

2013

Discovering E-Discovery: a Resources Guide

Timothy L. Coggins

University of Richmond, tcoggins@richmond.edu

Follow this and additional works at: <http://scholarship.richmond.edu/law-faculty-publications>



Part of the [Legal Profession Commons](#), and the [Legal Writing and Research Commons](#)

Recommended Citation

Timothy L. Coggins, *Discovering E-Discovery: a Resources Guide*, Va. Law., Dec. 2013, at 20.

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

Discovering E-Discovery: a Resources Guide

by Timothy L. Coggins



Timothy L. Coggins is associate dean for Library and Information Services and professor of law at the University of Richmond School of Law. He is a member of the American Association of Law Libraries and has chaired several AALL committees, including those that deal with government relations and advocacy and digital legal information. He has received numerous honors and awards for his work with information technology, government relations, and the authentication and preservation of digital legal information, including the 2013 Robert L. Oakley Advocacy Award.

“Finding a suitable sanction for the destruction of evidence in civil cases has never been easy. Electronic evidence only complicates matters. As documents are increasingly maintained electronically, it has become easier to delete or tamper with evidence (both intentionally and inadvertently) and more difficult for litigants to craft policies that ensure all relevant documents are preserved. This opinion addresses both the scope of a litigant’s duty to preserve electronic documents and the consequences of a failure to preserve documents that fall within the scope of that duty,” wrote U.S. District Judge Shira Scheindlin in her influential *Zubulake v. UBS Warburg LLC* decision in 2003.¹ And thus began the legal community’s increasing attention to electronically created information and e-discovery.

E-discovery refers to discovery in civil litigation that focuses on the exchange of information in electronic form. Lainie Crouch Kaiser, a litigation attorney with McDermott Will & Emery, writes that “e-Discovery can be used as an umbrella term for both the legal and operational considerations related to how electronically stored information (ESI) is used in the modern day practice of law.”² There are many types of ESI, including e-mail and office documents, voicemail, photos, video, and databases. Attorneys and others who write about e-discovery also include “raw data” as discoverable information. Ronald J. Hedges of Nixon Peabody writes that “[t]echnically, documents and data are ‘electronic’ if they exist in a medium that can only be read through the use of computers. Such media include cache memory, magnetic disks (such as DVDs or CDs), and magnetic tapes.”³

This article does not present any legal analysis of e-discovery and what is and is not discoverable, but rather it provides a listing of resources that attorneys and those who work with them can use to gain a better understanding of e-discovery and its application in both federal and state courts.

Research Guide and Comprehensive Collections

As in other legal research, starting with a source that identifies the relevant resources is useful and

time-efficient. The law library at the University of Missouri School of Law produced and updates a research guide titled *Electronic Discovery*. The guide, designed for attorneys, judges, and law students who need to research electronic discovery issues, is thorough. It includes an overview and sections addressing sanctions and privileges, relevant blogs, law firm e-discovery practice groups, and more. The guide references important materials produced by the Sedona Conference, the leading voice in addressing concerns about electronic discovery, and links to the *Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*. The guide is available at <http://libraryguides.missouri.edu/electronicdiscovery>.

The Touro College Jacob O. Fuchsberg Law Center’s library produced another useful guide titled *Social Media Use For Attorneys*. The guide includes a list of print and electronic resources that deal specifically with e-discovery and a list of e-discovery blogs that address current and cutting-edge issues. The guide is available at <http://guides.tourolaw.edu/socialmedia>.

Westlaw, LexisNexis, Bloomberg BNA, and the Practising Law Institute all have databases that provide varied e-discovery resources. Westlaw’s e-discovery collection includes law reviews, texts and bar journals, a national e-discovery law briefs collection, e-discovery trial court orders, state and

federal e-discovery law cases, national e-discovery law civil trial court filings, and an *Electronic Discovery and Records and Information Management Guide*. This guide addresses issues such as proper planning of possible discovery in order to reduce costs and burdens of complying with discovery requests. It also addresses issues relating to records management.

