

2021 EDITION

Civil Discovery in Virginia

Editor: Wyatt B. Durette, Jr.



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Civil Discovery in Virginia

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VIRGINIA LAWYERS PRACTICE HANDBOOK

CIVIL DISCOVERY IN VIRGINIA

Sixth Edition

Wyatt B. Durette, Jr., Editor
Durette, Arkema, Gerson & Gill PC / *Richmond*

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Publications

TABLE OF CONTENTS

<i>Chapters and Authors</i>	iii
<i>About the Editor and Authors</i>	v
<i>Acknowledgments</i>	xiii
<i>Preface</i>	xv
<i>Electronic Forms: Instructions and Table</i>	xvii

CHAPTER 1: PLANNING AND USING DISCOVERY

1.1	AN OVERVIEW OF DISCOVERY PLANNING	1
1.101	In General.....	1
1.102	Why Plan Discovery?.....	2
1.103	Nature and Type of Case	3
1.2	THE LAW OF DISCOVERY.....	4
1.201	Court Rules	4
1.202	Statutes.....	5
1.203	Case Law.....	6
1.3	THE DISCOVERY PLAN	9
1.301	Objectives.....	9
1.302	Preservation of Evidence.....	9
1.303	Formulating the Plan.....	14
1.304	The Uniform Pretrial Scheduling Order	17
1.305	Supplementation of Discovery Responses.....	19
1.4	METHODS AND TOOLS OF DISCOVERY.....	20
1.401	Informal Discovery Tools	20
1.402	Formal Discovery Tools.....	22
1.403	Other Devices	23
1.5	PRIORITY AND SEQUENCE OF DISCOVERY	26
1.501	In General.....	26
1.502	Examples of Case-Specific Discovery Sequences	27
1.6	USING DISCOVERY	30
1.601	In General.....	30
1.602	Depositions	31
1.603	Requests for Admissions	33
1.604	Interrogatories.....	34
1.7	PROFESSIONALISM AND DISCOVERY CONFERENCES.....	34

TABLE OF CONTENTS

APPENDIX 1-1: UNIFORM PRETRIAL SCHEDULING ORDER (RULE 1:18B)	35
APPENDIX 1-2: WORKSHEET—UNIFORM PRE TRIAL SCHEDULING ORDER RULE 1:18	39
APPENDIX 1-3: SAMPLE ENTRIES FOR A DISCOVERY PLAN—PRODUCTS LIABILITY CHEMICAL EXPLOSION CASE	41
 CHAPTER 2: SCOPE OF DISCOVERY	
2.1 SCOPE OF CHAPTER	43
2.2 LIBERAL DISCOVERY AND RULE 4:1(b)	43
2.3 RELEVANCE.....	43
2.301 Relevance to the Subject Matter	43
2.302 Reasonably Calculated to Lead to Discovery of Admissible Evidence	44
2.303 Discoverability of Specific Kinds of Information	45
2.4 PRIVILEGES LIMITING SCOPE OF DISCOVERY	47
2.401 Attorney-Client Privilege.....	47
2.402 Doctor-Patient Privilege and Related Limitations.....	47
2.403 Privilege for Communications Between Counselors, Social Workers, and Psychologists and Their Clients.....	53
2.404 Marital Communications Privilege	54
2.405 Priest-Penitent Privilege	58
2.406 Protection for Trade Secrets.....	60
2.407 Privilege Against Self-Incrimination	61
2.408 State Secrets Privilege.....	65
2.409 Privileges Afforded to Government Executives and Officials.....	69
2.410 Accountant-Client Privilege	72
2.411 Bank-Customer or Banker-Depositor Privilege	72
2.412 Privilege Related to Insurance	72
2.413 Privilege Related to Tax Information	73
2.414 Privilege Related to Disclosure of News-Gathering Process	74
2.415 Self-Evaluation Privilege.....	76
2.416 Miscellaneous Privileges and Limitations on Discovery.....	77
2.5 WORK PRODUCT PROTECTION	82

