

V. New E-Discovery Sources, Tips and Tactics

o Tried and True Websites and Other Sources

Research on electronic discovery is greatly facilitated by two excellent websites: K&L Gates (<http://www.ediscoverylaw.com/>, accessed March 20, 2013) and Kroll Ontrack (<http://www.krollontrack.com/>, accessed March 20, 2013). Both of these websites have databases of e-discovery cases that have been indexed and summarized. Other resources are provided through these websites, including upcoming events, rules and statutes, updates to federal rules amendments, industry news, blogs, podcasts, white papers and a glossary. These websites are an excellent place to begin any research project involving e-discovery. Moreover, these services are provided free of charge.

In terms of K&L Gates, the initial screen provides the most recent case summaries and other significant activities in e-discovery, such as amendments to rules and upcoming events.

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Electronic Discovery Law
 Legal issues, news, and best practices relating to the discovery of electronically stored information.

[Court Denies Motion for Protective Order or Cost-Shifting Related to Request to Utilize Sixty-Seven Search Terms](#)
 Posted on March 16, 2013 by K&L Gates
Juster Acquisition Co., LLC v. N. Hudson Sewerage Auth., No. 12-3427 (JLL), 2013 WL 541972 (D.N.J. Feb. 11, 2013)
 In this case, the court denied Defendant's motion for a protective order regarding the sixty-seven (67) electronic word searches demanded by the plaintiff. It also denied Defendant's request that the cost of running those searches be shifted to the plaintiff.
 Plaintiff's first Request for Production included a list of 67 proposed search terms to be run against Defendant's ESI. In response, Defendant sought a protective order or, alternatively, an order shifting the costs associated with the search, arguing it was "entitled" to a protective order because it had already produced 8000 pages of responsive documents (in hard copy) and because, in its view, the requested search terms were "quite broad and vague."
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[In Minnesota, Amendments to the Rules of Civil Procedure Highlight Proportionality](#)
 Posted on March 12, 2013 by K&L Gates
 On February 4, 2013, the Supreme Court of the State of Minnesota adopted amendments to the Rules of Civil Procedure, including those affecting discovery. Of particular note were

<http://www.ediscoverylaw.com/2013/03/articles/case-summaries/court-denies-motion-for-protective-order-or-costshifting-related-to-request-to-utilize-sixtyseven-search-terms/>

From the top left of the screen, select E-Discovery Case Database:

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Electronic Discovery Law
 Legal issues, news, and best practices relating to the discovery of electronically stored information.

Home > [E-Discovery Case Database](#) >

E-Discovery Case Database
 Posted on January 9, 2006 by K&L Gates
 Search more than 2000 cases collected from state and federal courts involving electronic discovery issues by keyword, or by any combination of 29 different case attributes, including on-site inspection, format of production, allegations of spoliation, or involving data that is "not reasonably accessible," etc.
 CLICK HERE to access the database, free of charge.
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 TAGS: [E-Discovery Case Database](#)
[Comments \(4\)](#) [Trackbacks](#)

Older Entries

Once you select [Click Here](#), you will be presented with a search screen, where you will be able to enter keywords as well as select from one or more case attributes.

Electronic Discovery Case Database

K&L Gates maintains and continually updates a database containing over 1,500 electronic discovery cases collected from state and federal jurisdictions around the United States. This database is searchable by keyword, as well as by any combination of 29 different case attributes, e.g., on-site inspection, allegations of spoliation, motion for a preservation order, etc. Each search will produce a list of relevant cases, including a brief description of the nature and disposition of each case, the electronic evidence involved and a link to a more detailed case summary if available. For an alphabetical list of all cases contained within the database, click the search button at the bottom of the page.

Please select one or more of the following case attributes and/or enter keyword search terms below:

E-Discovery Rules

- | | | |
|--|--|---|
| <input type="checkbox"/> FRCP 26(b)(2)(B)
"Not Reasonably Accessible" | <input type="checkbox"/> FCRP 34(b)
Procedure or Format | <input type="checkbox"/> FRCP 26(b)(5)(B)
or FRE 502 |
| <input type="checkbox"/> FRCP 37(e) Safe Harbor | <input type="checkbox"/> FRCP 26(b)(2)(C)
Limitations | <input type="checkbox"/> Local Court Rule, Form
or Guideline |
-

Context

- | | | |
|---|---|--|
| <input type="checkbox"/> TRO or Preliminary
Injunction | <input type="checkbox"/> Motion for Preservation
Order | <input type="checkbox"/> Early Conference or
Discovery Plan |
| <input type="checkbox"/> Motion to Compel | <input type="checkbox"/> Motion for Protective
Order | <input type="checkbox"/> Third-Party Discovery |
| <input type="checkbox"/> Motion for Sanctions | | |
-

Particular Issues

- | | | |
|---|---|---|
| <input type="checkbox"/> Data Preservation | <input type="checkbox"/> Mirror Images | <input type="checkbox"/> Cost Shifting |
| <input type="checkbox"/> Records Retention Policy | <input type="checkbox"/> On-Site Inspection | <input type="checkbox"/> Spoliation |
| <input type="checkbox"/> Backup Media Recycling | <input type="checkbox"/> Keyword Searches | <input type="checkbox"/> Court-Appointed Expert |
| <input type="checkbox"/> Backup Tapes | <input type="checkbox"/> Format of Production | <input type="checkbox"/> Privilege or Work Product |
| <input type="checkbox"/> Deleted Data Recovery | <input type="checkbox"/> Metadata | <input type="checkbox"/> Lack of Cooperation or
Inaccurate Representations |
| <input type="checkbox"/> Admissibility | | |
-

Enter keyword search terms:

Limit results to citations with case summaries only

Search

Search

A simple search on the keyword "YouTube" yields three cases with short summaries:

Records 1 - 3 of 3

Printer-friendly: [all records](#)