The Lexis e-discovery database is extensive and includes treatises, forms, litigation reports, and other materials. Its collection of e-discovery forms includes demand letters, discovery plans, interrogatories, motions, preservation orders, requests for production, stipulations, and others. Most forms are from Matthew Bender publications that are included in the Lexis databases. *Mealey's Litigation Report: Discovery* covers the latest news pertaining to discovery issues, such as how federal discovery rules are interpreted by different districts and judges, work product, attorney-client and common interest privileges, and discovery abuse. An important resource located in Lexis is *E-Discovery: the Newly Amended Federal Rules of Civil Procedure*, authored by the Honorable Shira A. Scheindlin. This guide includes sections that deal with the changes to the Rule 26(f) meet-and-confer requirement, new requirements in Rule 26(b) about production of inaccessible electronically stored information, new "safe harbors" provision in Rule 37 for loss of information due to routine, good faith operation of an electronic information system, and new procedures under Rule 26(b)(5) for requesting return of privileged or work product-protected information that was inadvertently produced.

Bloomberg BNA's e-Discovery Resource Center includes many types of materials, including:

- Federal and state statutes and rules dealing with e-discovery,
- Practice tools, including pleadings and forms, calendars, etc.,
- Latest e-discovery cases,
- BNA Insight articles (such as the one cited earlier by Lainie Crouch Kaiser),
- Top headlines in the news about e-discovery, digital discovery, and e-evidence, and
- A comprehensive and searchable database of e-discovery cases.

Attorneys using this collection can focus the research on narrower topics, including digital discovery and e-evidence, preservation, production, costs, privilege, and sanctions.

Practising Law Institute's Discover Plus is the online version of familiar PLI materials, including

treatises, course handbooks, CLE materials, and session transcripts. Searching the collection is easy, and an attorney can restrict results to particular types of publications. To locate information about e-discovery, an attorney selects Litigation from the Practice Area choices. In the Litigation practice area, a simple search for e-discovery results in valuable and important documents. Representative results include course handbook chapters about sanctions for e-discovery violations, efficient e-discovery for the smaller case, and ethical issues in e-discovery. Results also include an important course handbook chapter written in 2012, titled *The Courts Intervene with Model Rules to Curb the Costs of E-Discovery: Will It Work and Should Litigants Use these Model Rules in the Rule 26(f) Conference*.

Included in the PLI Discover Plus database is a full-text and searchable copy of *The Electronic Discovery Handbook*, authored by Thomas Y. Allman, Anthony J. Diana, Ashish S. Prasad, and Matthew A. Rooney, very important authors and practitioners in e-discovery. Representative chapters in the handbook deal with information management policies and procedures, preservation obligations, review and production of electronically stored information, managing spoliation claims and defenses, international issues, and the next generation of ESI (social media, web-based collaboration applications, cloud computing, and mobile technologies). Chapter 11 of the *Electronic Discovery Handbook* covers e-discovery in specific areas of practice, such as antitrust, construction, contracts, intellectual property, product liability,

The Lexis e-discovery database is extensive and includes treatises, forms, litigation reports, and other materials.

and securities. For each specific area of practice, the authors cover the nature of discovery, relevant data courses, and issues regarding preservation and production.

The print treatise most frequently cited and commonly considered the authority in the field is *Electronic Discovery: Law and Practice*, authored by Adam I. Cohen and David J. Lender (two volumes; Wolters Kluwer Law and Business, 2013). Cohen, a principal with Ernst & Young LLP's Forensics Technologies and Dispute Services practice, has more than seventeen years of experience



in law and technology. Lender, a partner in the litigation department of the New York office of Weil, Gotshal & Manges LLP, specializes in complex commercial litigation with a particular emphasis in patent and intellectual property law. This treatise began as a primer on electronic discovery for the Weil Gotshal litigation attorneys to teach them about the role that electronic discovery would play in shaping the litigation process. The authors delve deeply into the analysis of e-

“Perhaps the best advice lawyers should heed regarding the scope of electronic discovery is this: if it’s relevant, you need to worry about how to handle it, regardless of the system or storage media in which it is contained.”

discovery case law and then present suggestions and strategies about the current state of e-discovery law and where it is likely heading. In chapter 1 of this book, the authors present an overview of the e-discovery issues facing litigators and write the following: “Perhaps the best advice lawyers should heed regarding the scope of electronic discovery is this: if it’s relevant, you need to worry about how to handle it, regardless of the system or storage media in which it is contained.”⁴ Incorporated into this treatise now is the *ESI Handbook*, which offers valuable practice aids to help attorneys with corporate retention policy drafting, electronic discovery depositions, and many other issues.