TABLE OF CONTENTS

2.6	WAIVER	82
2.601	Introduction	82
2.602	Waiver by Voluntary Disclosure	82
2.603	Waiver by Inadvertent Disclosure	83
2.604	Waiver by Making a Claim or Defense in an Action	84
2.605	Waiver by Immunity	84
2.7	PROTECTED INFORMATION AND PROTECTIVE ORDERS	84
2.701	In General	84
2.702	Court’s Discretion	85
2.8	MISCELLANEOUS LIMITATIONS ON DISCOVERY	86
2.801	Limitations in Specified Proceedings	86
2.802	Pretrial Discovery Orders	87
 CHAPTER 3: INTERROGATORIES		
3.1	IN GENERAL	89
3.101	Nature and Purpose	89
3.102	Rules of Court	89
3.103	Use of Interrogatories Generally	89
3.2	TIMING, NUMBER, AND FORMAT OF INTERROGATORIES AND USE OF FORMS	90
3.201	Timing	90
3.202	Number	91
3.203	Format and Instructions	92
3.204	Use of Forms	93
3.205	Filing	93
3.3	SCOPE AND CONTENT OF INTERROGATORIES	93
3.301	Identifying Persons with Knowledge of Discoverable Matters	93
3.302	Identifying Experts and Their Expected Testimony	94
3.303	Identifying Facts	96
3.304	Identifying Documents	96
3.305	Insurance Information	96
3.306	Contention Interrogatories	96
3.4	RESPONDING TO INTERROGATORIES—ANSWERS AND OBJECTIONS	98
3.401	Duty to Answer and When to Answer	98
3.402	Grounds for Objection	100
3.403	Supplementation of Responses	100

TABLE OF CONTENTS

3.5	USING LEGAL ASSISTANTS TO DRAFT INTERROGATORIES AND RESPONSES	101
3.6	MOTIONS CONCERNING INTERROGATORIES	103
3.601	Motion for a Protective Order.....	103
3.602	Motion to Compel Answers.....	103
3.603	Motion for Sanctions	104
3.7	USE OF INTERROGATORIES FOR SUMMARY JUDGMENT OR AT TRIAL	105
	APPENDIX 3-1: SAMPLE INTERROGATORIES.....	107
	APPENDIX 3-2: SAMPLE OBJECTIONS	109
	APPENDIX 3-3: SAMPLE OATHS TO BE EXECUTED BY RESPONDING PARTY	111
CHAPTER 4: INSPECTION OF DOCUMENTS, THINGS, AND PLACES		
4.1	OVERVIEW.....	115
4.2	AUTHORITY AND SCOPE.....	115
4.201	Rules of the Virginia Supreme Court.....	115
4.202	Federal Rules of Civil Procedure.....	116
4.203	Scope of Discovery	116
4.204	Uniform Interstate Depositions and Discovery Act	118
4.3	LIMITATIONS.....	119
4.301	In General.....	119
4.302	Protective Orders	120
4.303	Privileged Materials.....	120
4.4	ELEMENTS OF THE REQUEST.....	122
4.401	Persons to Whom a Request May Be Directed	122
4.402	Leave of Court	123
4.403	Timing of Service	123
4.404	Description of Material Sought	124
4.405	Signature and Filing Requirements.....	125
4.406	Form of Production	125

TABLE OF CONTENTS

4.5	RESPONSE	126
4.501	Timing of Response	126
4.502	Manner of Response	126
4.6	NONCOMPLIANCE	129
4.601	Motion to Compel	129
4.602	Discovery Orders and Sanctions.....	130
4.603	Motion to Show Cause.....	130
4.7	PRODUCTION OF PARTICULAR THINGS	130
4.701	Insurance Agreements	130
4.702	Accident Reports.....	131
4.703	Tax Returns and Financial Statements	133
4.704	Experts' Materials	134
4.705	Hospital Incident Reports and Other Documents	135
4.706	Medical Records.....	137
	APPENDIX 4-1: REQUEST FOR PRODUCTION OF DOCUMENTS	139
	APPENDIX 4-2: REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS	147
	APPENDIX 4-3: REQUEST FOR PRODUCTION OF DOCUMENTS.....	153
	APPENDIX 4-4: REQUEST FOR SUBPOENA DUCES TECUM	157
	APPENDIX 4-5: REQUEST FOR PERMISSION TO ENTER UPON LAND.....	159
	APPENDIX 4-6: MOTION FOR A PROTECTIVE ORDER.....	161
	APPENDIX 4-7: STIPULATION AGREEMENT AND PROTECTIVE ORDER	163
	APPENDIX 4-8: SUBPOENA DUCES TECUM FOR HEALTH INFORMATION.....	167
	APPENDIX 4-9: LETTER TO HEALTH CARE PROVIDER REGARDING SUBPOENA FOR HEALTH INFORMATION	171

