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Facing E-Discovery: Preparedness and Compliance

Chris Delgado

Georgia State University College of Law

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Facing E-Discovery: Preparedness and Compliance

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E-Discovery News

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- [The Upcoming Carmel Valley E-Discovery Retreat \(CVEDR\) 2012](#)
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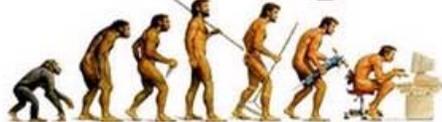
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Overview of E-Discovery

eDiscovery



[Electronic Discovery](#) (E-Discovery or eDiscovery) is an evolution of the discovery phase of civil litigation. Discovery involves the exchange of information during an intermediate stage between pleading and trial. The discovery process allows litigants to obtain information about the merits of the lawsuit. Based on this information, the parties can make informed judgments about the strength of their position and their opponent's position.

Within the past twenty years, corporations have revolutionized the way they communicate and store records and information. Moving almost exclusively from paper-based storage and microfiche, corporations have embraced electronic media storage and communications. Today, this means not just email, but corporate blogs, wikis, instant messaging, and even social media sites. Additionally, electronic document and content management systems house everything from contracts, internal memos, corporate policies, and job procedures.

Electronic storage technology provided efficiency for both storage and access to information. In turn, this fueled the growth of corporate data to the point where the discovery process encountered delays. Court-ordered discovery of email relevant to the proceeding sometimes cannot be produced because, for example, a backup tape was lost, or the email was not properly archived. A seminal case highlighting this problem is [Zubulake v. UBS Warburg LLC](#). Critical evidence was held in email stored on UBS computer systems. When UBS was unable to produce the email, the court determined the emails likely existed. Even though UBS' general counsel instructed all emails be preserved, UBS' technology department did not archive past emails. The court sanctioned UBS for failure to comply with discovery orders.

This intent of this legal bibliography is to provide law sources and best practices enabling a proactive approach to E-Discovery. Lawyers assisting corporations need to work closely with Information Technology (IT) staff to form a records management program that supports E-Discovery efforts. Records management policies must be developed to archive and preserve corporate information, while discarding records that fall outside of set policies. Attorneys must be knowledgeable of statutes and common law that establish record retention periods and document classification. The key policies include:

- [Records Management](#) must include a classification scheme for electronic documents and storage.
- Records falling outside of retention requirements and duration must be destroyed in a systematic and documented manner.
- Records having business value must be tagged and stored under a records management policy file plan.
- Records that have no business value must be destroyed according to records management policy and in the normal course of business.

Scope

This legal bibliography was prepared for Professor Nancy Johnson's [Advanced Legal Research](#) course at [Georgia State University College of Law](#). The scope of this bibliography includes primary and secondary legal sources and relevant information on E-Discovery preparedness and compliance. This research guide is intended to assist attorneys and E-Discovery practitioners gain an overview of this evolving area of the law. In addition to legal sources, this guide contains RSS feeds and other Internet sources for E-Discovery information related to compliance with E-Discovery law. Technology plays a critical role in enabling E-Discovery. This guide also provides an overview of the types of technology, such as enterprise search, that enable the E-Discovery process.

Disclaimer

This research guide is provided as a starting point for legal research related to E-Discovery preparedness and compliance. E-Discovery is a rapidly growing and changing area of the law. Corporations continue to store information in digital formats, and corporate communications is almost entirely electronic in the form of email, blogs, wikis, and social media sites. The law can be slow to catch up to such dynamic change - however, E-Discovery is an active area of litigation, and the [Federal Rules of Civil Procedure](#) are also catching up. Therefore, this guide should not be considered as providing legal advice or a legal opinion. Primary sources, such as case law, statutes, and procedural rules, should be [Shepardized](#) or [KeyCited](#). If you need further assistance in researching this topic, please contact a [Reference Librarian](#) at the [Georgia State University College of Law](#) or consult an attorney knowledgeable in E-Discovery.

Where do I start?

Not sure where to begin? Follow these 6 steps towards E-Discovery preparedness and compliance:

1. Identify and Inventory all [Electronically Stored Information](#) (ESI).
2. Implement a [Records Management](#) Policy for ESI.
3. Establish a "[Legal Hold](#)" process to mark records.
4. Implement a data backup and archive policy for ESI.
5. Log and Audit employee access to ESI.
6. Purge expired ESI.

E-Discovery Glossary

The following terms are commonly used in E-Discovery primary and secondary law resources:

- [Electronically Stored Information \(ESI\)](#) - ESI refers any information stored on a digital format that requires software for access.
- [Social Media](#) - represents web-based and mobile technology that publishes content by the users that make up the site.
- [Spoliation](#) - the intentional or negligent destruction, damage, or withholding of evidence relevant to a legal proceeding.
- [Personally Identifiable Information \(PII\)](#) - an information security concept referring to any digital information that can identify a single person.

About the Author



[Chris Delgado](#) is a part-time student at [Georgia State University College of Law](#). In law school, Chris is a [Moot Court](#) board member, and a member of the [Hispanic Student Bar Association](#). Chris is Managing Director of [JSYMMETRIC, Inc.](#), an IBM Business Partner specializing in Enterprise Content Management including Content Discovery, Enterprise Search, and Content Analytics. Chris graduated from [Loyola University New Orleans](#). For more information about this bibliography, please contact Chris at cdelgado5@student.gsu.edu or Professor Nancy Johnson at njohnson@gsu.edu.

