

# Seeing 20/20

Reasonable and Proportional Discovery in 2020



# Presenter Credentials

- **Doug Austin:** Doug is the Editor of [eDiscovery Today](#) and is an established eDiscovery thought leader with over 30 years of experience providing eDiscovery best practices, legal technology consulting and technical project management services. Doug has published a daily blog since 2010 and has written numerous articles and white papers. He has received the JD Supra Readers Choice Award as the Top eDiscovery Author for 2017 and 2018 and as a Top Cybersecurity Author for 2019.
- **Mandi Ross:** Mandi Ross is the founder and CEO of [Prism Litigation Technology](#), an eDiscovery advisory firm started in 1997. She is a court-appointed ediscovery expert who has led many successful engagements for both corporate legal teams and outside counsel during her 32-year career. Specializing in the deployment of technology-assisted workflows that operationalize proportionality, she has served as a strategic advisor for some of the largest, most complex lawsuits and investigations in the last three decades. Mandi is also a nationally recognized speaker on eDiscovery-related topics and has developed and provided varying levels of continuing education to the legal community.
- **Martin T. Tully:** Martin is a founding partner of [Actuate Law, LLC](#) in Chicago. He is a veteran trial lawyer with over 25 years of national experience representing companies and individuals in complex commercial litigation concerning a broad array of fields and industries. Empowered by his commercial litigation practice, Martin is nationally recognized for his knowledge and experience in the fields of electronic discovery, information governance, and data security/data privacy. Martin is also a founder and the Managing Member of [Quintec LLC](#), a legal tech subsidiary powered by Actuate Law. Quintec's mission is to design and build legal expert systems and other AI-driven tools that automate the delivery of legal and compliance services to meet client and industry demand for more efficient, scalable, and cost-effective solutions.



# Overview

- Challenges Posed by BIG Data and Variety of Data Sources
- Rules Regarding Proportionality and Discovery
- Why the “Boilerplate” Objection is No Longer Acceptable
- Key Case Law Related to Proportionality and Discovery
- Accelerated Timeframes for Understanding Your Data Collection
- Bridging the Void Between Legal Hold and Collection
- A Case Study in Operationalizing Proportionality
- Recommendations for Proportional and Defensible Discovery
- Resources for More Information
- Questions



# Disclaimer

Ideas expressed here are not necessarily those of our clients, employers or partners and may simply represent ideas intended to be helpful in the context of this webcast.