CHAPTER 5: INITIATING AND PREPARING FOR DEPOSITIONS

5.1	OVERVIEW.....	173
5.2	MECHANICS OF DEPOSITIONS	175
5.201	In General.....	175
5.202	Place of Deposition.....	175
5.203	Notice of Examination (Deposition)	175
5.204	Notice of Deposition of a Corporate Designee	177
5.205	Who May Be Present at Deposition	178
5.206	Telephone, Teleconference, and Video Conference Depositions	179
5.207	Videotaped Depositions	180
5.208	<i>De Bene Esse</i> Depositions	181
5.209	Handling Objections at a Deposition	182
5.210	Timing and Sequence of Depositions	183
5.211	Subpoenaed Presence.....	183
5.212	Reimbursement for Travel Expenses.....	184
5.3	EVALUATION AND GOAL SETTING	184
5.301	In General.....	184
5.302	Identifying Deponents	184
5.303	Practical and Strategic Considerations	185
5.304	General Evidentiary Considerations	185
5.4	PURPOSES OF DEPOSITIONS.....	186
5.401	Assessment of Foundation, Credibility, Effectiveness, and Bias.....	186
5.402	Discovery of Information	187
5.403	Impeachment.....	187
5.404	Support for Motions	187
5.405	Support for Requests for Admissions.....	187
5.406	Settlement	188
5.407	Use as Evidence at Trial.....	188
5.408	Rules of Evidence	188
5.409	Binding Effect of Depositions	189
5.5	PREPARATION FOR DEPOSITIONS	190
5.501	In General.....	190
5.502	Review of Case Law, Jury Instructions, and Statutes	190
5.503	Review of Experts, Facts, and Key Elements of Case.....	190
5.504	Preparation of the Favorable Witness or Client.....	190
5.505	Party Participation	192

TABLE OF CONTENTS

5.6	PREPARATION AND TECHNIQUES FOR QUESTIONING	192
5.601	Modes of Questioning	192
5.602	Attorney-Client Privilege and Work Product Protection.....	194
5.603	Guarding One’s Theories and Strategies	194
5.7	AVOIDING MISTAKES THAT CAN LEAD TO SANCTIONS	195
5.701	Thorough Preparation.....	195
5.702	Importance of the Truth.....	195
5.703	Other Grounds for Sanctions	196
5.8	“TRICKS” OF THE TRADE.....	197
5.9	TIPS FOR WORKING WITH CLIENTS	200
	APPENDIX 5-1: NOTICE OF DEPOSITION DUCES TECUM (AUTOMOBILE ACCIDENT)	203
	APPENDIX 5-2: NOTICE OF DEPOSITION DUCES TECUM FOR CORPORATE DESIGNEE	205
	APPENDIX 5-3: DEPOSITION PREPARATION—ATTORNEY CHECKLIST.....	209
	APPENDIX 5-4: DEPOSITION PREPARATION—CLIENT DEPOSITION CHECKLIST.....	211
	APPENDIX 5-5: DEPOSITION PREPARATION—TIPS FOR WITNESSES	215
CHAPTER 6: TAKING AND DEFENDING DEPOSITIONS		
6.1	GENERAL CONSIDERATIONS.....	219
6.101	Introduction	219
6.102	Importance of Preparation.....	219
6.2	CONDUCTING THE DEPOSITION.....	220
6.201	Controlling the Deposition.....	220
6.202	Who May Be Present at Deposition.....	221
6.203	Stipulations and Objections.....	221
6.3	ERRORS AND IRREGULARITIES	223

TABLE OF CONTENTS

6.4	HANDLING IMPROPER BEHAVIOR.....	224
6.401	In General.....	224
6.402	Making the Record.....	224
6.403	Resolving Disputes with Opposing Counsel	225
6.404	Judicial Intervention	225
6.405	Defense Considerations	226
6.5	USES OF THE DEPOSITION	226
6.501	In General.....	226
6.502	Impeachment Techniques.....	227
6.503	Party Depositions.....	228
6.504	Rule 4:7(a)(4) Uses	228
6.505	Deposition Versus Examination.....	230
6.506	Using Only a Portion of the Deposition	230
6.507	Use by Different Parties and in Other Actions	230
6.508	Leading Questions	231
6.509	Supporting Motions for Summary Judgment.....	231
6.6	CORRECTIONS TO TRANSCRIPT	231
 CHAPTER 7: DEPOSITIONS USED AND TAKEN IN OTHER STATES		
7.1	INTRODUCTION	233
7.101	Lack of Uniformity Among States.....	233
7.102	Uniform Interstate Depositions and Discovery Act	234
7.103	Principles of Comity.....	236
7.2	PROCEDURE FOR TAKING OUT-OF-STATE DEPOSITIONS	237
7.201	Authority for Taking Depositions Outside Virginia.....	237
7.202	Courts and Other Tribunals That State Courts Will Aid in Taking a Deposition.....	237
7.203	Persons Who May Seek to Take Depositions Under Foreign Deposition Laws	238
7.204	Application to the Foreign State for Assistance in Taking a Deposition	239
7.205	Notice of Deposition	240
7.206	Location of Out-of-State Deposition.....	241
7.207	Witness Fee for the Deponent	242
7.208	Issuance of Subpoenas	242