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Primary Sources

Federal Rules of Civil Procedure

The [United States Judicial Advisory Committee](#) on Civil Rules first heard of problems with electronic discovery in 1996. This time period roughly corresponds to the beginning of the Internet revolution. Corporations were well on their way to digitizing their paper documents, and moving rapidly towards exclusive use of electronic systems for communications and document management. The Advisory Committee took action by proposing several amendments to the [Federal Rules of Civil Procedure](#). The proposed changes affected Rules 16, 26, 33, 34, 37, and 45, as well as Form 35. Between 1996 and December 2006, the Advisory Committee received feedback from nearly 300 persons and organizations during a public comment period. Several modifications were made based on this feedback. The resulting final amendments were submitted and approved by the [Judicial Conference](#) and the [United States Supreme Court](#).

- [Fed. R. Civ. P. 16\(b\)\(5\)](#)
- [Fed. R. Civ. P. 26\(a\)\(1\)\(B\)](#)
- [Fed. R. Civ. P. 26\(f\)](#)
- [Fed. R. Civ. P. 33](#)
- [Fed. R. Civ. P. 34](#)
- [Fed. R. Civ. P. 37\(f\)](#)
- [Fed. R. Civ. P. 45](#)
- [Fed. R. Civ. P. Form 35](#)

Federal Rules of Evidence

E-Discovery involved changes to the [Federal Rules of Evidence](#). Primarily, the changes address issues with attorney-client privilege and a requirement that electronic evidence be authenticated just like physical evidence. The following Federal Rules of Evidence were impacted or necessitated by E-Discovery Development:

- [Fed. R. Evid. 502\(b\)](#)
- [Fed. R. Evid. 901](#)

Federal Statutes

Most E-Discovery specific rules are found in the [Federal Rules of Civil Procedure](#), and to a lesser extent, the [Federal Rules of Evidence](#). However, several cases involving discovery of ESI run into challenges based on the following Federal Statute. [18 U.S.C. § 2701](#) is part of a broader set of laws known as the [Electronic Communications Privacy Act](#). As corporations continue to expand their Internet presence using Cloud technology and even social media sites, future E-Discovery litigation is bound to collide with electronic privacy laws.

- [18 U.S.C. § 2701](#)

Legislative History for Electronic Communications Privacy Act

Active areas of litigation include the confrontation between electronic privacy legislation and court ordered electronic discovery in civil actions. Several House and Senate Reports provide information on legislative intent. These may be helpful in constructing arguments to protect or force compliance with e-discovery requests:

- Senate Report 99-541 (P.L. 99-508 Electronic Communications Privacy Act of 1986). This report discusses the concerns of government access to electronic communications and begins with a discussion of Constitutional rights to privacy beginning with Katz. United States, 389 U.S. 347 (1967). Senators comments describe how the law is "hopelessly out of date" when it comes to electronic communications.
- [House Report 104-788 \(P.L. 104-294 Economic Espionage Act of 1996; 1996 U.S.C.C.A.N. 4021\)](#). This House report describes a main purpose of the Economic Espionage Act as protecting company's trade secrets. This is potentially an issue when E-Discovery requests include ESI that may reveal a company's trade secrets.
- [House Report 107-609\(I\) \(P.L. 107-296 Homeland Security Act of 2002\)](#). This report includes new requirements for electronic storage of information and access to government computer systems. While the thrust is cyber-terrorism, protection and access to data will also affect electronic discovery requests and must be balanced with issues of national security.

Federal Case Law

The following cases were chosen for this bibliography because they provide guidelines and outer limits courts impose when interpreting E-Discovery rules. More recent developments in the realm of E-Discovery include discoverability of ESI on social networking sites, like Facebook. These cases capture how Federal Courts are applying E-Discovery standards:

- [Zubulake v. UBS Warburg, LLC., 382 F. Supp. 2d 536 \(S.D.N.Y. 2005\)](#)

[Zubulake](#) involved an employment discrimination claim against UBS. The plaintiff claimed key evidence substantiating her claim was contained in email on UBS servers. In the end, UBS was only able to produce 100 pages of email where the plaintiff was able to produce more than 4 times as much evidence. Ultimately, the court concluded UBS failed to take all necessary steps to preserve ESI. A [summary of the Zubulake proceedings](#) is available at Wikipedia.com.

- [Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC., 685 F. Supp. 2d 456 \(S.D.N.Y. 2010\)](#)

In [Pension Committee](#), the court accepts that each E-Discovery case will turn on the specific facts and circumstances, especially regarding reasonableness. However, the parties must provide evidence and demonstrate to the court how their efforts were reasonable in protecting and producing electronic discovery evidence. For more information and analysis of the importance of Pension Committee, please see [The Metropolitan Corporate Counsel article](#) provided by [Kramer Levin Naftalis & Frankel, LLP](#).

- [Wilson v. Thorn Energy, LLC., 2010 WL 1712236 \(S.D.N.Y. 2010\)](#)

[Wilson](#) demonstrates how even data contained on a USB "[flash drive](#)" can be subject to E-Discovery. The dispute in [Wilson](#) was over the Plaintiff's loan to the Defendants for an oil project in Africa. Seventh months after agreeing to provide financial and accounting information regarding the project, the Defendant claimed that all of the records were held on a flash drive that was shipped to Africa, and was ultimately discarded. The Plaintiffs were awarded sanctions for Defendant's failure to protect and produce the data. The [Electronic Discovery Blog contains an article](#) discussing this case.

- [Mt. Hawley Ins. Co. v. Felman Prod. Inc., 271 F.R.D. 125 \(S.D. W. Va. 2010\)](#)

In [Mt. Hawley Ins. Co.](#), we see how attorney-client privilege is an issue with inadvertent disclosure of ESI, particularly email. The relevant questions include whether the actions were reasonable to prevent the disclosure and, if not, whether the disclosure constitutes a waiver. This case also discusses E-Discovery claw-back agreements apply to inadvertently disclosed email. The [Electronic Discovery Blog summarizes the issues](#) presented in this case.

