

# Electronic Discovery Overview

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# Three key takeaways...

- **Changes to Missouri discovery rules effective July 1, 2019**  
<https://www.courts.mo.gov/sup/index.nsf/d45a7635d4b8f8625662000632638/29952db2555a35258625832a006c02be?OpenDocument>
- **Senate Bill 224, further changes to Missouri discovery rules effective August 28, 2019 pending Governor's signature** <https://www.senate.mo.gov/19info/pdf-bill/tat/SB224.pdf>
- **U.S. District Court Western District of Missouri**  
<https://www.mow.uscourts.gov/district/rules>
  - **Civil ESI Principles**  
[https://www.mow.uscourts.gov/sites/mow/files/DC\\_Civil%20ESI%20Principles.pdf](https://www.mow.uscourts.gov/sites/mow/files/DC_Civil%20ESI%20Principles.pdf)
  - **Civil ESI Checklist**  
[https://www.mow.uscourts.gov/sites/mow/files/DC\\_Civil%20ESI%20Checklist.pdf](https://www.mow.uscourts.gov/sites/mow/files/DC_Civil%20ESI%20Checklist.pdf)
  - **Criminal ESI Principles and Checklist**  
[https://www.mow.uscourts.gov/sites/mow/files/DC\\_Criminal%20ESI%20Principles%20and%20Checklist.pdf](https://www.mow.uscourts.gov/sites/mow/files/DC_Criminal%20ESI%20Principles%20and%20Checklist.pdf)

# E-disco riffs...

*Hendrix v. Pitsicalis*  
2018 WL 6191039 (S.D.N.Y.)

<https://www.logikcull.com/blog/purple-haze-hendrix-family-faces-spoliation-sanctions>

**Manafort**

<https://www.cjr.org/analysis/manafort-mueller-redacted-document-ukraine.php>

**Wells Fargo**

<https://www.americanbar.org/groups/litigation/publications/litigation-news/featured-articles/2018/attorney-error-results-massive-leak-privileged-client-data/>

*Paisley Park Ent v. Boxill*  
330 F.R.D. 226 (D. Minn. 2019)

<https://e-discoveryteam.com/2019/03/10/purple-rain-of-sanctions-falls-on-the-record-company-in-the-prince-case-for-their-intentional-destruction-of-text-messages/>

**Greitens**

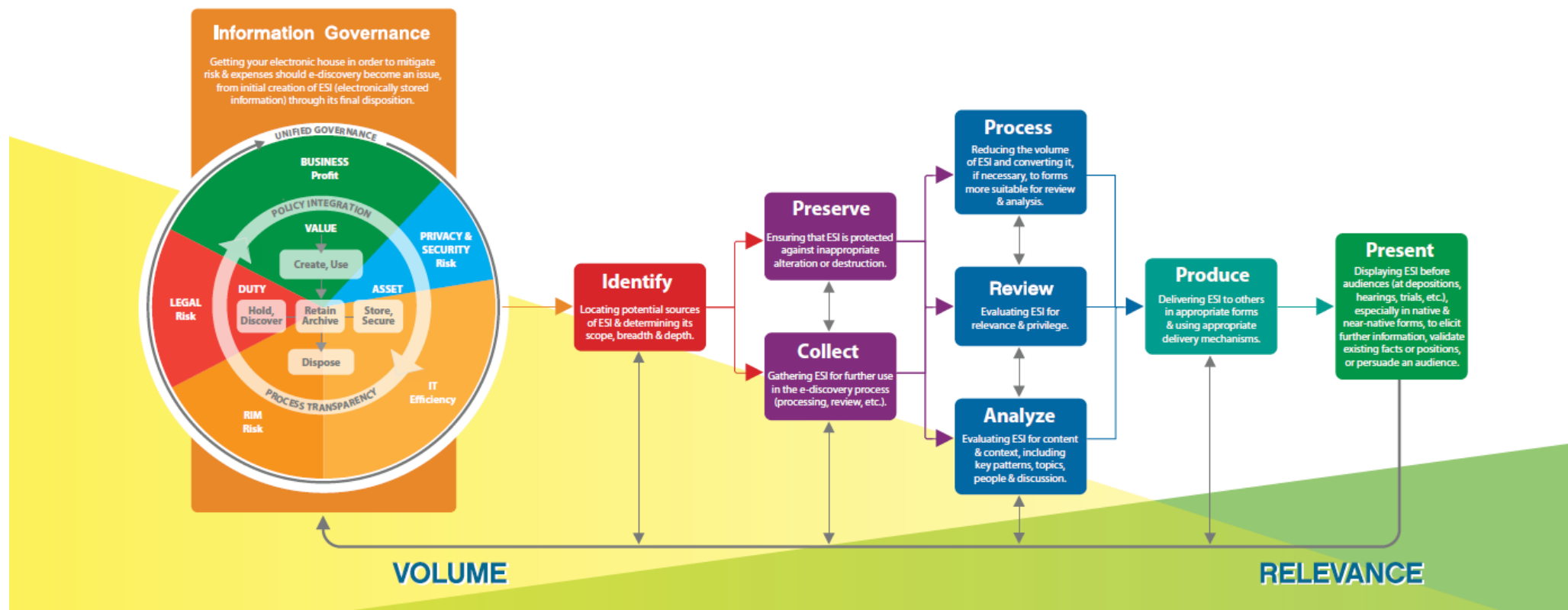
<https://www.stlmag.com/news/politics/greitens-texting-app-controversy-explained/>

