

Negligence Law Section

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“A Brave New World: Electronically Stored Information and the New Michigan Court Rules”

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The new year means a new beginning for the Michigan Court Rules. It also means a new beginning for understanding the technology driven world that underlies civil cases.

The changes to the Michigan Court Rules are aimed at improving the civil discovery process to make it more efficient and more cost effective, and to increase access to the courts. MCR 2.302(A) encourages parties and their attorneys to cooperate in the process of discovery at the outset of a case by requiring initial disclosure of relevant and proportional information.

I. Introduction: ESI Under the New Court Rules

Electronically Stored Information (or ESI) is featured throughout the new Court Rules, including in required initial disclosures. As a result, attorneys must have or obtain ESI competence to fulfill their duty to provide competent representation under MRPC 1.1.

In determining what ESI is relevant and proportional to a particular case, MCR 2.401(J)(3) requires an ESI discovery conference. Attorneys need to identify what ESI their clients and opposing parties have, and work to disclose all ESI to be produced at the outset of a case.

MCR 2.310(A)(2) defines ESI as "electronically stored information, regardless of format, system, or properties." ESI is broadly defined under the court rules. This definition is flexible to encompass future changes and developments in a fast-paced technology driven world.

Time limits apply to initial disclosures, so it is important to identify ESI at the outset of a case.¹ A party must serve initial disclosures based on the information reasonably available to the party.

Under MCR 2.302(A)(6) a party is not excused from making disclosures because they've not yet

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Pursuant to MCR 2.302(A)(5)(b)(i), once a party files a complaint or claim, that party must serve its initial disclosures within 14 days after any opposing party files an answer. Likewise, under MCR 2.302(A)(5)(b)(ii), a party answering a complaint or claim must serve its initial disclosures within the later of 14 days after the opposing party's disclosures are due or 28 days after the party files its answer.

investigated the case or because of the insufficiency of the other party's disclosures.

The above generates numerous questions which we will answer in turn:

- What is ESI?
- How is ESI relevant to my particular case?
- How do I find and preserve ESI?
- In what form or format should ESI be preserved and/or disclosed?

II. *A Brief Primer on Computers & ESI*

A simple example of a computer is a basic electric hand-held calculator. Let's look at how a calculator works.

The user enters the first number they would like to add by using 0-9 keys, presses the operator type (+, -, /, *), next enters the second number using the 0-9 keys, and then presses the equals key (=) to get a result.

The two numbers the users enter are considered data. The operators(+, -, /, or *) are the type of instruction for the computer to apply (i.e. add, subtract, divide, or multiply). This is considered code, or the instructions for what the computer should do.

Pressing the equal key (=), executes the temporary stored data and instruction command, and returns the result in a human readable form.

So as you can see what is actually happening under the calculator buttons a user is pressing is a bit more complicated than what is readable on the calculator screen.

In its most basic form, all ESI can be broken down into binary language, or a series of 0s and 1s. These 0s and 1s turn circuits off and on in the computer. Programing in 0s and 1s takes a very long time to do by hand. As computers evolved and became more powerful, computer engineers have found easier ways of representing sets of instructions into simpler abstractions. Abstraction is the process of taking something complex and making it simpler for the user.

Take for example, making the words "Hello World" appear on a computer. Programmers now can use one line of code to do this; under the interface, this might take 10,000 actual instructions in binary.

In the 1940s through 1960s, vacuum tube computers took up entire rooms. These computers received instructions via code from holes punched in little cards. A vacuum tube computer was not available to the average consumer.

Over time, computer programmers developed shorthand for the plethora of 0s and 1s that make up binary computer instructions. This shorthand is known as computer programming language or as code. Computer programming tells the computer what circuits to turn off and on, and thereby what complex operations to perform.

In 1984, Steve Jobs revolutionized personal computing with the development of the Macintosh.

Unlike computers that required hole punched cards or tapes to give them instructions, the Macintosh had internal memory that stored programs, and it had a graphical user interface (or a GUI) that was intuitive to a lay person.