Other Useful Books and Resources

Attorneys who need the basics about electronic discovery and digital evidence should look first at *Electronic Discovery and Digital Evidence in a Nutshell* by Judge Shira A. Scheindlin and Daniel Capra (West 2009). The following treatises and other resources are useful for more in-depth coverage.

Michael R. Arkfeld, *Arkfeld Electronic Discovery and Evidence* (3d ed. 2013).

John M. Barkett, *The Ethics of E-Discovery* (2009) and *E-Discovery: Twenty Questions and Answers* (2008).

Michael D. Berman, Courtney Ingrassia Barton & Paul W. Grimm, eds., *Managing E-Discovery and ESI* (2011).

Prashant Dubey & Sam Panarella, *Litigation Readiness: a Practical Approach to Electronic Discovery* (2011).

E-Discovery: Creating and Managing an Enterprise Program: a Technical Guide to Digital Investigation and Litigation Support (2009).

Neal Feigenson & Christina Spiesel, *Law on Display: the Digital Transformation of Legal Persuasion and Judgment* (2009).

Jeffrey J. Fowler & William H. Dance, *Preserving Electronically Stored Information: a Practical Approach* (Bloomberg BNA e-Discovery Portfolio Series 2013 ed.).

Jay E. Grenig & William C. Gleisner III, *E-Discovery & Digital Evidence* (2005).

Alison Grounds & Benjamin W. Cheesbro, *Cloud Control: E-Discovery and Litigation Concerns With Cloud Computing*, in *Cloud Computing 2013: Cut Through the Fluff & Tackle the Critical Stuff* (2013).

Brent Kidwell, Matthew Neumeier & Brian Hansen, *Electronic Discovery* (2005).

David J. Lender, *Privilege Issues in the Age of Electronic Discovery* (Bloomberg BNA e-Discovery Portfolio Series 2013 ed.).

Amy Jane Longo, *Electronic Discovery Practice Under the Federal Rules* (Bloomberg BNA e-Discovery Portfolio Series 2013 ed.).

Ralph C. Losey, *e-Discovery: Current Trends and Cases* (2008).

Ralph C. Losey, *Electronic Discovery: New Ideas, Case Law, Trends and Practice* (2010).

Managing E-Discovery and ESI: From Pre-Litigation Through Trial (ABA Section on Litigation 2011).

Sharon D. Nelson, *Electronic Evidence and Discovery Handbook* (2006).

Catrien Noorda & Stefan Hanloser, eds., *E-Discovery and Data Privacy: a Practical Guide* (2011).

Bruce A. Olson & Tom O'Connor, *Electronic Discovery for Small Cases: Managing Digital Evidence and ESI* (2012).

Predictive Coding for Dummies (Wiley 2013).

Marian K. Riedy, Suman Beros & Kim Spurduto, *Litigating With Electronically Stored Information* (2007).

The Rule(s) of Law: Electronic Discovery and the Challenge of Rulemaking in the State Courts: Report of the 2005 Forum for State Appellate Court Judges (2005).

Seventh Annual National Institute on E-Discovery ABA Section of Science and Technology Law and the Center for Professional Development (2013).

John Hardin Young, Terri A. Zall & Alan A. Blackley, *Written and Electronic Discovery* (2009).

E-Discovery – Virginia Resources

Like attorneys in other states, Virginia attorneys closely monitor e-discovery developments.⁵ On Nov. 22, 2013, the National Business Institute presented *Everything You Don't Know About E-Discovery (But Wish You Did)* in Virginia Beach. The program, featuring John C. Lynch (Troutman Sanders), Craig L. Mytelka (Williams Mullen), and Dustin M. Paul (VanDeventer Black), covered latest state rules and regulations; e-discovery precautions, risks, and advice; ethical pitfalls; handling social media, e-mail, video, and other ESI, new discovery sources; and other topics.

