

Michigan's New E-Discovery Rules Provide Ways to Reduce the Scope and Burdens of E-Discovery

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On December 16, the Michigan Supreme Court adopted proposed changes to several discovery court rules. Those changes take effect January 1, 2009.

To a large extent Michigan's new e-discovery rules track the federal e-discovery rules that became effective two years ago. That is good news. Accordingly, if an organization has an effective records management program and a litigation readiness plan, Michigan's new e-discovery rules provide the following ways to reduce the scope and/or burden of e-discovery.

E-Discovery Preservation Safe Harbor

Michigan Court Rules 2.302(B) and 2.313 have been amended to state "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." The Staff Comment to these new rules explains that "good faith" may be shown by a party's actions to attempt to preserve information as part of an e-discovery "litigation hold" process.

Limitation on E-Discovery

Michigan Court Rule 2.302(B) has been amended to state that "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 has several options under Rule 2.302(C) to reduce the scope of the discovery and/or shift some or all of the costs of the discovery to the requesting party.

Early Scheduling Conference & Order

Michigan Court Rule 2.401 has been amended to state that courts may direct that early scheduling conferences be held and that during such conferences, courts "should consider...discovery, preservation, and claims of privilege of electronically stored information." The amended rule also states that a court's scheduling order may include various provisions regarding the preservation and production of electronically stored information. Getting the other party's agreement or the court's pre-approval of your discovery plan early in the case is probably the best way to reduce the scope and burden of discovery.

Webinar

During January 2009, Miller Canfield will conduct a webinar which will discuss in more detail all of the new Michigan e-discovery rules. We will also discuss how the similar federal e-discovery rules have been interpreted during the last two years. An invitation will be sent after details are finalized.