# Challenges Posed by BIG Data and Variety of Data Sources

## BIG Data Is Adding New Challenges

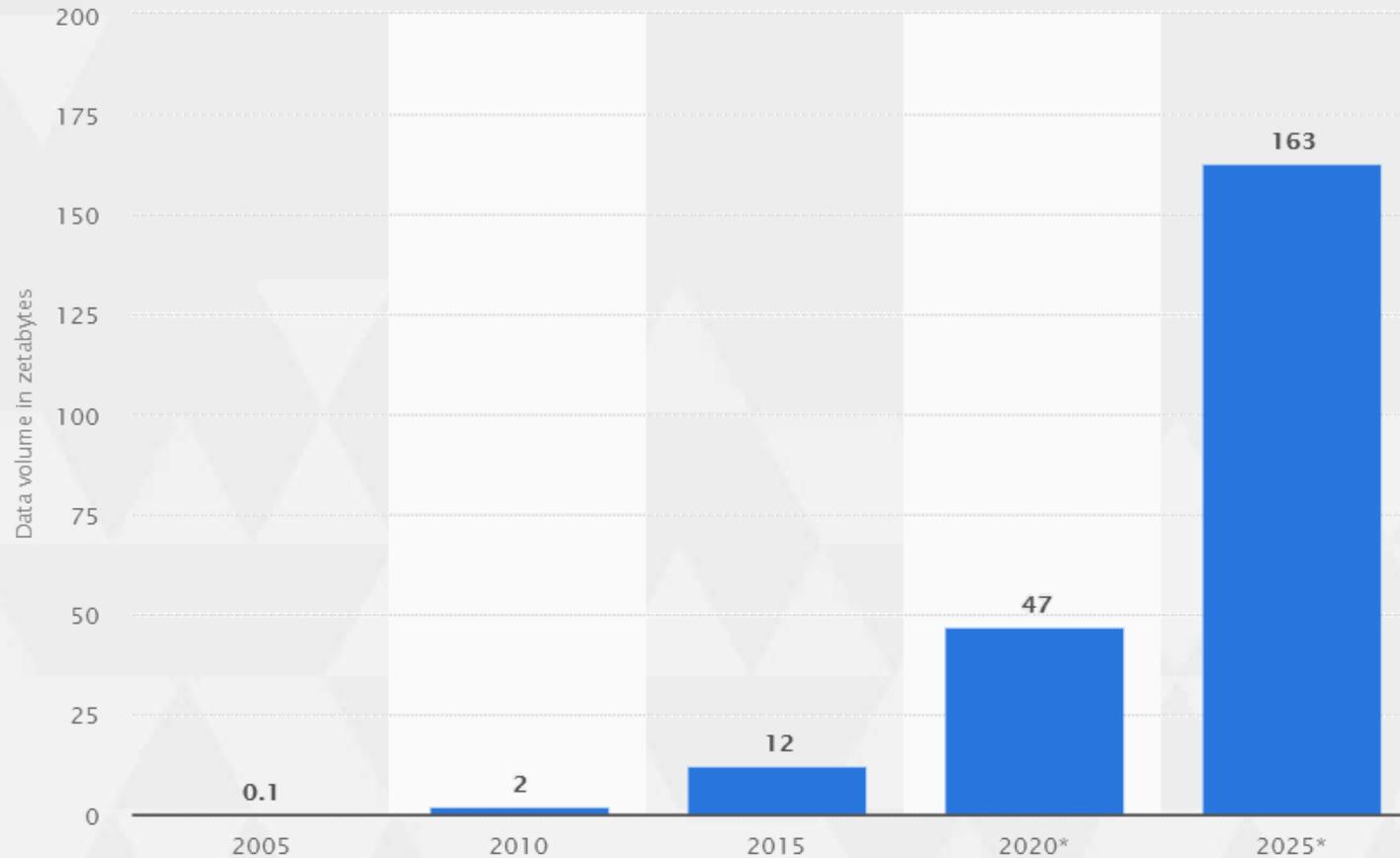
Some BIG Data Fun Facts:

- Every **2 days** we create as much information as we did from the beginning of time until **2003**.
- Data is growing faster than ever before and by this year, about **1.7 megabytes** of new information is being created **every second for every human being** on the planet.
- By 2025, our accumulated digital universe of data will grow from **2 zettabytes** in 2010 to around **163 zettabytes**, or **163 trillion gigabytes**.
- If you burned all of the data created in just one day onto DVDs, you could stack them on top of each other and reach the moon – **twice**.



Source: SmartDataCollective

# Challenges Posed by BIG Data and Variety of Data Sources



Source: Statista

# Challenges Posed by BIG Data and Variety of Data Sources

## Various Sources of Data

- Volume
- Velocity
- Variety
- Variability
- Veracity
- Validity
- Vulnerability
- Volatility
- Visualization
- Value
- Complexity

## 2020 *This Is What Happens In An Internet Minute*



# Rules Regarding Proportionality and Discovery

Rule 26(b)(1): Duty to Disclose, General Provisions Governing Discovery; Discovery Scope and Limits; Scope in General

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.



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Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is **relevant** to any party's claim or defense and **proportional** to the needs of the case, considering the **1)** importance of the issues at stake in the action, **2)** the amount in controversy, **3)** the parties' relative access to relevant information, **4)** the parties' resources, **5)** the importance of the discovery in resolving the issues, and **6)** whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.



# Rules Regarding Proportionality and Discovery

## Rule 34(b)(2): Producing Documents, Electronically Stored Information...; Procedure; Responses and Objections

(B) Responding to Each Item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) Objections. An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.



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# Why the “Boilerplate” Objection is No Longer Acceptable

{Party} “objects to this request as overly broad, unduly burdensome, vague, ambiguous, and not reasonably calculated to lead to the discovery of admissible evidence”

The phrase “overly broad, unduly burdensome, vague, ambiguous” violates the requirement in Rule 34(b)(2)(B) to “state with specificity the grounds for objecting to the request, including the reasons”.

