

# Memo

**To:** All Attorneys  
**From:** MG  
**Date:** October 3, 2008  
**Re:** **Lawyers Weekly Article: Lack of Safe Harbor Raises Questions about MSC's Proposed E discovery Rules by Todd C. Berg**

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The Michigan Supreme Court's (MSC) proposed changes to electronically stored information alters the discovery section of the Michigan Court Rules. This leaves attorneys with *no safe harbor provision* for parties that inadvertently destroy relevant, discoverable ESI, creating a risk of discovery sanctions if information later determined relevant and discoverable was inadvertently deleted. The Federal Rules, in contrast, have a safe harbor in place to protect "routine, good-faith operation of an electronic information system."

This means that those who destroy information under either a reasonable recovery destruction policy or in the course of implementing reasonable litigation hold procedures, may still be subject to discovery sanctions. No announcement has been made about when the court will make a decision on its proposed rules.

The authors further opine that the court's proposed rules ignores the reality that there has been a massive increase in the amount of ESI in the business community, which has led to obvious record retention and destruction policies to manage the volume of ESI. This creates a fear of never being able to throw away anything. The State Bar of Michigan advocated withholding sanctions when the information "was destroyed under a reasonable record destruction policy."

The authors requested a more detailed safe harbor provision, following the federal rules lead, but adding the language of "reasonable litigation hold procedures". Justice Corrigan asked for a definition of this expression while Justice Young questions whether the pair's proposal had the "unintended consequence of creating a burden for parties, rather than a safe harbor". The pair plans to submit a follow up letter to the Supreme Court in the coming weeks. We will keep you posted!