. Type of Sanctions.

It is only after these predicates are met will the court then determine the degree of culpability and the degree of prejudice. A court could not award the sanctions under subparagraph (D)(2) unless it found that the spoliator acted with "intent to deprive another party of the information's use in the litigation...." Neither negligence nor gross negligence arise to this level of culpability. *Applebaum v Target Corp*, 831 F3d 740 (CA6 2016). In the absence of a finding of an "intent to deprive" the court could only issue lesser sanctions under subparagraph (D)(1). Any sanction levied under this subrule could not have the practical effect of the severe sanctions authorized under subparagraph (D)(2). *Estate of Esquivel v Brownsville Ind School Dist*, 2019 WL 219888, at *2 (SD Tex Jan 16, 2019) (holding preclusion of evidence improper under Rule 37(e)(1) where it would have the practical effect of striking a central defense).

Even when the court finds that the spoliating party has acted with an "intent to deprive," that does not mean that sanctions under subparagraph (D)(2) are mandatory. As the Notes to the Federal Rule explain,

> Finding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt any of the measures listed in subdivision [(D)](2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision [(D)](1) would be sufficient to redress the loss.

Current Michigan law comports with this directive. *MASB-SEG Property/Casualty Pool v Metalux*, 231 Mich App 393, 401 (1998) (before ordering dismissal "trial court must consider lesser sanctions . . . ").

F. PRETRIAL PROCEDURES, CONFERENCES, AND ORDERS.

Rule 2.401 Pretrial Procedures; Conferences; Scheduling Orders

****

(C) <u>Discovery Planning.</u>

(1) <u>Upon court order or written request by another party, the parties must confer among themselves and prepare a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared are</u>

jointly responsible for arranging the conference and for attempting in good faith to agree on a proposed discovery plan.

(2) A proposed discovery plan must address all disclosure and discovery matters, including the matters set forth in subrule (B), and propose deadlines for completion of disclosure and discovery. The parties must show good cause to request a change in deadlines set by a scheduling order.

(3) A discovery plan, noting any disagreements between the parties, may be submitted to the court as part of a stipulation or motion. The court may enter an order governing disclosure, discovery, and any other case management matter the court deems appropriate.

(4) If a party or attorney fails to participate in good faith in developing and submitting a proposed discovery plan, the court may enter an appropriate sanction, including payment of attorney fees and costs caused by the failure.

Subrule 2.401(C) has no direct Federal Rules counterpart, but elements of the subrule are derived from Fed. R. Civ. P. 26(f) and 37(f). While the language of MCR 2.401(C) departs from that of the Federal Rules, the intent and purpose of the subrule is much the same as the SBM Committee comments make clear.

> Unlike the federal rules, which require the parties to hold a discovery planning conference in most cases, this procedure can be directed by the court or requested by a party.
> ***
> This procedure is adapted from the requirement for the parties to prepare a proposed discovery plan in FR Civ P 26(f)(3). Unlike federal practice, these proposed rules anticipate that the presumptive disclosure requirements and discovery limits will apply in most cases, the parties will stipulate to change them, or the court will do so in a case management order. Preparing a discovery plan— either by court direction or on the initiative of a party—is an alternative for addressing disclosure and discovery issues.

One notable difference, the penalty for failing to participate in developing a discovery plan is broader under the subrule than under the Federal Rule. Federal Rule 37(f) allows only monetary sanctions. *Bardfield v Chisolm Prop Circuit Events, LLC,* 2010 WL 2278461 (ND Fla May 4, 2010). The subrule allows for monetary sanction or other "appropriate sanction." As with newly adopted MCR 2.313(D), the severity of any sanction should depend on the degree of culpability and degree of prejudice and be limited to the least severe sanction necessary under the circumstances.

The topics that are to be covered during discovery planning are those listed under MCR 2.401(B)(1)(a)-(r) governing early scheduling conferences, with (e)-(r) being new under the amended rule. Discovery-related items include subparagraph (d) that adds "disclosure" to the current list of "discovery, preservation, and claims of privilege of electronically stored information" and subparagraph (f), which adds "the amount of time necessary for discovery,

staging of discovery, and any modification to the extent of discovery." Also, concerning expert witnesses, subparagraph (f) provides, "the limitation of the number of expert witnesses, whether to have a separate discovery period for experts, whether to require preparation and disclosure of testifying expert reports, and whether to specify expert disclosure deadlines."

The list does not directly address issues related to ESI discovery because MCR 2.401(J) provides that the court may order or the parties may request an ESI Conference and prepare an ESI Discovery Plan thereafter.

Rule 2.401 Pretrial Procedures; Conferences; Scheduling Orders

****

(J) ESI Conference, Plan and Order.

