

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) Fall 2021

Professor Randy Diamond 573-882-2935 diamondrj@missouri.edu Office Rm 121

Class meets **Tues and Thurs, 9:30 – 10:45 a.m. in Room 332A**

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 and investigations. 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 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 or in my office with masks on.

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 (85%)**
The final exam is open book essay/short answer exam (no multiple-choice questions). The final counts for 85% of your grade potentially adjusted by participation points per the Attendance and Participation section above.
- **E-Discovery Projects (15%)**
 - Legal Hold Drafting Assignment (10%) **due October 8 by 11 p.m.**
 - Relativity Review Platform Exercise (5%) **due December 3 by 11 p.m.**

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> **Canvas course page opens Aug 13**

Week One - Course Intro

Aug 24 – E-discovery in action

In addition to the textbook readings (starting in Week 2), pending high profile investigations and lawsuits like the ones below illuminate electronic discovery's essential role in uncovering truth and the pursuit of justice. Please read the bulleted sources below for class discussion.

California Sues Activision Blizzard Over a “Culture of Constant Sexual Harassment”

- <https://slate.com/technology/2021/07/activision-blizzard-lawsuit-sexual-harrasment-frat-boy-culture-explained.html>
- <https://www.theverge.com/2021/7/28/22598508/activision-blizzard-cosby-suite-sexual-harrasment-allegations>
- <https://gamejobs.co/Director-Internal-Investigations-at-Activision>

Sandy Hook Wrongful Death Lawsuit

- <https://www.nytimes.com/2021/07/29/nyregion/sandy-hook-shooting-remington-settlement.html>
- Soto v. Bushmaster Firearms, Intl. Plaintiffs' Motion to Compel Filed July 2, 2021 <https://s3.documentcloud.org/documents/20985580/sandy-hook-lawsuit-motion-to-compel.pdf>

Skim Sandy Hook Complaint <https://www.koskoff.com/wp-content/uploads/sites/1501160/2020/09/Sandy-Hook-Families-Complaint.pdf>

Related sources (glance over them, none are required reading for our first class)

When Can the Firearm Industry Be Sued? Congressional Research Service Legal Sidebar

<https://crsreports.congress.gov/product/pdf/LSB/LSB10292>

<https://www.cnbc.com/2016/11/15/huge-trove-of-remington-rifle-documents-is-made-public.html>

Remington Rifle Trigger Defect Documents <http://www.remingtondocuments.com/the-documents/powerpoints-and-timelines/> (historical archive of predating the Sandy Hook litigation)

California agency Complaint against Activision <https://aboutblaw.com/YJw>

Class Action Complaint against Activision

https://www.rosenlegal.com/media/casestudy/2462_Activision%20Blizzard%20-%20Web%20Complaint.pdf

Aug 26 – Show Me e-discovery

View interactive discovery platform tutorials

- <https://www.relativity.com/ediscovery-training/self-paced/getting-started-in-relativity/>
- <https://www.relativity.com/ediscovery-training/self-paced/reviewing-and-coding-documents/>

Read

- *Hill v. SSM Healthcare*, Mo. Ct. Appeals Eastern District May 29, 2018
<https://www.courts.mo.gov/file.jsp?id=127175> Give the facts a close read. Consider 1) the parties' characterizations of the loss of evidence, 2) Hill's misunderstanding of the effect and extent of an adverse inference, and 3) the court's concerns in footnote 1 about presenting spoliation evidence to juries.
- *Bartis v. Biomet* Memorandum and Order (E.D. Mo.) May 24, 2021
<https://findfx.thomsonreuters.com/gfx/legaldocs/xklywwawpg/PRODUCTS%20BIOMET%20FITBIT%20opinion.pdf>

Browse/Skim

- United States District Court, Western District of Missouri Principles for the Discovery of Electronic Information
https://www.mow.uscourts.gov/sites/mow/files/DC_Civil%20ESI%20Principles.pdf

Preservation of Electronic Information

Tues, Aug 31

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

- Textbook read pp. 77-97

Government Investigations / Preservation Letters

- example [here](#)
- Senator Warner's preservation letters summarized [here](#)
- Preservation letter to FB [here](#)

Thurs, Sept 2

Scope of the Duty to Preserve: "Possession, Custody, or Control"

- Textbook: pp. 97-118

Civil Litigation: Exemplar Preservation Letters

- <https://embed.documentcloud.org/documents/20437410-08-20201222-preservation-notice-to-m-carone/>
- <https://s3.documentcloud.org/documents/20437413/11-20201222-preservation-notice-to-oan.pdf>

Tues, Sept 7

BYOD, Social Media Discovery

- Textbook: **Skim** pp. 129-134; **Read** pp. 134-138; 154-157

Internal and Regulatory Investigations

- McDonald's Former CEO <https://www.jdsupra.com/legalnews/no-internal-investigation-is-complete-65895/>
- California agency Complaint against Activision Blizzard <https://aboutblaw.com/YJw>

Thurs, Sept 9

Preservation Failures – Evidentiary Hearings – Legal Hold Assignment

- *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

Instructions for Legal Hold Drafting Assignment (**due October 8**).

