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MICHIGAN COURT RULES 2020

A GUIDE

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Michigan Court Rules 2020 - A Guide

THE TIMES, THEY ARE A-CHANGIN'

No Need to Panic!

As Greek philosopher Heraclitus noted, "Change is the only constant in life." And so, for the first time in three decades, the Michigan Supreme Court has issued comprehensive revisions of the state's discovery rules. In many ways, Michigan's newly adopted rules mirror the 2015 amendments to the Federal Rules of Civil Procedure (FRCP), particularly in regard to proportionality. The revised rules place more emphasis on expediting the discovery process and creating protocols from the outset of the case, particularly with regard to ESI.

This booklet provides you with a helpful guide on the revised process of discovery in a civil matter, particularly initial disclosures, what to know for the early scheduling conference, and how to handle ESI matters. It walks through the following processes:

♦ MCR 2.302(A) - accelerated process of required initial disclosures

♦ MCR 2.401(B)(C) - the Discovery Planning Conference / Early Scheduling Conference

♦ MCR 2.401(J) - the Electronically Stored Information (ESI) Conference

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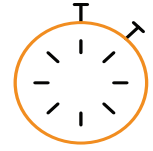
The Clock is Ticking – MCR 2.302

Michigan's new civil discovery rules go into effect January 1, 2020. Make no mistake, the changes are significant. The goal of these revisions is to expedite discovery, making it more efficient and less burdensome. Initial disclosures are key to this process. Important changes are as follows:

♦ Initial disclosures be provided to the other parties "without awaiting a discovery request."

♦ They must be provided "within 14 days after any opposing party files an answer," essentially setting a 35-day clock.

♦ A party must make disclosures regardless of whether the other party has done so or not.

The rules require that initial disclosures include:

♦ Relevant custodian information.

♦ A copy or a description by category and location of all documents, both within and outside of the disclosing party's possession, that may be used to support its claims or defenses.

The following four steps can help ensure initial disclosures are complete and ready within the shortened timeline.

If initial disclosures are incomplete or incorrect, there is a duty to supplement; otherwise, the court may refuse the use of such documents during future proceedings.

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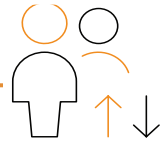
Step #1 - Custodian Relevance

Speed is the key! To quickly find important documents, identified custodians should be ranked according to their relevancy to the case. A quick five-minute questionnaire that corresponds to the claims and defenses at issue makes this task easy, particularly if technology is leveraged to compute a relevancy ranking based on the answers provided. The steps are simple:

♦ Create a set of questions that relate to the claims and defenses.

♦ Either send a questionnaire to targeted employees or have attorneys gather responses directly. Survey technology is available to accelerate this process.

♦ Score custodian relevance based on the answers gathered and focus your initial assessment on the custodians who are identified to be highly relevant.

♦ Focus can also be applied based on specific claims or defenses to identify highly relevant custodians.

Custodians who do not have any relevant knowledge or information relating to the claims and defenses should be immediately identified and released from legal hold.

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Step #2 - Data Source Assessment

Next, it is important to identify relevant, non-duplicative data sources and locations that align to the claims and defenses, as well as weighing relevant evidence to the damages at issue. This information can be gleaned from custodian surveys and interviews and leveraged to support proportionality negotiations. In large matters, phasing can be implemented by interviewing only the most relevant custodians (scored in step 1) at this preliminary stage.

Again, the steps are simple:

♦ Send data source surveys to relevant custodians who are subject to legal hold.

♦ Have attorneys verify locations of unique and relevant data via custodian interview.

♦ Score data sources based upon the burden and effort of collection, an important step for proportionality negotiations.

♦ Work with IT to develop a preservation plan for sources targeted for initial disclosures.

Having attorney oversight related to what constitutes a relevant, unique data source can significantly reduce the volume of content that is collected, in comparison to reliance on the custodian's representation alone.

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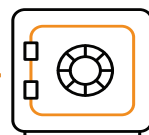
Step #3 - Preservation Obligation

The revised rules strictly enforce the preservation obligation for both hard copy material and ESI. It is important to work with the IT department to develop a preservation plan specific to the party's environment. There are several ways to meet your client's preservation obligation.

♦ **Index in place** - Various software applications can index content in place without moving data outside the corporate firewall. This can be facilitated quickly and at a reasonable cost.