(1) **ESI Conference**. Where a case is reasonably likely to include the discovery of ESI, parties may agree to an ESI Conference, the judge may order the parties to hold an ESI Conference, or a party may file a motion requesting an ESI Conference. At the ESI Conference, the parties shall consider:

(a) any issues relating to preservation of discoverable information, including adoption of a preservation plan for potentially relevant ESI;

(b) identification of potentially relevant types, categories, and time frames of ESI;

(c) identification of potentially relevant sources of ESI and whether the ESI is reasonably accessible;

(d) disclosure of the manner in which ESI is maintained;

(e) implementation of a preservation plan for potentially relevant ESI;

(f) the form in which each type of ESI will be produced;

(g) what metadata, if any, shall be produced;

(h) the time to produce the information;

(i) the method for asserting or preserving claims of privilege or protection of trial preparation materials, including whether such claims may be asserted after production;

(j) privilege log format and related issues;

(k) the method for asserting or preserving confidential and proprietary status of information either of a party or a person not a party to the proceeding;

(l) whether allocation among the parties of the expense of production is appropriate, and,

(m) any other issue related to the discovery of ESI.

(2) **ESI Discovery Plan**. Within 14 days after an ESI Conference, the parties shall file with the court an ESI discovery plan and a statement concerning any issues upon which the parties cannot agree. Unless the parties agree otherwise, the attorney for the plaintiff shall be responsible for submitting the ESI discovery plan to the court. The ESI discovery plan may include:

(a) a statement of the issues in the case and a brief factual outline;

(b) a schedule of discovery including discovery of ESI;

(c) a defined scope of preservation of information and appropriate conditions for terminating the duty to preserve prior to the final resolution of the case;

(d) the form in which ESI will be produced; and

(e) sources of any ESI that is not reasonably accessible because of undue burden or cost.

(3) **ESI Competence**. Attorneys who participate in an ESI Conference or who appear at a conference addressing ESI issues must be sufficiently versed in matters relating to their clients' technological systems to competently address ESI issues; counsel may bring a client representative or outside expert to assist in such discussions.

(4) **ESI Order**. The court may enter an order governing the discovery of ESI pursuant to the parties' ESI discovery plan, upon motion of a party, by stipulation of the parties, or on its own.

This subrule is new to Michigan law. It has no counterpart in the Federal Rules. However, many federal district courts have, as part of their local rules, adopted model or standing orders related to ESI discovery. These local orders provide a framework for discussion of ESI-related discovery issues similar to subparagraph 2.401(J)(1). *See, e.g.,* Eastern District of Michigan's Model Order Relating to the Discovery of Electronically Stored Information (ESI) Checklist for Rule 26(f) Meet and Confer Regarding ESI, which can be found at https://www.mieb.uscourts.gov/court-info/local-rules-and-orders. Many state court rules provide for ESI conferences. Unlike the Michigan proposal, several states require mandatory ESI conferences, including Arizona, Arkansas and Kansas.

Subparagraph 2.401(J)(1), as noted, does not require the parties or the court to participate in an ESI conference. The permissive nature of the rule recognizes that not all cases will require a specialized conference solely to address ESI discovery. But, in any case "reasonably likely to include the discovery of ESI," the parties may agree to, the court may order, or a party may request the court via motion for, an ESI conference.

If an ESI conference is held, subparagraph 2.401(J)(1) mandates that the parties consider the issues listed in 2.401(J)(1)(a)-(m). Many of the issues are related to each party's common law duty to preserve evidence and duty under the amended rules to make initial disclosures.

Of particular note, though, is subparagraph 2.401(J)(1)(j), "privilege log format and related issues." Currently under Michigan law, there is no requirement to identify to the requesting party responsive documents withheld under claim of privilege. *Koster v June's Trucking, Inc*, 244 Mich App 162, 171 (2000). However, courts may order the production of a privilege log and/or conduct an in camera inspection when a dispute arises over a claim of privilege. *See, e.g., Prendushi v Farmers Ins Exchange*, --NW2d--, 2015 WL 5440200, at *12 (Mich App Sept 15, 2015); *see also Warner, Norcross & Judd, LLP v. Police & Fire Ret Sys*, --NW2d--, 2012 WL 593124, at *4 (Mich App Feb 23, 2012). As written, it is unclear whether the subrule creates an obligation to provide a privilege log in cases where an ESI conference is held. If so, it provides no guidance as to a format for the privilege log. Practitioners should look to Federal Rule 26(b)(5)(A) and its interpretive case law regarding the content and sufficiency of privilege logs. *Great Lakes Concrete Pole Corp v. Eash*, 148 Mich App 649, 658 n6 (1986).

