

December 16, 2008

ADM File No. 2007-24

Amendment of Rules 2.302, 2.310,
2.313, 2.401, and 2.506
of the Michigan Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 2.302, 2.310, 2.313, 2.401, and 2.506 of the Michigan Court Rules are adopted, effective January 1, 2009.

[Additions are indicated by underline, and deletions by strikethrough.]

Rule 2.302 General Rules Governing Discovery

(A) [Unchanged.]

(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, 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.

(2)-(4)[Unchanged.]

(5) Electronically Stored Information. A party has the same obligation to preserve electronically stored information as it does for all other types of information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

- (6) Limitation of Discovery of Electronic Materials. A party need not provide discovery of electronically stored information 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 the limitations of MCR 2.302(C). The court may specify conditions for the discovery.
- (7) Information Inadvertently Produced. If information that is subject to a claim of privilege or of protection as trial-preparation material is produced in discovery, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(C)-(H)[Unchanged.]

Rule 2.310 Requests for Production of Documents and Other Things; Entry on Land for Inspection and Other Purposes

(A)-(B)[Unchanged.]

(C) Request to Party.

- (1) The request may, without leave of court, be served on the plaintiff after commencement of the action and on the defendant with or after the service of the summons and complaint on that defendant. The request must list the items to be inspected, either by individual item or by category, and describe each item and category with reasonable particularity. The request must specify a reasonable time, place, and manner of making the inspection and performing the related acts, as well as the form or forms in which electronically stored information is to be produced, subject to objection.
- (2) The party on whom the request is served must serve a written response within 28 days after service of the request, except that a defendant may serve a response within 42 days after being served with the summons and

complaint. The court may allow a longer or shorter time. With respect to each item or category, the response must state that inspection and related activities will be permitted as requested or that the request is objected to, in which event the reasons for objection must be stated. If objection is made to part of an item or category, the part must be specified. If the request does not specify the form or forms in which electronically stored information is to be produced, the party responding to the request must produce the information in a form or forms in which the party ordinarily maintains it, or in a form or forms that is or are reasonably usable. A party producing electronically stored information need only produce the same information in one form.

(3)-(6)[Unchanged.]

(D) [Unchanged.]

Rule 2.313 Failure to Provide or to Permit Discovery; Sanctions

(A)-(D)[Unchanged.]

(E) 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.

Rule 2.401 Pretrial Procedures; Conferences; Scheduling Orders

(A) [Unchanged.]

(B) Early Scheduling Conference and Order.

(1) Early Scheduling Conference. The court may direct that an early scheduling conference be held. In addition to those considerations enumerated in subrule (C)(1), during this conference the court should consider:

- (a) whether jurisdiction and venue are proper or whether the case is frivolous,
- (b) whether to refer the case to an alternative dispute resolution procedure under MCR 2.410, ~~and~~
- (c) the complexity of a particular case and enter a scheduling order setting time limitations for the processing of the case and

establishing dates when future actions should begin or be completed in the case, and

(d) discovery, preservation, and claims of privilege of electronically stored information.

(2) Scheduling Order.

(a) At an early scheduling conference under subrule (B)(1), a pretrial conference under subrule (C), or at such other time as the court concludes that such an order would facilitate the progress of the case, the court shall establish times for events the court deems appropriate, including

- (i) the initiation or completion of an ADR process,
- (ii) the amendment of pleadings, adding of parties, or filing of motions,
- (iii) the completion of discovery,
- (iv) the exchange of witness lists under subrule (I), and
- (v) the scheduling of a pretrial conference, a settlement conference, or trial.

More than one such order may be entered in a case.

(b) The scheduling of events under this subrule shall take into consideration the nature and complexity of the case, including the issues involved, the number and location of parties and potential witnesses, including experts, the extent of expected and necessary discovery, and the availability of reasonably certain trial dates.

(c) The scheduling order also may include provisions concerning discovery of electronically stored information, any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production, preserving discoverable information, and the form in which electronically stored information shall be produced.

~~(e)~~(d) Whenever reasonably practical, the scheduling of events under this subrule shall be made after meaningful consultation with all counsel of record.

- (i) If a scheduling order is entered under this subrule in a manner that does not permit meaningful advance consultation with counsel, within 14 days after entry of the order, a party may file and serve a written request for amendment of the order detailing the reasons why the order should be amended.
- (ii) Upon receiving such a written request, the court shall reconsider the order in light of the objections raised by the parties. Whether the reconsideration occurs at a conference or in some other manner, the court must either enter a new scheduling order or notify the parties in writing that the court declines to amend the order. The court must schedule a conference, enter the new order, or send the written notice, within 14 days after receiving the request.
- (iii) The submission of a request pursuant to this subrule, or the failure to submit such a request, does not preclude a party from filing a motion to modify a scheduling order.

(C)-(I)[Unchanged.]

Rule 2.506 Subpoena; Order to Attend

(A) Attendance of Party or Witness.

- (1) The court in which a matter is pending may by order or subpoena command a party or witness to appear for the purpose of testifying in open court on a date and time certain and from time to time and day to day thereafter until excused by the court, and to produce notes, records, documents, photographs, or other portable tangible things as specified.
- (2) A subpoena may specify the form or forms in which electronically stored information is to be produced, subject to objection. If the subpoena does not so specify, the person responding to the subpoena must produce the information in a form or forms in which the person ordinarily maintains it, or in a form or forms that are reasonably usable. A person producing electronically stored information need only produce the same information in one form.

(3) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. In a hearing or submission under subrule (H), the person responding to the subpoena must show that the information sought 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 the limitations of MCR 2.302(C). The court may specify conditions for such discovery.

~~(2)~~(4) The court may require a party and a representative of an insurance carrier for a party with information and authority adequate for responsible and effective participation in settlement discussions to be present or immediately available at trial.

~~(3)~~(5) A subpoena may be issued only in accordance with this rule or MCR 2.305, 2.621(C), 9.112(D), 9.115(I)(1), or 9.212.

(B)-(I)[Unchanged.]

Staff comment: These amendments update Michigan’s discovery rules as they relate to electronically stored information. The provisions of the proposal at MCR 2.302(B)(6) and MCR 2.506(A)(3) allow the court to shift the cost of discovery to the requesting party if discovery is requested from sources that are not reasonably accessible, and prohibit sanctions if information is lost or destroyed as a result of a good-faith, routine record destruction policy or “litigation hold” procedures. The “safe harbor” provision provided in MCR 2.302(B)(5) and in MCR 2.313 applies when information is lost or destroyed under a routine electronic information system, if the operation of the system was performed in good faith. Good faith may be shown by a party’s actions to attempt to preserve information as part of a “litigation hold” that would otherwise have been lost or destroyed under an electronic information system.

The new language of MCR 2.302 and MCR 2.506 also allows parties to determine the format in which the information should be produced, and how to handle a situation in which protected information is inadvertently produced.

The staff comment is not an authoritative construction by the Court.