

# Electronic Discovery

Schedule & Syllabus – Fall Semester 2009

## Course Information

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**Please note** that my preferred manner of communication is email. I will typically respond to your email within 24 hours (if not sooner).

**Day/Time:** Tuesday 5:50 p.m. to 8:30 p.m.  
**Location:** DePaul O'Malley Room 631

## Course Description

This course will provide an in-depth treatment of both the legal and technical aspects of electronic discovery – the preservation, collection, review, production and use of electronically stored information in civil and criminal litigation (and investigations). We will cover selected aspects of the quickly developing body of e-discovery case law, Federal and State e-discovery rules, and the technology issues impacting electronic discovery. This course will provide the student with a detailed grounding in the law and application of electronic discovery principles to civil and criminal litigation. Demonstrations utilizing live technology will occur when helpful to provide a learning “laboratory” for the students.

## Course Topics and Tentative Schedule

Week	Topic	Detailed Description
1	Introduction & Planning for E-Discovery	<ul style="list-style-type: none"><li>▪ Course overview</li><li>▪ History and development of e-discovery</li><li>▪ Overview of technology at issue in e-discovery matters, including distinction between data and metadata</li><li>▪ General framework of Federal Rules of Civil Procedure (particularly December 1, 2006 Amendments), state rules, local court rules, and case law</li><li>▪ E-discovery industry and community, including exposure to the Sedona Conference Working Group 1, the Electronic Discovery Reference Model Project, and other professional associations furthering development of e-discovery</li><li>▪ Client proactive planning for e-discovery challenges</li><li>▪ Developing “data maps” for enterprises</li><li>▪ Developing litigation hold procedures and processes (see below for substance)</li><li>▪ Federal Rule of Civil Procedure Rule 26 discovery planning conferences - “meet and confer” - planning and preparation</li><li>▪ Technology tools for archiving and retrieving ESI</li><li>▪ Negotiating with government agencies in investigations to limit scope and cost of e-discovery (SEC, DOJ, State AG’s, etc.)</li><li>▪ The role of document retention and records management policies in</li></ul>

Week	Topic	Detailed Description
		corporations and e-discovery
2	Data Preservation & Data Collection	<ul style="list-style-type: none"> <li>▪ Duty to preserve electronic data</li> <li>▪ "Litigation holds" and litigation preservation</li> <li>▪ Court ordered data preservation</li> <li>▪ Preservation demand letters</li> <li>▪ Technology and data preservation - issues and means of preservation</li> <li>▪ Sanctions for failures to preserve and Federal Rule of Civil Procedure 37 "safe harbor" provision</li> <li>▪ Ethical issues for attorneys and risk management issues when working with clients</li> <li>▪ Identifying the scope of data collection efforts - sources of data, relevant custodians and related issues</li> <li>▪ Technical means of collecting ESI, including the use of forensic and non-forensic means and tools</li> <li>▪ Negotiating agreements to minimize costs of data collection</li> <li>▪ Preservation of metadata and data during the collection process</li> <li>▪ Client self-collection of data and implications for attorneys (<i>Qualcomm</i>)</li> <li>▪ International issues and privacy laws</li> </ul>
3	Discovery Tools and E-Discovery Issues	<ul style="list-style-type: none"> <li>▪ Federal Rule of Civil Procedure 34 document requests</li> <li>▪ Inspection of data collections, including inspection of computers and forensic imaging</li> <li>▪ Federal Rule of Civil Procedure 33 interrogatories</li> <li>▪ The role of the Rule 30(b)(6) deposition in planning for e-discovery and obtaining information about opposing party systems</li> <li>▪ Third-party subpoenas under Federal Rule of Civil Procedure 45 (offensive and defensive issues)</li> <li>▪ The two tiers of accessibility under the Federal Rules: "reasonably" accessible and "not reasonably" accessible data</li> <li>▪ Backup tape preservation and processing</li> <li>▪ Technological impediments to collection and data processing</li> <li>▪ The role of sampling in ESI production disputes</li> <li>▪ Cost-shifting and cost-sharing agreements in e-discovery matters</li> <li>▪ The use of protective orders with electronic data and disputes</li> </ul>
4	ESI Processing & Search	<ul style="list-style-type: none"> <li>▪ Technological methods of processing ESI in preparation for review and production</li> <li>▪ Reducing the volume of ESI through de-duplications, system file filtering, or other culling methodologies</li> <li>▪ The use of search in e-discovery, including different text search technologies and reaching agreements with opponents</li> <li>▪ "Keyword" search compared to "concept" search and other search technologies</li> <li>▪ Quality control measures and risk management for the use of search to filter electronic data</li> </ul>
5	Review & Production of ESI	<ul style="list-style-type: none"> <li>▪ "Forms" of document production (Federal Rule of Civil Procedure 34), e.g., native production, images, etc.</li> <li>▪ Producing metadata</li> <li>▪ Difference between OCR and extracted text (and accompanying privilege risks)</li> <li>▪ Handling foreign language documents</li> <li>▪ Risks and issues off-shoring data processing and document review</li> </ul>
6	Privilege & Evidentiary Issues in E-Discovery	<ul style="list-style-type: none"> <li>▪ New Federal Rule of Evidence 502 and non-waiver of privilege</li> <li>▪ Privilege issues and risks in electronic discovery</li> <li>▪ Using technology to mitigate risk of producing privileged documents</li> <li>▪ Claw-back and quick peek agreements</li> <li>▪ Preparing privilege logs and the special issues associated with logging e-mail messages and other document "chains"</li> <li>▪ Evidentiary issues regarding electronic documents (admissibility, hearsay,</li> </ul>

