


# The New Civil Discovery Rules

By Daniel D. Quick

 In January 1, 2020, Michigan's civil litigation system moves into a new era. It will have been 35 years since the last holistic revision of the civil court rules. With the changes adopted by the Michigan Supreme Court and reflected in its Administrative Order No. 2018-19 (2019),<sup>1</sup> Michigan not only catches up with national developments, but in some cases embraces the cutting edge. Make no mistake, these are not mere tweaks; to steal a quote from United States Supreme Court Chief Justice John Roberts, "The amendments may not look like a big deal at first glance, but they are."<sup>2</sup>

Attorneys must not only learn the new and revised rules, but should appreciate the underlying goals of the revisions. The judiciary is likewise engaged in an educational process because, textual changes aside, these rules officially signal a paradigm shift in how civil litigation will be conducted in Michigan courts. The good news: the revised and new rules preserve all that is good and necessary about discovery while accentuating efficiency and increasing access to our courts for those seeking redress. Everyone should be able to get behind that.

## What was wrong with the old rules?

Thirty-five years ago, most of us were using rooftop antennae to watch TV, enduring adjustment problems and fuzzy displays. The court revisions upgrade those antennae to 4k streaming video. While various portions of the rules were updated over the years, they had not been reviewed comprehensively or revised with the totality of the discovery process in mind. The rules also did not keep up with some of the real-world aspects of litigation, nor were they optimized to help parties, lawyers, and judges administer cases fairly and effectively.

Discovery is a vital aspect of litigation, but it is broadly perceived as too expensive; too often abused and the source of time-consuming conflict; an obstacle to using the courts, thus limiting access to justice and sapping vitality from the judicial system; and distorting the administration of judicial resources.

Under the current system, the presumptive approach for many—even if not sanctioned by the letter of appellate decisions—deems information discoverable even if there is only a remote possibility of finding relevant evidence. While the courts never sanctioned "fishing expeditions," the liberal policy in favor of discovery often makes any rationale sufficient and enables the "leave no stone unturned" mentality of some parties and counsel. Without doubt, in some cases, this broad discovery paid off and revealed something useful; for the civil justice system *as a whole*, however, broad discovery imposes daunting costs on litigants, making courts too expensive for individuals and small businesses and incentivizing parties to flee the court system in favor of arbitration.<sup>3</sup>

Even cases filed in court rarely go to trial because parties can't afford to continue that far through the process. Many judges take a *laissez faire* attitude toward discovery—either by choice, out of exasperation, or because of lack of resources—

strongly signaling that parties should keep all discovery disputes out of their courtrooms. When discovery motions are heard, instead of slogging through the issues, some judges simply apply the presumptive rule: allow the discovery, figuring the case is likely to settle; if it doesn't, the issues could be addressed at trial. The combined effect of these dynamics at present is that in order to reach an outcome—whether summary disposition, trial, or settlement—everyone has to run through the brambles and often comes out worse for wear, but not necessarily any closer to resolution.

In conducting its work, the State Bar of Michigan Civil Discovery Court Rule Review Committee envisioned a system in which civil litigation is more cost-effective; courts are more accessible and affordable; the rules aid case management and judicial efficiency; and cooperation and reasonableness are emphasized as key principles to parties and lawyers.<sup>4</sup>

## Case management and proportionality

The spirit behind the revised rules begins with the rules' overall foundation: MCR 1.105. Under the Order effective January 1, 2020, MCR 1.105 is revised to state that the rules are to be "construed, administered,

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and employed by the parties and the court” to secure the just, speedy, and economical determination of every action. Mirroring Fed R Civ P 1, this change signals that all participants—parties, counsel, and the court—must collaborate to make the system thrive.

Courts are expressly vested with various case management tools. Revised MCR 2.301(C) states what had previously been implied: “The court may control the scope, order and amount of discovery, consistent with these rules.” To execute this obligation, MCR 2.401 has been expanded under the Order. Revised MCR 2.401(B) signals to the court and parties various issues that might be considered in an early scheduling conference to help guide the overall life of the case. Under revised MCR 2.401(C), either the court or a party may initiate a process for collaboration between the parties to establish a discovery plan—again, designed to identify issues early and allow the parties and court to get ahead of potential issues. If electronically stored information is going to be an issue, new MCR 2.401(J) creates a novel process—first in the nation—allowing the parties and the court to address the issue before expenses and motion practice get out of control.