- [Victor Stanley, Inc. v. Creative Pipe, Inc., 2010 WL 3530097 \(D. Md. 2010\)](#)

[Victor Stanley](#) deals specifically with spoliation through misconduct. This resulted in heavy sanctions. The case provides a useful summary and guidelines for the culpability required for different levels of sanctions. The opinion reinforces the need for objective reasonableness in determining if a litigant has honored her duty to preserve ESI. Also, the court cited [Fed. R. Civ. P. 26\(b\)\(2\)\(C\)](#) to frame its reasonableness discussion within the requirement that all permissible discovery must be measured against the "yardstick of proportionality".

- [Rajala v. McGuire Woods LLP., 2010 WL 2949582 \(D. Kan. 2010\)](#)

[Rajala](#) involves parties that could not agree on a clawback provision. The Defendant argued the clawback would prevent contentious and expensive disputes resulting from the large amounts of ESI involved. The Plaintiff expressed fears that a clawback would allow the Defendants to, in effect, redact from the discovery process relevant artifacts. [Rajala](#) also shows how a Defendant might rely on [Fed. R. Evid. 502\(d\)](#) which allows a court to order that a privilege or protection is not waived by disclosure through discovery.

- [Crispin v. Christian Audigier Inc., 717 F. Supp. 2d 965 \(C.D. Ca. 2010\)](#)

This case demonstrates potential limits to ESI in the form of [Facebook](#) and [MySpace](#) postings. The court held that "private" messages sent using social media sites, such as Facebook, are protected by the [Stored Communications Act 18 U.S.C. § 2701](#).

- [E.E.O.C. v. Simply Storage Mgmt., LLC., 2010 U.S. Dist. Lexis 52766 \(S.D. Ind. 2010\)](#)

While [Crispin](#) demonstrated limits to a court's tolerance of personal ESI, the court in [E.E.O.C.](#) allowed a broad-based discovery of personal communications and photos from both Facebook and MySpace. [E.E.O.C.](#) involved a sexual harassment claim where the litigants disputed whether material from social networking sites could be brought in through discovery. The court ruled E.E.O.C. must provide relevant materials from social networking sites and it is not shielded from discovery simply because it is considered "private." The [Connecticut Education Law Blog](#) reviews the case in detail.

- [DeGeer v. Gillis, 2010 U.S. Dist. Lexis 97457\(N.D. Ill. 2010\)](#)

This case provides guidance on what may be protected by attorney-client privilege in the context of an employee using an employer's laptop and email account for communications with his attorney. [DeGeer](#) involved a breach of contract action where the Defendants claimed the Plaintiff had waived privilege for emails between the Plaintiff and his attorney. Ultimately, the case was determined on whether corporations publish policy governing expectation of privilege when using an employer's laptop. The [LexisNexis Online Law Library](#) provides a review of the factors used by this court.

- [Rimkus v. Cammarata, 688 F. Supp. 2d 598 \(S.D. Tex. 2010\)](#)

In a 2010 decision from the Southern District of Texas, [Rimkus](#) provides further guidance on evidence spoliation and sanctions first discussed in [Pension Committee](#). The court in [Rimkus](#) distinguishes the facts of [Pension Committee](#) by highlighting that negligence was involved in spoliation of ESI. [Rimkus](#) involves a group of defecting employees attempting to circumvent a non-competition covenant by intentionally destroying ESI. The court ordered an "adverse inference" instruction due to the intentional destruction of ESI. The online [E-Discovery Law Review](#) contains a complete discussion of this important case.

- [Orbit One Communications Inc. v. Numerex Corp., 692 F. Supp. 2d 373 \(S.D.N.Y. 2010\)](#)

In another case involving covenants not to compete, the court addressed sanctions and whether a parties conduct in defiance or disregard of ESI preservation is per se sanctionable. Even though Orbit One failed to place a "litigation hold" to protect ESI relevant to the litigation, the court held that sanctions are warranted only when there is proof that information of significance is lost. This holding is important because some commentators read [Pension Committee](#) as provided for per se sanctions when a litigant fails to properly safeguard ESI. The online blog [Legal Hold Pro](#) discusses the court's holding and its impact in more detail.

Georgia Case Law

The following cases demonstrate how Georgia Courts define electronic business records, the effects of spoliation, and requirements for litigants to share costs for E-Discovery. Also, note that the Georgia Civil Practice Act does not require litigants to develop a "discovery plan". Since there are substantially fewer Georgia cases interpreting E-Discovery requirements, look to federal cases for additional guidance.

- [Georgia Emission Testing Co. v. Reheis, 602 S.E. 2d 153 \(Ga. Ct. App. 2004\)](#)

This case shows how the [Georgia Court of Appeals](#) required litigants to share the costs of E-Discovery. The court ordered discovery from a third-party, and further ordered sharing of costs for certain specifically tailored discovery requests. Ultimately, the court disagreed with GETCo's contention that they should pay for a portion of the hourly time needed for the third party to produce records.

- [WGNX, Inc. v. Gorham, 364 S.E. 2d 621 \(Ga. Ct. App. 1988\)](#)

In [WGNX](#), the [Georgia Court of Appeals](#) overturned a trial court holding that computerized business records were insufficient as a business record evidence as defined in [O.C.G.A. § 24-3-14](#). The Plaintiff's account statements were keyed into a computer system as checks came into the office. It was customary practice to prepare account statements by keying this data into a computer. The court's holding is important because it included computerized records as "records made in the regular course of business" admissible.

- [Cotton v. Eshelman & Sons, Inc., 223 S.E. 2d 757 \(Ga. Ct. App. 1976\)](#)

In [Cotton](#), the court dealt with the question of whether business records stored on electronic tape satisfied the requirements for a "proper foundation" for business records to be admitted as evidence. In holding that electronic records were acceptable, the court cited to [Green, Georgia Law of Evidence, 312](#), stating the requirements imposed by business records statutes will vary by each state. Since Georgia does not prescribe acceptable forms for business records, the trial judge has wide discretion to determine what constitutes a business record.