The phrase “reasonably calculated to lead to the discovery of admissible evidence” was stricken from Rule 26(b)(1) in the 2015 Federal Rules changes and replaced with the six points of relevancy and proportionality previously discussed.



# Key Case Law Related to Proportionality and Discovery

## Halleen v. Belk, Inc., No. 4:16-CV-55 (E.D. Tex. Aug. 6, 2018)

- In this Fair Labor Standards Act (“FLSA”) conditionally classified collective action against the defendant over failure to pay overtime compensation, the plaintiffs filed a Motion to Compel Production of Documents and Electronically Stored Information, and Proper, Complete Answers to Interrogatories in March 2018;
- The plaintiffs argued that the defendant’s objections to their RFPs and Interrogatories were “deficient, inapplicable, and/or without merit”, but the defendant, whose responses and objections consisted of assertions of privilege or contained “subject to” or boilerplate language, responded that its objections were not only appropriate but necessary to protect itself from Plaintiffs’ abusive discovery requests;
- Among his rulings, Texas District Judge Amos L. Mazzant, III granted the plaintiffs’ motions in part, ruling that the defendant **“as a result of using such language, waived each of its objections”**.



# Key Case Law Related to Proportionality and Discovery

## Small v. Univ. Med. Ctr. of Southern Nevada, No. 2:13-cv-00298-APG-PAL (D. Nev. Aug. 18, 2014)

- A partial chronology within the Special Master's report demonstrated that the defendant did not issue or put any litigation hold in place until more than **250 days** after the plaintiffs initiated the action.
- It was determined that the company issued mobile devices were not put under litigation hold until after a number of the devices were wiped clean and no hold was issued at all for BYOD devices.
- The defendant also failed to identify and preserve network file shares, two laptops belonging to key custodians and work computers used by **24** of the **27** custodians.
- The Special Master, calling the defendant's widespread failure to preserve data a "**mockery of the orderly administration of justice**", recommended that the court enter an order of default judgment, along with further sanctions, in favor of the plaintiffs.



# Key Case Law Related to Proportionality and Discovery

## Solo v. United Parcel Services Co., No. 14-12719 (E.D. Mich. Jan. 10, 2017)

- In this putative consumer class action case dealing with alleged overcharging for shipments, the plaintiff requested detailed package-specific discovery for a period going as far back as 2008.
- The defendant contended that providing the package-specific information requested would be excessively burdensome because the data was maintained in a “live” format for a limited period of time and then archived on backup tapes (the defendant provided an estimate of at least **\$120,000** just to restore the backup tapes).
- Instead, the defendant provided an estimate of the number of packages with declared value over \$300 that were shipped during the period June 30, 2013 to December 29, 2013 per the 180-day period to provide notice of a billing dispute per contract terms.
- Michigan Magistrate Judge R. Steven Whalen agreed that the defendant showed that the level of data requested by the plaintiff “would be extraordinarily burdensome” and ordered the parties to meet and confer regarding the defendant’s proposed methodology.



# Accelerated Timeframes for Understanding Your Data Corpus

## How Long Do You Have?

- **Rule 16(b):** The [scheduling] order shall issue as soon as practicable but in any event within **90** days after the appearance of a defendant and within **120** days after the complaint has been served on a defendant.
- **Rule 26(f):** “the parties must, as soon as practicable and in any event at least **21** days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer.”



