

**eDiscovery: Modern Discovery in the Digital Era**  
George Mason University, Antonin Scalia Law School  
Summer 2021 Term, Law 204 (3 credit hours)

**CLASS DETAILS**

First Class Date: ***May 18th***

Last Class Date: ***July 1st***

Class will be held every ***Tuesday*** and ***Thursday*** evening from ***6:05 – 8:45 PM***, starting and ending on dates listed above.

***Instructors:***

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**\*Office Hours by Appointment**

This will be an ***online course***. Please join each class promptly at the start time.

For technical support, please contact the iLaw Helpdesk at:

**Phone:** 703.993.4855

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**COURSE DESCRIPTION**

The exchange of information between adverse parties in litigation—i.e., Discovery—has become more complex than ever in the digital age. With the expanded business use of social media platforms like Facebook, Twitter and Instagram, instant messaging tools like WhatsApp and Signal, and collaboration tools like Slack and Teams, modern litigation requires an attorney to understand, not only the legal

framework, but also the role of modern communications and data systems to their case.

Broadly speaking, “eDiscovery” includes the identification, preservation, collection, review/analysis, and production of electronically stored information (“ESI”). The vast expansion and predominance of data in modern litigation brings challenges that have led to changes in the Federal Rules of Civil Procedure and the way in which courts, scholars, and legal practitioners view eDiscovery.

Although there was a time when “eDiscovery” was seen as a discipline separate and apart from general case discovery, in the modern era where all communications and documents are electronic, the evidence of the case will necessarily be electronic as well. Thus, all discovery now involves eDiscovery, and it is critical that attorneys—and particularly young attorneys who often handle the nuts and bolts of eDiscovery—are knowledgeable about how modern communications will impact their case.

In the modern era, attorneys routinely work with consultants and vendors who provide technology-focused solutions to meet these eDiscovery challenges. To become effective lawyers, attorneys will need to be familiar with how technology impacts their clients and their practice. This includes using cutting-edge tools to find relevant evidence. Lawyers are now using artificial intelligence (“AI”) and technology-assisted review (“TAR”) to make the review of millions of documents more manageable and cost-effective; and advanced data analytics to help attorneys efficiently organize and review massive amounts of data.

This hands-on class will take students through an exploration of the ways in which modern discovery is fundamentally transforming the practice of law as we know it. The class will provide valuable insights that will illuminate the interplay of technology and law, with particular focus on how understanding this interplay can shape case outcomes.

## **LEARNING OUTCOMES**

This course will provide students with a comprehensive understanding of the legal, practical, and technical parameters of mastering the various stages of eDiscovery, and will offer students the opportunity to apply that knowledge to a hypothetical case that mirrors the experience they will have as real-world litigators engaged in eDiscovery practice in the modern digital world.

In this course, students will learn:

- The applicable rules and law governing eDiscovery in federal court, including the Federal Rules of Civil Procedure, Federal Rules of Evidence, ABA Model

Rules of Professional Conduct, and relevant caselaw, as well as authoritative legal scholarship on eDiscovery

- The stages of the eDiscovery process, including identification, preservation, collection, review/analysis, production, and case closure
- Practical steps to effectively navigate and comply with eDiscovery obligations throughout the various stages, including opportunities for students to explore the issues based on a detailed hypothetical
- Best practices at each stage of the eDiscovery process
- How to leverage technology to more efficiently and effectively comply with eDiscovery obligations
- The technological components of managing the eDiscovery process and working with eDiscovery consultants and vendors

### **GRADING**

Students will be evaluated on the following criteria and a letter grade will be assigned.

- **Mid-Term Examination (25%):** Students will draft a Motion for Protective Order or Motion to Compel and Present Oral Argument on the Motion. Detailed requirements and a due date for the Motion will be provided at the beginning of the class term.
- **Final Examination (75%):** The Final Exam will consist of essay questions designed to test students' knowledge of the topics covered in this course and will be based on a detailed hypothetical.
- **Grading Criteria:** The Motion and Final Exam will be graded based on the student's demonstration of critical thinking and analysis, substantive support for arguments, organization, clarity of writing, and appropriate legal citation.
- **Class Attendance and Participation:** Students are expected to be present and prepared for every class session. The instructors may choose, in our discretion, to adjust the final grade based on attendance and a student's level of class participation by increasing or reducing the final course grade to the next higher or lower grade (e.g., from a B to a B+ or from an A- to a B+).