- [State v. A 24 Hour Bail Bonding, 634 S.E. 2d 99 \(Ga. Ct. App. 2006\)](#)

This case involved a criminal defendant and bond forfeiture for failure to appear at trial. After the defendant failed to appear the bond holder filed a surety motion to be released from liability on the bond. On appeal, the State contended error in admission of certain computer printout evidence under the business records hearsay exception. The [Georgia Court of Appeals](#) agreed, finding the printout was not authenticated or certified, nor was custody of the printout established. Since the bond holder did not seek to admit the printout under the business records hearsay exception, the trial court erred in admitting the document.

- [Bridgestone/Firestone N. Am. Tire, LLC v. Campbell, 574 S.E. 2d \(Ga. Ct. App. 2002\)](#)

[Bridgestone](#) was a product liability suit involving spoliation of evidence. The Plaintiff lost control of his SUV and alleged negligent design and manufacturer. However, Plaintiff initially decided against legal action, and disposed of the SUV's tires. The [Georgia Court of Appeals](#) held this to be spoliation of evidence causing irreparable prejudice to the defendants and excluded testimony regarding condition of the tires. Please see [Active Use of Spoliation as a Defense](#) for other cases and discussion on evidence spoliation and discovery.

- [Owens v. Am. Refuse Sys., Inc., 536 S.E. 2d 782 \(Ga. Ct. App. 2000\)](#)

[Owens](#) demonstrates whether the [Georgia Court of Appeals](#) considers spoliation of evidence as a separate tort. [Owens](#) involved personal injury when a cap blew off a pressure tank used to clean the insides of a garbage truck. Initially, the tank owner promised to preserve the tank such that a third-party product liability lawsuit could be filed, but the tank was destroyed. In affirming summary judgment for the defendants, the court determined no error in concluding Georgia does not recognize spoliation of evidence as a separate tort.

- [Pascal v. Prescod, 674 S.E. 2d 623 \(Ga. Ct. App. 2009\)](#)

In [Pascal](#), the trial court entered an order directing the parties to consider alternative dispute resolution. However, the court did not require the parties to meet to devise a discovery plan. The Georgia Civil Practice Act, unlike the Federal Rules of Civil Procedure ([Fed. R. Civ. P. 26\(f\)](#)), do not require parties to agree to a discovery plan.

Georgia Statutes

Presently, the [Georgia Rules of Civil Procedure](#) and [Georgia Code](#) do not have specific provisions for E-Discovery. However, E-Discovery is implicated in Georgia case law regarding admissibility of electronic records as evidence and requirements for a discovery conference or discovery plan. The following Georgia Code Sections are relevant for E-Discovery:

- [O.C.G.A. § 9-11-26](#)
- [O.C.G.A. § 24-3-14](#)

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Secondary Sources

American Jurisprudence

American Jurisprudence (Am. Jur.) is a legal encyclopedia published by West. Am. Jur. provides extensive information on the civil discovery process, including E-Discovery. The following Am. Jur. references provide information on topics ranging from email recovery to discovery plans:

- 23 Am. Jur. 2d Depositions and Discovery § 2

E-Discovery is a subset of the deposition and discovery process in civil proceedings. This article provides an excellent context for E-Discovery, and the discovery conference requirements in particular. Additionally, the article provides extensive coverage of the Federal Rules of Civil Procedure (Rules 26-37) which govern discovery in civil actions. For more information on these particular Federal Rules of Civil Procedure, please see the "Primary Sources" tab of this guide.

- 103 Am. Jur. Trials 123 Admission of E-mail Evidence in Civil Actions

This article provides in-depth coverage of admission of evidence in civil actions. In one of the most quoted emails revealed through E-Discovery, Microsoft Chairman Bill Gates asked "Do we have a clear plan on what we want Apple to do to undermine Sun?" This article chronicles how email has become the default communication tool within companies. It also describes the impact of the informal nature of email and how this has become ripe ground for the civil discovery process.

- 58 Am. Jur. 2d New Trial § 327

This article discusses how a trial court may order a new trial, including how discovery issues may result in a new trial. Because the modern civil litigation relies on a system of the well-pleaded complaint, many facts are revealed during the discovery process. Important corporate communications and information, specifically email, are an important part of discovery. Failure to produce this information during discovery may result in the order of a new trial.

- 121 Am. Jur. Proof of Facts 3d 1

Discussing pre-trial discovery motions, this section discusses information held in Facebook, MySpace, LinkedIn, Twitter, and other social networking sites. Even though many corporations have policies against using social media sites at work, more than 70% of workers with Facebook accounts access it during business hours. Increasingly, data posted to these sites are the subject of subpoenas and are becoming a vital part of discovery in many civil actions.

American Law Reports

American Law Reports (ALR) provides annotations on specific legal areas, and is more specific and precise than a legal encyclopedia. ALR provides several annotations on Electronic Records and E-mail discovery related to the overall discovery process:

- 27 A.L.R. 6th 565

This annotation deals specifically with discoverability of deleted e-mail or other electronic data which may be requested as part of a discovery order. Since electronic documents are no less subject to discovery than paper records, revisions to Rules of Civil Procedure beginning in 1993 progressively address the discoverability of ESI. This ALR annotation includes a detailed review of the Federal Rules of Civil Procedure and Evidence affected by E-Discovery developments.

- 66 A.L.R. 6th 83

Often times, a litigant will object to admission of e-mail evidence gained through E-Discovery as being protected by attorney-client privilege. This annotation deals specifically with the issue of attorney-client privilege in e-mail, as well as presence of a third party and how this affects attorney-client privilege.

- 34 A.L.R. 6th 253

This annotations presents the requirements of authentication of electronically stored evidence, including text messages and e-mail. Authentication is required by the Federal Rules of Evidence to demonstrate that the writing is what the offering party claims it to be. This is especially difficult with ESI because electronic evidence is increasingly important in civil litigation, and the sender and recipient may not know one another.