*“Marbury v. Madison”*

<https://www.edcclaw.com/the-latest/ive-cited-her-enough-times-i-might-as-well-meet-her>

# Electronic Discovery Reference Model

Standards, Guidelines, and Practical Resources for Legal Professionals and E-Discovery Practitioners



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<b>ZAPPROVED</b>						

# *Zubulake v. UBS*

- **Looking Back on Zubulake, 10 Years Later**

[http://www.abajournal.com/magazine/article/looking\\_back\\_on\\_zubulake\\_10\\_years\\_later](http://www.abajournal.com/magazine/article/looking_back_on_zubulake_10_years_later)

- **eDiscovery History: A Look Back at Zubulake**

<https://ediscovery.co/ediscoverydaily/case-law/ediscovery-history-a-look-back-at-zubulake/>

- **CloudNine Ediscovery Daily** <https://ediscovery.co/category/ediscoverydaily/>

*Courts have been cautioned to tailor the [discovery] remedy to the problem and to*

*“take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms.”*

*Hill v. SSM Health Care St. Louis,*  
563 S.W.3d 757 (Mo. App. ED, May 29, 2018)

- Premises Liability
- Video Surveillance
- Spoliation
- What the jury hears about loss of evidence

**Adverse inference?**

**Plaintiff's overreach**

**Defendant's overreach**

# Federal and State Discovery Rules

## Missouri amendments July 1, 2019

- **FRCP 26 Scope of Discovery**
  - Rule [56.01\(b\) Scope of Discovery](#)
  - Rule [56.01\(c\) amended and new subdivision 56.01\(g\) adopted, effective July 1, 2019](#)
  - Rule [56.01\(b\)\(1\),\(b\)\(2\),\(b\)\(3\) pending Governor signature, effective Aug 28, 2019](#)
- **FRCP 34 Producing Documents**
  - Rule [58.01 Production of Documents](#)
  - Rule [58.01\(c\) repealed, new subdivision 58.01\(c\) adopted, effective July 1, 2019](#)
  - Rule [58.01\(a\),\(b\)\(1\),\(c\)\(3\) pending Governor signature, effective Aug 28, 2019](#)
- **FRCP 26(b)(5) and FRE 502(d) Privilege**
  - Rule [58.01\(c\)\(3\) Objections and Privileges](#)
  - Rule [56.01\(b\)\(9\), 58.01\(c\)\(3\) pending Governor signature, effective Aug 28, 2019](#)
- **FRCP 37 Sanctions**
  - Rule [61.01 Failure to Make Discovery: Sanctions](#)
- **FRE 902 Self-Authenticating**



# FRCP

## Rule 1. Scope and Purpose

- These rules govern the procedure in all civil actions and proceedings in the United States district courts...
- They should be construed, administered, and employed by the court **and the parties** to secure the just, speedy, and inexpensive determination of every action and proceeding.
- Effective July 1, 2019 new section added to 56.01 General Provisions Governing Discovery
- **56.01(g) Cooperation in Discovery.** All parties shall make reasonable efforts to cooperate for the purpose of minimizing the burden or expense of discovery.