The Macintosh allowed anyone to interact with a computer. No longer did you have to be Steve Jobs or Bill Gates, or know how to program to use a computer. Now everyone, from the elementary school student to the veteran businessman, could use and reap the benefit of computers. This was because the MacIntosh took input from the everyday person using code and then converted it to appear through user interface that anyone could use.

Code forms the basis for all software applications on your computer, on your phone, and in your internet browser. Code is electronically stored information.

Computers may also run programs that store points of data in a database. A database is a table of rows and columns, containing myriad points of data. Computerized records, specifically those created and stored by a software application, are often comprised of data points created by a user or the software application, and then stored away. The stored data that makes up an electronic record often does not live in a format that can be glimpsed and interpreted with the naked eye.

A database is likely home to all the data points making up the record you are viewing through your software application. They cannot be easily printed or put into a PDF format. In this way, electronic records are much bigger than what you see on the surface through the user interface, or the printed template. There is always information underlying the surface of an electronic record.

For example, an email on its surface reads: “It is raining out today and I can’t make our appointment.” The message is time stamped for yesterday at 3 p.m. A look at the email writer’s calendar says that the meeting at 3 p.m. was cancelled. At first glance, on the surface of this email, it appears the meeting never happened.

However, a further review of weather records from that day tells us it wasn’t raining. A look at the underlying geolocation data logged on the writer’s email and cell phone tells us that the writer actually went to the meeting location. In addition, the cell phone geolocation of the recipient of the email shows that they were also at the meeting location at the same time.

As you can see, an email appearing to say one thing on the surface, was clearly a deception, when viewed in light of the underlying data. The underlying data of the email helps verify the reality of what happened.

Today, code and data are everywhere. We live in an internet of things. Nearly everything is connected to the internet and is logging data. Your internet browser is tracking your website and search history. Your FitBit is tracking your physical activity and sleep. Your city has sensors in its water supply, sewers, and electrical grid. Amazon’s Alexa is responding to and logging your every request. Your front door has a camera that shows you who is at your front door. There are computers logging data on the other side of all of these devices. There’s a date and time-stamp associated with every transaction made by a computer, whether it’s in your office or in the phone in the palm of your hand. This data underlies what you see on the surface of the user interface. If a file is deleted – it’s usually never really gone. When you delete a file, the directory file, which is akin to the catalog card in the library, has been disassociated from

wherever that book (i.e. the data) was stored on the bookshelf. That disassociation is not necessarily permanent. A software or database expert, can often use software or detective skills to put the directory file and the book (i.e. the data) on the bookshelf back together again.

In order to find or admit any of the above described ESI in your particular case, you will need to identify and preserve ESI.

III. *Preserving ESI*

In a case where it is reasonably likely to include discovery of ESI it is important to act early. Under 2.302(B)(5) a party has a duty to preserve when litigation is filed or reasonably anticipated. This duty to preserve also extends to ESI.²If a party fails to preserve ESI, that party may be subject to claims of spoliation and potential sanctions, including dismissal or default judgment.³

The duty to preserve may exist from another source as well, such as statute, rule, common law or court order. It is important to recognize whether there are rules independent of litigation that require preservation of ESI by your clients.

For example, in the case of the Health Insurance Portability and Accountability Act (HIPAA), the Privacy Rule guarantees patients the right to access their medical records and to obtain a copy of them. See 45 C.F.R. § 164.524 (a)(1). It also requires that health care providers keep a copy of records for six years. *Id.*

New rule MCR 2.313(D) further addresses the sanctions that may be imposed where a party fails to take reasonable steps to preserve ESI. However, a competent ESI attorney will consult with their clients about preservation from the outset, and will be prepared for a full discussion and disclosure of pertinent ESI.

IV. *Preparing for ESI Conferences Under the New Rules*

Under MCR 2.401(J), the parties may agree to an ESI conference, the court may order the parties to hold an ESI conference, or a party may file a motion requesting an ESI conference.