TABLE OF CONTENTS

7.3	CONFLICT OF LAWS	242
7.301	In General.....	242
7.302	Choice of Procedure for Taking Depositions	243
7.303	Protective Orders.....	243
APPENDIX 7-1: MOTION FOR COMMISSION TO TAKE DEPOSITION OUT OF STATE		
		245
APPENDIX 7-2: COMMISSION AUTHORIZING THE TAKING OF OUT-OF-STATE DEPOSITIONS		
		249
CHAPTER 8: PHYSICAL AND MENTAL EXAMINATION OF PERSONS		
8.1	RULE 4:10 OF THE RULES OF THE VIRGINIA SUPREME COURT	251
8.101	Introduction	251
8.102	Prerequisites for the Examination	253
8.103	Who May Be Examined.....	255
8.104	Who May Conduct the Examination	255
8.105	Selection and Qualification of the Examiner	257
8.106	The Court's Order.....	260
8.107	The Report	262
8.108	The Examiner's Testimony	263
8.109	The Examiner's Liability	266
CHAPTER 9: DISCOVERY OF EXPERTS		
9.1	IN GENERAL.....	269
9.2	CLASSIFICATION OF EXPERTS UNDER RULE 4:1(b)(4).....	270
9.3	DISCOVERY OF EXPERTS WHO MAY BE TRIAL WITNESSES	272
9.4	DISCOVERY OF RETAINED EXPERTS NOT EXPECTED TO BE CALLED AS WITNESSES AT TRIAL	275
9.5	INFORMALLY CONSULTED EXPERTS	279
9.6	EXPERT INFORMATION NOT ACQUIRED IN ANTICIPATION OF LITIGATION.....	279

TABLE OF CONTENTS

9.7	EXPERTS UNCONNECTED WITH LITIGATION.....	282
9.8	INTERACTION BETWEEN RULE 4:1(b)(4) AND THE WORK PRODUCT DOCTRINE.....	284
9.9	PAYMENT OF THE EXPERT’S FEES	287
9.10	EX PARTE COMMUNICATIONS WITH AN OPPONENT’S EXPERT	289
9.11	USE OF ADVERSE PARTY’S FORMER EMPLOYEE AS EXPERT	292
 CHAPTER 10: REQUESTS FOR ADMISSION		
10.1	RULE GOVERNING REQUESTS FOR ADMISSION	293
	10.101 The Rule	293
	10.102 Request Procedure	293
10.2	SCOPE OF REQUESTS FOR ADMISSION	293
10.3	EFFECT OF ADMISSION	294
10.4	USE AT TRIAL	296
	10.401 Waiver by Failing to Introduce into Evidence.....	296
	10.402 Waiver by Permitting Evidence Contrary to Responses.....	296
10.5	PROHIBITED USES	296
10.6	SERVING REQUESTS FOR ADMISSION.....	298
	10.601 Number Permitted	298
	10.602 Guidelines for Preparing Requests	298
10.7	PERMISSIBLE SUBJECT MATTER.....	300
10.8	FORM OF THE REQUEST	300
10.9	RESPONSES TO REQUESTS FOR ADMISSION	301
	10.901 Admission	301
	10.902 Admission by Failure to Respond.....	301
	10.903 Denial.....	301
	10.904 Denial Based on Lack of Information: Reasonable Inquiry Requirement	302

