

Making Everything Easier!™

e-Discovery

FOR

DUMMIES®

Learn to:

- Follow the correct steps in the e-discovery process
- Anticipate potential risks
- Develop an e-discovery strategy for your company
- Identify best practices in the event of litigation

Linda Volonino
Ian Redpath
e-discovery consultants



e-Discovery for Dummies®

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by Linda Volonino and Ian Redpath



WILEY
Wiley Publishing, Inc.

e-Discovery For Dummies®

Published by Wiley Publishing, Inc. 111 River
Street Hoboken, NJ 07030-5774 www.wiley.com

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Indiana

Published by Wiley Publishing, Inc., Indianapolis, Indiana

Published simultaneously in Canada

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Library of Congress Control Number: 2009937841

ISBN: 978-0-470-58409-5

Manufactured in the United States of America

10 9 8 7 6 5 4 3 2 1



About the Authors

Linda Volonino (PhD, MBA, CISSP, ACFE) entered the field of computer forensics and electronic evidence in 1998 with a PhD and MBA in information systems (IS). She's been a guest lecturer on computer forensics and e-discovery at the State University of New York at Buffalo School of Law, and to attorneys and state Supreme Court justices as part of Continuing Legal Education (CLE). She's a computer forensics investigator and e-discovery consultant with Robson Forensic, Inc. working for plaintiff and defense lawyers in civil and criminal cases. In addition to standard e-mail and e-document evidence, she's consulted on cases involving electronically stored information (ESI) from social media sites and handheld devices as part of e-discovery.

Linda's coauthored Computer Forensics For Dummies and four textbooks: two on information technology, one on information security, and one on computer forensics. She's published in academic, industry, and law journals on e-discovery and the need for electronic records management as part of prelitigation readiness. She's a senior editor of Information Systems Management and was Program Chair for the 2009 Conference on Digital Forensics, Security and Law. Linda can be reached via lvolonino@aol.com.

Ian J. Redpath holds a Bachelor's degree from Hillsdale College, a JD from the University of Detroit, and an LLM from the University of Wisconsin. He has 34 years experience in litigation and has been admitted to practice in the states of Michigan, Wisconsin, and New York as well as the Federal and Tax Courts. Ian is also a former prosecuting attorney. He has published numerous articles on contemporary issues and topics and coauthored several books.

Ian has taught American Jurisprudence at the University of Clermont-Ferrand School of Law in France and lectures regularly on American Law at the prestigious MGIMO in Russia. He has extensive national and international experience in developing, writing, and presenting continuing education programs.

Currently, Ian is the principal in the Redpath Law Offices with offices in Buffalo and New York City where he specializes in criminal and civil litigation. He can be reached at IanRedpath@redpathlaw.com.

Dedication

I would like to dedicate this book to my beautiful wife Liz, and children, Eric, Bridget, and Lauren who provide me with love, inspiration, and support.

- Ian Redpath

Authors' Acknowledgments

Our Project Editor Rebecca Senninger kept us moving forward and doing our best work. Thanks Rebecca! We're also most grateful to Amy Fandrei, Acquisitions Editor, for the expert guidance needed to write a techno-legal book that lawyers, managers, information technologists, and judges may use as a reference.

Special thanks to our hard-working copy editors Brian Walls, Virginia Sanders, and Heidi Unger and our technical

editor Jake Frazier. We appreciate your feedback and suggestions for improving our chapters.

Publisher's Acknowledgments

We're proud of this book; please send us your comments at <http://dummies.custhelp.com>. For other comments, please contact our Customer Care Department within the U.S. at 877-762-2974, outside the U.S. at 317-572-3993, or fax 317-572-4002.

Some of the people who helped bring this book to market include the following:

Acquisitions and Editorial

Project Editor: Rebecca Senninger

Acquisitions Editor: Amy Fandrei

Copy Editor: Brian Walls

Technical Editor: Jake Frazier

Editorial Manager: Leah Cameron

Editorial Assistant: Amanda Graham

Sr. Editorial Assistant: Cherie Case

Cartoons: Rich Tennant (www.the5thwave.com)

Composition Services

Project Coordinator: Sheree Montgomery

Layout and Graphics: Joyce Haughey, Mark Pinto

Proofreaders: Laura Albert, ConText Editorial Services, Inc.