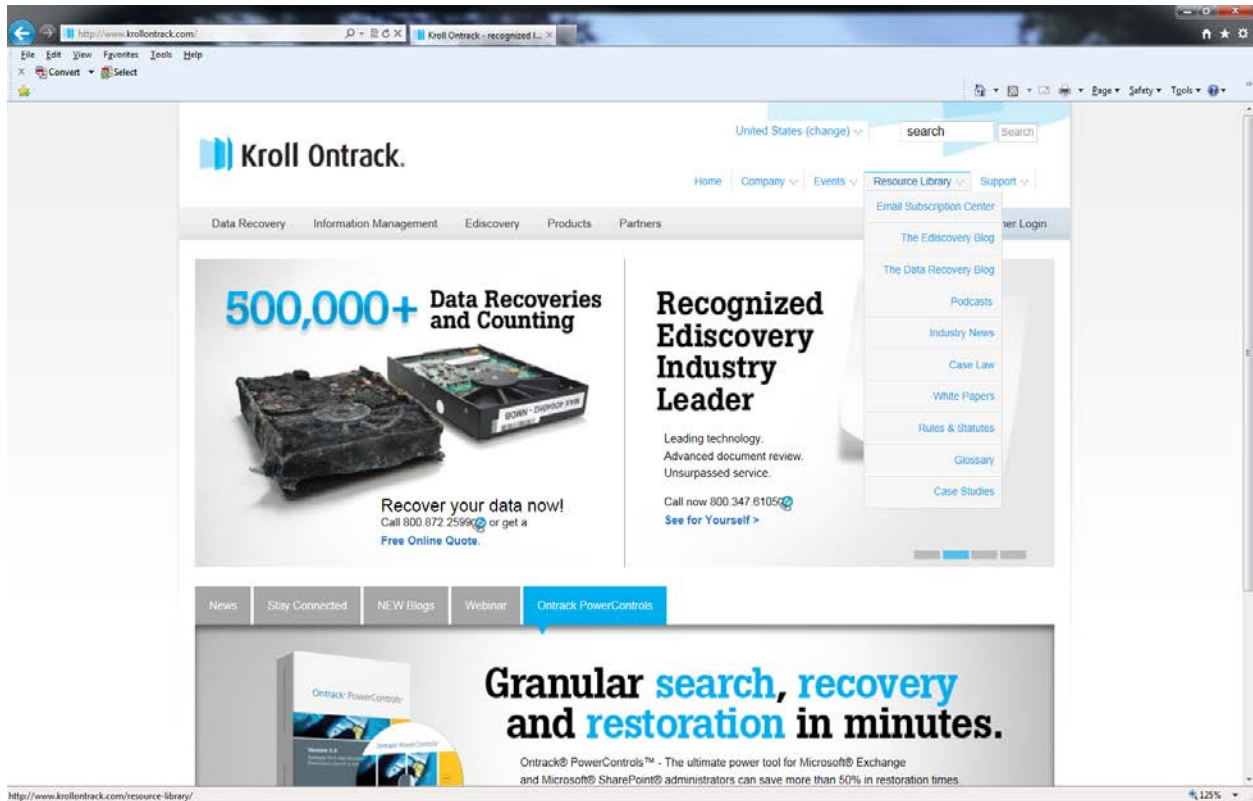
<< Previous Next >>

Case Citation:	People v. Torres, No. E052071, 2012 WL 1205808 (Cal. Ct. App. Apr. 11, 2012)
Nature of Case:	Attempted murder
Electronic Data Involved:	YouTube video
E-Discovery Issue:	Trial court did not abuse its discretion in permitting prosecution to show a YouTube video where, although officer testified "he did not know when the video was made or who produced it" he testified that the video was an accurate depiction of what it looked like on YouTube such that the trial court "could conclude that the video would assist jurors in determining the facts of the case and motivation for the crimes" and where the court determined that the issues of when and who produced the video spoke to issues of reliability and weight and that the images on the video (picture of the alleged victim with an "x" over his face, for example) coupled with evidence linking defendant to the crime of attempted murder "sufficiently link[ed] the video with the defendant"
Case Summary:	Not Available
Attributes:	Admissibility
Case Citation:	Viacom Int'l, Inc. v. YouTube Inc., 2009 WL 102808 (N.D. Cal. Jan. 14, 2009)
Nature of Case:	Copyright infringement
Electronic Data Involved:	ESI
E-Discovery Issue:	Court granted defendants' motion to compel production of third party's materials related to plaintiffs despite objections where documents sought were relevant and where the alleged burden was insufficient in light of probable reimbursement to third party by plaintiffs, plaintiffs' performance of the necessary privilege review, and third party's prior success in reducing the volume of responsive documents; where defendants sought third party material unrelated to plaintiffs, court ordered defendants and third party to meet and confer regarding scope of production and ordered defendants to bear the cost; court also ordered meet and confer regarding format of production, including specific consideration of granting defendants access to Kroll database where documents were stored
Case Summary:	Not Available
Attributes:	FRCP 34(b) Procedure or Format; Motion to Compel; Motion for Protective Order; Third Party Discovery; Cost Shifting; Inspection; Keyword Search; Format of Production

Case Citation:	Viacom Intern. Inc. v. Youtube Inc., 2008 WL 2627388 (S.D.N.Y. July 2, 2008)
Nature of Case:	Copyright infringement
Electronic Data Involved:	Databases, computer source code which controls both the YouTube.com search function and Google's internet search tool "Google.com" and source code for YouTube's "Video ID" program
E-Discovery Issue:	Ruling on parties' cross-motions regarding production of various types of ESI sought by plaintiffs, court denied motion to compel source code given its value and secrecy and plaintiff's failure to make proper preliminary showing justifying production; court further denied motion to compel production of schema for Google's advertising database, but granted motion to compel as to data from YouTube logging database and schema for Google Video Content database
Case Summary:	Not Available
Attributes:	Motion to Compel; Motion for Protective Order; Format of Production