TABLE OF CONTENTS

10.905	Objection	302
10.906	Admit in Part, Deny in Part	302
10.907	Guidelines for Preparing Responses	303
10.10	WITHDRAWAL OR AMENDMENT OF RESPONSES TO REQUESTS FOR ADMISSION	303
10.1001	Grounds for Withdrawal or Amendment	303
10.1002	Effect of Withdrawal or Amendment	305
10.11	SANCTIONS FOR FAILURE TO ADMIT.....	305
10.12	USE AS A DISCOVERY TOOL.....	306
APPENDIX 10-1:	REQUESTS FOR ADMISSION PLAINTIFF TO DEFENDANT—LIABILITY, GENUINENESS OF MEDICAL BILLS/RECORDS	307
APPENDIX 10-2:	REQUESTS FOR ADMISSION PLAINTIFF TO DEFENDANT—SLIP-AND-FALL IN SUPERMARKET (COMBINING REQUESTS FOR ADMISSION WITH INTERROGATORIES AND REQUEST FOR PRODUCTION).....	311
APPENDIX 10-3:	REQUESTS FOR ADMISSION PLAINTIFF TO DEFENDANT—GENUINENESS AND REASONABLENESS OF MEDICAL BILLS/RECORDS (COMBINING REQUESTS FOR ADMISSION WITH INTERROGATORIES)	317
CHAPTER 11: JUDICIAL SUPERVISION AND ENFORCEMENT		
11.1	INTRODUCTION.....	321
11.2	SUPERVISING THE DOCKET	322
11.201	In General	322
11.202	Pretrial Conferences.....	323
11.203	Pretrial Orders	325
11.3	JUDICIAL ENFORCEMENT.....	330
11.301	In General	330
11.302	Orders to Compel.....	331
11.303	Protective Orders.....	332

TABLE OF CONTENTS

11.4	IMPOSING SANCTIONS.....	335
11.401	In General.....	335
11.402	Violation of Court Order Required for Some Sanctions.....	336
11.403	Specific Sanctions.....	338
11.5	APPELLATE REVIEW.....	347

CHAPTER 12: KEY DISCOVERY PRINCIPLES

12.1	IN GENERAL	351
12.2	ATTORNEY-CLIENT PRIVILEGE	351
12.201	Introduction.....	351
12.202	General Formulation	352
12.203	Communications from a Client	353
12.204	Communications to a Lawyer.....	363
12.205	Legal Advice	365
12.206	Expectation of Confidentiality.....	370
12.207	Crime-Fraud Exception	376
12.208	Waiver.....	378
12.3	WORK PRODUCT DOCTRINE.....	393
12.301	Introduction.....	393
12.302	Creating the Protection	394
12.303	What Is Covered.....	396
12.304	When Applicable	399
12.305	Who Can Assert the Protection	405
12.306	Duration of the Protection	406
12.307	Overcoming the Protection	406
12.308	Crime-Fraud Exception	410
12.309	Waiver.....	410
12.310	Disclosures to Expert Witnesses	413
12.4	ASSERTING AND LITIGATING THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT PROTECTION	414
12.5	ETHICS	422
12.501	Lawyers' Dealings with Other Participants in Discovery Matters	422
12.502	Substance of Discovery Responses	449
12.503	Remedies.....	456
12.504	Discovery Procedures.....	461
12.505	Courtesy.....	467

TABLE OF CONTENTS

12.6	PROFESSIONALISM AND CIVILITY.....	469
	APPENDIX 12-1: PRINCIPLES OF PROFESSIONALISM.....	471
CHAPTER 13: DISCOVERY IN THE DIGITAL AGE		
13.1	OVERVIEW.....	475
	13.101 Electronic Information and the Legal Profession.....	475
	13.102 ABA Model Rules of Professional Conduct	476
13.2	CATEGORIES OF POTENTIALLY DISCOVERABLE ELECTRONIC DOCUMENTS AND INFORMATION.....	477
	13.201 In General.....	477
	13.202 Email.....	478
	13.203 Mobile Devices and Messaging Communications.....	479
	13.204 The Cloud and Collaboration.....	481
	13.205 The Internet and Social Media	482
	13.206 Archive Data and Backup Media.....	485
	13.207 Residual Files	485
	13.208 Metadata.....	487
13.3	ELECTRONIC DISCOVERY RULES, PROCESS AND OBLIGATIONS	488
	13.301 The Federal Rules of Civil Procedure and Their Virginia Counterparts.....	488
	13.302 Sanctions.....	519
	13.303 Duty to Preserve; Litigation Holds.....	523
13.4	LIMITS ON DISCOVERY	528
	13.401 In General.....	528
	13.402 Economic Limits	528
	13.403 Overly Broad and Unduly Burdensome Requests.....	529
	13.404 Data Sampling and Cost Shifting.....	530
	13.405 Search Methodologies.....	532
	13.406 International Privacy.....	540
13.5	EMAIL AND DATABASE CONCERNS	541
	13.501 Communication Confidentiality and Privilege Concerns	541
	13.502 Computer-Stored Litigation Support Databases.....	545
13.6	CONCLUSION.....	549

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... 551

INDEXI-1



CHAPTER 13

DISCOVERY IN THE DIGITAL AGE

13.1 OVERVIEW

13.101 Electronic Information and the Legal Profession.

Electronic information has invaded every aspect of business. Communications are transmitted and stored on computers, mobile, and wearable devices, in the cloud, and in the near future will be transmitted using methods not yet invented.