In this conference the court should consider matters that will facilitate fair and expeditious discovery, including: "...disclosure, discovery, preservation, and claims of privilege of ESI. MCR 2.401(b)(1)(d). MCR 2.401(J)(1) lists a number of factors to consider at the ESI conference.⁴ Following the conference, MCR 2.401(1)(4) allows the parties to motion the court

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Zubulake v UBS Warburg LLC, 220 FRD 212, 217 (SDNY 2003).

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See MCR 2.313(D); see also *Citizens Insurance Co of America v Juno Lighting, Inc*, 247 Mich App 236, 243; 625 NW2d 279, 382-383. (2001); *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997).

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MCR 2.401(J)(1) factors for consideration include, but are not limited to:

1. any issues relating to preservation of discoverable information, including adoption of a preservation plan for potentially relevant ESI;
2. identification of potentially relevant types, categories, and time frames of ESI;
3. identification of potentially relevant sources of ESI and whether the ESI is reasonably accessible;
 4. disclosure of the manner in which ESI is maintained;

or enter a stipulation governing the discovery of ESI. The parties have 14 days after an ESI conference to file an ESI discovery plan. See MCR 2.401(J)(2). The plaintiff's attorney is responsible for submitting the plan.

Under MCR 2.401(J)(4), the court may enter an order governing the discovery of ESI. This can occur pursuant to the parties' discovery plan, on motion of a party, by stipulation of the parties or on the court's own initiative.

Attorneys who participate in an ESI conference must be sufficiently versed in matters relating to their clients' technological systems to competently address ESI issues. There are numerous steps that attorneys can take to ensure ESI competence⁵:

1. Initially assess ESI discovery needs and issues, if any;
2. Implement appropriate ESI preservation procedures, including the obligation to advise a client of the legal requirement to take actions to preserve evidence, like electronic information, potentially relevant to the issues raised in the litigation;
3. Analyze and understand a client's ESI systems and storage;
4. Identify custodians of relevant ESI;
5. Perform appropriate searches for relevant ESI;
6. Collect responsive ESI in a manner that preserves the integrity of the ESI;
7. Advise the client as to options for collection and preservation of ESI;
8. Engage in competent and meaningful meet and confer with opposing counsel concerning an ESI discovery plan; and
9. Produce responsive ESI in a recognized and appropriate manner.

In sum, attorneys should obtain a basic understanding of what ESI, in code and in data, their client possesses that must be disclosed.

V. *ESI Form & Format*

One of the most important facets of an ESI discovery plan is "the form in which the ESI will be produced." See MCR 2.401(J)(2)(d). This requires understanding the "form" in which that code and data will be provided pursuant to MCR 2.310(A)(1) to ensure that it is viewable/useful when

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5. implementation of a preservation plan for potentially relevant ESI;
 6. the form in which each type of ESI will be produced;
 7. what metadata, if any, will be produced;
 8. the time to produce ESI;
 1. the method for asserting or preserving claims of privilege or protection of trial preparation materials, including whether such claims may be asserted after production;
 9. privilege log format and related issues;
 10. the method for asserting or preserving confidential and proprietary status of information either of a party or a person not a party to the proceeding;
 1. whether allocation among the parties of the expense of production is appropriate; and
 11. any other issue related to the discovery of ESI.

produced.

The new rule MCR 2.401(B)(2)(c) governing conferences and scheduling orders, permits the court to consider ESI and the form in which it should be produced as part of the scheduling order.

ESI data can be stored in various formats:

- Photos can be stored as: .JPG, .PNG, .BMP, .GIF or .PDF.
- Audio can be stored as: .MP3 or .WAV.
- Videos can be stored as: .MP4 or .MOV.
- Text document files can be saved as: .TXT, .DOCX or .WPD.

The above formats are just a few examples. In identifying and saving ESI discovery, attorneys should identify in what file format the information will be saved and how that information can be used in addition to what computer program or application will be necessary to open the file.

A Word document, ending in “.DOCX,” can only be viewed using Microsoft Word software. WordPerfect cannot open or review a “.DOCX” file. So if you only have WordPerfect software, you want files in a “.WPD” format, so that you can open and view them.