## FRCPP 26(b) Discovery Scope and Limits

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and

**proportional** to the needs of the case considering...

the importance of the issues at stake in the action,

the amount in controversy,

the parties' relative access to relevant information,

the parties' resources,

the importance of the discovery in resolving the issues, and

whether the burden or expense of the proposed discovery outweighs its likely benefit.

# Effective July 1, 2019 new 56.01(c)

- (c) Protective Orders.
- Upon motion by a party or by the person from whom discovery is sought, **including e-discovery**, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
  - (1) that the discovery not be had;
  - (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
  - (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

# Effective July 1, 2019 new 56.01(c)

- In ruling on an objection that the discovery request creates an undue burden or expense, the court shall consider the issues in the case and the serving party's need for such information to prosecute or defend the case and may consider, among other things, the amount in controversy and the parties' relative resources in determining whether the proposed discovery burden or expense outweighs its benefit.

# Pending Governor signature, Aug. 28, 2019

## 56.01 General Provisions Governing Discovery

- Adds “**electronically stored information**” as a method of discovery under 56.01(a)
- Amends 56.01(b)(1)
  - Parties may obtain discovery...provided the discovery is proportional to the needs of the case [and gives six examples of non-exclusive proportionality considerations]
  - Information within the scope of discovery need not be admissible in evidence to be discoverable.

## **Pending Governor signature, Aug. 28, 2019**

**56.01(b)(2) Limitations. ...the court must limit the frequency or extent of discovery if it determines that**

- **(A) The discovery sought is cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;**
- **(B) The party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or**
- **(C) The proposed discovery is outside the scope permitted by his Rule 56.01(b)(1).**

**Pending Governor signature, Aug 28, 2019**

## **56.01(b)(3) Specific Limitations on Electronically Stored Information.**

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.

On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost.

If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 56.01(b)(2).

The court may specify conditions for the discovery.

## 26(f) Conference of the Parties; Planning for Discovery

the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case...

## Checklist for Rule 26(f) Meet and Confer Regarding ESI

- Preservation
- Liaison
- Informal Discovery About Location and Types of Systems
- Proportionality and Potential Cost-Saving Measures
- Prioritization
- Identification of Discoverable ESI
- Production
- Privilege



## 26(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

- (i) consistent with these rules...
- (ii) not interposed for any improper purpose...
- (iii) neither unreasonable nor unduly burdensome or expensive...
- If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both...

## FRCP 34(e) [https://www.law.cornell.edu/rules/frcp/rule\\_34](https://www.law.cornell.edu/rules/frcp/rule_34)

- (i) A party must produce documents as they are kept in the usual course of business **or** must organize and label them to correspond to the categories in the request;
- (ii) If a request does not specify a form for producing electronically stored information, **a party must produce it in a form or forms in which it is ordinarily maintained or** in a reasonably usable form or forms; and

Ferne P. Wolf, *Beyond the Usual Course:  
Producing Documents Under Discovery Rules*,  
75 Journal of the Missouri Bar 130 (May-June 2019)

<http://www.mobar.org/journal/mayjun2019/discovery-rules.htm>

58.01. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND  
FOR INSPECTION AND OTHER PURPOSES

Effective July 1, 2019 amended 58.01(c) Response

- (4) Method of Production. A party who produces documents for inspection shall produce them as they are kept in the usual course of business so long as this form is reasonably usable by the requesting party, or shall organize and label them to correspond with the categories in the request.

# Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

[https://www.law.cornell.edu/rules/fre/rule\\_502](https://www.law.cornell.edu/rules/fre/rule_502)

## (d) Controlling Effect of a Court Order.

A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding.