### **COURSE MATERIALS AND SYLLABUS**

#### ***Course Materials***

Many of the pre-class reading assignments include publications by the Sedona Conference. These materials can be found online by searching the Sedona

Conference® Publication Library, which is accessible at <https://thesedonaconference.org/publications>.

Other course materials, including Federal Rules, caselaw, and academic scholarship, can be found online by searching an electronic legal database, such as Westlaw. The Instructors may supplement the pre-class reading assignments with additional materials during the course of the term.

The following publication may be helpful as a resource throughout the course: The Sedona Conference® Glossary: Commonly Used Terms for E-Discovery and Digital Information Management, Fifth Edition (available at [https://thesedonaconference.org/publication/The\\_Sedona\\_Conference\\_Glossary](https://thesedonaconference.org/publication/The_Sedona_Conference_Glossary)).

***Syllabus Overview***

<b>Class #</b>	<b>Date</b>	<b>Topic</b>
1	May 18	Introduction to Modern Discovery
2	May 20	The Rules of Engagement (FRCP); Pre-litigation Corporate Information Governance
3	May 25	At the Outset: The Duty to Identify and Preserve
4	May 27	Pre-Trial Meetings and Negotiations: Creating the Discovery Plan
5	June 1	Serving and Responding to Requests for Production of Documents
6	June 3	Motion for Protective Order/Motion to Compel
7	June 8	Collecting Relevant ESI
8	June 10	Processing and Review/Analysis of ESI
9	June 15	Production of ESI
10	June 17	Class Oral Arguments on Motions for Protective Order/Motion to Compel
11	June 22	The Intersection of Privacy and Cyber-Security Law
12	June 24	Discovery of Social Media Evidence
13	June 29	Protecting Privileged Information
14	July 1	Case Closure; Emerging ESI and Ethical Issues

**Detailed Syllabus**

**Class #1 Introduction to Modern Discovery (May 18, 2021)**

**Lecture/Discussion Topics**

- Review syllabus
- What is eDiscovery and why is it important?
- The basics of ESI
- The Sedona Conference
- The EDRM Model and Process
- Introduction to class hypothetical

**Pre-Class Required Reading**

- ABA Model Rule 1.1 of Professional Conduct and Comment to Rule 1.1
    - *Rule 1.1: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*
    - *Rule 1.1 Comment: To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.*
  - The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production 19 SEDONA CONF. J. 1 (2018), pp. 51-64
  - The Sedona Conference Cooperation Proclamation (2008)
  - Review Electronic Discovery Reference Model (“EDRM”) and diagram, available at <https://www.edrm.net/frameworks-and-standards/edrm-model/> and <https://edrm.net/wp-content/uploads/2020/04/EDRM-clean-poster-24x36-1.pdf>
  - Class hypothetical documents (to be provided)
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**Class #2 The Rules of Engagement (May 20, 2021)**

**Sedona Principle #1**

*Electronically stored information is generally subject to the same preservation and discovery requirements as other relevant information.*

**Lecture/Discussion Topics**

- Review applicable Federal Rules of Civil Procedure and Federal Rules of Evidence
- eDiscovery within the litigation process

- Pre-litigation corporate information governance policies
- Importance of early case assessment to eDiscovery planning

***Pre-Class Required Reading***

- Federal Rules of Civil Procedure 1, 11, 16, 26, 34, 37, and 45 and the 2015 Advisory Committee Notes to each Rule
  - Federal Rule of Evidence 502(d) and the Advisory Committee Notes
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**Class #3    At the Outset: The Duty to Identify and Preserve (May 25, 2021)**

***Sedona Principle #5***

*The obligation to preserve electronically stored information requires reasonable and good faith efforts to retain information that is expected to be relevant to claims or defenses in reasonably anticipated or pending litigation. However, it is unreasonable to expect parties to take every conceivable step or disproportionate steps to preserve each instance of relevant electronically stored information.*

***Lecture/Discussion Topics***

- Identifying ESI
  - Types of ESI
  - Working with the client to create data maps of ESI (class hypothetical)
- Triggering the duty to preserve
- Litigation holds
- Scope of the duty to preserve
  - Possession, custody or control
- Discussion of the duty to preserve based on class hypothetical
- Spoliation sanctions

***Pre-Class Required Reading***

- The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, pp. 93-117
- *New Mexico Oncology and Hematology Consultants, Ltd. v. Presbyterian Healthcare Svcs.*, 2017 WL 3535293 (D.N.M. Aug. 16, 2017) (pp. \*1-\*5)
- *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (pp. 214-219)
- *GN Netcom, Inc. v. Plantronics, Inc.*, 930 F.3d 76 (3d Cir. 2019)
- *Estate of Moreno v. Correctional Healthcare Cos.*, No: 4:18-cv-5171, 2020 WL 5740265 (E.D. Wash. June 1, 2020)