E-discovery resources listed below might be useful to Virginia attorneys.

Va. Sup. Ct. R. 4:1 & 4:9A, Va. Code Ann. (2013)

Joan E. Feldman, "Mechanics of Electronic Discovery," in *The Nuts and Bolts of Electronic Discovery* (Virginia CLE 2003) (advice about gathering computer-based information, filling in the details with computer-based evidence, and the expert's role in computer-based discovery) (chapter is dated, but useful).

Barron K. Henley, "Business Continuity: the New Frontier of Backup and Data Protection," in *Legal Technology and Practice Management: Future Trends and the Best of What's Out There Now* (Virginia CLE 2012) (practical aspects of electronic data storage, including types of electronic

data, backup procedures, and how to deal with data loss).

Honorable Thomas D. Horne, "The Nuts and Bolts of Electronic Discovery: Virginia Practice 2003," in *The Nuts and Bolts of Electronic Discovery* (Virginia CLE 2003) (issues relating to privileges, expectation of privacy, spoliation, and others) (chapter is dated, but useful).

V. Thomas Lankford & William F. Coffield, "Electronic Discovery: Navigating the New Federal Rules," in *E-Discovery and the New Federal Rules: a Legal and Technological Survival Kit* (Virginia CLE 2006) (includes the Sedona Conference Principles and information about computer forensics experts, phases in the electronic discovery process, and preservation and storage).

Edward B. Lowry, "Virginia's Proposed Rules of Discovery Relating To Electronically Stored Information," in *Digital Tools for the Uber Litigator: What Every Trial Attorney Needs to Know* (Virginia CLE 2008) (discussion of how the proposed rules would affect e-discovery).

Stephen E. Noona, *The Discovery and Introduction of Electronic Evidence in Federal Court, in Digital Tools for the Uber Litigator: What Every Trial Attorney Needs to Know* (Virginia CLE 2008) (how various rules that govern electronic information may be used in federal court, how to introduce and use electronic information at trial, and practice advice on obtaining electronic discovery and how to manage the e-discovery process and costs).

Correy E. Stephenson, "Trends to Watch on Electronic Discovery," *Virginia Lawyers Weekly* (available at <http://valawyersweekly.com/2011/11/22/trends-to-watch-on-electronic-discovery/>) (changes in e-discovery expected during 2012, including data, coding, and sanctions issues).

Correy E. Stephenson, "Computer Assisted Review Becomes Popular," *Virginia Lawyers Weekly* (available at <http://valawyersweekly.com/2013/02/01/computer-assisted-review-becomes-more-popular/>) (increasing use of computers to review large numbers of documents and how courts have handled determining whether computer assisted document review is acceptable).

E-Discovery continued on page 27

Correy E. Stephenson, *Rules Changes Would Deal with Discovery*, Virginia Lawyers Weekly (available at <http://valawyersweekly.com/2013/05/10/rule-changes-would-deal-with-discovery/>) (recent proposed changes to the Federal Rules of Civil Procedure and how the changes impact discovery, particularly e-discovery).

Conclusion

E-discovery continues to be challenging for judges and lawyers. In a recent article, Craig D. Ball lists three reasons why electronic data discovery can be challenging to the bench:

- “Judges tend to be more senior than the average lawyer – with the consequence that most jurists have had little hands-on experience with electronically stored information in their own law practices.
- Most lawyers are still at sea with e-discovery technology, so they are less adept at framing ESI issues, making a record, and educating courts.
- The common practice to ‘split the baby’ to achieve a just result rarely prompts outcomes in electronic data discovery.”⁶

Ball then proceeds with eleven tips to help both judges and practitioners “get it right.” His first tip summarizes well why it is so important for attorneys and others in the legal community to understand e-discovery: “Electronic evidence is the new normal, there is no going back. If you don’t fully accept that ESI is here and growing in importance, litigants will prey on your nostalgia and exploit your desire to stay within a last-century comfort zone.”⁷