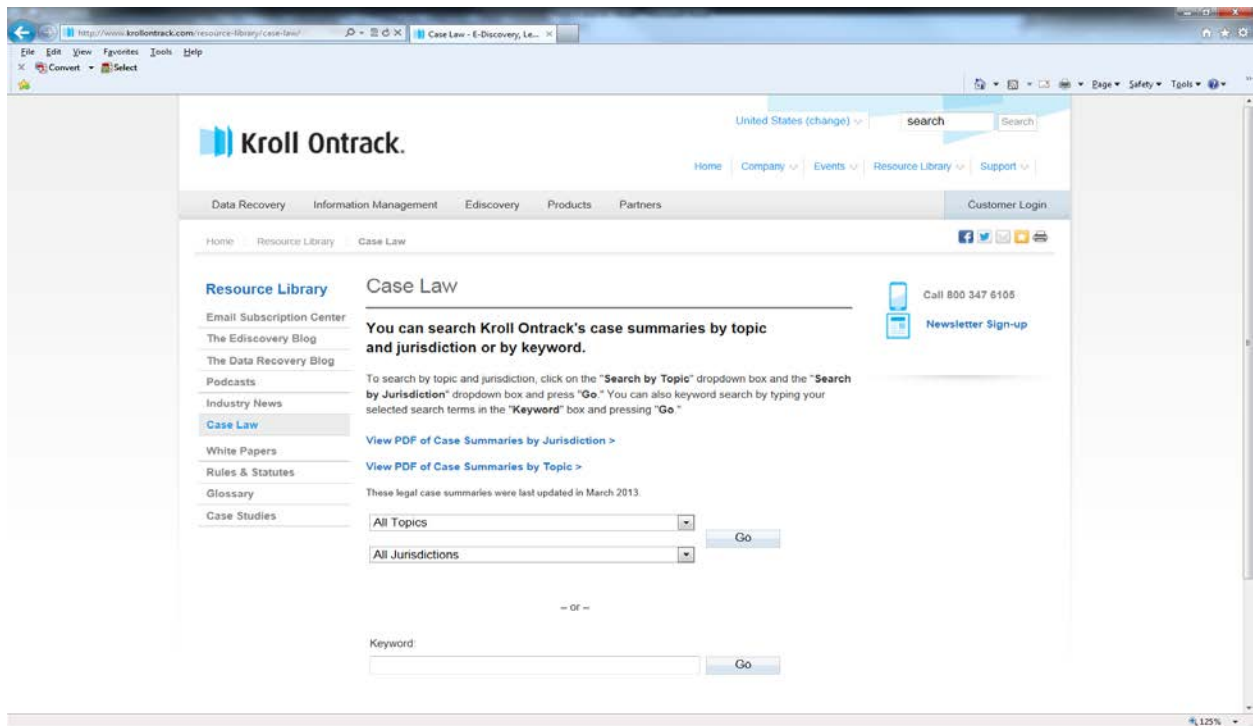
Notice the generous amount of helpful information provided for each case: the case citation, the nature of the case, the electronic data involved, a short summary of the e-discovery issue, and the attributes (which correspond to the checkboxes in the search screen). Note whether the case summary is Available. If it is Available, a more extensive case summary will be provided and often there will be a link to the actual decision or other case-related materials. However, even the short case summaries provided in the box will help you determine whether you want to read the actual case itself. A suggestion is to cut and paste these boxes into a Word document, which will quickly provide you with a list of cases with short summaries that you can use as the foundation for your research. Also, if you try different keywords and attributes, you can eliminate duplicates as you cut and paste the cases into your Word document. Accessing the K&L Gates database is always my first step in any e-discovery project and many of the cases I cite later in my materials were retrieved from this database.

The second website for cases and other e-discovery materials is Kroll Ontrack.

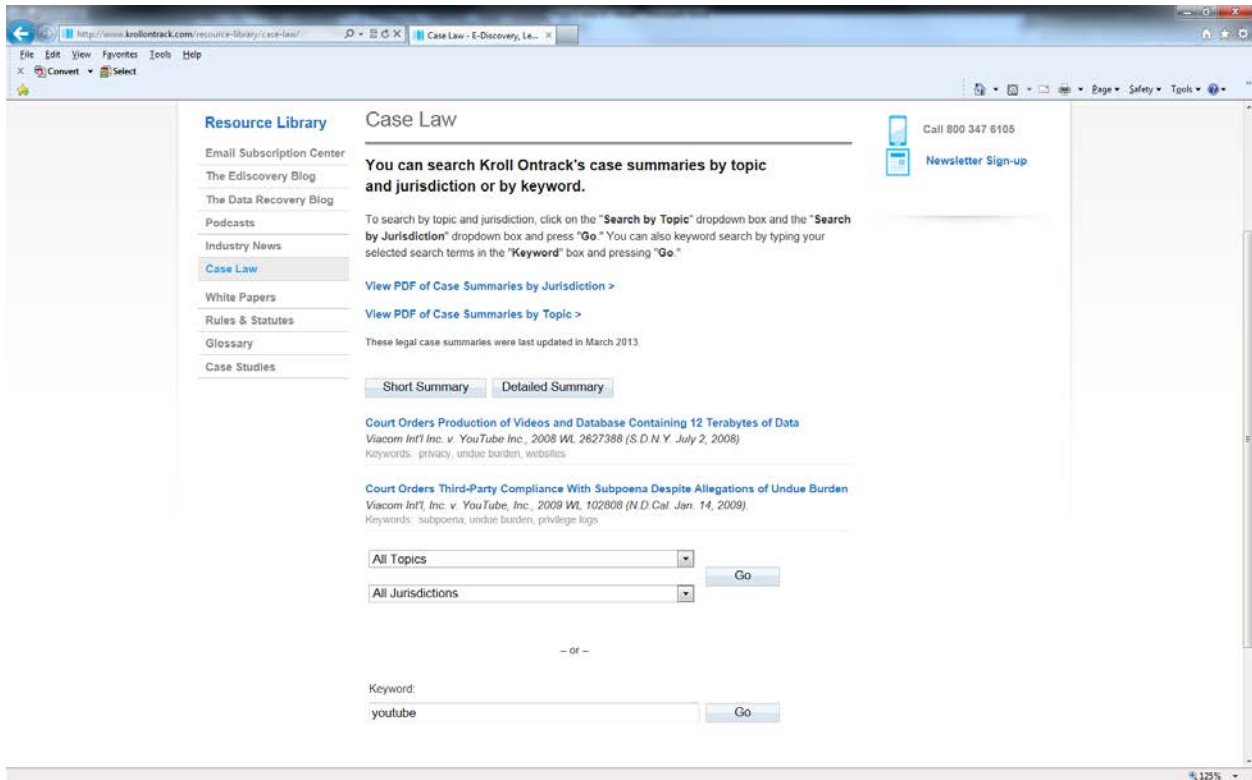


From the pull-down menu under Resource Library, you can access blogs, podcasts, industry news, case law, white papers, rules and statutes, a glossary and case studies.