- 29 A.L.R. 6th 167

Electronic data is often managed by centralized computers referred to as "servers". These servers use metadata to store attributes of unstructured content. Metadata is considered to be attributes of a certain piece of ESI, such as the date a document was last modified. Another example of metadata is who owns the document. This annotation describes the admissibility of metadata of ESI. Often times, metadata is not visible when the document is printed, however, Courts have generally held metadata admissible as evidence if it can be properly authenticated.

Law Review Articles

While there are hundreds of law review articles on E-Discovery, the following articles discuss the tension surrounding the costs and also highlight what courts expect corporations and organizations to do in preserving ESI.

- Hardaway, R., et. al., [E-Discovery's Threat to Civil Litigation: Reevaluating Rule 26 for the Digital Age](#), Rutgers Law Review v. 63 no. 2 (Winter 2011) p. 521-97

This article takes on the default position that the producing party bears the cost of discovery. Based on changes to the Rules of Civil Procedure and the ability of corporations to store more information than ever, the author proposes alternatives that would equally distribute the costs of discovery. The author takes the position that E-Discovery poses a threat to civil litigation whereby a litigant, through discovery requests, can impose undue burden on a respondent to E-Discovery requests.

- Spencer, A. B. [The preservation obligation: Regulating and sanctioning prelitigation spoliation in Federal Court](#) [Part of the symposium: Civil procedure and the Legal Profession]. Fordham Law Review v. 79 no. 5 (April 2011) p. 2005-34

This article provides guidance and information on preservation obligations. It identifies the important caselaw that provides guidance on what courts expect corporations to preserve, but also notes that these are evolving common-law regulations. However, companies seeking direction on preservation obligations can look to the cases and information in this article for more information.

- Hastings, A. B. [A Solution to the Spoliation Chaos: Rule 37\(e\)'s Unfulfilled Potential to Bring Uniformity to Electronic Spoliation Disputes](#). The George Washington Law Review v. 79 no. 3 (April 2011) p. 860-89

Spoliation of evidence involves destruction of electronic information that should have been preserved during the discovery process. In some jurisdictions, spoliation is a factor considered by courts. In other jurisdictions, spoliation is considered a dispositive element establishing that electronic information in fact existed. This article proposes a solution to the varying standards on electronic evidence spoliation disputes.

- Anga, A. [Legal Research in an Electronic Age: Electronic Data Discovery, a Litigation Albatross of Gigantic Proportions](#). University of New Hampshire Law Review v. 9 no. 1 (December 2010) p. 1-29

This article provides an in-depth review of the impact of E-Discovery on the Federal Rules of Civil Procedure. It begins with a description of how courts have defined limits to potentially enormous requests for electronic information. Other parts of the article discuss the impact to Rule 26(f), and describes sanctions for failure to comply with this rule.

- Willoughby, D. H., et. al., [Sanctions for e-discovery violations: by the numbers](#) [Part of the Symposium on civil litigation review]. Duke Law Journal v. 60 no. 3 (December 2010) p. 789-86

Sanctions for failure to preserve or produce ESI during discovery are increasing. The sanctioned behavior most often involves the destruction of electronic documents rather than a delay in production. Courts usually impose sanctions when they find willful bad faith of the violator. This article discusses how courts have issued sanctions related to violations of orders for E-Discovery.

Treatises & Casebooks

The following treatises and casebooks are widely on the topic of E-Discovery:

- eDiscovery & Digital Evidence by Jay E. Grenig, William C. Gleisner, Troy Larson, John L. Carroll
Publication Date: 2004
<http://store.westlaw.com/ediscovery-digital-evidence/132113/40570618/productdetail> This treatise provides guidance in determining when forensic or similar specialized technical help is necessary. It also discusses preservation and retention policies, discovery, disclosure, cost sharing, spoliation, and the admissibility of digital evidence, including computerized business records and computer-generated evidence. Further, its appendices include a detailed glossary, practical forms in print and on CD-ROM, pertinent Federal Rules of Civil Procedure, proposed changes to the Civil Procedure Rules, and Federal Rules of Evidence, comprehensive manuals concerning searching for digital

information, and the effective use of technology in the courtroom.

- **Electronic Discovery and Digital Evidence** by Shira Scheindlin, Daniel J. Capra, The Sedona Conference
ISBN: 0314191313
Publication Date: 2009
<http://www.amazon.com/Electronic-Discovery-Digital-Evidence-Materials/dp/0314191313>This casebook is the first in its field on electronic discovery and digital evidence. Judge Scheindlin, the author of the landmark Zubulake opinions, is the leading authority on electronic discovery issues in the federal judiciary. Professor Capra is the Reporter to the Advisory Committee on Evidence Rules, a co-author of a five-volume treatise on Evidence, and the principal author of Rule 502. Members of The Sedona Conference Working Group on Electronic Document Retention and Production, which published The Sedona Principles cited by courts and litigators on a daily basis, contributed commentary and practical guidance.
- **Moore's Federal Practice, E-Discovery: The Newly Amended Federal Rules of Civil Procedure** by Shira A. Scheindlin
ISBN: 9781422406908
Publication Date: 2006
<http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?pageName=relatedProducts&skuld=SKU60160&catId=cat50231&prodId=60160>The Hon. Shira A. Scheindlin, one of the nation's leading experts on e-discovery, introduces the important rule changes taking effect on December 1, 2006. Topics include: Changes to the Rule 26(f) meet-and-confer requirement; New requirements in Rule 26(b) with regard to production of "inaccessible" electronically stored information; New procedure in Rule 26(b)(5) for requesting return of privileged or work product-protected information that was inadvertently produced; and New "safe harbor" provision in Rule 37 for loss of information due to routine, good faith operation of an electronic information system.
- **Electronic Discovery Deskbook** by Mayer Brown LLP
ISBN: 1402411650
Publication Date: 2009
http://www.amazon.com/Electronic-Discovery-Deskbook-Litigation-Library/dp/1402411650/ref=sr_1_cc_1?s=digital-text&ie=UTF8&qid=1321236490&sr=1-1-catcorrThe discovery stage in litigation is costly in terms of time and expense for attorneys and their clients. Today's explosion of electronic technologies and data has made the process even more difficult. Written by legal and technical experts in this specialized field, PLI's new Electronic Discovery Deskbook helps you to reduce the cost and complexity of e-discovery by showing you how to more easily and quickly prepare, collect, prepare, and produce electronically-stored information (ESI) for discovery purposes. Packed with step-by-step advice, Electronic Discovery Deskbook guides you on how to educate company personnel on the importance of preserving ESI; respond effectively to reasonable discovery requests; handle the unique demands of preserving different types of ESI, such as voice mail, instant messaging, and hard drives; use the latest technologies to speed the retrieval of ESI; and prevent the unintentional destruction of company data and other missteps and avoid potentially crippling lawsuits. Updated at least annually, Electronic Discovery Deskbook is an indispensable resource for attorneys, company IT personnel, executives, managers, compliance officers, and government regulators.