- FRCP 37(e) and 2015 Advisory Committee Notes
  - Litigation hold sample (to be provided)
  - Class hypothetical documents (to be provided)
    - Capriotti Data Map (Plaintiff)
    - Pure Markets Data Map (Defense)
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**Class #4 Pre-Trial Meetings and Negotiations: Creating the Discovery Plan (May 27, 2021)**

**Sedona Principle # 3**

*As soon as practicable, parties should confer and seek to reach agreement regarding the preservation and production of electronically stored information.*

**Lecture/Discussion**

- Rule 16(b) Case Management Conference
- Rule 26(a) Initial Disclosures
- The Rule 26(f) Discovery Conference
- Discussion of potential issues to be raised during pre-trial conferences based on class hypothetical

**Pre-Class Reading**

- Federal Rules of Civil Procedure 16, 26(a), 26(f) and corresponding Advisory Committee Notes
  - The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, pp. 71-86
  - The Sedona Conference Jumpstart Outline (March 2016)
  - Checklist for Rule 26(f) Meet and Confer Regarding Electronically Stored Information (N.D. Cal.), <https://www.cand.uscourts.gov/eDiscoveryGuidelines>
  - Report of Parties' Planning Meeting (S.D. W. Va.), <https://www.wvsc.uscourts.gov/pdfs/forms/LRCivP16.1Form-ReportofPartiesPlanningMeeting.pdf>
  - Review all class hypothetical documents
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**Class #5 Serving and Responding to Requests for Production of Documents (June 1, 2021)**

**Sedona Principle # 4**

*Discovery requests for electronically stored information should be as specific as possible; responses and objections to discovery should disclose the scope and limits of the production.*

**Lecture/Discussion**

- Discovery of ESI: Requests for Production of Documents, Responses and Objections
- Possession, custody or control
- Relevance and proportionality
- Cost shifting
- FRCP 26(g) certification/sanctions
- Discussion of example requests for production of documents and responses/objections based on class hypothetical

### Pre-Class Reading

- Federal Rules of Civil Procedure 26 and 34 and corresponding 2015 Advisory Committee Notes
  - The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, pp. 87-92
  - *Mitchell v. Capitol Records, LLC*, 2018 WL 2011934 (W.D. Ky. Apr. 30, 2018)
  - *Fischer v. Forrest*, 2017 WL 773694 (S.D.N.Y. Feb. 28, 2017)
  - *Liguria Foods v. Griffith Labs.*, 320 F.R.D. 168 (N.D. Iowa 2017) (pp. 182-192)
  - Review all class hypothetical documents
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### Class #6 Motion for Protective Order/Motion to Compel (June 3, 2021)

#### Sedona Principle # 2 (Proportionality)

*When balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard embodied in Fed. R. Civ. P. 26(b)(1) and its state equivalents, which requires consideration of the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.*

#### Sedona Principles # 7 & 8

*7. The requesting party has the burden on a motion to compel to show that the responding party's steps to preserve and produce relevant electronically stored information were inadequate.*

*8. The primary sources of electronically stored information to be preserved and produced should be those readily accessible in the ordinary course. Only when electronically stored information is not available through such primary sources should parties move down a continuum of less accessible sources until the information requested to be preserved or produced is no longer proportional.*

#### Lecture/Discussion

- Relevance



- Proportionality
- Accessibility
- Motion Practice
- Cost-shifting/sanctions

**Pre-Class/Class Reading**

- Federal Rule of Civil Procedure 26 and corresponding 2015 Advisory Committee Notes
  - Federal Rule of Civil Procedure 37(a)
  - The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, pp. 65-70, 131-143
  - The Sedona Conference Commentary on Proportionality in Electronic Discovery, 18 Sedona Conf. J. 141 (2017)
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**Class #7 Collecting Relevant ESI (June 8, 2021)**

***Sedona Principle # 11***

*A responding party may satisfy its good faith obligations to preserve and produce relevant electronically stored information by using technology and processes, such as sampling, searching, or the use of selection criteria.*

***Lecture/Discussion Topics***

- Working with clients' in-house counsel and IT departments
- Collection of relevant ESI, including use of technology
- Tracking collections efforts
- Working with eDiscovery vendors

