

Order

Michigan Supreme Court
Lansing, Michigan

March 26, 2014

Robert P. Young, Jr.,
Chief Justice

ADM File No. 2012-02

Michael F. Cavanagh
Stephen J. Markman

Proposed Amendments of
Rule 2.302 of the
Michigan Court Rules

Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack
David F. Viviano,
Justices

On order of the Court, this is to advise that the court is considering two alternative amendments of Rule 2.302 of the Michigan Court Rules. Before determining whether either of the proposals should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas of public hearings are posted at <http://courts.mi.gov/courts/michigansupremecourt/rules/pages/public-administrative-hearings.aspx>.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of either proposal in its present form.

This publication order contains two alternative proposals. The first alternative, shown below as Alternative A, is the original proposal submitted by the State Bar of Michigan and published for comment in this administrative file. Alternative A, in summary, would clarify that discovery-only depositions are allowed only if stipulated to by the parties or upon order of the court. Alternative B is a proposal submitted at the invitation of the Supreme Court by opponents of the bar proposal. Alternative B would allow any party to schedule (without stipulation or court order) a discovery-only deposition. The two proposals are published together to enable commenters to understand the difference between the proposals, and to generate broad comment on the implications that may relate to adoption of either proposal.

[Additions to the text are indicated in underlining and
deleted text is shown by strikeover.]

Alternative A

Rule 2.302 General Rules Governing Discovery

(A) [Unchanged.]

(B) Scope of Discovery.

(1)-(3)[Unchanged.]

- (4) Trial Preparation; Experts; Fees and Expenses. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subrule (B)(1) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(a) Expert Expected to Testify.

~~(a)~~(i) A party may through interrogatories require another party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter about which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and ~~a summary of the grounds for each opinion.~~

(ii) A party may take the deposition of a person whom the other party expects to call as an expert witness at trial. In the absence of a stipulation or an order under this subrule (B)(4)(a)(ii), the deposition may be used for any purpose permitted under the Michigan Rules of Evidence. On written stipulation or on order, the deposition of an expert may be available for limited purposes, including that the deposition is for discovery only and may be used only for impeachment. The stipulation or order must specify the purposes for which the deposition may be used and provide for the allocation of the fees and expenses attributable to the deposition.

(iii) On motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions ~~(pursuant to under~~ subrule [B][4][c]) concerning fees and expenses as the court deems appropriate.

(b) Expert Not Expected to Testify. A party may not discover the identity of and facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except

(i) as provided in MCR 2.311, or

(ii) where an order has been entered on a showing of exceptional circumstances under which it is impracticable for the party

seeking discovery to obtain facts or opinions on the same subject by other means.

(c) Fees and Expenses.~~Unless manifest injustice would result~~

(i) ~~If a deposition is taken under a stipulation or order under subrule (B)(4)(a)(ii), the stipulation or order controls payment of expenses and expert fees. the court shall require that the party seeking discovery under subrules (B)(4)(a)(ii) or (iii) or (B)(4)(b) pay the expert a reasonable fee for time spent in a deposition, but not including preparation time; and~~

(ii) In order cases, with respect to discovery obtained under subrule (B)(4)(a)(ii) ~~or (iii)~~, the court may require, and with respect to discovery obtained under subrule (B)(4)(b) the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses and expert fees reasonably incurred by the latter party in obtaining facts and opinions from the expert. Otherwise, the assessment or allocation of fees and expenses shall be reserved for determination after entry of judgment.

(d) Deposition for Use at Trial. A party may depose a witness that he or she expects to call as an expert at trial. The deposition may be taken at any time before trial on reasonable notice to the opposite party, and may be offered as evidence at trial as provided in MCR 2.308(A). The court need not adjourn the trial because of the unavailability of expert witnesses or their depositions.

(5)-(7) [Unchanged.]

(C) Protective Orders. On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:

(1)-(6) [Unchanged.]

(7) that, consistent with subrule (B)(4)(a)(ii), a deposition shall be taken only for the purpose of discovery and shall not be admissible in evidence except for the purpose of impeachment;

(8)-(9)[Unchanged.]

If the motion for a protective order is denied in whole or in part, the court may, on terms and conditions as are just, order that a party or person provide or permit discovery. The provisions of MCR 2.313(A)(5) apply to the award of expenses incurred in relation to the motion.

(D)-(E)[Unchanged.]

(F) Stipulations Regarding Discovery Procedure. Unless the court orders otherwise, the parties may by written stipulation:

- (1) ~~provide that depositions may be taken before any person, at any time or place, on any notice, and in any manner, and when so taken may be used like other depositions; and~~
- (2) modify the procedures of these rules for ~~other methods of~~ discovery, except that stipulations extending the time within which discovery may be sought or for responses to discovery may be made only with the approval of the court.

(G)-(H) [Unchanged.]

Alternative B

Rule 2.302 General Rules Governing Discovery

(A) [Unchanged.]

(B) Scope of Discovery.

(1)-(3)[Unchanged.]

(4) Trial Preparation; Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subrule (B)(1) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

- (a)(i) A party may through interrogatories require another party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter about which the expert is expected to testify, and to state the substance of the facts and

opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

- (ii) A party may take the deposition of a person whom the other party expects to call as an expert witness at trial. The party taking the deposition may notice that the deposition is to be taken for the purpose of discovery only and that it shall not be admissible at trial except for the purpose of impeachment, without the necessity of obtaining a protective order as set forth in MCR 2.302(C)(7).
- (iii) On motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions (pursuant to subrule [B][4][c]) concerning fees and expenses as the court deems appropriate.

(b)-(d)[Unchanged.]

(5)-(7)[Unchanged.]

(C)-(H)[Unchanged.]

Staff Comment: These two proposals offer proposed amendments of MCR 2.302 regarding discovery-only depositions. The proposed amendments in Alternative A would clarify that discovery-only depositions may be taken only by stipulation or court order. The amendment would also require that the stipulation or order explain how the costs of this type of deposition are to be allocated. These proposed amendments were submitted by the State Bar of Michigan Representative Assembly. The proposed amendments in Alternative B would allow any party to schedule a discovery-only deposition without the need to obtain stipulation of the other party or parties or approval of the court.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or

electronically by July 1, 2014, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2012-02. Your comments and the comments of others will be posted at <http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/chapter-2-civil-procedures.aspx>.



I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 26, 2014


Clerk