Subparagraph 2.401(J)(2) sets forth the timing and content for the ESI discovery plan. The parties have fourteen days after the ESI conference to file the plan. Unless otherwise agreed, it is the plaintiff's responsibility to file the plan. The plan must set forth those items on which the parties have agreed and those left open that require the attention of the court. As the topics for discussion at the ESI conference are mandated by subparagraph 2.401(J)(1)(a)-(m), it is recommended that the ESI discovery plan address each of the items in turn, even if to simply note that the parties agree the item is not applicable to the case.

Subparagraph 2.401(J)(3) concerns ESI competence and requires that attorneys who participate in or appear at an ESI conference "be sufficiently versed in matters relating to their clients' technological systems to competently address ESI issues ." If an attorney does not feel adequately knowledgeable to address ESI issues, the attorney "may bring a client representative or outside expert to assist in such discussions." If an ESI conference is to be held, the goal is to make it as fruitful as possible. This requires counsel, with or without assistance, to be able to address all of the mandatory topics for consideration in a meaningful way.

The subrule provides no further guidance as to what an attorney should know in order to feel "sufficiently versed...to competently address ESI issues." "Technological competence" is a relatively new concept in legal practice. It was not until 2012 that the American Bar Association included technological competency within the ambit of the Model Rules of Professional Conduct. *See* MRPC 1.1, comment 8 ("[A] a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology....). Since then 36 states have adopted this version of the Model Rule. Michigan is not among this group.

California has not adopted the Model Rule, but its state bar has issued a highly detailed ethics opinion that sets forth what an attorney's ethical duties are when handling ESI discovery. *See* The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-193. The opinion states that,

> Attorneys handling e-discovery should be able to perform (either by themselves or in association with competent cocounsel or expert consultants) the following:
> - initially assess e-discovery needs and issues, if any;
> - implement/cause to implement appropriate ESI preservation procedures;
> - analyze and understand a client's ESI systems and storage;
> - advise the client on available options for collection and preservation of ESI;
> - identify custodians of potentially relevant ESI;
> - engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan;
> - perform data searches;
> - collect responsive ESI in a manner that preserves the integrity of that ESI; and
> - produce responsive non-privileged ESI in a recognized and appropriate manner.

Id., at 3-4. In addition, an article by two prominent thought leaders in the field of eDiscovery sets forth in great detail what they believe "technological competency" encompasses, including the need to understand technological issues concerning negotiating the scope of discovery and the identification, preservation, collection, review and production of relevant ESI. *See* Ronald J. Hedges and Amy Walker Wagner, *Competence with Electronically Stored Information: What Does It Currently Mean in the Context of Litigation and How Can Attorneys Achieve It?*, 16 DDEE 322 (2016).

An open question is whether an attorney in violation of subrule 2.401(J)(3) would be subject to discipline under Michigan Rule of Professional Conduct 1.1. As noted, MRPC 1.1 does not explicitly include "technological competence" within the language of the rule or its comments. And, of course, subrule 2.401(J)(3) is not part of the MRPC. But, the language of MRPC 1.1 is broad enough as currently written to include "technological competence." So, it remains to be seen if there are ethical implications for violations of subrule 2.401(J)(3).

Subrule 2.401(J)(4) provides the court with the authority to enter an ESI order incorporating the parties' ESI discovery plan or, in the absence of an ESI discovery plan, to enter an ESI order pursuant to a party's motion, the parties' stipulation or on its own. With this authority, a trial court could enter its own model or standing order to handle ESI-related discovery issues in appropriate cases.

G. MEDIATION; APPOINTMENT OF ESI EXPERT.

Rule 2.411 Mediation

[(A) – (G) [No change.]

(H) Mediation of Discovery Disputes. The parties may stipulate to or the court may order the mediation of discovery disputes (unless precluded by MCR

3.216(C)(3)). The discovery mediator may by agreement of the parties be the same mediator otherwise selected under subrule (B). All other provisions of this rule shall apply to a discovery mediator except:

(1) The order under subrule (C)(1) will specify the scope of issues or motions referred to the discovery mediator, or whether the mediator is appointed on an on-going basis.

(2) The mediation sessions will be conducted as determined by the mediator, with or without parties, in any manner deemed reasonable and consistent with these rules and any court order.

(3) 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 expedited attention by the court. In such cases, the moving party shall certify in the motion that it is filed only after failure to resolve the dispute through mediation or due to a need for immediate attention by the court.

(4) In cases involving complex issues of electronically stored information, the court may appoint an expert under MRE 706. By stipulation of the parties, the court may also designate the expert as a discovery mediator of ESI issues under this rule, in which case the parties should address in the order appointing the mediator whether the restrictions of MCR 2.411(C)(3) and 2.412(D) should be modified to expand the scope of permissible communications with the court.

