Electronic Discovery (Law 5534)
Spring Semester 2018
Professor Randy Diamond
Tues and Thurs, 4:30 – 5:45 (Room 208)
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Course Description
Electronic Discovery provides an in-depth treatment of the legal, technical, and cost management issues involving identification, preservation, collection, review, and production of electronically stored information (“ESI”) in civil litigation. Covers the 2006 and 2015 FRCP ESI amendments: (Rules 26 meet and confer, 34 production, and 37 sanctions), FRE 502 (privilege review and production), state e-discovery rules, the rapidly developing ESI case law, and emerging best practices from the Sedona Conference Cooperation Proclamation, the Electronic Discovery Reference Model, and other e-discovery authorities.

Learning Outcomes (in compliance with Standard 301(b) of the ABA Standards and Rules of Procedure for Approval of Law Schools) Students will:

- become familiar with the FRCP e-discovery rules and other sources of e-discovery law;
- become familiar with e-discovery ethical issues;
- become familiar with e-discovery best practices;
- learn how to apply their knowledge to resolve typical and somewhat more complex e-discovery problems;
- acquire basic knowledge and skill in using an e-discovery review tool

Office Hours I am generally in my office during the week and you are welcome to stop by at any time. If my door is closed, you should not hesitate to knock; if it is not a good time, I will let you know. You may also e-mail to set up an appointment.

Attendance and Participation There will be no distinction between excused and unexcused absences. If you miss more than six classes, you will be dropped from the course barring extraordinary circumstances. I reserve the right to adjust grades by two points in either direction based on class preparation, attendance, and participation.
Consistent and thoughtful class participation is expected. Successful class participation encompasses participating in discussions, asking questions, being an active listener, and paying attention to the comments of others. Quality, not quantity, of comments and questions counts most, as will contributions to a positive, attentive, and engaged learning environment, including respect for others and opposing points of view.

**Intellectual Pluralism** The School of Law community welcomes intellectual diversity and respects student rights. Students who have questions concerning the quality of instruction in this class may address concerns to either myself, one of the law school deans or the Director of the Office of Student Rights and Responsibilities (http://osrr.missouri.edu). All students will have the opportunity to submit an anonymous evaluation of the instructor at the end of this course.

**Academic Integrity** Academic integrity is fundamental to the activities and principles of both the Law School and the legal profession for which you are preparing to join. All members of the Law School community must be confident that each person’s work has been responsibly and honorably acquired, developed, and presented. Any effort to gain an advantage not given to all students is dishonest, whether or not the effort is successful. The Law School community regards breaches of its Honor Code as extremely serious matters. In the event that you violate our Academic Integrity rules on any portion of the work required for this class, you may expect a failing grade in this course as well as possible disciplinary sanctions ranging from probation to expulsion. When in doubt about plagiarism, paraphrasing, quoting, collaboration, or any other form of cheating, consult the course instructor.

**Grading**

- **Final Exam** (100%)
  The final exam is open book essay/short answer exam (no multiple-choice questions). The final counts for 100% of your grade potentially adjusted by participation points per the Attendance and Participation section above.

- **Catalyst Search Exercises** *(successful completion of the exercises is a course requirement)*
  - Complete tutorials by Feb 16
  - Complete Enron exercise by March 23

**Required Textbook**

**E-Discovery Legal and Technology Overview**

**Tues, Jan 16**
- View: Competence in e-Discovery (Casey Flaherty) [https://www.youtube.com/watch?v=cK7lURiCrvs](https://www.youtube.com/watch?v=cK7lURiCrvs)
- Skim: Textbook Introduction pp. 1-23
Thurs, Jan 18
• View: Competence in e-Discovery (Craig Ball)
  https://www.youtube.com/watch?v=2KShLYUjLI
• Read: Swofford v. Eslinger, 671 F. Supp. 2d 1274 (M.D. FL 2009)
  https://www.courtlistener.com/opinion/2407955/swofford-v-eslinger/
• Skim: Textbook pp. 51-75

Preservation of Electronic Information

Tues, Jan 23
Amended Rule 26 Governing Scope of Discovery
Trigger of the Duty to Preserve
• Textbook pp. 77-97

Thurs, Jan 25
Scope of the Duty to Preserve: “Possession, Custody, or Control”
• Textbook: pp. 97-118

Tues, Jan 30
BYOD, Social Media, Accessible/Not Reasonably Accessible Information
• Textbook: pp. 129-138; 154-162; 165-170

Thurs, Feb 1
Proportionality in the Preservation Context
• Textbook: pp. 170-192

Tues, Feb 6
Implementing the Duty to Preserve
• Textbook: pp. 193-216

Thurs, Feb 8
Implementing the Duty to Preserve (continued)
Preservation Orders
• Textbook: pp. 216-238

Cooperation and the Discovery Plan

Tues, Feb. 13
• Textbook: pp. 245-268

Data Collection

Thurs, Feb. 15
• Textbook: pp. 289-307
Collection of ESI by Law Enforcement

**Tues, Feb. 20**
- Textbook: pp. 777-803

Production

**Thurs, Feb. 22**
Rule 34: Form of Production
How Production Should be Organized
- Textbook: pp. 317-338

**Tues, Feb. 27**
Metadata
- Textbook: pp. 338-360

**Thurs, Mar 1**
On-Site Inspections
30(b)(6) Witnesses
- Textbook: pp. 360-379

Search of Electronically Stored Information

**Tues, March 6**
Search Methods
- Textbook: pp. 425-442; 447-455

**Thurs, March 8**
Technology-Assisted Review (TAR)
- Textbook: pp. 456-475

**Tues, March 13**
Technology-Assisted Review (TAR) (continued)
Party Agreement on Search Protocols
- Textbook: pp. 480-503

Costs, Cost Sharing, and Cost Shifting

**Thurs, March 15**
Cost Shifting
- Textbook: pp. 540-564, 585-591
Spoliation

Tues, March 20
New Rule Governing Sanctions 37(e) and Committee Note
Elements of Spoliation
• Textbook: pp. 625-641

Thurs, March 22
Elements of Spoliation (continued)
• Textbook: pp. 641-657

Spring Break March 27 and 29

Tues, April 3
Default Judgments, Dismissal
• Textbook: pp. 658-674

Thurs, April 5
Adverse Inference/Permissive Spoliation Inference
• Textbook: pp. 674-695

Tues, April 10
Adverse Inference/Permissive Spoliation Inference (continued)
Monetary Sanctions
Sanctioning a Party/Counsel
• Textbook: pp. 695-716

Privilege Issues

Thurs, April 12
• Textbook: pp. 871-891

Tues, April 17
• Textbook: pp. 892-911

Ethical Issues in E-Discovery

Thurs, April 19
• Textbook: pp. 750-756
• State Bar of California Formal Opinion No. 2015-193
  http://ethics.ca.gov/Portals/9/documents/Opinions/CAL%202015-193%20%5B11-0004%5D%20%2806-15%29%20-%20FINAL.pdf

Topic tba

Tues, April 24

Exam Review and Course Wrap

Thurs, April 26
Past exams will be posted to TWEN