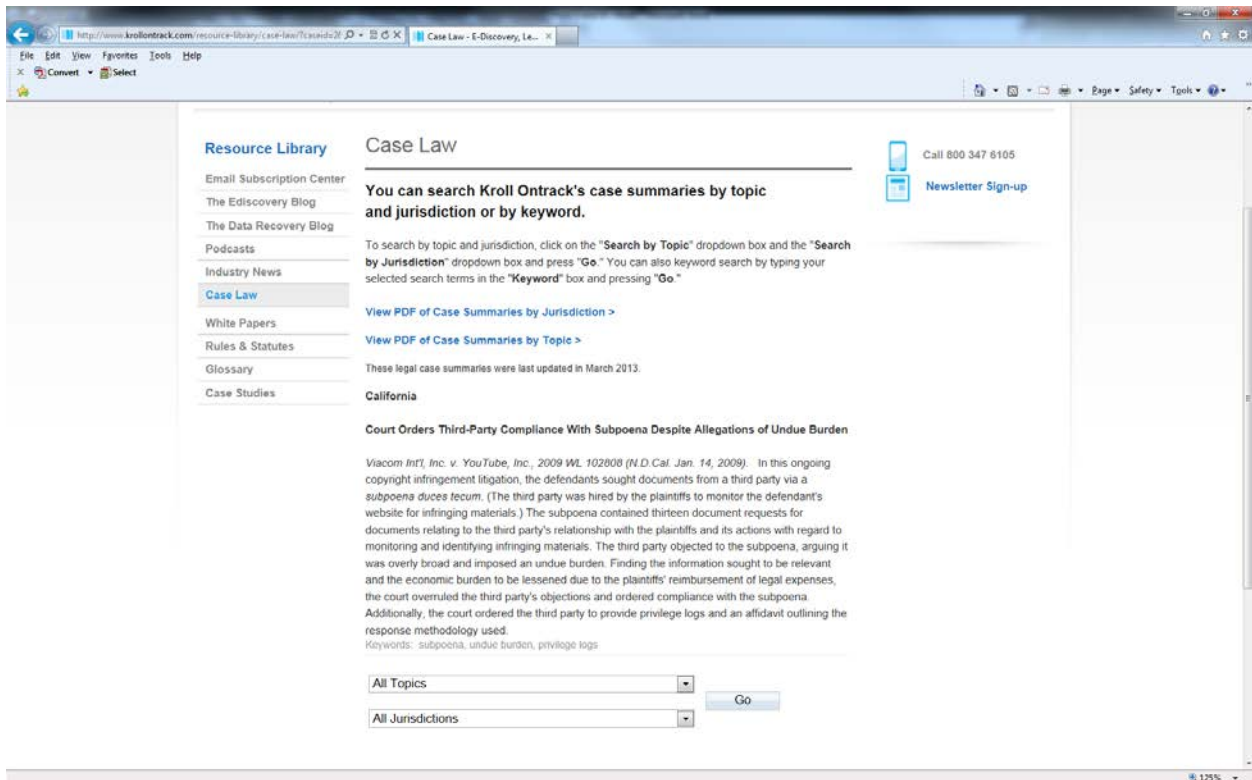
Scroll down and select Case Law to bring up a search screen:



Note that instead of searching, you can view a PDF of case summaries by jurisdiction or a PDF of case summaries by topic. You can use the pull-down menus to search by topics (these are e-discovery topics, such as admissibility and sanctions, rather than substantive areas of law) or by jurisdiction. A simple search using the keyword “YouTube” yields a short list of cases:



Clicking on one of the cases provides a short summary (note that keywords are also indicated):



From this point, you can cut and paste these case summaries into your Word document. If some of these cases were also retrieved from the K&L Gates databases, you can interleave them at the appropriate places. It is especially reassuring to have case summaries from both databases.

Accessing the Kroll Ontrack database is always my second step in any e-discovery project and many of the cases I cite later in my materials were retrieved from this database.

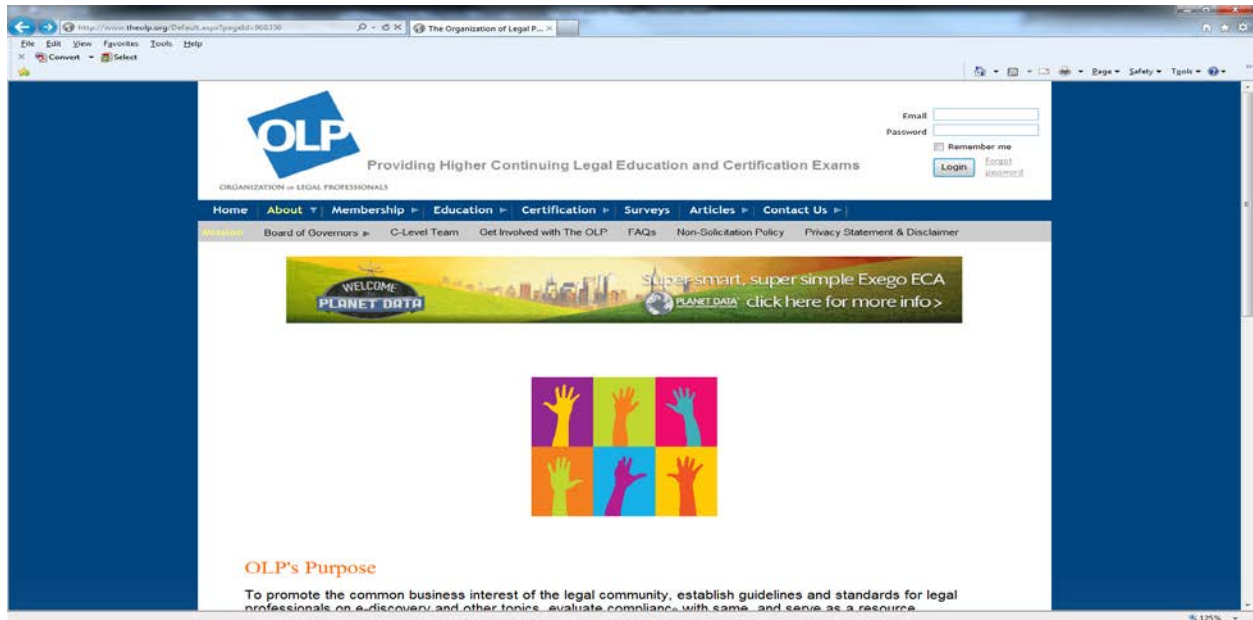
At this point, I review the cases in my Word document and decide which of them I am most interested in. Although the summaries are helpful in illuminating the most important aspects of the cases, if I am going to discuss a case in detail for a journal article, presentation or seminar manual, I want to read the full decision. I have free access to LexisNexis through the university and Casemaker through the Indiana State Bar Association, but I often find it is easiest and most expedient to just input the case citation into Google or another search engine.

Other useful sources of primary authority law for e-discovery include the Legal Information Institute at the Cornell University School of Law (for the Federal Rules of Evidence and the Federal Rules of Civil Procedure) and the American Bar Association website (for the ABA Model Rules of Professional Conduct).

In the early years of e-discovery, it was difficult to find credible sources of information. Fortunately, as this emerging area of the law has evolved, the result has been a wealth of publications, blogs, seminars and websites from professional organizations and vendors. One of the first places to start may be a search of the local public, law or academic library. Many excellent books have been published that capture the field of e-discovery from both a legal and a technical perspective. Several books are available from the American Bar Association. Sharon Nelson and John Simek have been leaders in the e-discovery arena as well as digital forensics

and information security, with their respective expertise in law and technology providing a powerful combination. Their company (Sensei Enterprises, Inc.) website, <http://www.senseient.com/> , provides links to their publications and information about their past and upcoming seminars. You can sign up for their listserv and then you will periodically be notified of new articles that they have published. They are exceptionally fine speakers and I have also used their books in my courses (most recently, *Locked Down: Information Security for Lawyers* in my course on the legal and social issues of cyber-security). More recently, Ms. Laura Zubulake, the famous plaintiff in the *Zubulake v. UBS Warburg* case that resulted in the various pronouncements that are the foundation for our system of e-discovery, has published a book about her experiences, titled *Zubulake's E-Discovery: The Untold Story of My Quest for Justice* (<http://www.laurazubulake.com/>, accessed March 20, 2013).

