

Five Ways to Prevent Common E-Discovery Mistakes  
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1. Don't hope it will go away—learn about it
  - a. Information is digital and electronically stored
    - i. 98% stored on computer devices
    - ii. 80% never sees paper
  - b. The amount of it is increasing - “Memory’s cheap, why delete anything” mentality
  - c. Need not become an expert, but understand the basics to be able to recognize the issues and manage the discovery project.
2. Know your duties and get assistance when needed (Rule 1.1, Duty of Competence).
  - a. Preserve if you reasonably anticipate litigation. (*Point Blank Solutions, Inc. v. Toyobo America, Inc.*, 2011 WL 1456029 (S.D. Fla. Apr. 5, 2011)).
  - b. Reasonable (not perfect) inquiry in response to Request for Production under Rule 34.
  - c. Bad faith is the standard in this jurisdiction for sanctions for spoliation. *Iverson v. Xpert Tune, Inc.*, 553 So.2d 82 (Ala. 1989); *Point Blank Solutions, Inc. v. Toyobo America, Inc.*, 2011 WL 1448137 (S.D. Fla.).
  - d. Do not be afraid to employ technical or project management assistance. *Bray & Gillespie Management, LLC v. Lexington Ins. Co.*, 2009 WL 71678 (M.D. Fla.) (mildly admonishing counsel for not knowing it or its vendor’s capabilities).
  - e. Know how to make informed decisions regarding vendors. Can you get the services you need, consistent with your duties and the needs of the case, without exceeding your client’s budget?
  - f. *Martin v. Northwestern Mutual Life Ins. Co.*, 2006 WL 148991 (M.D. Fla.) (attorney confession to being “computer illiterate” as reason for failure to produced electronically stored information was “frankly ludicrous”).
3. Communicate with your client, especially regarding preservation.
  - a. Jump start outline (The Sedona Conference), available for download from [http://www.thesedonaconference.org/dltForm?did=jumpstart\\_outline.pdf](http://www.thesedonaconference.org/dltForm?did=jumpstart_outline.pdf)
  - b. Ask the right questions to get the information you need. F.R.C.P. 26(g) requires discovery responses based upon a “reasonable inquiry.”
  - c. Carefully document important decisions.
  - d. Most sanctions regarding electronically stored information arise from a failure to preserve, which is a process, not an event.
4. Cooperate with opposing counsel regarding electronic discovery efforts.
  - a. You are serving your client’s interests when you cooperate regarding scope of preservation, scope of discovery, form of production, etc.—if nothing else, you’re saving your client money. See *Mancia v. Mayflower Textile Servs. Co.* 253 F.R.D. 354 (D. Md. 2008).

- b. Respond to communication from opposing counsel regarding form of production because the failure to do so can have consequences.
    - i. Rule 34(b): “If objection is made to the requested form or forms for producing electronically stored information—or if no form was specified in the request—the responding party must state the form or forms it intends to use.”
    - ii. Rule 34(b): “The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.”
    - iii. Rule 34(b): “Regarding the discovery of electronically stored information: (1) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and (2) a party need not produce the same electronically stored information in more than one form.
  - c. Tailor your discovery requests.
  - d. Evaluate what opposing counsel proposes before you agree.
5. Educate the court on issues that are likely to arise or that have arisen.

## **DUTIES**

- a. Alabama Rule of Professional Conduct 1.1 (Competence).
 

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- b. Alabama Rule of Professional Conduct 3.4 (Fairness to Opposing Party and Counsel).
- c. Ala.R.Civ.P. 34(a)
- d. Fed.R.Civ.P. 26(g) (Signing Disclosures and Discovery Requests, Responses, and Objections).
- e. Ala.R.Civ.P. 37/Fed.R.Civ.P. 37 (but do not forget about the court’s inherent power to maintain its docket. *See, e.g., Kipperman v. Onex Corp.*, 260 F.R.D. 682 (N.D. Ga. 2009)(citing FRCP 26 and 37, as well as its inherent authority, in imposing sanctions of over \$1,000,000)).
- f. Ala.R.Civ.P. 45

**OTHER RESOURCES:**

*Mancia v. Mayflower Textile Services Co.*, 253 F.R.D. 354 (D. Md. 2008)

*U.S. v. O'Keefe*, Cr. No. 06-249, (D.D.C. Feb. 18, 2008)

*Rinkus Consulting Group, Inc. v. Cammarata*, 688 F.Supp.2d 598 (S.D. Tex. 2010)

Hon. Paul W. Grimm, Ilan Weinberger, and Lisa Yurwit, *New Paradigm for Discovery Practice: Cooperation*, 43 Dec. Md. B.J. 26 (2010)

Ralph C. Losey, *Lawyers Behaving Badly: Understanding Unprofessional Conduct in e-Discovery*, 60 Mercer Law Review 983 (2009)

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