♦ **Traditional collection methods -** Often, parties move straight to collection of all data sources, a method which can be premature, costly and ultimately unnecessary. At this early stage, preservation is adequate until further negotiation is performed during the scheduling conference. *Resist the urge to collect too early*.

♦ **Self-preservation by custodian** - Custodians can be instructed not to destroy data, but this method is hard to regulate and has a high risk of inadvertent or intentional deletion.

♦ **Forensic imaging** - Capturing a mirror image of a data source can help to identify inappropriate behaviors such as file deletion or USB transfer activity, but the image must be taken immediately to mitigate or alleviate spoliation of evidence. It should be noted that Michigan has specific certification requirements for individuals who are qualified to perform this process.

> ⚠️ *Preservation strategies are varied and complex in nature and require strong technical competence to ensure that the process is defensibly sound. Be sure to utilize expert resources for this step.*

INITIAL DISCLOSURES

Step #4 - Targeting Data

Once data sources are located and preserved, artificial intelligence and machine learning tools, used in tandem with data indexing technologies, can provide a wide variety of effective methodologies to target relevant content. Examples include:

♦ **Index in place** - This technology option is perfectly suited for building more complex Boolean searches to create a targeted narrative analysis relative to the claims and defenses. These complex searches can be dialed up or down in precision and combined with metadata to target specific categories of documents in the corpus.

♦ **Communication networks / email threading tools** - Analyze communication patterns of custodians to identify normal channels of communication, as well as new and or unexpected channels. These tools can trace topics of interest and map the channels of relevant information that flow throughout the data set. This is particularly important in matters where who knew what and when is relevant.

♦ **Concept clustering** - Organize the data into broad concepts or categories to identify representative documents that align to the claims and defenses. Combine this with communication network analysis for even more insight.

> *Don't attempt to use all of these techniques in every situation. Remember that the approach is not a one size fits all. Understanding the end goal is key when determining which methods are suitable and will yield the most effective results.*

EARLY SCHEDULING CONFERENCE

MCR 2.401

A key component of the revised rules is the early scheduling conference. The goal is to "facilitate the fair and expeditious disposition of the action," specifically in regard to the scope of discovery.

Being prepared for the early scheduling conference is crucial. By proactively assessing custodian relevancy and data sources according to the burden of collection, this early conference can be an excellent opportunity to apply the proportionality standards intended by the rules. Similar to the Federal Rules of Civil Procedure, the new Michigan rules require that discovery be "proportional to the needs of the case… including whether the burden or expense of the proposed discovery outweighs its likely benefit."

The following ten tips can help you prepare for this early case conference.

The early conference allows parties to create a discovery protocol that applies proportionality. Coming prepared is key!

EARLY SCHEDULING CONFERENCE

Tip #1 - Assessment and Scope of Discovery

A well-crafted discovery protocol requires that the parties agree upon the timing and scope of discovery. The rules contemplate that all disclosure and discovery matters be discussed, and proposed deadlines be established at the early conference. In order to prepare for this discussion, counsel should have the following information:

♦ An understanding of the discovery effort relative to the claims and defenses, which includes knowing the number of custodians, relevant data sources, complexity of collection, and review efforts.

♦ The effort and scope of discovery should be aligned with potential damages, so understanding the potential value of the claim and cost estimations of discovery efforts is essential.

♦ Potential phasing of discovery with an eye to cost containment can benefit all parties and is easily obtainable if custodians have been ranked according to relevancy.

Understanding how to leverage the principles of proportionality as advised by the Sedona Commentary on Proportionality can yield a targeted discovery plan aligned with the merits of the case.

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Tip #2 - Legal Hold

One thing hasn't changed: When a duty to preserve is triggered, legal hold instructions sent to custodians should be the first step to preserve potentially relevant information. Depending on the sophistication and size of the client's operations, they may have software that automates this process. Counsel should be prepared to discuss the client's legal hold procedures at the scheduling conference, including:

- ♦ When the legal hold was issued.

- ♦ Which custodians received the hold.

- ♦ Whether the holds were acknowledged.

- ♦ If the IT department received notice of the legal hold for IT-controlled data sources.

- ♦ What steps were taken to ensure that disposition and routine deletion policies were halted for data sources that contain relevant information.

Counsel should consider a mutual agreement to realign the scope of their legal hold after the early conference.

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Tip #3 - Preservation Plan

Under the revised rules, "a party has the same obligation to preserve ESI as it does for all other types of information." MCR 2.302(B)(5). Therefore, counsel should be prepared to address what and how ESI will be preserved. Technology should be used to identify and track data sources to ensure a comprehensive and defensible approach.