# Accelerated Timeframes for Understanding Your Data Corpus

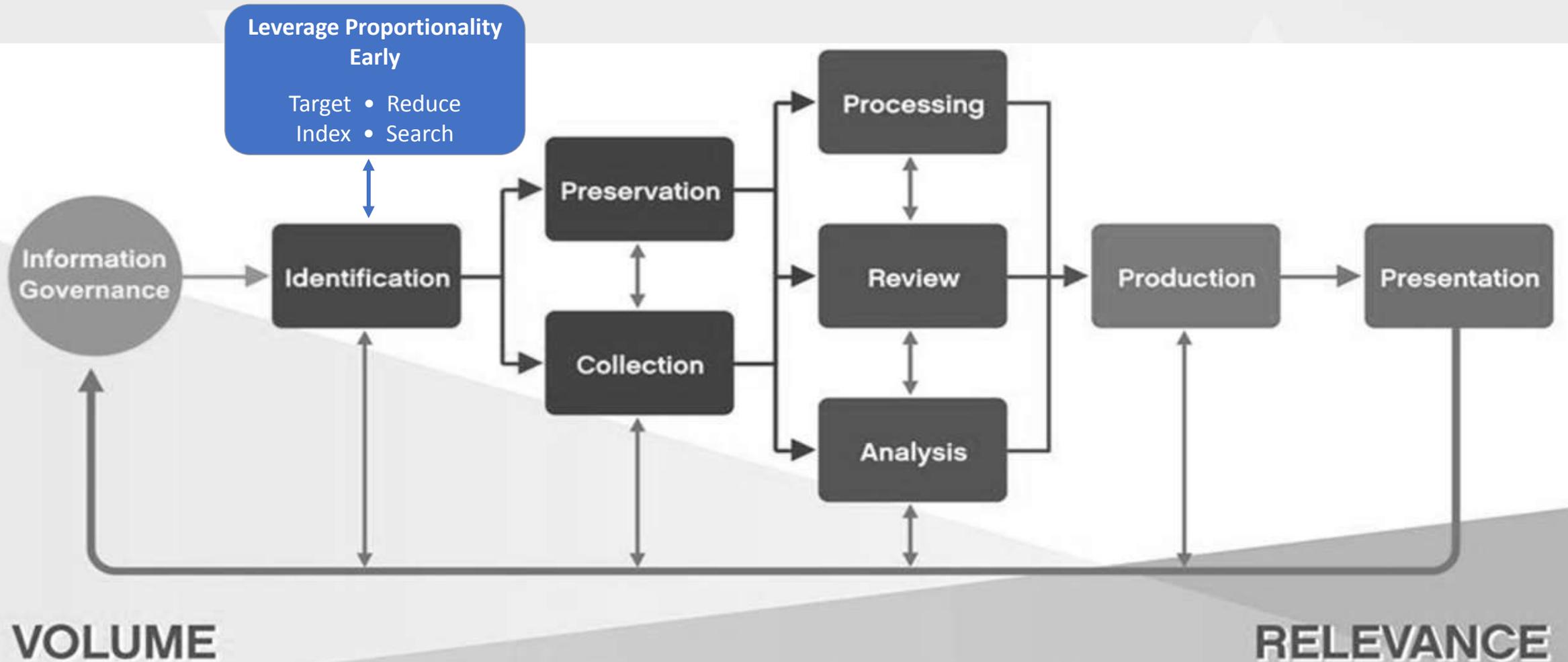
## How Long Do You Have?

- **Michigan MCR 2.302(A)(5)(b)(i):** Parties filing a complaint, counterclaim, cross-claim, or third-party complaint must serve initial disclosures **14 days** after opposing party files an answer.

Initial disclosures must include relevant custodian information and a copy or a description by category and location of all documents, both within and outside of the disclosing party's possession, that may be used to support its claims or defenses.



# Bridging the Void Between Legal Hold and Collection



# Deploying an Early Proportionality Mindset

Identification (EDRM)