Newly added MCR 2.411(H) has no direct Federal Rules counterpart, but Federal Rule 53 does allow for the appointment of Masters that can be used to oversee all aspects of discovery, including ESI discovery disputes. *See, e.g., Small v. University Medical Center*, 2014 WL 3735670 (D Nev Mar 3, 2014). In addition, several other states, including California, allow for the appointment of a discovery referee either pursuant to agreement of the parties or by court order.

SBM Committee comments to the amended rule provide:

> A small number of cases are particularly complex or otherwise generate an inordinate number of discovery disputes requiring court attention. In order to best serve the parties and the interests of justice, the services of a discovery mediator may provide enhanced case management without causing undue expense, delay or burden, and without prejudice to a party's rights to have all discovery disputes adjudicated by the court. In no circumstance may a court delegate its judicial authority to the discovery mediator.
>
> The existing ability of the court to appoint an expert under MRE 706 is reinforced here to emphasize it as an option when dealing with complex ESI issues outside the normal ken of the court. In certain cases, it may also be efficient and desirable to have the same person serve as a discovery mediator of ESI disputes, but only by consent of the parties. If that

process is utilized, the normal rules governing mediator disclosures may need to be relaxed to allow the expert to testify, *e.g.*, she considered both plaintiff's and defendant's proposed search terms and believes a compromise position is reasonable. In all cases, the court remains the sole arbiter of any discovery disputes not otherwise settled.

While the SBM Committee believes that discovery mediation would be beneficial in "a small number of...particularly complex" cases, the subrule provides no limitation on when the parties or the court can invoke mediation. It trusts that decision to the parties and the court. This leaves open the possibility that mediation will be requested in cases where it will not be beneficial and will only serve to delay the proceedings and increase costs.

In cases where the court appoints an ESI expert and that person serves in the dual role of mediator, the subrule reminds the parties to consider the limitations placed on mediators by MCR 2.411(C)(3) and MCR 2.412(D) and to include any necessary modifications to those limitations in the court order appointing the mediator.

H. OTHER NOTEWORTHY CHANGES.

Practitioners should also note these changes to the Michigan Court Rules.

MCR 2.301(A)(1) & (4) Timing of Discovery. In cases where initial disclosures are required "a party may seek discovery only after the party serves its initial disclosures under MCR 2.302(A)." In addition, the serving party must initiate discovery "by a time that provides for a response or appearance, per these rules, before the [established] completion date."

MCR 2.306(A)(3) Time Limit on Depositions. "A deposition may not exceed one day of seven hours."

MCR 2.305 Discovery Subpoena to a Non-Party. This rule will now only apply to non-party discovery. It is important to note the rules for cost-shifting when seeking ESI are different as to parties and non-parties. Cost-shifting is allowed for party discovery regardless of whether ESI is accessible or inaccessible. MCR 2.302(B)(6). However, for non-party discovery, cost-shifting is only available for inaccessible ESI. MCR 2.506(A)(3).

This is an odd result because generally non-parties are afforded greater protection from the burdens of litigation than parties. "Although party witnesses must generally bear the burden of discovery costs, the rationale for the general rule is inapplicable where the discovery demands are made on non-parties. Non-party witnesses are powerless to control the scope of litigation and discovery, and should not be forced to subsidize an unreasonable share of the costs of a litigation to which they are not a party." *US v Columbia Broadcasting Sys, Inc*, 666 F.2d 364, 371 (CA9 1982).

MCR 2.313(A)(5) Award of Expenses of Motion. This subrule governs the award of expenses when the court grants a motion for protective order filed under MCR 2.302(C) or grants a motion to compel filed under MCR 2.313(A) or when the disclosure or requested discovery is provided after the motion to compel is filed. In both cases the award is

predicated on “the moving party...attempting in good faith to obtain the disclosure or discovery without court action” before filing the motion. If the moving party fails to “meet and confer” with the opposing party prior to filing the motion, the court may not award the moving party expenses if the motion is granted. NOTE: The obligation to “meet and confer” does not apply to the filing of a motion for sanctions under MCR 2.313(E). Understandably so because in most instances a motion to compel will precede the filing of a motion for spoliation sanctions. So, the parties will presumably already have been through a “meet and confer” related to the discovery at issue.

MCR 2.401(B)(2)(a)(2)(iii)-(iv) Early Scheduling Conference and Order. The court is authorized to make changes to the “timing, form, or requirement for disclosures under MCR 2.302(A)” and to “the limitations on discovery imposed under these rules” and to decide “whether other presumptive limitations should be established.”

18501209