Another useful resource on e-discovery is the website for the Organization of Legal Professionals (OLP) (<http://www.theolp.org/> - I'm a member of the Board of Governors). This is a relatively new professional organization which was formed in response to a need for training, guidance and certification in e-discovery.



The website includes links to articles, salary surveys, lists of webinars and online courses, training videos and information on certification exams. Other professional organizations which have a considerable interest in e-discovery issues are the International Legal Technology Association (<http://www.iltanet.org/>, accessed March 20, 2013) and ARMA International (<http://www.arma.org/>, accessed March 20, 2013). A lawyer/law firm that is facing many cases with e-discovery issues may want to consider joining one or both of these organizations, which offer excellent publications, conferences and webinars, with many regional and local chapters for in-person educational opportunities and networking. Of course, The Sedona Conference has been providing leadership in the area of e-discovery for many years (<https://thesedonaconference.org/>, accessed March 20, 2013), so its website should also be consulted for the latest in best practices and guiding principles.

Vendor websites can also be useful information on e-discovery issues. Several companies whose websites I have used or whose services I have highlighted in e-discovery courses, presentations and publications are discover-e, Clearwell Systems (Symantec) and

Access Data (Summation). There are so many more e-discovery service providers than there were ten years ago, so it is worthwhile visiting the websites of several vendors, including those you might not be familiar with. A good place to start is the 2012 e-Discovery & Technology Vendor Directory offered by Paralegal Today (http://paralegaltoday.com/directories/legal_tech/legal_tech_default.htm , accessed March 30, 2013).

There are many blogs (or “blawgs”) devoted to e-discovery. Among these blogs (accessed March 20, 2013) are Discovery Advocate (<http://www.discoveryadvocate.com/>), eLessons Learned (<http://ellblog.com/>), eDiscovery Daily (<http://www.ediscoverydaily.com/>), eDiscovery Law & Tech (<http://blog.x1discovery.com/>), The Electronic Discovery Reading Room (<http://www.ediscoveryreadingroom.com/>), e-Discovery Team (<http://ediscoveryteam.com/>) and {ride the lightning} Electronic Evidence and Information Security Blog (<http://ridethelightning.senseient.com/>), offered by Sensei Enterprises, Inc. This list of blogs was provided by Tuoro Law, which is another source of information on e-discovery (Tuoro College Jacob D. Fuchsberg Law Center).

- o Email into Evidence

Fortunately, email has already been dealt with robustly as a recognized format for electronically stored information (ESI) in electronic discovery cases. For example, just searching on the keyword “email” in the K&L Gates database of e-discovery cases yields 600 records! Narrowing the search in this database to just 2012 and 2013 provides several useful cases to examine how email should (and should not) be handled at all stages of the e-discovery

process. What is interesting is how many of these cases address email, text messages and social media, illustrating the many technologies that we currently use to communicate. The nature of these cases cover breach of contract, breach of fiduciary duty, employment discrimination, patent infringement, fraud, the Fair Labor Standards Act, the False Claims Act, misappropriation of trade secrets, conversion, unlawful termination, under ADEA, violation of property rights, sexual harassment and retaliation and even the death of an inmate while incarcerated. A quick search through the Kroll Ontrack database of e-discovery cases includes cases from even the early 1990s, pre-dating either the *Zubulake v. UBS Warburg* case or the 2006 revisions to the Federal Rules of Civil Procedure by more than a decade.

- *Apple, Inc. v. Samsung Elecs. Co. Ltd.*, No. C 11-1846 LHK (PSG) (N.D. Cal. July 25, 2012) and *Apple, Inc. v. Samsung Elecs., Co. Ltd.*, No. 11-CV-01846-LHK, 2012 WL 3627731 (N.D. Cal. Aug. 21, 2012).
- *Ceglia v. Zuckerberg*, No. 10-CV-00569A(F), 2012 WL 1392965 (W.D.N.Y. Apr. 19, 2012).
- *E.E.O.C. v. Original Honeybaked Ham Co. of Georgia, Inc.*, No. 11-cv-02560-MSK-MEH, 2012 WL 5430974 (D. Colo. Nov. 7, 2012).
- *Optiver Australia Pty, Ltd. & Anor v. Tibra Trading Pty. Ltd. & Ors*, No. C 12-80242 EJD (PSG), 2013 WL 256771 (N.D. Cal. Jan. 23, 2013).
- *Special Markets Ins. Consultants, Inc. v. Lynch*, No. 11 C 9181, 2012 WL 1565348 (N.D. Ill. May 2, 2012).
- *U.S. ex rel Baklid-Kunz v. Halifax Hosp. Med. Ctr.*, No. 6:09-cv-1002-Orl-31TBS, 2012 WL 5415108 (M.D. Fla. Nov. 6, 2012).

A blog posting titled Get Started with Email Retention and Compliance Policies on the Grexit Blog (<http://blog.grexit.com/get-started-with-email-retention-and-compliance-policies/>, accessed March 20, 2013), provides important information on why and how corporations and other organizations should properly retain email messages, whether required by law or under industry best practices to do so. Lawyers should work with their clients as well as within their own firms to make sure that a system and proper policies and procedures are in place. “While many of us tend to think of Email as an informal means of communication, the legal and IT departments have to go beyond this and look at Email as a critical resource. While it’s often up to a business to decide what kind of mail and other communication it wants to archive and make discoverable, some businesses are tightly bound by governmental rules. In most countries, including the US, any Email sent (or received) from a government mail box is a part of the public record and must be archived. Strict rules also apply to the financial services industry, publicly listed organizations, and those in the medical and healthcare sectors.” (Id.) In this blog, recommendations are provided for designing an email retention policy and what should be covered in the policy, using email archival solutions (including Google Vault) and using hardware appliances for email retention, such as those provided by DataCove, Arcmail, Cryoserver and Imation InfiniVault.

- o E-Discovery Goes Mobile - E-Discovery Apps

The trend in law practice as well as many other fields of endeavor is to move from desktop machines to smaller and smaller devices, particularly various versions of smartphones and tablets. Fortunately, the market has responded so for electronic discovery work, we can now say “there’s an app for that.” For example, BlueStar now offers an E-Discovery Toolkit (EDD Toolkit) app for iPhone that it touts as “a useful application for attorneys, paralegals, litigation

support staff, and clients who need more information about common processing, reviewing and production questions.” (See EDD Toolkit App for iPhone, <http://www.bluestarcs.com/app-for-iphone>, accessed March 20, 2013). Among the features of the app are: a cost estimator, a time estimator, an e-discovery glossary and a conversion table. Technical support for the app is also provided.

