

E-Discovery in Michigan



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DISCLAIMER:



This is by no means a comprehensive examination of E-Discovery issues.

You will not be an E-Discovery expert after this presentation.

The intent of this presentation is to familiarize you with some of the core E-Discovery concepts and rules.

What is E-Discovery?

Electronic Discovery is still discovery. The goals are the same, and the guiding principles are the same.

E-Discovery deals with Electronically Stored Information (“ESI”).

In our “paperless” society, almost every case will have some ESI that needs to be dealt with. 93% (or more) of all new information is stored in digital form.

www2.sims.berkeley.edu/research/projects/how-much-info-2003

Michigan Rules Impacting E-Discovery

- Michigan rules effective as of: **January 1, 2009**.
- Substantially follow the 2006 E-discovery amendments to the Federal Rules of Civil Procedure
- Address how ESI should be preserved, produced, allocation of e-discovery costs, use of claw back agreements, and form of production. The new rules also include a “safe harbor” provision intended to protect parties who, in good faith, inadvertently delete ESI relevant to litigation.
- Michigan is one of approximately 19 states that have added court rules to address e-discovery.

Michigan Rules Impacting E-Discovery

- Two principal differences from the federal rules:
 - MCR 2.302(B)(6) and 2.506(A)(3) more explicitly allow for cost shifting when dealing with ESI that is "not reasonably accessible;" and
 - MCR 2.302(B)(5) and 2.313(E) provide for broader "safe harbor" provision when information is lost in good faith subject to routine retention/deletion policy of the responding party.

Common E-Discovery Issues

- Accessibility
- Collection of ESI
- Determining What to Produce
- Privilege
- Form of Production
- Spoliation

ACCESSIBILITY

Accessibility

MCR 2.302(6)

Limitation of Discovery of Electronic Materials. 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 may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of MCR 2.302(C). The court may specify conditions for the discovery.

What is “Not Reasonably Accessible?”

Sedona Principle 2: “When balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard embodied in Fed. R. Civ. P. 26(b)(2)(C) and its state equivalents, which require consideration of the **technological feasibility and realistic costs of preserving, retrieving, reviewing, and producing electronically stored information**, as well as the nature of the litigation and the amount in controversy.”

What is “Not Reasonably Accessible?” (cont’d)

Sedona Principle 8: “The primary source of electronically stored information for production should be active data and information. Resort to disaster recovery backup tapes and other sources of electronically stored information that are not reasonably accessible requires the requesting party to demonstrate need and relevance that outweigh the costs and burdens of retrieving and processing the electronically stored information from such sources, including the disruption of business and information management activities.”

Accessibility - Cost Shifting

MCR 2.302(B)(6) and 2.506(A)(3) are more explicit than their Federal counterparts in allowing for cost shifting when dealing with data that is not “reasonably accessible”

COLLECTION OF ESI

Collection of ESI

- Develop written Collection Plan
- Choose best collection personnel
 - Vendor specialist vs. client (IT) collection
- Select optimal collection technologies
 - Collect all active files vs. using tool to collect more selectively?
- Maintain appropriate documentation (e.g., Chain-of-Custody, Collection Tracking Worksheet)
- Evaluate reports of collected data
- Every step must be legally defensible

Common ESI Collection Pitfalls

- Failing to plan effective collection (poor coordination with custodians, collecting over a network rather than direct)
- Compromising metadata during collection
- Over-collection (not using technology or processes to cull irrelevant files at point of collection, if applicable)
- Under-collection (using flawed searches or missing relevant custodians and sources)

DETERMINING WHAT TO PRODUCE

Reviewing the Collected ESI

- Vendors estimate that 80% of E-Discovery cost is tied to the review
- Start out by defining the scope of the review (typical scope: Sort out responsive documents to produce and privileged documents that should be withheld)
- At this stage, it is typically a good idea to segregate “potentially privileged” for later review (we will discuss privilege review later)
- Determine whether using vendor or in-firm technology or combination (keeping in mind storage space, review software needs, and cost).