# FRE 902 Evidence That is Self-Authenticating

[https://www.law.cornell.edu/rules/fre/rule\\_902](https://www.law.cornell.edu/rules/fre/rule_902)

- **Admissibility of Electronic Evidence**

<https://complexdiscovery.com/admissibility-of-electronic-evidence-grimm-brady-evidence-admissibility-chart/>

- **New Federal Rules of Evidence 902(13) and 902(14)**

<https://www.foley.com/en/insights/publications/2017/12/new-federal-rules-of-evidence-90213-and-90214>

# FRCP 37(e)

[https://www.law.cornell.edu/rules/frcp/rule\\_37](https://www.law.cornell.edu/rules/frcp/rule_37)

- If electronically stored information **that should have been preserved in the anticipation or conduct of litigation** is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court [may]:
  - (e)(1) [upon finding of prejudice] order curative measures
  - (e)(2) [upon finding of intent to deprive] invoke harshest sanctions

# Diamond's Top Ten E-Disco cases

## Attorney e-disco basic competencies

- **Brown v. Tellermate**, 2014 WL 2987051 (S.D. Ohio 2014)
- **Qualcomm v. Broadcom**, 2008 WL 66932 (S.D. Cal. 2008)
- **In Re Seroquel Products Liability Litigation**, 224 F.R.D. 650 (M.D. Fla. 2007)
- **Pradaxa Products Liability Litigation**, 2013 WL 6486921 (S.D. Ill. 2013)

## Social media discovery

- **Gatto v. United Airlines**, 2013 WL 1285285 (D. N.J. 2013) (social media discovery)

## Retention policies are shields not swords

- **Micron V. Rambus**, 645 F.3d 1311 (Fed. Cir. 2011)

## “Serve and volley” -- Rule 34 Production requests/responses

- **Venture Corp. v. Barrett**, 2014 WL 5305575 (N.D. Cal. 2014)

## Metadata

- **Williams v. Sprint**, 230 F.R.D. 640 (D. Kan. 2005)

## Cell Phone Forensic Search Protocol

- **Antico v. Sindt Trucking**, 148 So.3d 163 (Fla. Dist. App. 2014)

## Adverse inference for loss of video footage

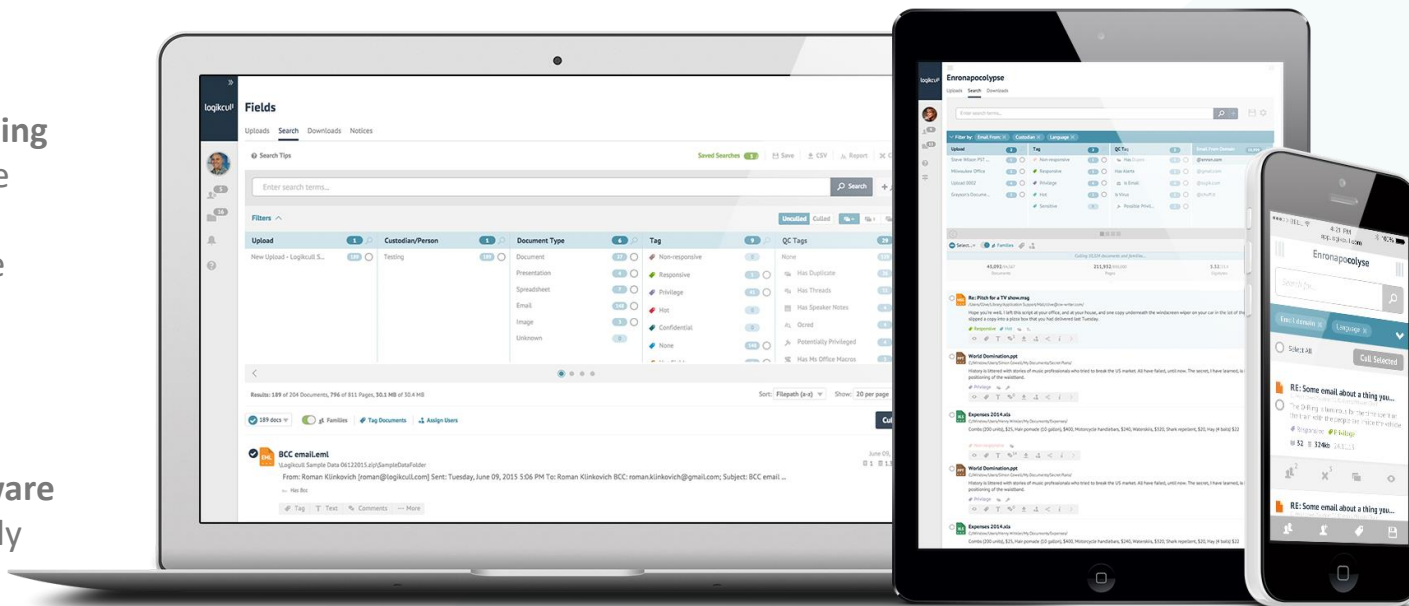
- **Brookshire Brothers v. Aldridge**, 438 S.W.3d 9 (Tex. 2014) (surveillance camera)