Computers, servers, and databases store and analyze data critical to business operations. This includes data for production and sales, payroll and accounting, employee performance and evaluation, market and product research, competitive intelligence, and more. More recently, companies have emerged whose entire business model uses big data applications to aggregate data from a variety of sources for analysis.¹ The rapid evolution of computer technology has spurred an exponential growth of data.² In the span of a decade, we moved to discussing data volumes in terms of “bytes” to “kilobytes” to “megabytes” to “gigabytes” to “terabytes” to “petabytes” to “exabytes” to “zetabytes,” each step a thousand-fold increase over the previous level. The ever increasing volume of data also increases the complexity of issues related to data awareness, retention, preservation, collection, and analysis.

As these complexities and costs grow, so does the need for effective and thoughtful handling of discovery. Today most practitioners use computers not only for word processing, time recordation, and accounting, but also for communicating with each other and with clients and for storing and retrieving source documents, pleadings, and transcripts. Documents of this nature are presumptively immune from discovery, but their immunity is increasingly

¹ Gartner defines “big data” as “high-volume, high-velocity and/or high-variety information assets that demand cost-effective, innovative forms of information processing that enable enhanced insight, decision making, and process automation.” Gartner, IT Glossary, www.gartner.com/it-glossary/. In the business context it typically means the aggregation and analysis of data to enable business decisions. For example, many retailers use big data techniques to make marketing and product pricing decisions.

² Cisco estimates that by the year 2021, more than 2.8 zettabytes (i.e., 2.8 trillion gigabytes) of data will transmit over the internet each year. Five things that are bigger than the internet: Findings from this year’s Global Cloud Index, <https://blogs.cisco.com/sp/five-things-that-are-bigger-than-the-internet-findings-from-this-years-global-cloud-index>.

under attack. Both attorney-client-privileged and work product materials can be vulnerable to discovery if their confidentiality is not maintained.³

This chapter addresses the unique aspects of digital information that must be considered in pursuing and responding to discovery. A lawyer who does not understand the role of electronic information today, or who does not thoroughly investigate his client's information systems and applications, cannot effectively pursue or respond to discovery requests. A search for information cannot be effective without appreciating how technology creates, manipulates, stores, and leaves traces of that information.

Helpful resources on this topic abound. Electronic discovery vendors, law firms, and independent commentators electronically publish white papers, compilations of recent case law, and a wealth of other materials. Many conferences and seminars focus on this topic alone. Independent, unbiased authorities are useful sources of information. One such authority, the Sedona Conference, is a non-profit research and educational institute dedicated to the advanced study of law and policy in complex litigation.⁴

Sedona Conference publications are often cited as highly regarded authority by many in the legal field, including the judiciary.⁵

13.102 ABA Model Rules of Professional Conduct.

A. In General. Since August 2012, the American Bar Association Model Rules of Professional Conduct explicitly require lawyers to keep abreast with evolving technology that impacts law practice. Though the ABA Model Rules are not binding on lawyers, they do serve as models for the ethics rules in most states.

B. Model Rule 1.1. Model Rule 1.1 requires a lawyer to “provide competent representation to a client,” and “competence” is defined as having the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Comment [8] to Model Rule 1.1 requires that “[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks*

³ See generally ¶¶ 12.2, 12.3 of this book.

⁴ www.thesedonaconference.org/aboutus.

⁵ See, e.g., *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251 (D. Md. 2008); *Cason-Merenda v. Detroit Med. Ctr.*, Civ. Action No. 06-15601, 2008 U.S. Dist. LEXIS 51962, 2008 WL 2714239 (E.D. Mich. July 7, 2008).

*associated with relevant technology . . .*⁶ This comment indicates that a lawyer advising a client should become familiar with the technology that would affect the related advice. Many technical decisions could have a direct impact on the litigation process, and exhibiting “competence” requires the lawyer to understand enough about the implicated technology to analyze those potential results.