Responsiveness Review

- Typical considerations during review
 - Establish workflow and milestones
 - Learn all deadlines, and don't forget to factor in time
 - to obtain all docs from client
 - deliver to vendor
 - load into review tool and process
 - train reviewers on case subject-matter
 - train reviewers on review tool
 - review documents
 - QC/audit
 - process documents for production,
 - and QC production

Responsiveness Review

- Typical considerations during review (cont.)
 - Assemble the right review team
 - Select good review technology and environment, configure review tool to match review protocol
 - Organize review workflow - First-pass review, second-pass review, who should review documents of particular significance or sensitivity?
 - Analyze opportunities for culling in review tool
 - Search and eliminate junk mail (advertising)
 - Provide effective reviewer protocol

Responsiveness Review

- Assemble package of key documents for reviewers, including Complaint and/or Answer, interview memos, sample documents, and document review memo
- Document review memo should describe: Issues in case, what plaintiff/defendant will try to prove and how, the names and roles of key players, the names and roles of attorneys, what the subject matter tags are and why they should be used, and a decision tree for reviewing documents
- Assign review sets (if possible, match reviewer with email custodian, subject matter, and/or e-mail strings)

Common Review Pitfalls

- Not knowing the data prior to processing
- Failing to evaluate effective data culling strategies (de-duplication, search terms, date ranges, file types, etc.)
- Failing to code consistently
- Not allocating enough time and analysis to keyword search terms
- Not managing expectations

More Pitfalls...

- Poor document review planning (not calculating required resources to meet given production deadlines)
- Failing to communicate precise review protocol/document decisions to review team
- Failing to supervise the review team
- Inadequate quality checks and progress monitoring

PRIVILEGE

Privilege

- After potentially privileged documents have been segregated, they need to be reviewed for privilege.
- Documents that are privileged will need to be logged and the log must be produced. Non-privileged docs that were segregated will need to be part of a supplemental production.
- Beware of redactions! Make sure to redact the text as well as the image. If you are doing a native file production, you will have to make an exception for partially-privileged docs.
- *Sedona Principle 10*: "A responding party should follow reasonable procedures to protect privileges and objections in connection with the production of electronically stored information."
- Federal Rule 26(b)(5)(B); MCR 2.302(7) (inadvertent production)

Privileges

- Attorney-Client Privilege
 - Confidential
 - Communication
 - Between Attorney and Client
 - For Purpose of Giving/Receiving Legal Advice
- Work Product Protection
 - Prepared by or at request of Attorney
 - Because of/For Use in/Would not be created but for
 - Litigation
- Other Privileges

How to establish the right of protection

➤ Privilege Log

- Minimal Contents:
 - Author
 - Recipients
 - Date
 - Description (but don't waive the privilege!)
 - Protection Claimed
- Log must provide sufficient information to support the claim of privilege or protection
- Failure to provide an adequate log can waive the privilege

Identifying Privileged Documents

➤ Knowledge is the Key

- Who are (and were) the players?
 - What are (and were) their roles?
 - What legal issues/litigation has the client faced?
- You will need a memo with the names of all attorneys (don't forget your client's legal department), the e-mail addresses of all attorneys, and the e-mail domain names of all attorneys (search the domain name to pick up other staff at the law firms who might not be on your list). Also include information regarding the varying roles of the attorneys on the list.
- Prepare a privilege review protocol.

FORM OF PRODUCTION

Form of Production

- Types of productions
 - All at once
 - Rolling
- Forms of production
 - Paper
 - Quasi-Paper
 - Native
 - Quasi-Native

Form of Production

- Consult FRCP 26(f)(3) & FRCP 34(b) regarding duty to confer in federal court.
- MCR 2.401 states 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.”
- Find out what review platform your opponent is using, and what type of load file they need
- What fields/metadata are being exchanged (work out an agreement re objective data, and always check the final production CD to make sure that only those fields are on the disk...you do not want to give away work product!)

Form of Production

Federal Rule 34(b) – “The request: [...] may specify the form or forms in which electronically stored information is to be produced [...] [the responding party may lodge] an objection to the requested form for producing electronically stored information...the [responding] party must state the form or forms it intends to use.”

Form of Production (cont'd)

- Rule 34(b)(2)(E) – “(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and
- “(iii) A party need not produce the same electronically stored information in more than one form.”