Tues, Sept 14

Implementing the Duty to Preserve

- Textbook: pp. 194-202, 208-213

Early Case Assessment Simulation

- Class Action Shareholders Complaint against Activision
https://www.rosenlegal.com/media/casestudy/2462_Activision%20Blizzard%20-%20Web%20Complaint.pdf

Thurs, Sept 16

Implementing the Duty to Preserve (continued) Preservation Orders

- Textbook: pp. 216-228

Cooperation and the Discovery Plan

Tues, Sept 21

- Textbook: pp. 245-268 .
- Browse: Affidavit of attorney Alinor Sterling in *Soto v. Bushmaster*
<http://civilinquiry.jud.ct.gov/DocumentInquiry/DocumentInquiry.aspx?DocumentNo=21004269>

Data Collection

Thurs, Sept 23

- Textbook: pp. 289-307
- Skim Getting Critical Information from Tough Locations
http://www.craigball.com//Getting%20Critical%20Information%20from%20Tough%20Locations_201804_FINAL.pdf

Collection of ESI by Law Enforcement

Tues, Sept 28

Fourth Amendment issues

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

Thurs, Sept 30

“Policing” Technologies

- “Digital Dragnet” <https://www.nytimes.com/interactive/2019/04/13/us/google-location-tracking-police.html>
- <https://www.jdsupra.com/legalnews/where-does-ediscovery-fit-in-the-facial-40933/>
- <https://www.jdsupra.com/legalnews/court-s-police-body-camera-opinion-90443/>
- Location Histories <https://craigball.net/2018/12/01/loving-location-histories/#more-5501>

Requests for Production

Tues, Oct 5

**Rule 34: Form of Production
How Production Should be Organized**

- Textbook: pp. 317-338

Thurs, Oct 7

Metadata

- Textbook: pp.338-360

Tues, Oct 12

**On-Site Inspections
30(b)(6) Witnesses**

- Textbook: pp. 360-379

Criminal Investigations

- <https://news.bloomberglaw.com/us-law-week/forced-phone-fingerprint-swipes-raise-fifth-amendment-questions>
- <https://www.abajournal.com/news/article/judge-permits-prosecutors-to-use-facial-recognition-to-open-accused-capitol-rioters-laptop>
- <https://www.abajournal.com/files/ReffittProsMot.pdf>

Search of Electronically Stored Information

Thurs, Oct 14

Search Methods

- Textbook: pp. 425-442; 447-455

Tues, Oct 19

Technology-Assisted Review (TAR)

- Textbook: pp. 456-462, 467-475, 480-484, 497-503

Thurs, Oct 21

Beyond TAR – AI on Trial

- Algorithmic Justice League <https://www.ajl.org/>
- <https://onezero.medium.com/we-must-fight-face-surveillance-to-protect-black-lives-5ffcd0b4c28a>
- Using Artificial Intelligence to Address Criminal Justice Needs
<https://www.ojp.gov/pdffiles1/nij/252038.pdf>
- <https://www.wired.com/story/done-right-ai-make-policing-fairer/>
- <https://www.technologyreview.com/2020/07/17/1005396/predictive-policing-algorithms-racist-dismantled-machine-learning-bias-criminal-justice/>

Cost Sharing and Cost Shifting

Tues, Oct 26

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

Spoliation

Thurs, Oct 28

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

- Textbook: pp. 625-647

Tues, Nov 2

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

- Textbook: pp. 647-674
- <https://www.law360.com/lifesciences/articles/1409985>

Thurs, Nov 4

Adverse Inference/Permissive Spoliation Inference

- Textbook: pp. 681-695
- *Hendrix v. Pitsicalis* <https://www.logikcull.com/public/blog/Experience-Hendrix-v-Pitsicalis-Sanctions-Order.pdf>

Tues, Nov 9

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

- Textbook: pp. 695-706
- *WeRide Corp. v. Kun Huang*
[https://www.callaborlaw.com/images/blog_files/WeRide v. AllRide_order_1.pdf](https://www.callaborlaw.com/images/blog_files/WeRide_v._AllRide_order_1.pdf)

Guest Practitioners

- *Thurs, Nov 11*

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

Denise Talbert, Shook, Hardy & Bacon
<https://www.shb.com/professionals/t/talbert-denise>

Privilege and Admissibility Issues

Tues, Nov 16

- Textbook: pp. 871-891

Thurs, Nov 18

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

E-Discovery Capstone

Tues, Nov 30

- Towards a New Paradigm for E-Discovery in Civil Litigation: A Judicial Perspective
<http://www.floridalawreview.com/2020/towards-a-new-paradigm-for-e-discovery-in-civil-litigation-a-judicial-perspective/>
- California Ethics Opinion on E-Discovery Competency
[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**

Thurs, Dec 2

I will post past exams to CANVAS mid-semester.

Friday, Dec 3 Relativity review platform assignment 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.

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/>