Looseleaf Service

The following looseleaf service provides everything from a best practices guide to forms.

- **Arkfeld on Electronic Discovery and Evidence 3d** by Michael R. Arkfeld, Esq.
ISBN: 9781422482056
Publication Date: 2011
<http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?pageName=relatedProducts&prodId=65900#>Arkfeld on Electronic Discovery and Evidence is a comprehensive treatise that addresses all the key aspects of the discovery and admission of electronic evidence, within the context of relevant statutes, regulations, and federal and state case law. Authored by Michael R. Arkfeld, Esq., a leading attorney and speaker, the Third Edition is completely revised, enhanced both in substance and format. The up-to-date 1400 page treatise contains 8 chapters as well as four companion Best Practices Guides, which are cross-referenced to the treatise, and a fully-searchable CD-ROM. It provides fingertip access to sample discovery forms, letters, and court orders, and includes dozens of practice tips and pointers.

Nutshells

Nutshells provide a concise digest of an area of law. This Nutshell covers E-Discovery:

- **Electronic Discovery and Digital Evidence in a Nutshell** by Shira A. Scheindlin, Daniel J. Capra, The Sedona Conference
ISBN: 9780314204486
Publication Date: 2009
<http://www.amazon.com/Electronic-Discovery-Digital-Evidence-Nutshell/dp/0314204482>A concise treatment of all issues relating to the use of electronic information in litigation today. Extensive treatment of questions of preservation, search for and production of electronically stored information, as well as the ethical issues faces by lawyers in managing all of this information. The book also discusses how electronic information can be produced in court and how the federal rules can be and have been adopted to accommodate digital evidence. The book has been written by the author of the landmark Zubulake opinions; the Reporter to the Advisory Committee on the Federal Rules of Evidence; and the Sedona Conference, which is at the forefront of thinking and writing on the problems of electronic discovery.

Corpus Juris Secundum

Corpus Juris Secundum (CJS) is a legal encyclopedia. Prior to Thompson's acquisition of Westlaw, CJS competed directly with American Jurisprudence. The mission of CJS was to provide a clear statement of areas of developing law. The following CJS article is relevant to E-Discovery:

- 27 C.J.S. Discovery § 119

This title discusses disclosure of facts during civil discovery. Particularly, this article covers grounds for discovery in terms of jurisdiction and proceedings to obtain materials. The article describes defenses and objections for requests to discovery, including electronic discovery. This article is helpful to understand the foundation for penalties and sanctions which existed prior to widespread ESI.

- 35 C.J.S. Federal Civil Procedure § 594

The [Federal Rule of Civil Procedure 26\(f\)](#) was amended in 2006 specifically to address electronic discovery in the context of a discovery-planning conference. Rule 26(f) was amended to require parties to discuss issues regarding preservation of electronic materials during the discovery process. The rule also addresses how privilege applies to ESI during the discovery process.

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Internet Groups & Associations

E-Discovery Groups & Associations

The following on-line groups and associations are either dedicated to E-Discovery or electronic digital evidence:

- [The American Society of Digital Forensics & eDiscovery](#)

The American Society of Digital Forensics & eDiscovery is a not-for-profit association for digital forensics and E-Discovery professionals. The mission of the organization is to provide high-quality education materials and training to the community at reasonable prices. Membership is fee-based.

- [DiscoveryResources.org](#)

This site is up-to-date and contains pod casts and blogs on all things related to E-Discovery. The site is particularly useful because it provides recent case law and commentary on recent proposed legislation on rules for electronic discovery.

- [International Legal Technology Group](#)

The scope of this group goes beyond E-Discovery, but members regularly post on E-Discovery topics and digital evidence. This online group is well-established, having been online since the 1990s.

- [Electronic Discovery Reference Model](#)

This site requires membership for a fee, but provides assistance in developing guidelines for developing an E-Discovery ESI preservation strategy. The E-Discovery Reference Model (EDRM) participants include major vendors that provide E-Discovery software solutions like IBM, Sensei Enterprises, Inc., Bridgeway, and ZyLab.

- [Women in eDiscovery \(LinkedIn Group\)](#)

This group on social networking site LinkedIn brings together women in the field of E-Discovery. LinkedIn is a popular professional networking site. Members are offered several options, including a free basic membership. Members of the Women in eDiscovery group can choose to receive a weekly or monthly digest of group postings.

- [Electronic Discovery \(LinkedIn Group\)](#)

This LinkedIn group has more than 3000 members, and many actively post questions, job inquiries, or requests for information about E-Discovery.

- [eDiscovery \(Facebook Group\)](#)

eDiscovery professionals can also join a Facebook group. Facebook is the world's largest social networking site and has over 400 members. The group's description is "The first and hopefully best place for eDiscovery people to share ideas, resources, and networking."