Indexer: Sherry Massey

Special Help: Virginia Sanders, Heidi Unger

Publishing and Editorial for Technology Dummies

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Andy Cummings, Vice President and Publisher

Mary Bednarek, Executive Acquisitions Director

Mary C. Corder, Editorial Director

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Debbie Stailey, Director of Composition Services

Introduction

Electronic discovery gone wrong is kryptonite to a legal action, as many have learned since the amended Federal Rules of Civil Procedure (FRCP) took effect in December 2006. Now you may urgently want to learn about e-discovery (short for *electronic discovery*) but don't know who to call, or even better, what to read. *e-Discovery For Dummies* is an end-to-end reference and tutorial written for litigators and jurists, corporate counsel and paralegals, information technology (IT) and human resources (HR) managers, executives and record librarians, and anyone who might file a lawsuit or be the recipient of one. For those not engaged in e-discovery now, the time is fast approaching when having a commanding knowledge of it is going to be vital to your career.

Who Should Read This Book?

e-Discovery For Dummies is for everyone needing an understanding of the e-discovery rules of procedure and the protections they provide, and how to position your case to be covered by those protections. IT, HR, records managers, and others who might be responsible for e-litigation readiness or electronic records management should start reading this book as soon as possible.

CPAs who provide forensic information and damage calculations for clients need to be aware of e-discovery issues, particularly the liability implications of metadata

contained in client files. Inadvertent disclosure of metadata in client files could remove legal protections. For example, if a client's metadata is disclosed accidentally, then it may enable opponents to use that metadata against the client's interests.

Insurance companies are enormously concerned and interested in e-discovery. Insurers are like the father of the bride — even though no one pays much attention to him at the event, he pays much of the bill. So insurance companies have one of the largest stakes in e-discovery.

If you know nothing about e-discovery or want to sharpen your litigation strategy, this book's for you.

About This Book

e-Discovery For Dummies is an introduction to the hottest legal issue. The e-discovery rules expand the definition of what's discoverable to include electronically stored information (ESI), require parties to discuss ESI during initial meet-and-confer conferences, may provide a safe harbor against sanctions for routine deletion of ESI, and may protect against a privilege waiver for inadvertent disclosure.

The rulings and opinions of various judges provide invaluable lessons that you and your lawyers can learn from this book, much cheaper than learning through experience. We cover the Advisory Guidelines to better prepare you to understand the process of obtaining, protecting, and presenting ESI. You learn how Federal Rule of Evidence 502, enacted in 2008, provides relief for

inadvertent disclosure of items privileged under the attorney-client relationship or protected as work product.

Every company and agency needs to be litigation-ready and know how to proceed when requesting or responding to e-discovery agreements. Preparing for litigation implies that all of these new data repositories must be included in a data and records retention policy and program. Security executives involved in litigation could be called upon to describe their company's records retention policy and be knowledgeable of the systems used to manage their department's data. Lacking a credible program or failing to adhere to the policy is indefensible in court and might expose your company to legal risk.

It's an honest presentation of the issues and challenges, strengths and weaknesses of e-discovery.

What You're Not to Read

Depending on your background in law, criminal justice, investigative methods, or technology, you can skip the stuff you already know. If you're the victim, the accused, the plaintiff, or the defendant, feel free to skip sections that don't relate directly to your case or predicament.

Foolish Assumptions

We make a few conservative assumptions, even though we're serious about issues and advice we offer. We assume that:

You need to understand e-discovery.

You use and have a basic understanding of e-mail, the Internet, and digital devices.

You have an interest in learning from the experience of others.

You are considering expanding your career to include e-discovery.

You realize that this book is not legal advice.

How This Book Is Organized

This book is organized into seven parts. They take you through the basics of e-discovery, ESI, rules, advisories, and litigation readiness. They cover the phases from preservation through production. Specialty issues, such as e-discovery in large cases and small cases and computer forensics, are covered. For a more detailed overview of topics, check out the following sections.

Part I: Examining e-Discovery and ESI Essentials

The book starts by introducing you to the e-discovery laws that have changed the responsibilities of legal and information technology (IT) professionals. You read why every lawsuit and most civil cases can and will involve e-discovery and the accessibility of ESI (as well as ESI that's not reasonably accessible).