Form of Production (cont'd)

- MCR 2.310(C) - Requests for Production of Documents
- Amended to require that requests must specify a reasonable time, place, and manner of making the inspection/production, as well as the form or forms in which ESI is to be produced
- If the request does not specify the form in which ESI is to be produced, it must be produced in a form or forms in which the producing party ordinarily maintains it, or in a “reasonably usable” form
- ESI need only be produced in one form

Form of Production (cont'd)

Sedona Principle 12: “Absent party agreement or court order specifying the form or forms of production, production should be made in the form or forms in which the information is ordinarily maintained or in a reasonably usable form, taking into account the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case.”

SPOLIATION

Spoliation in General

Sedona Principle 14: “Sanctions, including spoliation findings, should be considered by the court only if it finds that there was a clear duty to preserve, a culpable failure to preserve and produce relevant electronically stored information, and a reasonable probability that the loss of the evidence has materially prejudiced the adverse party.”

Spoliation — Fed. Rule 37(e)

- Safe Harbor
- Rule 37(e) “Failure to Provide Electronically Stored Information. 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.

Spoliation

MCR 2.302(B) & 2.313(E)

- Provide for broader “safe harbor” when information is lost in good faith subject to routine retention/deletion policy of the responding party
- Staff comment explains that “good faith” may be shown by a party’s attempts to preserve ESI as part of an e-discovery “litigation hold” process.

TOP TEN WAYS TO CUT COSTS

[<http://www.ca10.uscourts.gov/conference/downloads/ediscovery6.pdf>]

#10

- Cooperate with opposing counsel to develop a “multi-tiered” discovery plan that concentrates first on review and production of relevant data from the most accessible sources, and avoids review and production of data from less accessible sources unless and until it is shown to be necessary.
- See Sedona Principles 8 and 9, Rule 26(b)(2)(B)

#9

- Make specific requests and responses. Nothing wastes more time and energy in discovery than a set of vague, overbroad requests promoting a set of vague, overbroad objections.
- See Sedona Principle 4

#8

- Enter into a “clawback” agreement with opposing counsel to mitigate both parties’ privilege review risks.
- See Sedona Principle 10, Rule 26(b)(5)

#7

- Go beyond agreeing with opposing counsel on the form or forms of production, and consider agreeing on a common litigation support platform and the exchange of “standard” objective metadata
- See Sedona Principle 12, Rules 26(f)(3) and 34(b)

#6

- Use technology to assist in identification, review, and response. Mutually agreed-upon sampling, de-duplication, and keyword searches are good starting points.
- See Sedona Principle 11

#5

- Preserve and review potentially responsive data in native format, if possible. If money must be spent on data conversion, spend it later on the small amount of data most likely to be produced to opposing counsel.
- See Sedona Principle 12

#4

- Focus on data preservation issues early in the case – well before the Rule 26(f) conference. This is a two-way street, for both requesting and responding parties.
- See Sedona Principle 3

#3

- Include knowledgeable IT, RM, and business personnel in litigation response planning, conferences, and execution. Effective response is a team effort.
- See Sedona Principle 6

#2

- Establish a standard “litigation response” procedure, just as you would have any other business risk mitigation procedure (fire, flood, earthquake, epidemic, etc.). No well-run business should be without it.
- See Sedona Principle 5, Rule 37(e)
- The Sedona Conference Commentary on Legal Holds (public comment version) (2007)
www.thesedonaconference.org

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- Develop and implement a comprehensive e-records management program before any litigation is contemplated. It just makes good business sense.
- See Sedona Principle 1, Rule 37(e).
- The Sedona Conference Commentary on Email Management (2007)
www.thesedonaconference.org

Resources

- The Rules and Committee Notes themselves
www.uscourts.gov/rules/EDiscovery_w_Notes.pdf
- Managing Discovery of Electronic Information: A Pocket Guide for Judges (FJC: 2007) www.fjc.gov
- The Sedona Principles, Second Edition (2007)
www.thesedonaconference.org
- Conference of Chief Justices Guidelines
www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf
- Fios (vendor) Website – free webinars, articles, etc.
www.fiosinc.com/e-discovery-knowledge-center/default.aspx
- Applied Discovery (vendor) Website – free articles, caselaw, white papers, samples, etc.
www.applieddiscovery.com/ws_display.asp?filter=Online%20Law%20Library