E-Discovery Information by K&L Gates



For an excellent source of local rules, forms, and guidelines relating to E-Discovery, please visit the Electronic Discovery Law blog and best practices site provided by [K&L Gates](#). The following links provide useful information about states that have enacted specific E-Discovery legislation, and other recent developments in this body of law:

- [Local Rules, Forms, and Guidelines of United States District Courts Addressing E-Discovery Issues](#)

More than 40 United States District Courts require compliance with local rules. Some federal judges have even created their own forms. This information, provided by K&L Gates, provides a very useful list of local district court rules.

- [List of States that have enacted E-Discovery Rules](#)

This is a dynamic area of the law, and states continue to adopt legislation on discovery of electronic information. This list was most recently updated on October 1, 2011 by K&L Gates.

- [United States Court of Federal Claims](#)

The United States Court of Federal Claims is a federal court with jurisdiction over monetary claims against the United States. The Court generally hears matter such as breach of contract, takings claims, and patent and copyright infringement. Like other civil proceedings, litigants participate in discovery and the rules of the Court address electronic evidence during discovery.

- [The Sedona Conference® Commentary](#)

The Sedona Conference exists to allow leading jurists, lawyers, experts, academics and others, at the cutting edge of issues in the area of antitrust law, complex litigation, and intellectual property rights, to come together in conferences and mini-think tanks (Working Groups). One area addressed by the Conference is E-Discovery.

- [Managing Discovery of Electronic Information: A Pocket Guide for Judges](#)

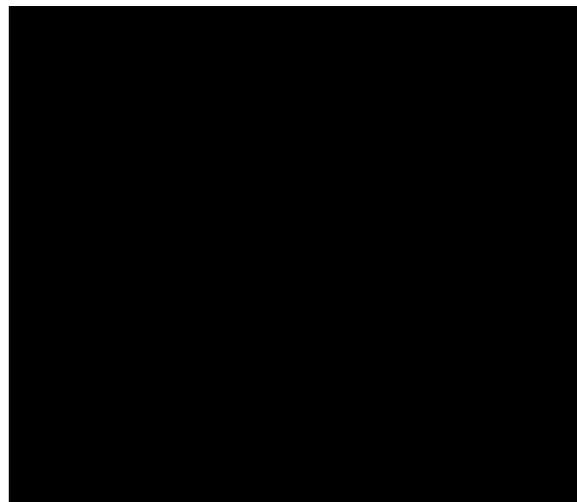
This pocket guide was compiled based on problems that recur during the E-Discovery process. This is a 26-page publication that provides management tools for judges to address E-Discovery issues. The publication is available free of charge from the [Federal Judicial Center](#).

- [List of States Actively Considering Adoption of Special E-Discovery Court Rules](#)

K&L Gates also provides a regularly-updated list of states with proposed legislation on E-Discovery. This list includes those states that have published proposed rules amendments for public comment or are otherwise considering adoption of special court rules dealing with E-Discovery.

ITLA's Interview on E-Discovery

The following video describes a vendor solution called [AccessData](#), but the introduction discusses the challenges of choosing E-Discovery software. The video discusses litigation holds, security, searching, and creating file plans for complex data sets. The video describes E-Discovery functionality found in many vendor solutions.



E-Discovery Trends

The following are articles on more recent trends in the area of E-Discovery:

- [Email no longer top ediscovery priority](#)
- [How Clearwell and Symantec could benefit each other](#)
- [Sony and Geohot](#)
- [LegalTech New York 2011 Recap](#)
- [Litigation Support Software Options](#)
- [Free Ediscovery Course Online](#)
- [Ediscovery Jobs coming in 2011](#)
- [Digital Copiers as an Ediscovery Source](#)
- [Eighth Circuit Court Skips Opportunity to Enforce Legal Holds](#)
- [Looking for Effective Legal Project Management?](#)

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K&L Gates E-Discovery Blog

K&L Gates is a leading source of news and information on E-Discovery:

- [For Failure to Preserve, Court Orders Production of Privileged Documents and Work-Product](#)
- [Court Orders Broad Discovery of Class Members' Social Media, Text Messages & Email](#)
- [Da Silva Moore : Judge Carter Denies Motion for Recusal or Disqualification](#)
- [For Discovery Violations, Court Orders Retention of Outside Vendor to Collect Responsive Documents, Investigate Possible Spoliation](#)
- [Cloud Considerations: E-Discovery](#)
- [Court Instructs Parties to Utilize Predictive Coding, Requires Show of Cause to Avoid It](#)
- [Concluding Litigation Hold and Document Retention Policies are "Clearly Unacceptable," Court Allows Depositions to Determine if Spoliation Occurred](#)
- [Court Focuses on Cooperation & Proportionality to Resolve Discovery Disputes](#)
- [International Trade Commission Proposes to Amend Rules of Practice and Procedure](#)
- [For Spoliation, Court Holds Defendant in Contempt, Orders \\$600,000 to be Paid to Plaintiff, \\$25,000 to be Paid to the Court](#)

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E-Discovery Software Solutions

Autonomy eDiscovery Software

Software vendor [Autonomy Corp.](#) offers a suite of [E-Discovery software products](#), and even includes capability to manage social media. Autonomy offers its E-Discovery software as a service, an appliance, or as a licensed software package. Other features and capabilities include multi-lingual discovery and multi-party cases.

Clearwell eDiscovery (now Symantec)

[Clearwell](#) was recently acquired by [Symantec](#). Gartner predicts future consolidation of E-Discovery software vendors as the market consolidates among more established vendors. The [Clearwell platform](#) supports the entire E-Discovery lifecycle and offers an easy-to-use user interface to manage the complexity of E-Discovery. Clearwell's key strengths include consolidation of the E-Discovery process from identification and legal holds through review and production.