C. Model Rule 1.6. Model Rule 1.6 regarding confidentiality of information includes subpart (c): “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.” Comment [18] discusses the factors to be considered in determining “reasonable efforts” in confidentiality safeguards taken by the lawyer.⁷ This increased scrutiny on securing confidential information is a natural result of the proliferation of technology to transmit information or communicate with clients and non-lawyers employed to assist in the representation.⁸

D. Model Rule 5.3. Model Rule 5.3 provides guidelines about a lawyer’s responsibilities when engaging a non-lawyer to assist the client. Comment [3] specifically references examples of retaining a document management company to create and maintain a litigation support database and use of an internet-based service to store client information. The comment states: “When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s professional obligations.”

13.2 CATEGORIES OF POTENTIALLY DISCOVERABLE ELECTRONIC DOCUMENTS AND INFORMATION

13.201 In General. To conduct and respond to discovery effectively, an attorney needs to understand how events, ideas, communications, data compilations, and analyses are contemporaneously recorded and stored. For centuries, significant events and ideas have been contemporaneously recorded and communicated on paper documents. Today, paper documents constitute only a selectively composed snapshot of contemporaneously recorded events and ideas. The actual recordation increasingly occurs in digital form on computer

⁶ Italicized text is the 2012 amendment to the original comment.

⁷ Comment [18] references Model Rules 1.1, 5.1 and 5.3.

⁸ Similarly, Model Rule 4.4 and its comment [2] reference the inadvertent transmission of electronically stored information and metadata.

storage devices, and those devices are ever evolving regarding what they can store and how the information on them can be obtained. Communications in both the personal and business world are increasingly entirely electronic. For some cases, it is not the communications that are critical to discovery, but rather the data created, received, and otherwise maintained and analyzed by various departments within a client company.

Much of a business's ESI is in the form of electronic files. Electronic files generally store information in a standardized format that can be used by one or more applications. Most businesses utilize word processing files and spreadsheet files for creating and storing business records. There are other types of proprietary software for more specialized applications. Files typically have an alphanumeric name⁹ and can be stored on a computer storage device. Computer storage devices include physical or virtual computer hard drives, the flash memory inside a mobile device, remote servers, and legacy data on CD-ROM disk or digital tape.

Unless the file is simple and transitory, it will usually evolve over time. Certain collaboration channels, databases, or spreadsheets may evolve for years. Usually, as the file is revised, the new version replaces (overwrites) the last version. When this occurs, the record of the earlier version is often lost, although some computer systems have an auditing "trail" function or document management system that will store each revision separately. In this type of system, it may be possible to reconstruct the evolution of the document over time. Historical versions of electronic files are often just as relevant in discovery as current versions. Most modern cloud-based collaboration tools do not preserve versioning.

13.202 Email. Because of its pervasiveness,¹⁰ email warrants special attention in any litigation by both the requesting and the responding attorney. Certain aspects of email communication are attractive not only to email users, but also to litigators. First, large numbers of people communicate by email in a candid and informal manner that would not be used in traditional written memoranda. Second, the number of users and ease of use results in email replacing much oral communication. Third, the nature of email and the manner

⁹ Modern computer systems allow descriptive file names. Historically, severe limitations on creating file names often resulted in code names that were meaningless to all but the file creator. Even today, some systems used by large organizations may impose file-naming conventions that preclude descriptive names.

¹⁰ The Radicati Group estimates that by the end of 2024, more than 361 billion business and consumer emails will be sent and received per day. The Radicati Group, Email Statistics Report 2020-2024 (February 2020), www.radicati.com/wp/wp-content/uploads/2020/01/Email_Statistics_Report_2020-2024_Executive_Summary.pdf.

in which it can be copied and stored, even without any effort on the part of the sender or receiver, makes it a more permanent record than a conversation, a casual handwritten note, or even a typewritten note.¹¹ Fourth, many email users do not regularly delete messages, and even those who do attempt to delete them may not realize that copies may still exist in the mailboxes of other senders and receivers or in backup storage long after the message has been forgotten. Though the volume of retrievable email in a large company's files can be staggering and present cost concerns, the impact of email on litigation can in some cases be quite significant.