  
Custodian Relevancy Ranking

- 4 - Priority
- 3 - High
- 2 - Medium
- 1 - Low
- 0 - Released

  
Data Source Burden and Effort

- 1 - Low
- 2 - Medium
- 3 - High
- 4 - Burdensome
- 0 - Released

  
Preserve / Index Search in Place

Sample data based on claims and defenses

Negotiation

# Discovery Scoping and Negotiation



Negotiate scope of discovery

Calculate discovery budget

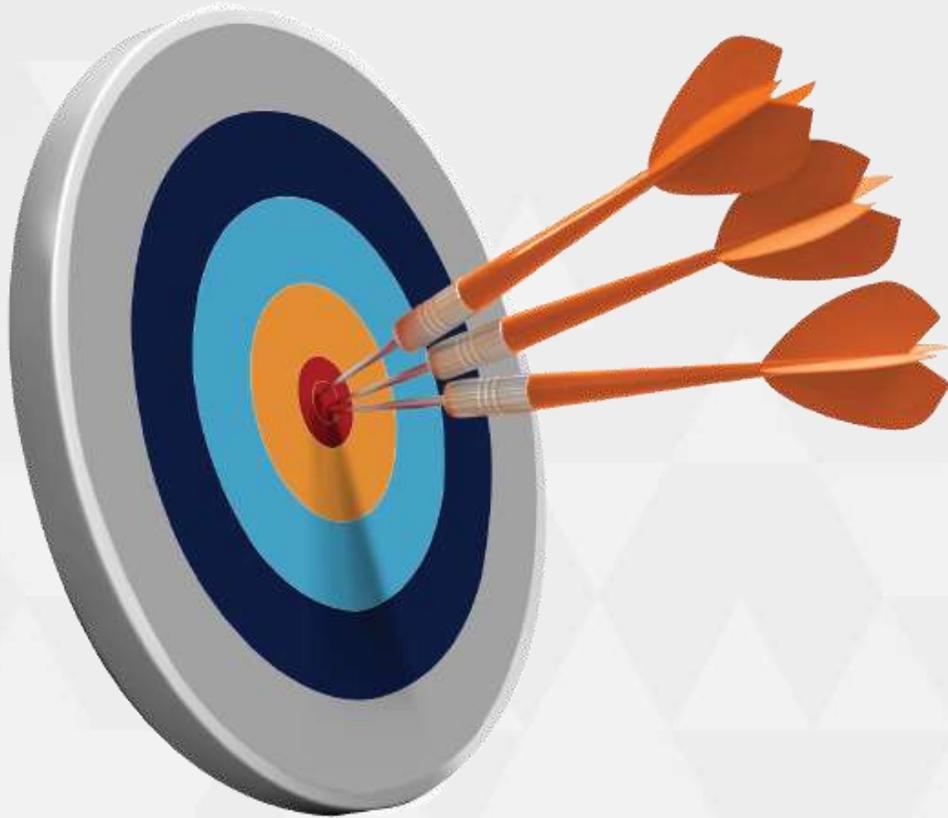
Finalize ESI Protocol

Release Hold (if applicable)

Perform targeted collection



# A Case Study in Operationalizing Proportionality



**63**

Custodians – Not relevant / released; no data collected (28%)

**130**

Custodians – Medium relevance; limited data collected (59%)

**29**

Custodians – Priority relevance; all data collected (13%)

# Important: Timing is Critical

## The First 7 to 10 Days are Critical

- **Create List of Key Custodians Most Likely to have Documents Relevant to the Litigation:** Track information such as name, title, email address, phone number, office location and where information for each is stored.
- **Issue Litigation Hold Notice and Track Results:** Issue ASAP and track compliance.
- **Interview Key Employees and Department Representatives:** Identify potential locations of responsive data, stop automated/routine destruction.
- **Inventory Sources and Volume of Potentially Relevant Documents:** Early data assessment.
- **Plan Data Collection Methodology:** Self-collected or managed by IT/outside provider.



# Recommendations for Proportional and Defensible Discovery

1. Recognize your responsibilities under FRCP 26(b)(1), Rule 34(b)(2) and applicable state rules
2. Be prepared to address Big Data and various non-traditional sources of ESI
3. Understand your data corpus early to support negotiations during meet and confer and specificity of potential objections
4. Create a defensible and transparent process for negotiations by documenting all custodian survey responses and attorney assessment decisions
5. Customize your workflow for each case to fit the needs of the case in terms of custodian interviews, assessment factors, etc.



# Resources for More Information

1. [How to Leverage the In Situ eDiscovery Model to Win Proportionality Arguments](#), Betsy Hendrick, Anne Kershaw, Mandi Ross, and Janice Yates, ACC Digital Docket, May 4, 2020
2. [Michigan Court Rules 2020 - A Guide](#), December 10, 2019, Prism Litigation Technology
3. [The eDiscovery Times, They Are A-Changin'](#), June 1, 2020, Martin Tully, Mandi Ross & Janice Yates
4. [Proportionality: The Earlier, The Better](#), 2019, Prism Litigation Technology
5. [Proportionality Archive](#), eDiscovery Today
6. [You Know It's Bad When The Court Decision Has A Table Of Contents](#), Above the Law, Mike Quartararo, September 18, 2018



# Questions/Comments/Contact

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