You learn that most cases are settled as a result of e-discovery because that's when both sides learn the strengths and weaknesses of their position relative to that of their opposition.

Part II: Guidelines for e-Discovery and Professional Competence

This part gives you an in-depth understanding of the e-discovery amendments, The Sedona Conference advisory guidelines often used by the bench in settling disputes, and the expected standards of legal competence and conduct. Although the Federal Rules and advisories guide e-discovery, the competency of counsel turns them into a winning edge. We present the Electronic Discovery Reference Model (EDRM) as it relates to processes of preserving, collecting, processing, reviewing, and producing ESI.

Part III: Identifying, Preserving, and Collecting ESI

In this part, we cover the first phases of e-discovery, namely the identification, preservation, and collection of ESI. These are the steps to take when a lawsuit is filed. You learn what to do when faced with an e-discovery request and the countdown to the meet and confer with opposing counsel within 99 days.

We discuss the meet-and-confer conference in detail. Being prepared to negotiate during this conference can

make the difference between a quick settlement and a prolonged battle. There are no re-negotiations or bailouts for bad agreements.

Part IV: Processing, Protecting, and Producing ESI

In the fourth part, we cover the next set of phases from processing of ESI through review, filtering, and the production of responsive, nonprivileged, redacted ESI. You read many examples of motions, mistakes, and monetary sanctions that could have been avoided.

All ESI issues might arise during these phases, including metadata, privilege, work product, keyword searches, and filtering by keyword, concept, and custodian. This part details the review process, which is the most expensive phase in e-discovery.

Part V: Getting Litigation Ready

In this fifth part, we examine the admissibility and relevance rule of electronic evidence, and forensics methods to recover and preserve it. Rules of evidence are subject to judgment, as are the federal rules of civil procedure. This part also covers advanced e-discovery strategies and issues, some of which are the use of experts, sanctions, depositions, and cost-shifting. We explain methods to authenticate evidence in civil trials. One indisputable duty is to keep the chain of custody

intact because you can't repair tainted electronic evidence.

Part VI: Strategizing for e-Discovery Success

In the sixth part, you learn about archiving electronic records, which differs from data backups. We discuss electronic records management (ERM) that's necessary to be ready to respond to a request for ESI. The focus shifts from internal to external. We discuss e-discovery from the perspective of the judges and their powers to encourage parties to practice good faith and dissuade gamesmanship.

For large-scale, high-stakes, or unusual cases, you learn the value of partnering with vendors or litigation services companies to augment your expertise. For small cases, ESI may be the most convincing witness.

Part VII: The Part of Tens

Every *For Dummies* book has The Part of Tens, and we give you three of them. The first one covers the must-know rules. The second focuses on keeping you up-to-date. The third one focuses on the courts and career-advancing lessons.

Glossary

We include an e-discovery dictionary of legal and technical terms used throughout this book.

normals Used in This Book

Useful clues represented by normals highlight especially significant issues in this book. The following paragraphs (with their representative normals) give you an idea of what to expect when you see these normals.



Time is money, and mistakes waste even more. Save yourself time, effort, and the pain of explaining to the court why you did or did not do something that you should or should not have done. These normals flag paragraphs that can be gold mines of information or land mines to sidestep.



Litigation that spans several years and involves many motions are not amenable to short summaries. The same is true of judges' opinions in cases where litigants or their lawyers made more than a fair share of mistakes. These normals provide an in-depth look at real-world cases and issues — both good and bad.



Sanctions ahead! We flag the land mines with this normal to draw your attention to what the rules mandate and what judges expect you to do correctly.



A heads-up and FYI normal on concepts to keep in mind.

Where to Go from Here

In this book, you find the basics of e-discovery rules, procedures, case law, and litigation readiness, but this is an exploding topic. You can use this book as a reference, how-to guide, and path to lifelong learning. Electronic discovery is not a passing phase. Electronic discovery case law is evolving. Litigants are sliding down the learning curve, which may significantly reduce time, costs, errors, and sanctions. When you know the basics and tactics, you have the foundation to expand your knowledge.

If you're looking for a handy reference to the e-discovery steps or the Federal Rules of Civil Procedure and Federal Rules of Evidence, check out the cheat sheet at www.dummies.com/cheatsheet/ediscovery.