

### **NOTICE TO STUDENTS WITH DISABILITIES:**

The information contained in this document is available in alternative formats upon request. If you anticipate barriers related to the format or requirements of this course, if you have emergency medical information to share, or if you need to make arrangements in case the building needs to be evacuated, please let Registrar Denise Boessen or Associate Dean Ben Trachtenberg know as soon as possible.

If you need accommodations because of a disability, if you have emergency medical information, or if you need special arrangements in case the building must be evacuated, please notify me or Dean Trachtenberg as soon as possible. If disability related accommodations are necessary (for example, a note taker, extended time on exams, captioning), please register with the Disability Center (<http://disabilitycenter.missouri.edu/>), S5 Memorial Union, 573-882-4696, and then notify Dean Trachtenberg of your eligibility for reasonable accommodations. For other MU resources for students with disabilities, click on “Disability Resources” on the MU homepage.

## **Electronic Discovery (Law 5534)**

Spring 2021

Professor Randy Diamond

Class: Mon and Wed, 9:00 – 10:15 a.m. **Online Via Zoom** (Sync Room 5)

573-882-2935 [diamondrj@missouri.edu](mailto:diamondrj@missouri.edu)

### **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. The course also considers 4<sup>th</sup> Amendment issues in law enforcement data collection.

**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 available to meet by appointment online.

**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.

## Grading

- **Final Exam (80%)**  
The final exam is open book essay/short answer exam (no multiple-choice questions). The final counts for 80% of your grade potentially adjusted by participation points per the Attendance and Participation section above.
- **E-Discovery Projects (20%)**
  - Document Review Platform Exercise (4%) **due February 12**
  - Litigation Hold Drafting Assignment (10%) **due March 15**
  - Big Tech Investigation (6%) **due April 30**

## Required Textbook

Sheindlin, Capra, and The Sedona Conference, Electronic Discovery and Digital Evidence **3d ed. (2015)** <https://www.westacademic.com/Scheidlin-Capra-and-The-Sedona-Conferences-Electronic-Discovery-and-Digital-Evidence-9781634592246>

## E-Discovery Course Intro

*Wed, Jan 20*

### Exemplars

- The Sedona Conference <https://thesedonaconference.org/>
- The Electronic Discovery Institute <https://www.ediscoveryinstitute.org/>
- <http://www.craigball.com/>
- <https://www.shb.com/professionals/t/talbert-denise>
- <https://www.thine.co/in-discovery/robert-keeling-shares-wisdom-from-his-journey-to-become-one-of-the-top-e-discovery-authorities-in-the-country>

### Recurring Challenges (please be prepared to discuss)

- *Swofford v. Eslinger*, 671 F.Supp.2d 1274 (M.D.FLA. 2009) (“*That we are here on this issue is inexplicable and inexcusable.*”) <https://casetext.com/case/swofford-v-eslinger-4>
  - Hearing on Swofford Spoliation Motion 2009 WL 7196484
    - Counsel Testimony 2009 WL 7196494
    - Paralegal Testimony 2009 WL 7196485
  - The court decision and hearing docs are on Westlaw and also on the Canvas course page.

**Tech** <https://www.logikcull.com/guide/ediscovery-document-review> (view **video** [here](#))

Please do not sign up for a free account. I will enable your Logikcull educational access after our first class and post on Canvas the Document Review Platform exercise **due Feb 12**.