In terms of iTunes, an electronic discovery app that lawyers may find useful for iPhones, iPads and iPods is the Infocentrix E-Discovery Toolkit. According to the website, “Infocentrix E-Discovery Toolkit is a useful application for lawyers and clients who need more information about common processing, Early Case Assessment (ECA) review and production questions. As a service to our current and prospective clients, we have put together a tool that provides valuable reference resources to give clients an idea how much their E-Discovery may cost and how long the process may take. Along with a handy data-to-documents/pages conversion calculator, the application is an essential tool for the e-Discovery practitioner.” (eDiscovery App, <https://itunes.apple.com/us/app/ediscovery-app/id495872501?mt=8>, accessed March 20, 2013) . As stated on the website, the app includes a conversion table that will estimate how many emails, attachments and pages are contained in a user-defined amount of emails and how many documents and pages may be found in a user-defined amount of electronic files. The app also includes Early Case Assessment (ECA), estimates of the time and cost to process and convert electronic documents, Bates stamping and bar coding, full-text extraction (OCR) and de-duplication. It also features a table comparing traditional paper discovery and e-discovery and a contact information page which includes the end-user license agreement and service details. The following screenshots were taken from the website:

Enter size of data:

- MB GB TB

Choose category of data:

- Emails (i.e. PST/NSF)
 E-files (i.e. Word/Excel/PowerPoint/Pdf/etc.)

Calculate

Result

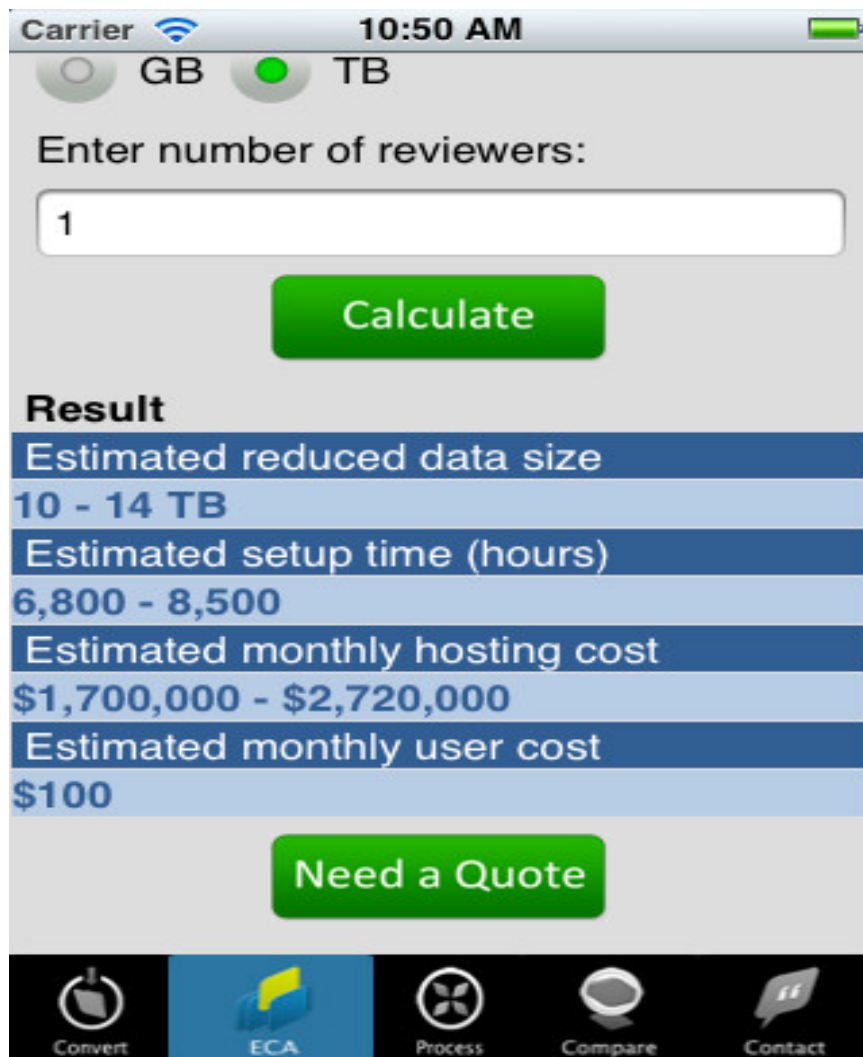
Number of emails

276

Number of attachments

69

    
Convert ECA Process Compare Contact



Finally, in March 2012, Google launched an e-discovery option for apps suite. Called Apps Vault, the new service was developed to store and index email messages and instant message (IM) chat sessions. According to Perez, “the new governance and e-discovery service is designed for companies that want to store this type of data and have it easily accessible in case they are involved in a lawsuit or regulatory investigation and need to provide this information was part of the proceedings.” (Perez, J.C.: Google launches e-discovery option for Apps suite. *Computerworld*, March 28, 2012) It is a cloud-based service, but commentary indicates that it is worth the prices, is easy to set up and manage and works more efficiently on the back end by

saving “deleted” emails and IM sessions on Google Apps servers. (See also Bradley, T.: Vault brings e-discovery tools to Google Apps. *PCWorld*, March 29, 2012.) According to a press release by Hong on December 18, 2012, Vault has been made available to existing Apps customers that purchased Google Apps online directly from Google as well as to Google Apps for Education customers, who may find Vault useful in responding to open records requests. (Hong, J.: Google Apps Vault now available to existing Apps and EDU customers.

<http://googleenterprise.blogspot.com/2012/12/google-apps-vault-now-available-to.html>,

December 18, 2012, accessed March 21, 2013)

VI. Social Media and E-Discovery

o Social Media Archiving and Compliance

Dealing with the complexities of social media as a form of electronically stored information (ESI) as part of an electronic discovery process presents issues for clients and their attorneys. This is especially true as companies and organizations turn to social media as marketing and customer relations tools, far beyond the personal and individual nature that characterizes many activities on social media sites. Consider the following tips for managing social media in prior to and during an e-discovery process, from Ten Tips for Managing Social Media in Ediscovery (Thought Leadership Team, The Ediscovery Blog, July 3, 2012, <http://www.theediscoveryblog.com/2012/07/03/ten-tips-for-managing-social-media-in-ediscovery/>, accessed March 20, 2013):

1. “Start preparing now.
2. Issue litigation holds early.
3. “Privacy” settings will not protect social media data from discovery.
4. Obtain consent before collecting data.
5. Don’t “false friend” to collect data from social media.
6. Avoid self-collection.
7. Leverage a service provider to conduct review.
8. Consider pertinent laws, such as the Stored Communications Act.
9. Don’t ban use of social media outright.
10. Craft proactive policies that encourage prudent posting.”