FTI Technology

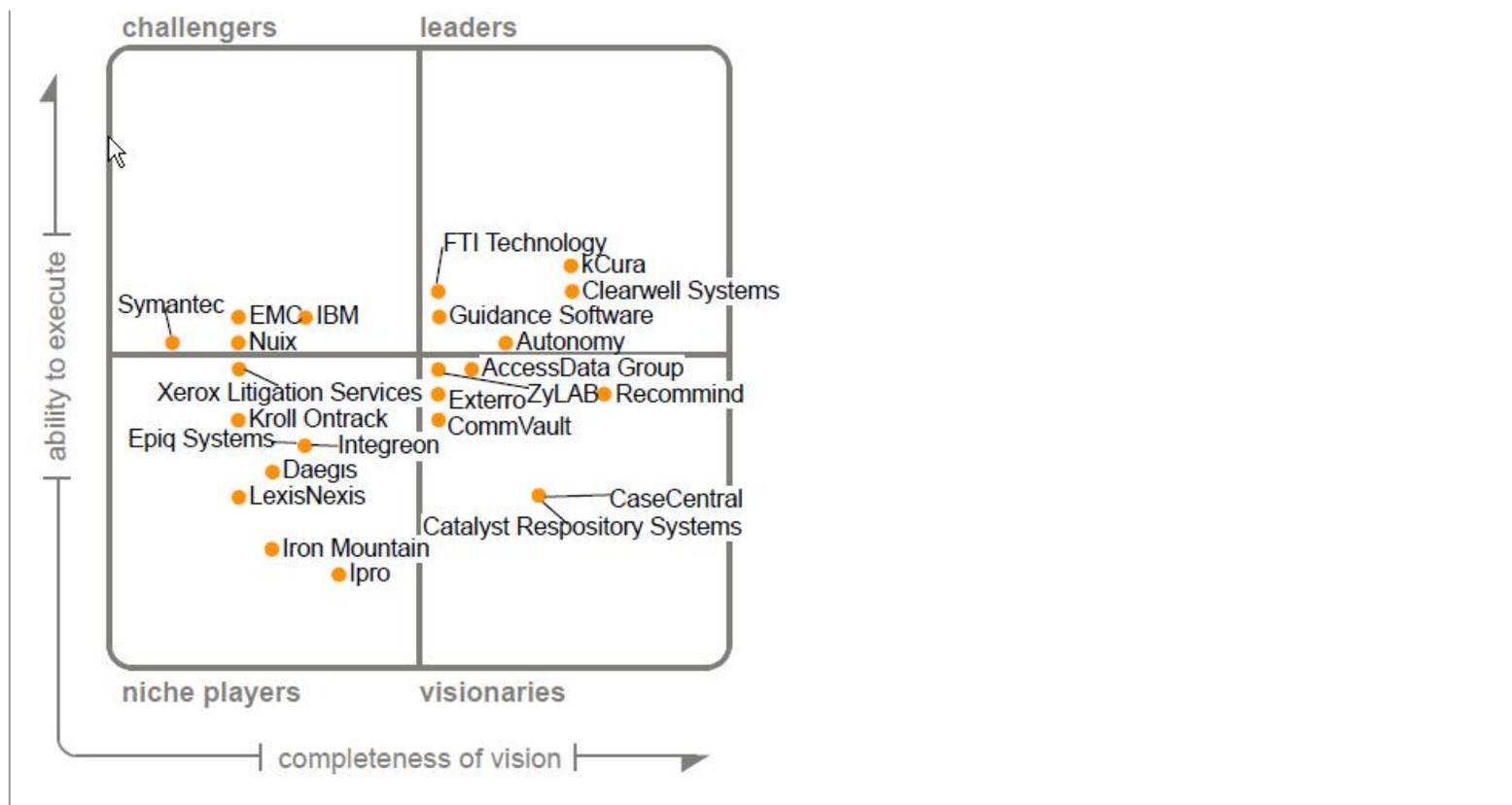
[FTI Technology](#) is a business segment of FTI Consulting, Inc. FTI takes a consulting approach combining software and services to deliver a leading E-Discovery solution. FTI offers a [suite of products](#) and consulting and offer products for more recent data storage trends, such as Cloud Computing. Functionality is end-to-end from identification, legal holds, search, and workflow.

Disclaimer on Software Vendors

This research guide page provides information on software vendors offering products specifically for E-Discovery. Please note that software offerings and functionality change frequently. [This research guide does not endorse any software vendor or its product.](#) The information is intended as a starting point for your research into software vendor offerings for E-Discovery.

Gartner's Magic Quadrant for E-Discovery Software

Corporations in search of an E-Discovery management tool will have no shortage of software vendors to choose from. [Gartner](#), the information technology research and advisory firm, publishes research on technology industry trends and software vendors. Known for its "[Magic Quadrant](#)", Gartner categorizes vendors as challengers, leaders, niche players, or visionaries. This is the Gartner magic quadrant for E-Discovery software as of May 2011:



IBM E-Discovery Manager

IBM's [E-Discovery Manager](#) supports secure ESI evidence preservation in an audit-tracked repository. While [IBM](#) does not offer an end-to-end litigation support software platform, E-Discovery Manager leverages IBM's Content Collector and Classification Modules for ESI management. E-Discovery Manager also allows scheduled searches to allow ongoing document collection.

kCura's Relativity

[kCura's Relativity](#) product takes an analytics approach to identify documents for legal holds. Their product speeds up the document review process and provides intelligent search results through text analysis. Other features include foreign language support, visual data analysis, and workflow capabilities in either a hosted or on-site installation.

Guidance Software

[Guidance Software](#) is a digital forensics, cyber security, and E-Discovery company offering both services and products for litigation support and other computer forensics needs. Guidance's E-Discovery solution, [EnCase eDiscovery](#), focuses on process and offers functionality from first pass review and legal holds through search and archive.

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