# <https://www.logikcull.com/>

## CLOUD-BASED INSTANT DISCOVERY FOR MODERN LEGAL TEAMS

- Searching and reviewing data is as easy as shopping on Amazon – Logikcull is ranked #1 for ease of use
- Use Logikcull to review all data types (including productions) all on one platform – eliminating the need to use outside vendors or manually convert everything to PDF
- Tag, redact, and produce documents without the need for costly software or slow vendors
- Logikcull is the most affordable eDiscovery software on the market – they recently released a massively disruptive pricing scheme



### Intuitive

Industry leading user interface that requires little to no training and allows for unlimited users.



### Fast

The ability to start a document review project in less than a minute – no more waiting to review.



### Secure

Reduce data risk by keeping all data in one spot with bank-level encryption.



### Affordable

Options for pay-as-you-go and subscription pricing – no commitments necessary.





**Craig Ball** <http://www.craigball.com/index.html>

[Have We Lost the War on E-Discovery?](#)

- **Getting Critical Information from Tough Locations**
- **Mobile to the Mainstream  
Preservation and Extraction of iOS  
Content for E-Discovery**

[Who says You Can't Bates Number  
Native Productions?](#)

- **Drafting Forensic Exam Protocols**
- **The Perfect Preservation Letter**
- **The Case for Native**

# Sedona Conference

<https://thesedonaconference.org/>

- [The Sedona Conference Commentary on Legal Holds, Second Edition: The Trigger & The Process](#)
- [The Sedona Conference Commentary on Information Governance, Second Edition](#)
- [The Sedona Conference Primer on Social Media, Second Edition](#)
- [The Sedona Conference Commentary on BYOD: Principles and Guidance for Developing Policies and Meeting Discovery Obligations](#)
- [The Sedona Conference Federal Rule of Civil Procedure 34\(b\)\(2\) Primer: Practice Pointers for Responding to Discovery Requests](#)
- [The Sedona Principles, Third Edition](#)

**Informal Advisory Opinion Number: 970161**

**Rule Number: 1.4;1.6;7.1;7.2;7.3;7.4;7.5**

<http://www.mobar.org/ethics/InformalOpinionsIndex.aspx>

- **QUESTION:** Attorney would like to use the internet for advertising and general legal consultations. Will this violate the rules?
- **ANSWER:** In the course of internet communications regarding Attorney's services, Attorney is required to comply with Supreme Court Rule 4, including Rules 7.1 through 7.5, relating to advertising.

**Additionally, unless e-mail communications,  
in both directions,**

- **are secured through a quality encryption program,**  
Attorney would need to advise clients and potential clients  
that communication by e-mail is not necessarily secure  
and confidential.

# Encryption resources

- **What Every Lawyer Needs to Know about Encryption**  
[https://milwbar.org/images/meeting/111617/11am\\_session\\_materials.pdf](https://milwbar.org/images/meeting/111617/11am_session_materials.pdf)
- **A primer on data encryption best practices for law firms**  
<https://www.logikcull.com/blog/primer-data-encryption-best-practices-law-firms>
- **Common Types of Encryption: What Lawyers Need to Know**  
<https://www.lawtechnologytoday.org/2018/07/common-types-of-encryption/>

# Orin Kerr, *Implementing Carpenter*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3301257](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3301257)

## Proposed Test

- New records of the “Digital Age”
- Records must be created without meaningful choice
- Records must tend to reveal the privacies of life

## Application of Test to

- Messaging services
- Voice calls
- Websurfing
- Ride sharing records

# Innovation and Technology in the Practice of Law

- Access to Justice Technologies
- Artificial Intelligence
- Blockchain
- Data Security
- Document Assembly
- E-discovery
- Legal Analytics
- Smart Contracts