## Preservation of Electronic Information

*Mon, Jan 25*

### **Amended Rule 26 Governing Scope of Discovery Trigger of the Duty to Preserve**

- Textbook read pp. 77-97, skim pp. 1-23

*Wed, Jan 27*

### **Scope of the Duty to Preserve: “Possession, Custody, or Control”**

- Textbook: pp. 97-118

*Mon, Feb 1*

### **BYOD, Social Media, Accessible/Not Reasonably Accessible Information**

- Textbook: **Skim** pp. 129-134; **Read** pp. 134-138; 154-162; 165-170
- **Skim** Mobile to the Mainstream  
[http://www.craigball.com/Mobile\\_to\\_the\\_Mainstream\\_20181018.pdf](http://www.craigball.com/Mobile_to_the_Mainstream_20181018.pdf)

*Wed, Feb 3*

### **Proportionality in the Preservation Context**

- Textbook: pp. 170-192
- Drafting and Negotiating ESI Agreements  
<https://www.logikcull.com/public/files/Logikcull-How-to-Craft-an-Effective-ESI-Agreement.pdf>

*Mon, Feb 8*

### **Implementing the Duty to Preserve**

- Textbook: pp. 193-216
- Instructions for Litigation Hold Drafting Assignment (**due March 15**).

*Wed, Feb 10*

### **Implementing the Duty to Preserve (continued)**

#### **Preservation Orders**

- Textbook: pp. 216-238
- Read: E-Discovery Competence of Counsel Criticized in Sanctions Decision, New York Law Journal article [https://www.paulweiss.com/media/3184760/boehning\\_toal\\_e-discovery\\_competence\\_of\\_counsel\\_criticized\\_in\\_sanctions\\_decision\\_10\\_6\\_2015.pdf](https://www.paulweiss.com/media/3184760/boehning_toal_e-discovery_competence_of_counsel_criticized_in_sanctions_decision_10_6_2015.pdf)

## Cooperation and the Discovery Plan

*Mon, Feb. 15*

- Textbook: pp. 245-268
- Document review platform exercise due 10 p.m.

## Data Collection

*Wed, Feb. 17*

- Textbook: pp. 289-307
- Skim Getting Critical Information from Tough Locations  
[http://www.craigball.com//Getting%20Critical%20Information%20from%20Tough%20Locations\\_201804\\_FINAL.pdf](http://www.craigball.com//Getting%20Critical%20Information%20from%20Tough%20Locations_201804_FINAL.pdf)

## Collection of ESI by Law Enforcement

*Mon, Feb. 22*

- Textbook: pp. 777-803
- Understanding the Supreme Court's *Carpenter* Decision  
<https://www.lawfareblog.com/understanding-supreme-courts-carpenter-decision>

*Wed, Feb 24 - Implementing *Carpenter**

- *Carpenter v. U.S.* [https://www.supremecourt.gov/opinions/17pdf/16-402\\_h315.pdf](https://www.supremecourt.gov/opinions/17pdf/16-402_h315.pdf) (pp. 1-23 only)
- “Digital Dragnet” <https://www.nytimes.com/interactive/2019/04/13/us/google-location-tracking-police.html>
- Location Histories <https://craigball.net/2018/12/01/loving-location-histories/#more-5501>

## Production

*Mon, March 1*

**Rule 34: Form of Production**

**How Production Should be Organized**

- Textbook: pp. 317-338

*Wed, March 3*

**Metadata**

- Textbook: pp.338-360

*Mon, March 8*

**On-Site Inspections**

**30(b)(6) Witnesses**

- Textbook: pp. 360-379

## Search of Electronically Stored Information

*Wed, March 10*

**Search Methods**

- Textbook: pp. 425-442; 447-455
- Instructions for Big Tech Investigation project (due **April 30**)

*Mon, March 15*

**Technology-Assisted Review (TAR)**

- Textbook: pp. 456-475

- Litigation Hold Drafting Assignment due 10 p.m.  
*Wed, March 17*

**Technology-Assisted Review (TAR) (continued)  
Party Agreement on Search Protocols**

- Textbook: pp. 480-503

**Guest Practitioners**

- *Mon, March 22*

Denise Talbert, Co-Chair, Data and Discovery Strategies Practice Group, Shook, Hardy & Bacon <https://www.shb.com/professionals/t/talbert-denise>

Vincent Michael Catanzaro, Senior Attorney at FedEx  
<https://www.linkedin.com/in/vincentmcatanzaro/>