(See also Green, S.W.: Social Media and E-Discovery: Impact and Influence. Bloomberg Law Reports, 2012, <http://hudsonlegalblog.com/topics/social-media>, accessed March 20, 2013.)

In Learning to “Like” Social Media Discovery, Wrightman notes that “[i]n 2012, issues related to privacy, discoverability, preservation, collection and authentication of such data permeate discussion among courts, litigators and commentators.” (Wrightman, J.: Learning to “Like” Social Media Discovery, Case Studies & White Papers, EDiscovery Blog, January 28, 2013, <http://www.theeddiscoveryblog.com/2013/01/28/learning-to-like-social-media-discovery/>, accessed March 20, 2013) Noting that governing standards have yet to emerge on these issues, the author provides additional guidance on discoverability, preservation and collection and authentication. The article concludes with a statement that “[p]ractices and laws regarding social media discovery will remain in a constant state of change. Ignoring social media is no longer feasible, practical or defensible. At the end of the day, legal professionals must ‘follow’ or ‘like’ such change to stay ahead of the curve or at least ride the crest of the wave.” (Id.) Kaufer notes that “[e]ven though there is tremendous value in social media marketing for companies, there are also risks” and he describes ten issues that should be considered as a company formulates its social media policies. (Kaufer, D.: 10 Basic Social Media e-Discovery Issues Legal Firms Should Consider, TERIS Sophisticated Litigation Support Blog, February 22, 2012, <http://blog.teris.com/socialmedialegalrisk/bid/74910/10-Basic-Social-Media-eDiscovery-Issues-Legal-Firms-Should-Consider>, accessed March 20, 2013).

1. “Chatting about the company.
2. Know the law.
3. Early detection.
4. Social media agreement.

5. It's simply different from paper.
6. Get a 2nd (or 3rd) opinion.
7. Take it seriously.
8. Multiple electronic devices.
9. New Federal laws.
10. Find the right partner.”

Interestingly, Murphy likens social media to the issues that were faced with email in electronic discovery almost two decades ago, but suggests that companies can learn from the precedents set by email and avoid some of the mistakes. (Murphy, B. Are social media e-discovery's next nightmare? *Computerworld*, August 20, 2012) Moreover, he believes that because of the experiences with email in e-discovery, companies will not be able to claim ignorance in how they handle social media as electronically stored information (ESI). He advocates that companies find ways to collect and preserve social media content in case it is needed for e-discovery, but notes that a recent study indicated that only 15% of respondents had to collect from popular social media services. Some technological methods he discusses for collection and preservation are web crawling, screenshots, publisher application programming interfaces (APIs), proxy method and publisher-specific methods. He also recommends that companies and organizations develop clear and detailed policies on social media, including monitoring, acceptable uses, collection, preservation and archiving. Murphy concludes the article by stating that “the relevance of social media to the e-discovery process is obvious. It would be a mistake not to start thinking about how to address the challenges that the emergence of social media poses.” (Id.)

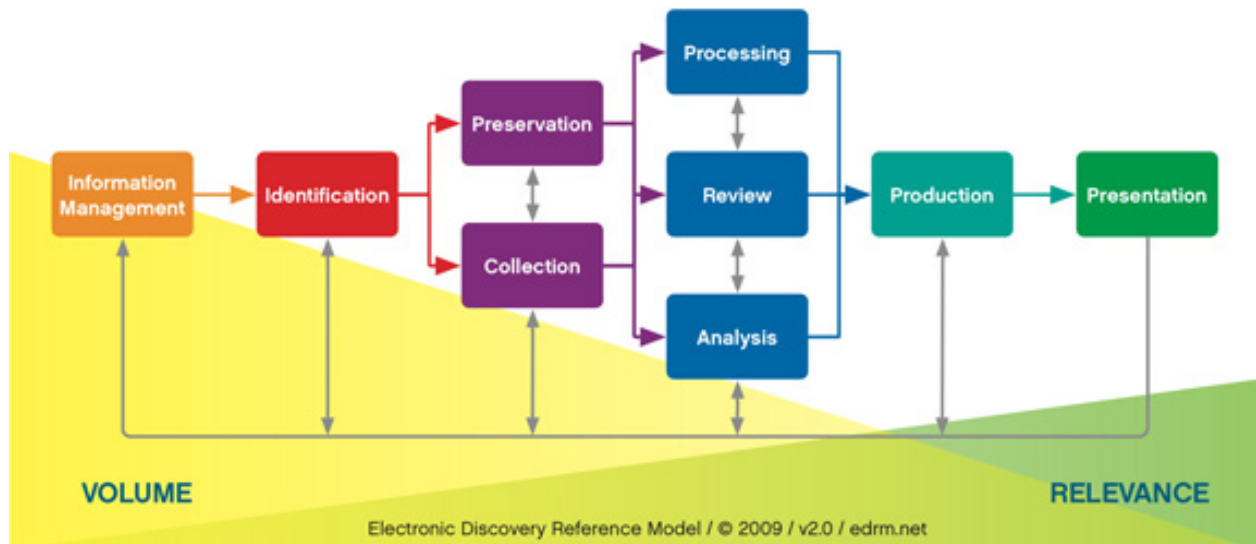
Torgersen considers proper collection techniques from the point of view of a forensics expert. (Torgersen, G.: Online data explosion brings new forensic collection techniques. Evidence Technology Magazine, vol. 11, #2, March-April 2013, pp. 6-9). After providing statistics about the billions of people using email and social media, he notes that in the context of electronic discovery and digital forensics, the inclusion of data from various social networking sites and webmail platforms is relatively new. (Id. at 7) His article provides helpful guidance on collecting email as part of an e-discovery process, based on a project at his company that involved 80 different accounts and approximately 500,000 email messages from both internal and multiple webmail applications. (Id.) He then offers recommendations for forensically collecting data from Facebook, Twitter, LinkedIn and Google. He observes that since each social media platform is different, with its own unique code and variations and running on its own hardware and software platforms and even with custom technology running their sites. (Id. at 8) Torgersen also comments that “Google” has taken great strides in making collection easy on their applications, such as Google Docs, Gmail and chats and mentions its e-discovery tool, Google Vault, as making it easy to monitor information governance, archive emails and chats, perform e-discovery searching, export and audit and place legal holds. (Id. at 9) In his conclusion, he cautions that “[t]here are many ways to gather data from social networks and webmail. However, not every collection method is acceptable, and digital forensic and e-Discovery companies must have proper authorization from the service provider.” [Id.] Moreover, he states that “[e]ach platform’s terms of service should be reviewed carefully to determine if the agreement will be violated – either by the manner in which collection happens or because of the information that is gathered.” (Id.)