.EXE is an executable file format. An executable file contains a program that is capable of being run as a program in the computer.

If there is conflict about the form/format in which ESI should be produced or a conflict in regard to ESI, under the new Court Rules, parties may stipulate to, or the court may order, mediation of discovery disputes. Parties may also stipulate to and designate an expert as a discovery mediator of ESI issues. MCR 2.411(H)(4) permits the court to appoint an expert under MRE 706 in cases involving complex issues of ESI.

Now if all of this ESI form/format discussion sends your head spinning -- do not panic! To aid in ESI competence, counsel may bring a client representative or outside expert to assist in ESI conferences, and may consult these persons in order to identify ESI disclosures. In this Brave New World of ESI in litigation, you can always seek help.

VI. ESI Disclosures

Under the new MCR 2.302(A)(1)(d), a party must provide to all other parties:

“A copy – or a description by category and location – of all documents, ESI, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defense unless the use would be solely for impeachment...”

Initial disclosure of all documents, ESI and tangible things not in a party’s control is also required under MCR 2.302(A)(1)(e). Disclosure of the name and, if known, the address and telephone number of the person who has possession, custody, or control of the material should be identified.

Whether ESI is in your client’s custody or not, there should be a determination of the form in which the ESI will be produced. ESI can be produced in electronic or paper format. However,

electronic production is typically faster, easier, and cheaper. Electronically stored information is stored for the very purpose of preserving the ability to access that information in the future.

Stored data can be obtained from databases in minutes by writing a query (i.e. a line of code to pull specific information from a database). Other times the GUI in a software program provides tools to request specific information. Information technology staff or clerical staff often maintain the databases and queries/reports information from the database as a matter of routine.

ESI is always easier to understand and manipulate in its native format. The native format is the format in which the information was initially created and viewed. However, sometimes when data is saved in a database, it is best viewed in Excel in a table.

Viewing data in a .CSV (comma separated value file) or other database file viewable through an interactive table is a good option when the software that created the data is not in the opposing party's possession.

Records produced in PDF format are not always the best way to ensure that the entirety of the record with its underlying data is being viewed. If a record is produced in PDF format, then it should be produced with Optical Character Recognition (OCR) so it is searchable and can be bookmarked.

A party may not need to provide discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost. MCR 2.302(B)(6) discusses limitations on discovery of ESI.

However, even if a showing of undue burden or cost exists with regard to ESI, the court may nonetheless order discovery if the requesting party shows good cause, considering proportionality under MCR 2.302(B)(1) and the limitations of MCR 2.302(C), including annoyance, embarrassment, oppression, undue burden or expense. The court may specify the conditions for the discovery, including allocation of the expense, and may limit the frequency or extent of discovery of ESI (whether or not the ESI is from a source that is reasonably accessible).

V. Conclusion - Key Takeaways

Aldous Huxley quotes Shakespeare in the title of his book, *A Brave New World*, to highlight the naive excitement we can have for technological wizardry and the world of perceived control that it brings. While we marvel at ESI, we must be mindful of the ever-growing challenges and requirements for marshalling ESI in civil cases.

ESI is complex discovery that requires strategic planning by attorneys to ensure full disclosure in the spirit and function of the new Michigan Court Rules. A few key takeaways in this endeavor are as follows:

1. Remind your clients and opposing parties about duty to preserve early on and make sure no ESI is deleted/spoliated (trash files, emails, etc).
2. Make sure your client understands where ESI is stored (phones, tablets, computers, servers, systems).

VI. Know in what form or format ESI will be produced and requested.

VII. Plan for inadvertent disclosure of privileged ESI and actions to recover.

VIII. Figure out and allocate costs of ESI discovery.

IX. If you do not understand technical aspects of ESI, hire an outside expert or affiliate with co-counsel skilled in ESI.

May we all marvel at our future ESI skills, and respect the need to keep learning more. Go forth and be an advocate competent in the world of ESI.

“O brave new world, That
has such people in ’t!”

• William Shakespeare

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