**Cost Sharing and Cost Shifting**

*Wed, March 24*

- Textbook: pp. 540-564, 585-591

Spring break March 29 and 31

**Spoliation**

*Mon, April 5*

**New Rule Governing Sanctions 37(e) and Committee Note  
Elements of Spoliation**

- Textbook: pp. 625-647

*Wed, April 7*

**Elements of Spoliation (continued), Default Judgments, Dismissal and Adverse Inferences**

- Textbook: pp. 647-674

*Mon, April 12*

**Adverse Inference/Permissive Spoliation Inference**

- Textbook: pp. 674-695

*Wed, April 14*

**Adverse Inference/Permissive Spoliation Inference, Monetary Sanctions, Sanctioning Party/Counsel**

- Textbook: pp. 695-716

**Privilege and Admissibility Issues**

*Mon, April 19*

- Textbook: pp. 871-891

*Wed, April 21*

- Textbook: pp. 891-917
- Grimm Brady Electronic Evidence Admissibility Chart  
<http://craigball.com/Grimm%20Brady%20Evid%20Admiss%20Chart%202018.pdf>

### Ethical Issues in E-Discovery

*Mon, April 26*

- Textbook: pp. 750-756
- State Bar of California Formal Opinion No. 2015-193

[https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/CAL%202015-193%20%5B11-0004%5D%20\(06-30-15\)%20-%20FINAL.pdf](https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/CAL%202015-193%20%5B11-0004%5D%20(06-30-15)%20-%20FINAL.pdf)

### Course Wrap and Exam Review

*Wed, April 28*

I will post past exams to TWEN over Spring Break

*Friday, April 30* Big Tech Investigation Project due 10 p.m.

**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.

### **Executive Order #38, Academic Inquiry, Course Discussion and Privacy**

University of Missouri System Executive Order No. 38 lays out principles regarding the sanctity of classroom discussions at the university. The policy is described fully in section 200.015 of the Collected Rules and Regulations. **In this class, students may not make audio or video recordings of course activity, except students permitted to record as an accommodation under section 240.040 of the Collected Rules.** All other students who record and/or distribute audio or video recordings of class activity are subject to discipline in accordance with provisions of section 200.020 of the Collected Rules and Regulations of the University of Missouri pertaining to student conduct matters.

Those students who are permitted to record are not permitted to redistribute audio or video recordings of statements or comments from the course to individuals who are not students in the course without the express permission of the faculty member and of any students who are recorded. Students found to have violated this policy are subject to discipline in accordance with provisions of section 200.020 of the Collected Rules and Regulations of the University of Missouri pertaining to student conduct matters.

## **Intellectual Pluralism**

The University community welcomes intellectual diversity and respects student rights. Students who have questions or concerns regarding the atmosphere in this class (including respect for diverse opinions) may contact the departmental chair or divisional director; the Office of Academic Integrity; the MU Equity Office, or [equity@missouri.edu](mailto:equity@missouri.edu).

All students will have the opportunity to submit an anonymous evaluation of the instructor(s) at the end of the course.

## **Mental Health**

The University of Missouri is committed to supporting student well-being through an integrated network of care, with a wide range of services to help students succeed. The MU Counseling Center offers professional mental health care, and can help you find the best approach to treatment based on your needs. Call to make an appointment at 573-882-6601. Any student in crisis may call or go to the MU Counseling Center between 8:00 – 5:00 M-F. After hours phone support is available at 573-882-6601.

Visit our website at <https://wellbeing.missouri.edu> to take an online mental health screening, find out about workshops and resources that can help you thrive, or learn how to support a friend. Download Sanvello, a phone app that teaches skills and strategies to help you maintain good mental health. Log in with your Mizzou e-mail to unlock all the tools available through Sanvello at no cost to you.

**Office of the Provost** <https://provost.missouri.edu/faculty-affairs/syllabus-information/>