As part of the discussion, counsel should understand and be prepared to address the following:

♦ Identify what data is being held based on the custodians identified.

♦ Determine whether IT is preserving data "in place" (*i.e.*, data is not collected but cannot be deleted).

♦ Know what criteria was utilized to locate data if collection has already occurred (*e.g.*, search terms, email only, *etc.*).

♦ Disclose non-standard data sources, including proprietary applications, legacy systems, and unduly burdensome sources.

Consider seeking a provision to allow the client to resume its normal document retention practices once agreement as to the scope of data has been reached.

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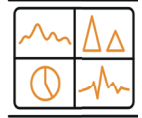
Tip #4 - Proportionality

An important aspect of the new rules is the application of proportionality; specifically, that discovery must be "proportional to the needs of the case… including whether the burden or expense of the proposed discovery outweighs its likely benefit." By utilizing information gathered during preparation for initial disclosures, counsel can easily come to the negotiation table with a plan in mind to ease the burden of discovery. The plan should include:

♦ **Phasing of custodians** - Start with those custodians at the center of the bullseye; those deemed most relevant to the claims and defenses.

♦ **Phasing of data sources** - Target highly relevant content located on easily collected sources.

♦ **Discovery spend** - Demonstrate that your proposed discovery strategy is reasonable by quantifying the costs associated with the entire discovery process, including attorney review costs.

♦ **Negotiate marginally relevant custodians and data sources** - Come to the table with an understanding of where marginally relevant information is located to facilitate exclusion of content which may be of little value or for which the cost of discovery is burdensome.

Discovery efforts are supposed to be reasonable, not exhaustive. Understanding cost implications early will help inform a strategy that is right-sized to the merits of the case.

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Tip #5 - Preparing for the ESI Conference
MCR 2.401(J)

An addition to the revised rules is an ESI conference, held when "a case is reasonably likely to include the discovery of ESI." It is at this conference, which may be held at the same time as the early scheduling conference, where counsel should seek agreement to an ESI protocol. The potential topics in the protocol are contingent on the complexity of the matter and may include:

♦ Processing requirements.

♦ Data minimization and search strategies, along with sampling processes, where applicable.

♦ Review methodologies and approach.

♦ How confidentiality and privilege issues will be handled.

♦ Method and form of production.

To be best prepared for the ESI conference, counsel should consider bringing the following items:

♦ List of proposed custodians and data sources.

♦ Client's data map.

♦ The costs associated with moving identified content through the discovery process, from preservation to review and production.

♦ Copies of all supporting documentation (*e.g.,* legal hold reports, budgeting information, *etc.*).

> *The rules make clear that "attorneys who participate in an ESI conference… must be sufficiently versed in matters relating to their clients' technological systems," or they must bring an outside expert who is.*

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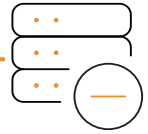
Tip #6 - Data Minimization

As data volumes grow, reducing the amount that moves downstream has become essential. Date range and deduplication, once the staples of data minimization, are joined by more advanced analytics and data-centric technologies. Counsel should understand which techniques are appropriate, and determine whether such items should be memorialized in the ESI Protocol.

The following are techniques to be contemplated:

◆ **Email threading and deduplication** - Allows for email threads to be compiled so that only the most complete thread of the chain is presented for review.

◆ **File type exclusions -** Identify or isolate nonrelevant file types (*e.g.,* music files) to be handled separately or excluded completely from the review process.

◆ **Domain Analysis** - Examine incoming and outgoing email domains for possible bulk exclusions, such as newsletters, shopping, travel, *etc*.

◆ **Entity recognition** - Use machine learning to identify and organize/isolate content based on criteria such as specific people, places, products, organizations and other entities.

When seeking to reduce the volume of ESI, consider limiting the file types that are collected and processed to standard business file types, such as Microsoft Word, Excel, PDF, and email formats.

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Tip #7 - Search Term Negotiation

Effective search term negotiations are a critical component in creating a sound ESI strategy. In complex cases or cases with a significant volume of ESI, counsel should consider negotiating a search term strategy that will specifically target content relevant to the claims and defenses, as well as pending discovery requests. Prior to the ESI conference, counsel should consider the following:

♦ The search terms or narrative that are appropriate to adequately examine your client's data *and* the search terms or narrative for the opposing party to execute on their client's data. Note that these approaches are not necessarily the same.