13.203 Mobile Devices and Messaging Communications.

Messaging services have exploded in popularity both with individuals and corporate users, and, for some users, have replaced email as the default method of casual communication.¹² Historically, messaging was bifurcated between mobile device messaging services (e.g., Short Message Service (SMS) messages, Rich Communication Service (RCS) messages, BlackBerry PIN messages) and computer messaging (e.g., AOL Instant Messenger). Not only are the number of messaging services growing, but most (e.g., Apple iMessage, WhatsApp, Skype for Business, Slack, Zoom) are now cross-platform. Further, most messaging services are adopting characteristics of file-sharing services and social media at the same time that social media platforms such as LinkedIn and Instagram and collaboration platforms such as Zoom, Teams, and Google Suite have integrated private and group messaging features. All have browser and mobile app functionality. Many integrate to wearable technology or external devices such as a watch, step counter, GPS tracing device, camera, or a virtual assistant.

These brief and informal messages may be subject to a party's duty to preserve and produce relevant information. Because of the ease and perceived privacy of sending short messages instantaneously, text messages have largely replaced email as a form of brief, "chatty" communication. Regardless of its informality (often because of it), this information is potentially discoverable depending on the facts of the individual case and whether the burden of either

¹¹ See Committee on Federal Courts, *Discovery of Electronic Evidence: Considerations for Practitioners and Clients*, Committee on Federal Courts, 53 The Record 656, 663 (Sept./Oct. 1998).

¹² According to Radicati, "Email is still the most pervasive form of electronic communication for both business and consumer user . . . as an email account (i.e. email address) is required to sign up to any kind of online activity, including social networking sites, instant messaging and any other form of account or presence on the internet. Online purchases also involve an email address for confirmations, notifications and more." Radicati Group, Email Statistics Report, 2020-2024 – Executive Summary (February 2020), [radicati.com/wp/wp-content/uploads/2020/01/Email_Statistics_Report_2020-2024_Executive_Summary.pdf](https://www.radicati.com/wp/wp-content/uploads/2020/01/Email_Statistics_Report_2020-2024_Executive_Summary.pdf).

preserving or producing that information, which can be substantial, would be worth the benefit of obtaining that information.¹³

Similarly, mobile devices such as cellphones and wearables may be a source of communications and other records that are not text-based, such as voicemails, images, or location tracking, that are within the realm of potentially discoverable information. Custodians commonly create and share photos, videos, and screen captures of accident scenes, altercations, and conversations, as they are experienced in real-time. Those records are frequently backed up to cloud accounts or shared with little or no descriptive text to provide context. The informal nature of modern messaging lends itself to jargon, abbreviations, misspellings, lack of punctuation, and emojis. Litigation counsel evaluating their preservation and collection strategy should consider whether the case is one that may involve non-traditional content shared between devices with potentially key metadata about date, time, and GPS location embedded throughout—but perhaps no text or keywords to be found.

Retention is a notable challenge associated with identification, preservation, and collection of messaging and other mobile data. SMS messaging apps on various operating systems are often configured by default to periodically auto-delete messages to preserve storage space—and users are frequently unaware of this feature. Some courts have identified an obligation for litigants (or their counsel) to include clear instructions in their legal hold notices that require proactive steps to ensure that potentially responsive communications are not deleted by an automatic system process before they are preserved.¹⁴ In contrast, messaging built into certain other platforms such as Instagram tend to linger potentially indefinitely—making filtering and unitization for discovery review and production a challenge. Consider also that many platforms are designed to send encrypted content that will be seen only one time and then completely destroyed. While public perception may accept that there are legitimate business uses for this level of privacy¹⁵ and some of

¹³ See, e.g., *Paisley Park Enters., Inc. v. Boxill*, 330 F.R.D. 226, 234 (D. Minn. 2019) (holding text messages discoverable under Rule 34). See *infra* ¶ 13.301(E) (discussing the not reasonably accessible test in Federal Rule 26(b)(2)(B)). *Dalton v. Commonwealth*, 64 Va. App. 512, 521-523, 769 S.E.2d 698, 703-04 (2015) (determining text messages constitute writings for the purposes of the best evidence rule).

¹⁴ See, e.g., *Paisley Park Enters., Inc. v. Boxill*, 330 F.R.D. 226, 233 (D. Minn. 2019) (holding that the failure to suspend auto-delete or institute a legal hold to suspend deletion of text messages was unreasonable, given the importance of the issues at stake and the amount in controversy) (citing *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 327 F.R.D. 96, 108 (E.D. Va. 2018)).

¹⁵ See the Department of Justice's 2019 revisions relaxing the stringent prohibition of any ephemeral messaging that was previously in their 2017 FCPA Corporate Enforcement Policy guidelines. The guidance now requires "Appropriate retention of business records, and prohibiting the improper destruction or deletion of business records, including implementing appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms that undermine the company's ability to