- Proper (and Pitfalls with) Data Mining, Gathering and Admitting Procedures: Facebook, Twitter, YouTube

Fortunately, even in 2012 and early 2013, there are a number of cases that illuminate some of the issues with handling social media as part of an electronic discovery process. It is important to note that information from social media has nearly always been deemed discoverable and admissible, even in criminal cases. Many social media users are shocked to learn that they can have little to no expectation of privacy for the material that they post on social media sites, irrespective of the settings they choose. (See Crews, A.D.: In civil litigation, 'private' social media data isn't private. *Computerworld*, January 20, 2012.) In fact, there are cases that suggest that someone who removes information from his or her social media site because of concerns about impending litigation may be liable for spoliation and faced with sanctions. Hence, the lawyer and legal team, the parties and any third-party vendors, contractors or consultants must be fully aware of the duties to collect, preserve, review and produce information from social media sites as electronically stored information (ESI) as outlined under the Federal Rules of Civil Procedures, the Federal Rules of Evidence and other state or specialized court rules.

It is helpful to review the Electronic Discovery Reference Model (EDRM) to trace the handling of information on social media from its creation to its presentation in court. At each stage of the EDRM, there are many opportunities for mistakes and mishaps that may jeopardize a client's case as well as result in sanctions against the client and the lawyer and/or disciplinary action against the lawyer under the Rules of Professional Conduct in the state or states where the lawyer is licensed to practice law.

Electronic Discovery Reference Model



(Electronic Discovery Reference Model, <http://www.edrm.net/>, accessed March 20, 2013)

A number of recent cases (2012 and 2013) discussing issues related to the proper handling and production of information from social media sites were located from the K&L Gates and Kroll Ontrack case summary databases (searches conducted on March 8 and March 20, 2013). Several of these cases will be discussed in detail during the seminar to further illuminate a wide spectrum of issues with collecting, preserving and presenting this type of ESI as part of litigation.

- *Anthony v. Atlantic Group, Inc.*, Nos. 8:09-cv-0283-JMC, 8:09-cv-02942-JMC, 2012 WL 4009490 (D.S.C. Sept. 12, 2012).
- *Calvert v. Red Robin Int'l, Inc.*, 2012 WL 1668980 (N.D. Cal. May 11, 2012).
- *Ceglia v. Zuckerberg*, 2012 WL 1392965 (W.D.N.Y. April 19, 2012).
- *E.E.O.C. v. Original Honeybaked Ham Co. of Georgia, Inc.*, 2012 WL 5430974 (D. Colo. Nov. 7, 2012).
- *Eagle v. Moran et al.*, Civil Action No. 11-4303 (E.D.Pa. Oct. 4, 2012).
- *Fawcett v. Altieri*, ---N.Y.S.2d---, 2013 WL 150247 (N.Y. Sup. Ct. Jan. 11, 2013)

- *Glazer v. Fireman's Fund Ins. Co.*, 2012 WL 1197167 (S.D.N.Y. Apr. 4, 2012).
- *Howell v. Buckeye Ranch, Inc.*, No. 2:11-cv-1014, 2012 WL 5265170 (S.D. Ohio Oct. 1, 2012).
- *In re White Tail Oilfield Servs.*, No. 11-0009, 2012 WL 4857777 (E.D. La. Oct. 11, 2012).
- *Keller v. Nat'l Farmers Union Prop. & Cas. Co.*, No. CV 12-72-m-DLC-JCL, 2013 WL 27731 (D. Mont. Jan. 2, 2013)
- *Kregg v Maldonado*, ---N.Y.S.2d---, 2012 WL 4469935 (N.Y. App. Div. Sept. 28, 2012).
- *Mailhoit v. Home Depot U.S.A. Inc.*, 2012 WL 393063 (C.D. Cal. Sept. 7, 2012).
- *People v. Harris*, 2012 WL 1381238 (N.Y. Crim. Ct. April 20, 2012) and *People v. Harris*, 2011NY080152 (NY Crim. Ct. New York Co. June 30, 2012).
- *People v. Torres*, No. E052071, 2012 WL 1205808 (Cal. Ct. App. Apr. 11, 2012) – YouTube video, attempted murder.
- *Richards v. Hertz Corp.*, 2012 WL 5503841 (N.Y. App. Div. 2d Dept. Nov. 14, 2012).
- *Robinson v. Jones Lang LaSalle Americas, Inc.*, 2012 WL 3763545 (D. Or. Aug. 29, 2012).
- *Tapp v. New York State Urban Dev. Corp.*, No. 9131N, 2013 WL 3622969 (N.Y. App. Div. Jan. 31, 2013).
- *Thompson v. Autoliv ASP, Inc.*, 2012 WL 2342928 (D. Nev. June 20, 2012).
- *Tienda v. State*, 358 S.W.3d 633 (Tex. Crim. App. Feb 8, 2012).
- *Tompkins v. Detroit Metropolitan Airport*, 278 F.R.D. 387 (E.D. Mich. Jan. 2012).
- *Winchell v. Lopiccolo*, ---N.Y.S.2d---, 2012 WL 5933033 (N.Y. Sup. Ct. Oct. 19, 2012).

It is interesting to review the nature of these cases, which illustrate how social media has permeated every facet of our work and daily lives. For example, these cases include personal injury, auto accidents, product liability, slip and fall, employment litigation, sexual harassment and retaliation, employment discrimination, breach of contract, motorcycle accident and even attempted murder. Among the disputes and mistakes outlined in these cases are broad or overly broad discovery requests, inadvertent production, appointment and use of experts, the Stored

Communications Act, production, relevance, admissibility, privilege, motions to compel, motions for protective orders, local rules and FRCP Rules 34(b) and 26(b)(1) and FRE 502.

Several articles provide guidance on best practices for collecting, preserving and producing electronically stored information (ESI) from social media sites as part of an electronic discovery process. Among these articles are Cloud Computing and Social Media: Electronic Discovery Considerations And Best Practices (by A.S. Prasad, in *The Metropolitan Corporate Counsel*, February 2012, pp. 26-27), E-Discovery in the Age of Social Media (S. Strnad, ABA Section of Litigation, 2012 Section Annual Conference, April 18-20, 2012, pp. 1-11) and Social Media Data Collection Best Practices (Thought Leadership Team, The Ediscovery Blog, <http://www.theediscoblog.com/2010/12/30/social-media-data-collection-best-practices/>, December 30, 2010, access March 21, 2013).