

Michigan's New eDiscovery Rules

The Michigan Supreme Court on September 18, 2019, [issued an order](#) making Michigan the 37th state in the nation to mandate attorneys' ethical duty of technology competence. The order adopted variations of Model Rule 1.1, Comment 8, of the American Bar Association's Model Rules of Professional Conduct, stipulating duty of technology competency, and Model Rule 1.6, stipulating duty to maintain confidentiality of electronically stored information (ESI).

The amendments come in the context of comprehensive changes to Michigan's civil discovery procedure rules, [adopted](#) by the Michigan Supreme Court on June 19, 2019. The changes, which mark the first holistic update to civil discovery procedure in more than three decades, aim to make the discovery process more efficient and less costly for the public. All changes are effective January 1, 2020.

What You Need to Do

Consulting with Acorn Legal Solutions at least four weeks prior to your ESI discovery plan deadline will help simplify the process of adhering to these changes. It's not yet clear how Michigan will enforce these rules. Some states have [mandated training](#) for all attorneys; others are simply establishing best practices. No matter what, these changes in the treatment of ESI and eDiscovery give attorney's two main options: **invest in education and in-house compliance measures** or **partner with an expert eDiscovery consultant**.

How the Rules Have Changed

As you start to scope out how much training and infrastructure your practice will need to comply with the new rules, here are the main issues to consider:

Duty of Technological Competence: Lawyers are required to maintain reasonable competence in relevant technology, including existing and developing technology that are reasonably necessary to provide competent representation for the client in a particular matter, as part of the lawyers' ethical duty. Sanctions may be imposed if ESI is lost due to incompetence.

Duty to Maintain Confidentiality: The rule stipulates that when transmitting a communication that contains confidential and/or privileged information relating to the representation of a client, lawyers are obligated to take reasonable measures and act competently so that the confidential and/or privileged client information will not be revealed to unintended third parties. Sanctions may be imposed on lawyers who do not maintain confidentiality, should that negligence result in loss of data or some other obvious violation of privacy.

Essential considerations for maintaining confidentiality of ESI include understanding how client information is transmitted and stored, determining how electronic communications regarding client matters should be protected, as well as training lawyers and nonlawyer assistants in technology and information security.

Procedural Issues: The amended **MCR 2.310(A)** clarifies that ESI is included in the definition of “documents,” which attorneys have a duty to preserve under Michigan common law. The updated rules also place case management tools squarely in the hands of the courts. MCR 2.401(J) outlines special rules for ESI conferences, discovery plans, and orders. New to the process is the addition of the ESI Conference which mandates parties to adopt a preservation plan and identify relevant files/data sources and assess accessibility.

Under **MCR 2.401(J)** the ESI discovery plan must be submitted to the court within 14 days of the conference. **MCR 2.401(J)(3)** requires “ESI competence” for any attorney participating in an ESI conference. The new rules also adopt a clear standard for the imposition of sanctions when ESI is lost, effectively encouraging early and regular case management including the appointment of ESI experts and discovery mediators to manage discovery plans from beginning to end.

Recommended Reading

- Warner Norcross+Judd: [A Look at the Coming Changes to Michigan’s Civil Discovery Rules](#). (Jul. 30, 2019) - An analytical list of the changes to the discovery rules by Kenneth J. Treece and Jay Yelton.
- LawSites: [A 37th State Adopts the Ethical Duty of Technology Competence](#). (Sep. 18, 2019) - An article by Robert J. Ambrogi highlighting the amendments to the rules and comments.
- Michigan Bar Journal: [The New Civil Discovery Rules](#). (Sep. 2019) - A breakdown of the new discovery rules and their importance by Daniel D. Quick.

About Acorn

Acorn is a legal data consulting firm that specializes in AI and Advanced Analytics for litigation application, while providing rigorous project management to the eDiscovery industry. Although capable of serving AmLaw 100 Law Firms and Corporate Legal departments, Acorn primarily works with large regional, midsize national and boutique litigation firms. Acorn provides a high-touch, customized litigation support services with a heavy emphasis on seamless communications.