The Order’s revised rules also adopt a proportionality standard in defining the “scope of discovery.” Looking to, but not exactly copying, Fed R Civ P 26, revised MCR 2.302(B) adopts the concept that discovery must be “proportional to the needs of the case.” This change mirrors longstanding practice and caselaw, albeit signaling more strongly proportionality’s central role, especially given deletion of the language “reasonably calculated to lead to the discovery of admissible evidence.” All readers are encouraged to review the advisory committee notes to the Fed R Civ P 26 changes,<sup>5</sup> which, among other things, describe the reason for deleting this language.<sup>6</sup> It is also important to emphasize that the change is not “intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional.”<sup>7</sup> The factors listed are nonexclusive, but one must appreciate that what is important in a case is not limited to monetary considerations.<sup>8</sup>

## Changes to the timing and flow of discovery

Good lawyers think three moves ahead and plan accordingly. The new rules nudge parties to pay more attention to their cases early on while attempting to reduce (seemingly inevitable) disputes down the road.

Under the Order, revised MCR 2.301(A) and (B) specify when discovery starts and ends, absent a court order saying otherwise. What happens in between is largely up to the court and the parties. While the revised rules adopt various presumptive procedures and limitations, parties and courts may opt out of them through stipulation or court order under revised MCR 2.302(F). Each case is different, and different cases require different discovery approaches. These new rules embrace that flexibility while promoting coordination between parties.

One major change in the revised rules is getting more information out sooner in the case. The new initial disclosure requirements of MCR 2.302(A) will eliminate the need for certain rote written discovery while getting basic information out quickly so parties can assess their liability and strategy earlier in the process. Importantly, the rules counsel against games of “gotcha” around these disclosures. Parties are required to produce specified information up front, which is simply information “then reasonably available” to the party under revised MCR 2.302(A)(6). While there is a duty to supplement, it exists under revised MCR 2.302(E)(1)(a)(i) only when “in some material respect” the disclosure is inaccurate or incomplete *and* the subject information has not already otherwise been disclosed in discovery. Lastly, under revised MCR 2.313(C)(1), sanctions never apply if the failure to supplement was substantially justified or harmless; in any case, the court has full discretion on whether and which sanctions might apply. In totality, the rules require disclosure to be carried out in good faith and eschew gamesmanship by either party.

In terms of the substance of the initial disclosures, the rules go beyond the analogous federal rule in various respects. For no-fault and personal injury cases, special additional disclosures are needed for basic information

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that would, in any event, eventually be required.<sup>9</sup> These rules expand on Wayne County local rules. Disclosures for domestic relations cases will be addressed in a future *Bar Journal* article by Mathew Kobliska.

### Changes to specific discovery devices

The new and revised rules under the Order make changes to various discovery devices. Some reflect practices adopted in other jurisdictions, but others are novel devices designed to drive efficiency and avoid unnecessary disputes.

MCR 2.305 and 2.306 have been revised to clarify third-party discovery procedures. The new rules better define the rights of nonparties who are subpoenaed, explicitly address objections to subpoenas, and provide for documents-only subpoenas and procedures for resolving third-party discovery disputes.

Deposition practice remains largely unchanged. MCR 2.306(A)(3) was revised to specify that a deposition is limited (as always, absent stipulation of the parties or court order) to a single day of seven hours. MCR 2.305(A)(6) and 2.306(B)(3) governing both party and nonparty representative depositions have been revised to clarify the process and provide for a mechanism for objections concerning topics to be identified and resolved.

Under revised MCR 2.309(A)(2), interrogatories are now presumptively limited to 20 to each separately represented party. Typically, interrogatories are the most misused and least valuable aspect of written discovery. With the adoption of initial disclosures, interrogatories are less necessary. Like the federal rule, a “discrete subpart” counts as a separate interrogatory. As explained in the comment to the rule amend-

ments, “courts generally agree that interrogatory subparts are to be counted as one interrogatory...if they are logically or factually subsumed within and necessarily related to the primary question.”<sup>10</sup> As a federal court explained, “[I]f the first question can be answered fully and completely without answering the second question,” then the second question is totally independent of the first and not factually subsumed within it.<sup>11</sup> Practitioners should not engage in gamesmanship that defeats the purpose of interrogatory limits “by combining several lines of inquiry into one interrogatory.” Courts should take a “pragmatic approach” that allows “reasonable latitude in formulating an inquiry to elicit as complete an answer as possible, while at the same time not allowing the multiplication of interrogatories which would defeat the purposes” of interrogatory limits.<sup>12</sup>

### Sanctions

All sanctions provisions have been amended under the Order to delete mandatory provisions (which were often ignored) in favor of judicial discretion. Sanctions related to electronically stored information have been amended to be less onerous and more flexible. If stipulated to by the parties or ordered by the court, discovery disputes are now subject to facilitation, although courts retain sole authority to resolve them.<sup>13</sup>

### A few things have not (really) changed

The committee chose not to adopt certain aspects of the federal rules. The new rules have no presumptive limits on the number of depositions, no written expert report requirement, and no express privilege log requirement. However, parties may agree to such devices if they make sense for

their case, and MCR 2.401 prompts the court and parties to at least consider whether to provide for expert reports or to have parties produce privilege logs. To avoid disputes, new MCR 2.302(B)(4)(e)–(f) clarify that certain communications between counsel and experts are exempt from discovery.

