

# **LAW 287/ IT 881 B: “eDiscovery, Digital Evidence and Computer Forensics”**

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## **Outline and Syllabus**

### **Class Schedule:**

Class meets Mondays, **(4 Hours) from 2:00 – 6:00 p.m.** Classroom assignment will be announced by the school. Class begins Monday, June 1<sup>st</sup> 2009. **We will meet on Mondays for a total of seven sessions.** Professors reserve the right to re-schedule a class, or change the order of class subject matters.

Case Book: **Electronic Discovery and Digital Evidence**, Cases and materials, Shira A. Scheindlin, Daniel J. Capra, The Sedona Conference, West Publishing 2009.

### **Course Professors:**

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NOTE: When contacting us, we prefer email. Please place the words “LLM COURSE” in the subject line. It will help prevent us from inadvertently deleting an email because we do not recognize the sender of the email.

## **Grading:**

30% - Attendance and Class Participation- **Class readings are critical.** Missing more than two classes will result in a full grade reduction.

70% - EXAM

## **Exam**

Details of the exam will be discussed in class

NOTE: This document supersedes all previous handouts and class information.

## **Additional Classroom Issues:**

We will not distribute copies of power point presentations that are used for classroom instruction. We also will not allow our lectures to be videotaped or audio recorded. If you intend to miss a class we would suggest you contact a classmate to obtain notes from the missed class.

## **Course Readings:**

The casebook Electronic Discovery and Digital Evidence will be **available in the book store.** The case book may periodically be supplemented with additional materials distributed via email

## **Course Schedule:**

### **I. Class 1 (June 1): Carlson**

**A. Readings: Introduction, Chapter I (Pages 1-66), Chapter III (Pages 186-202), & Chapter V (Pages 267-299; 337-343)**

B. Introduction to Electronic Media / eDiscovery (Ch. I – pp. 1-66)

1. eDiscovery in the Headlines

2. Primer on Electronic Data

C. Preservation and Discoverability of ESI (Ch. III – pp. 186-202; )

1. History and Development of eDiscovery in the Federal Rules

2. Discoverability of Electronic Data

a. Rule 26 Conference ( Ch. III - pp.186 – 202)

- b. Rule 16 Scheduling Conference (Ch III - pp. 186 – 202)
- c. Rule 33 Interrogatories
- d. Rule 34 Request for Production
- e. Inspection of Hard Drives (Ch. V - pp. 267-275)
- f. 30(b)(6) Witnesses (Ch. V - 276-283)
- g. Not Reasonably Accessible ESI (Ch. V - 284-299)
- 3. Subpoenas for Non-Parties (Ch. V - 325-343)
- 4. Local Rules vs. Federal Rules vs. State Rules

## II. **Class Two (June 8): Carlson**

- A. **Readings: Chapter II (Pages 67-185), Chapter V (300-336)**
- B. Document Retention Policies (Ch. II – pp. 67 – 77)
- C. Implementing the Duty to Preserve (Ch. II – pp. 78 to 164)
  - 1. Commencement of the Duty to Preserve Data
    - a. Scope of the Duty
  - 2. Fulfilling the Duty to Preserve
  - 3. Preservation Orders (Court Ordered and Agreed)
  - 4. Litigation Tips
    - a. Dealing with the “Preserve Everything Letter”
    - b. Sending an Useful Preservation Letter
- D. Possession, Custody and Control Issues (Ch. II – pp. 164-185)
- E. Costs Associated with E-Discovery (Ch. V – pp. 300-336)
  - 1. What are the Costs Involved?
    - a. Attorney Review Time
    - b. Preservation Costs
  - 2. Cost-Shifting Options

- a. Traditional View
- b. Rowe Decision
- c. Zubalake Decision

**III. Class Three (June 15) Chval**

- A. **Readings: Chapter IV (Pages 203-218)**
- B. Introduction to Computer Forensics and Forensically Sound Collection
  1. Understanding the Role of Computer Forensics in eDiscovery
  2. Distinguishing “Forensically Sound” measures from “Forensic” measures
  3. Understanding Preservation and Collection of ESI

**IV. Class Four, (June 22): Chval**

- A. **Readings: Chapter V (Pages 218-267) & Chapter IX (Pages 517-547)**
- B. Management of Electronic Data (Ch. V – pp. 218 – 248)
  1. Processing of ESI
  2. Culling/Searching/De-duplication
  3. Attorney Review
  4. Vendors and their role in eDiscovery
- C. Metadata Issues (Ch. V – pp. 249 – 266)
- D. Evidence Issues Associated with eDiscovery (Ch. IX – pp. 517-547)
  1. Authentication of ESI Generally
  2. Specific Examples of Evidentiary Issues

**V. Class Five, (June 29): Zeller**

- A. **Readings: Chapter VI (Pages 362-443) Chapter VII (Pages 443-479) Chapter VIII (Pages 486-517).**
- B. Sanctions (Ch. VI – pp. 362-443)
  1. Plaintiff and Defendant Issues
  2. Good Faith vs. Intent

3. Sources of Sanctions
    - a. Rule 11 Sanctions
    - b. Rule 37 Discovery Sanctions
    - c. Inherent Powers of the Court
  4. Rule 37 “Safe Harbor” Provision
  5. Case Examples
  6. Spoliation as a Separate Cause of Action
- C. Privilege Issues from eDiscovery (Ch. VIII – pp. 486 – 517)
1. Risks of waiver
  2. Agreements between parties
  3. what precautions should be employed
- D. Ethics and Future Issues in eDiscovery (Ch. VII – pp. 443 – 485)
1. Ethics
  2. Malpractice Concerns
    - a. Standards of Legal Malpractice
    - b. Cases involving paper discovery
    - c. Obligations of Outside Counsel in Discovery
    - d. Zubulake V implications on standard of care
    - e. Vendor Negligence

**VI. Class Six, (July 13th): Zeller**

- A. **Readings: Chapter V (344-359) & Chapter IX (Pages 548-560)**
- B. International Data Protection Issues (Ch. V – 344-359)
  1. Data Export Issues
  2. Data Privacy Issues
  3. Potential Criminal Issues

4. EU / USDOJ Safe Harbor
- C. Experts as it Relates to eDiscovery (Ch. IX – 548-560)
1. Consulting vs. Testifying Experts
  2. Certification of Experts
    - a. Value of “Credentials”
    - b. Daubert Challenges
  3. Variety of Opinion Testimony Available
    - a. Existence of a particular piece of data.
    - b. Origin of Email
    - c. Questioned Document Analysis
- D. What the future holds.
- VII. **Extra date (July 20)** maybe needed if a class is cancelled
- VIII. **Class Seven (July 28th)**
- A. **FINAL EXAM**
  - B. **May have a take home exam assigned on July 13**