***Pre-Class Required Reading***

- The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, pp. 164-168
  - The Sedona Conference Best Practices Commentary on Search & Retrieval Methods, 15 SEDONA CONF. J. 217 (2014), pp. 220-240
  - *William A. Gross Const. Assocs., Inc. v. Am. Manufacturers Mutual Ins. Co.*, 256 F.R.D. 134 (S.D.N.Y. 2009)
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**Class #8 Processing and Review/Analysis of ESI (June 10, 2021)**

**Lecture/Discussion**

- Processing collected ESI
- Reviewing collected ESI
- Document review workflows

- Responsive vs. Non-responsive
- Privileged vs. Non-privileged
- Key/sensitive documents
- QC review
- Privilege logging
- Other specialized reviews
- Document families
- Analysis of reviewed documents and creating attorney work product (e.g., early case assessments, chronologies, key players list)

**Pre-Class Reading**

- *Livingston v City of Chicago*, 16 CV 10156, 2020 WL 5253848 (N.D. Ill. Sept. 3, 2020)
  - *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125 (S.D.N.Y. 2015)
  - *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182 (S.D.N.Y. 2012) (pp.182 to 193)
  - *Hyles v. New York City*, 2016 WL 407114 (S.D.N.Y. 2016)
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**Class #9      Production of ESI (June 15, 2021)**

***Sedona Principle # 12***

*The production of electronically stored information should be made in the form or forms in which it is ordinarily maintained or that is reasonably usable given the nature of the electronically stored information and the proportional needs of the case.*

**Lecture/Discussion**

- Production of ESI – nuts and bolts of the production process
- Production format
- Technical issues related to production
- Working with eDiscovery vendors

**Pre-Class Reading**

- The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, pp. 169-186
  - To Be Announced
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**Class #10      Oral Arguments (June 17, 2021)**

Students will present oral argument to the Instructors on their Motion to Compel or Motion for a Protective Order. Further instructions and details will be provided at the beginning of the class term.

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**Class #11 The Intersection of Privacy and eDiscovery Law (June 22, 2021)**

***Lecture/Discussion Topics***

- Key privacy issues to consider during eDiscovery
- How privacy law intersects with eDiscovery
- Discussion of potential privacy issues based on class hypothetical

***Pre-Class Required Reading***

- Review all class hypothetical documents
  - To Be Announced
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**Class #12 Discovery of Social Media Evidence (June 24, 2021)**

**Lecture/Discussion**

- Discoverability of social media data
- Collection of social media data
- Discussion of social media issues based on class hypothetical

**Pre-Class Reading**

- *Howell v. Buckeye Ranch, Inc.* , 2012 WL 526170 (S.D. Ohio Oct. 1, 2012)
  - *Gordon v. TGR Logistics* , 321 F.R.D. 401 (D. Wyo. 2017)
  - Review all class hypothetical documents
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**Class #13 Protecting Privileged Information (June 29, 2021)**

**Sedona Principle # 10**

*Parties should take reasonable steps to safeguard electronically stored information, the disclosure or dissemination of which is subject to privileges, work product protections, privacy obligations, or other legally enforceable restrictions.*

**Lecture/Discussion**

- Review elements of Attorney-Client Privilege/Attorney Work Product
- Joint defense privilege
- Waiver/Clawbacks
- Agreements between counsel (Federal Rule of Evidence 502(d))
- Preparation of privilege log
- Discussion of attorney-client privilege issues based on class hypothetical

**Pre-Class Reading**

- Federal Rule of Evidence 502

- Federal Rule of Civil Procedure 26(b)(5)
  - The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, pp. 147-163
  - Model Protective Order (W.D. Wash.), available at <https://www.wawd.uscourts.gov/sites/wawd/files/ModelStipulatedProtectiveOrder.pdf>
  - Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework, 4 FED. CTS. L. REV. 19 (2010)
  - Review all class hypothetical documents
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**Class #14 Case Closure; Emerging ESI and Ethical Issues (July 1, 2021)**

**Lecture/Discussion**

- Terminating litigation holds and closing the case
- Inadvertent disclosures
- Duty of candor, competence, and fairness
- Admissibility issues regarding ESI
- Emerging trends and issues in eDiscovery practice

**Pre-Class Reading**

- Model Release of Litigation Hold Notice (to be provided)
  - ABA Model Rules of Professional Conduct 1.1, 1.16, 3.3, 3.4(a), & 5.1
  - *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007) (pp. 537 – 585)
  - Recent Changes to Federal Rules of Evidence: Will They Make it Easier to Authenticate ESI? 19 SEDONA CONF. J. 707 (2018)
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