Week	Topic	Detailed Description
		etc.)
7	Special Issues Regarding E-Mail, Related Messaging Technologies, and Web 2.0 Technologies	<ul style="list-style-type: none"> <li>▪ Technical anatomy of e-mail messages and e-mail systems</li> <li>▪ Enterprise class e-mail vs. private e-mail systems such as G-Mail, HotMail, Yahoo!, etc.</li> <li>▪ Collecting, processing, reviewing and producing e-mail messages</li> <li>▪ E-discovery of instant messaging</li> <li>▪ Discovery of online information assets like Facebook, web sites, wikis and other web 2.0 technologies</li> </ul>
8	Computer Forensics and the Role of Experts & Neutrals in E-Discovery	<ul style="list-style-type: none"> <li>▪ Overview of the science of computer forensics - technical overview</li> <li>▪ Use of computer forensics in civil and criminal litigation</li> <li>▪ Investigatory opportunities using computer forensics (recovering deleted files, retrieving internet activity, file fragment analysis, etc.)</li> <li>▪ The role of computer forensics specialists as testifying and consulting experts</li> <li>▪ Role of experts in assisting attorneys with e-discovery</li> <li>▪ Use of special masters to assist courts in resolving e-discovery disputes</li> <li>▪ Role of mediation to resolve e-discovery issues.</li> </ul>
9	Sanctions in E-Discovery	<ul style="list-style-type: none"> <li>▪ Sanctions under Federal Rules of Civil Procedure 11 and 37.</li> <li>▪ Rule 37 “safe harbor” provisions</li> <li>▪ Court inherent sanction authority</li> <li>▪ Types of sanctions and impact on cases, with study of sanction case law</li> </ul>

### Method of Evaluation

There will be no final examination in this course. Instead, my tentative plan is to assign four short (1 – 2 page) take home “quizzes” which will require short answers based on the material covered in the lectures, assigned cases/rules, or independent research. These quizzes will be distributed on alternating class sessions and will be due approximately 10 – 14 days thereafter. The average score on these quizzes will be the student’s final course grade in accordance with a normal grading scale (adjusted, if necessary, to curve for overall class performance).

### Materials

The textbook for this course is *Electronic Discovery and Digital Evidence* by Scheindlin, et al. (2009). Readings from this text will be assigned each week and will be an integral part of the course and class discussion. Additional cases, rules and other readings will be selected and announced throughout the course. These materials will either be distributed by email or be available for download from the Internet.

### Prerequisite Courses

None.