

RESOURCES

Some of the best resources are free or inexpensive and available on the Web. There is an abundance of CLE programs available from the Sections of the State Bar and other CLE providers. E-discovery is a team effort and relationships with non-lawyers will be invaluable. Your client, office assistant, or IT department is a resource.

Websites

<http://CaliforniaDiscovery.findlaw.com>
<https://extranet1.klgates.com/ediscovery/>
<http://www.discoveryresources.org/events-seminars/webcasts-podcasts/>

Articles & Key Cases

"E-Discovery Basics" *California Litigation: The Journal of the Litigation Section, State Bar of California*, August 2005
Dodge, Warren & Peters Ins. Services v. Riley (2003), 105 Cal.App.4th 1414 [preservation order & forensic exam of electronic storage media]
Toshiba America Electronics Components, Inc. v. Superior Court (Lexar Media, Inc.)(2004), 124 Cal.App.4th 762 [cost shifting]
Zubulake v. UBS, 229 F.R.D. 422 (S.D.N.Y. 2004) [1 of 5 opinions in most famous e-discovery case]

Glossaries & Explanations

<http://Wikipedia.org>
<http://www.thesedonaconference.org>
<http://whatis.techtarget.com>

California Discovery Act & Rules of Court

C.C.P. Sections 2031, 2016, 1985 et seq., 1985.3-.6
C.R.C. Rules 3.724-3.728 [case management of discovery: meet & confer, statement, conference, & order]

LITIGATION SECTION
STATE BAR OF CALIFORNIA

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LITIGATION SECTION

State Bar of California
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E-Discovery Pocket Guide

WHAT EVERY LITIGATOR MUST KNOW



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The **LITIGATION SECTION**
of the State Bar of California provides your

E-Discovery Pocket Guide

WHAT EVERY CALIFORNIA LITIGATOR MUST KNOW

- **Potential issue in each case**
- **Lawyers cannot ignore it**
- **Clients and judges expect e-competence**

RISKS of ignoring e-discovery

- Ignore vital evidence
- Sanctions / Spoliation
- Malpractice
- Discipline

BENEFITS

- Competence & results
- Ethical & professional duties
- Efficiency & cost reduction
- Client attraction & retention

E-DISCOVERY BASICS FOR EVERY LITIGATOR

Basic Knowledge

Do you have a working knowledge of the following concepts that today's litigators must understand?

- Metadata, RAM, computer logs
- Native format, TIFF, PDF
- Fields, queries, & relational databases
- Preservation duties, letters, and orders
- Spoliation & its remedies
- Backup tapes, data archives and storage
- Keyword, contextual and concept search
- Hard drive, server, flash memory
- Computer and network forensics
- Spreadsheet formulas
- Forensic copy
- ESI: electronically stored information
- Records management

Tips & Guidelines

- Most data, information and “documents” is created, used, transmitted, stored, saved and discovered in electronic form
- Understand how e-data differs from paper
- Tech changes: update your knowledge
- Apply basic discovery concepts and rules to e-data; reconsider clichés in e-data context
- Know your client's e-data system, practice & policy
- Address e-discovery duties with client immediately
- Evaluate all issues for e-data evidentiary sources
- Integrate e-data in all discovery inquiries & plans
- Understand e-data before you negotiate or make representations, assertions, or commitments to your client, opponent, or the court
- Evaluate & address e-data issues and problems with adversary & court ASAP
- Use e-data expert early; a good expert can be your mentor and your best evidence

- Use e-data, technology and discovery referees to achieve cost effective discovery
- Approach meet & confer and case management conferences with knowledge, expert assistance and a clear strategy
- Take corporate depositions early to understand opponents system and sources of information and to plan future discovery

Client Discussion Topics

- Assembly & supervision of discovery team
- Allocation of discovery duties: party / others
- Retention of expert assistance: types, need, selection, use, costs, credibility
- ESI data map: locate discoverable data
- Document retention, storage, and destruction policies, records and practices
- Preservation obligation (dates, subject matter, participants, hardware, data archives, software)
- Litigation hold: duty to preserve / stop destruction
- Preservation duty: compliance, monitoring, enforcement, supervision, review, modification and suspension; feasible response to opponent's demand or motion
- Duty of reasonable search and production
- New sources of e-data to preserve & search
- Forms of production of different information
- Legally defensible preservation & search
- Review process (relevancy, privilege, responsive)
- Costs & use of technology for review
- Cost of retrieval, processing, maintenance, review
- Cost shifting / allocation
- Spoliation and discovery sanctions
- Necessity of a Protective Order to preserve opponents' discoverable evidence
- Privilege Issues: waiver by inadvertent production & crime-fraud exception

Meet and Confer Topics

- Preservation duty, scope, costs & order
- Scope of search & production (metadata, back-ups, digital storage, related 3d party records, ISPs, web hosting services, GPS records, IP addresses, mobile phones, log data, flash drives and i-pods, surveillance tapes, voice mail, access logs, RAM, embedded data, telephone records and recordings...)
- Voluntary mutual production & depositions
- Shared data depository (concept organization)
- Simultaneous or phased production
- Relative value of specific data in electronic form
- Form of production (Native / TIFF / PDF)
- Cost allocation: preservation, search, production
- Forensic Inspection of drives and servers
- Database queries, keyword and concept searches
- Privilege ID & log / Quick Peek / Clawback
- Inadvertent production as waiver of privilege
- Judicial intervention and assistance: telephonic contact, informal guidance, status conferences
- Discovery referee: scope, authority, review
- Notice to & duties of related non-parties & agents
- Admissibility of e-data
- Access to adversary's database, servers or hard drive; use and instruction of neutral expert to protect confidentiality
- Discovery of preservation efforts or instructions
- Presentation of issues to court at case management conference: C.R.C. Rules, CM statement

Case Management

- Present issues to court and obtain orders
- Selecting and using a discovery referee
- Strategy for conference with judge
- Strategy in drafting case management order
- Informal court contact & dispute resolution
- Periodic discovery status conferences