### What’s next

While these rules are important and should lead to change, they require real people—lawyers, judges, and, yes, clients—to embrace them to make a difference. To prepare for the change, visit the State Bar Civil Discovery web page at [www.michbar.org/civildiscovery](http://www.michbar.org/civildiscovery) for resources and events focused on the new and revised rules.

Some of the new rules place Michigan ahead of other states and the federal system in adopting innovative tools to allow for civil litigation to be resolved fairly and efficiently. But in the end, these rules still exist within the confines of our current system of resolving civil disputes. Even if fully embraced, rules only get you so far. Many of the downsides of our civil litigation system are built in; it is a design problem. The bench and bar will continue to collaborate to help provide access to our justice system for all citizens and to allow it to perform its necessary functions. We invite your participation in this ongoing project through the State Bar of Michigan.

### Thank you

The effort to reform these rules began in 2013. I would not be writing this article without the critical assistance and support of many people. The State Bar’s Civil Discovery Court Rule Review Special Committee truly represented the *crème de la crème* of our profession, a group of committed individuals with widely varied backgrounds who all got in the canoe and rowed in the same direction. We were assisted by subcommittees of equally committed lawyers, supported throughout by the State Bar of Michigan (particularly Executive Director Janet Welch and Public Policy Counsel Kathryn Hennessey) and guided by Anne Boomer of the Supreme Court Administrative Office. Chief Justice Bridget Mary McCormack and her Supreme Court colleagues were open to these changes and,

once proposed, engaged with the public and moved expediently toward adoption. ■



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## ENDNOTES

1. Available at <[https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Adopted/2018-19\\_2019-06-19\\_FormattedOrder\\_AmendOfDiscoveryRules.pdf](https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Adopted/2018-19_2019-06-19_FormattedOrder_AmendOfDiscoveryRules.pdf)> [<https://perma.cc/QCQ2-2MDC>]. All websites cited in this article were accessed August 17, 2019.
2. 2015 Year-End Report on the Federal Judiciary, Supreme Court of the United States, p 5, available at <<https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx>> [<https://perma.cc/9426-3UKF>].
3. See, e.g., *Call to Action: Achieving Civil Justice for All, Recommendations to the Conference of Chief Justices by the Civil Justice Improvements Committee*, National Center for State Courts (2016) <<https://iaals.du.edu/sites/default/files/documents/publications/cji-report.pdf>> [<https://perma.cc/Y9JE-ZN8F>].
4. The committee was organized in 2016 and recommended rule changes to the State Bar Representative Assembly, after building broad consensus among stakeholder groups. The committee's original report, which also provides more background on the evolution of the work product, can be found at <[michbar.org/civildiscovery](http://michbar.org/civildiscovery)> [<https://perma.cc/N8QB-9FR5>].
5. For the federal advisory committee notes associated with the 2015 amendments to Fed R Civ P 26 and the other Federal Rules of Civil Procedure cited in this article, see <<https://www.law.cornell.edu/rules/frcp>> [<https://perma.cc/BX5Q-RMUQ>].
6. *Id.* The federal advisory committee noted that the "reasonably calculated" phrase "has been used by some, incorrectly, to define the scope of discovery" and, as such, had the potential to "swallow any other limitation on the scope of discovery." Because the phrase "has continued to create problems," it was removed and replaced "by the direct statement that 'Information within this scope of discovery need not be admissible in evidence to be discoverable.'"
7. See, e.g., *Vallejo v Amgen, Inc*, 903 F3d 733, 743; 101 Fed R Serv 3d 1328 (CA 8, 2018) ("A party claiming requests are unduly burdensome cannot make conclusory allegations, but must provide some evidence regarding the time or expense required. Rule 26 requires a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.") (citations and quotations omitted).
8. The federal advisory committee noted: "It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized 'the significance of the substantive issues, as measured in philosophic, social, or institutional terms. 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.' Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values."
9. Revised MCR 2.302(A)(2) and (3).
10. AO No. 2018-19, comment based in part on *Athwal v Nijjer*, unpublished order of the United States District Court for the Western District of Washington, issued March 5, 2018 (Case No. C17-00740RSL).
11. *Phoenix Process Equip Co v Capital Equip & Trading Corp*, memorandum opinion and order of the United States District Court for the Western District of Kentucky, issued March 19, 2019 (Case No. 3:16CV-00024-RGJ-RSE), slip op at 4.
12. *Id.* (citations omitted).
13. Revised MCR 2.411(H).

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