Judges have their own advice for attorneys about e-discovery. At the recent annual Electronic Discovery Institute Leadership Summit, four jurists presented one dominant theme — attorneys should solve EDD problems themselves without turning to the judges.⁸ The four judges recommended that attorneys develop protocols with their adversaries and offer tutorials to judges where technology may be a heavy factor. A goal, according to one jurist panelist, should be to change the “existing mindset of producing parties that the data ‘is mine to know and for you to find out,’ rather than cooperating.”⁹ She actually sends attorneys who are bickering to a jury

room and tells them to resolve the matters or she will. Another jurist panelist at the program was even more direct about e-discovery problems: “I don’t get headaches, I give headaches ... Without a discovery strategy, you are playing chicken.”¹⁰

The author thanks Jessica E. Barile, third-year law student at the University of Richmond School of Law, for her research assistance.

Endnotes:

- 1 220 F.R.D. 212 (S.D. N.Y. 2003). For more information about Judge Scheindlin’s influence in e-discovery developments, see “Another Big E-Discovery Ruling for Scheindlin,” *Nat’l L.J.*, Aug. 28, 2013, at 18, and Lisa Holton, “A Front-Row Seat: Five Judges At the Forefront of Electronic Discovery,” *Am. Law.*, Aug. 2013, at 54.
- 2 Lainie Crouch Kaiser, “Understanding eDiscovery Can Boost a New Associate’s Career,” *BNA Insight* (available via the Bloomberg BNA e-Discovery Resource Center) (Oct. 9, 2013).
- 3 Ronal J. Hedges, *Discovery of Electronically Stored Information: Surveying the Legal Landscape* 1 (2007).

E-Discovery continued on page 52

- 4 1 Adam I. Cohen, David J. Lender & G. Edward Kalbaugh, *Electronic Discovery: Law and Practice* § 1-2 (2013).
- 5 The *Richmond Journal of Law and Technology* (University of Richmond School of Law) presents an annual Spring symposium about e-discovery and presents the papers at <http://jolt.richmond.edu/>. See, e.g., *E-Discovery In a World of Cloud Computing, Social Networking, and Data Hoarding* (Spring 2011, issue 3).
- 6 Craig Ball, *11 E-Discovery Tips for Judges and Lawyers*, Law Technology News, Sept. 25, 2013 (available at <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202620757390&slreturn=20130913234725>). Ball is a trial lawyer and certified computer forensic examiner who has written many publications on e-discovery, including *E-Discovery Workbook, ED: a Special Master's Perspective, E-Mail in Civil Discovery 2009*, and *Plaintiff's Guide to E-Discovery*.
- 7 *Id.*
- 8 Monica Bay, *Jurists Spill the Beans About E-Discovery*, L. Tech. News, Oct. 16, 2013.
- 9 *Id.*
- 10 *Id.*

Call for Nominations

The Betty A. Thompson Lifetime Achievement Award

The VSB Family Law Section recognizes and honors an individual who has made a substantial contribution to the practice and administration of family law in the Commonwealth of Virginia. The award is presented at the Annual Family Law Seminar in April at The Jefferson Hotel in Richmond, Virginia.

Family Law Service Award

The VSB Family Law Section recognizes and honors an individual or organization who has consistently given freely of time, talent and energies to provide valuable services in advancing family, domestic relations or juvenile law in Virginia. The award is presented at the Annual Family Law Seminar in April at The Jefferson Hotel in Richmond, Virginia.

VSB Family Law Section award nominations are due January 31, 2014.

More information at <http://www.vsb.org/site/sections/family>

Award of Merit Competition

The VSB Conference of Local Bar Associations recognizes outstanding projects and programs of Virginia bar associations.

Local Bar Leader of the Year

The VSB Conference of Local Bar Associations recognizes past and presently active leaders in their local bar associations who have continued to offer important service to the bench, bar and public. The award serves as a continuing monument to the dedication of local bar leaders. It also serves to emphasize the importance of close cooperation between the Virginia State Bar and local bar leaders.

VSB Conference of Local Bar Associations nominations are due April 25, 2014.

More information at <http://www.vsb.org/site/conferences/clba/view/clba-awards>