♦ Maximize the use of simple and complex Boolean search strategies as well as machine learning tools such as concept clustering, if appropriate.

♦ Include a process to sample and test the recall and precision of your proposed strategy and possible adaptations to produce optimal results. Create a defensible rationale for your decisions.

♦ Recognize that keywords are not effective across all data types (*e.g.,* images, structured data), and include a plan for addressing those document types.

The old standby of a long list of any possibly related search term is no longer an effective approach, and typically results in a high percentage of false positive content.

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Tip #8 - Review Strategy

Although the days of dozens of attorneys gathered with banker's boxes of documents are gone, the document review process is still one of the costliest aspects of discovery. Luckily, highly effective technologies and workflows have been designed to minimize and control the costs associated with document review. Given the number of options, implementing the right approach can be a challenge.

Factors to consider when crafting a review strategy include:

◆ Overall review budget and timeline.

◆ Processing, data minimization, and targeting strategies that can be leveraged to help reduce and prioritize the review.

◆ Develop the appropriate review methodology:

- Managed review using outsourced attorneys

- Internal review using firm resources

- Predictive coding versus eyes-on linear review models

- Handling of structured data, images, video, voice and other types of exception files

- Control and identification of privilege documents

Use statistical sampling to identify subsets of documents to test for recall and precision when organizing your review priorities, which validates the approach.

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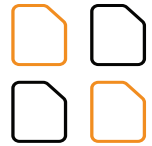
Tip #9 - Form of Production

The new rules require that an ESI discovery plan outline the forms in which ESI will be produced. This often overlooked topic can help to avoid future difficulties and costs associated with the review of incoming productions. The following items should be considered when formulating an approach.

♦ Agree on an image file format (typically TIFF).

♦ Consider a page limit when creating TIFF files. Excel, as well as certain non-standard file types, can render large numbers of pages which can significantly drive up the costs of production.

♦ Certain file types are better suited for production in native format (*e.g.,* Excel, PowerPoint, video and audio files). Be sure to understand what hidden content or metadata might exist to avoid the inadvertent production of privileged content.

♦ Extracted text or optical character recognition (OCR) should be included for searching purposes.

♦ Confirm production numbering requirements, along with confidential designations and redactions.

♦ Request that documents be produced family complete (*e.g.*, emails with all attachments included).

♦ Negotiate the production number fields, along with certain metadata fields and other identifying information (redaction or confidential designations) that should be exchanged.

> *Typically, you only get one bite at the apple. Make sure your production requirements are sound so that you can readily search and analyze incoming productions most effectively.*

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Tip #10 - Privilege

Counsel should be ready to address how claims of privilege regarding ESI will be handled. At minimum, counsel should consider discussing the following:

◆ What type of information, such as metadata fields, will be provided in the privilege log, if at all.

◆ Whether categorical privilege designations may be used on a privilege log instead of a linear approach to reduce time and costs associated with the privilege review.

◆ How inconsistencies between agreements made on privilege and subsequent protective orders will be handled.

◆ How claims of privilege over an inadvertently produced document and objections to such claims will be addressed.

Be sure to include specific language, such as a clawback provision, regarding the non-waiver of privilege due to an inadvertently produced document.

ESI EXPERTS

The Role of ESI Experts
MCR 2.401(J), 2.410(H)

Technological competence requirements in the revised rules may justify using outside experts on IT systems or ESI. In cases involving complex ESI issues, a court may appoint an ESI expert as a mediator to facilitate negotiations. Expert discovery advisors can provide great value by significantly reducing the overall cost of ediscovery. When choosing an expert, consider the following:

◆ An ESI expert should have a broad and very detailed understanding of the entirety of the ediscovery process, including various technologies and workflows.

◆ Investing in an expert early in the process facilitates appropriate discovery processes that can save significant money downstream when issues become more complex.

◆ Experts should always use a proportional mindset which mirrors the new rule requirements. Early proportionality decisions can alleviate significant costs downstream, particularly during the collection and review phases.

◆ Choose the right expert for the job. A complex data collection issue may require a forensic expert; however, it is unlikely they can tackle downstream issues during review and production. Completing a needs assessment can help identify the appropriate expert types for your matter.

> *Each matter is unique – avoid one-size-fits-all solutions. Early involvement by experts which embody a proportional mindset can avoid significant downstream costs.*
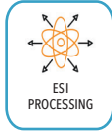
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