

ELECTRONIC DISCOVERY
Spring 2012

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Assignment Sheet

This assignment sheet attempts to chart out the course of coverage for this course and introduces the goals and other specifics. For law schools, this is a relatively new offering, although one about a rapidly growing focus of what lawyers do in practice. For me, it addresses something that I've been focused on for quite a while (about 15 years), but have not taught as a full course before. Like you, I will be feeling my way tentatively as we move forward.

Casebook: The book for the course is S. Scheindlin, D. Capra & The Sedona Conference, *Electronic Discovery and Digital Evidence* (2009). You should also get ahold of pertinent Federal Rules of Civil Procedure (FRCP) provisions and provisions of the California Code of Civil Procedure (CCP) and Rules of Court (Cal. Rules). For the FRCP, probably any FRCP pamphlet you got for a Civ. Pro. course will do. For the CCP, the Kane & Levine pamphlet may provide some of what you will want, but it may be that making copies of pertinent provisions from the official codes is a better source.

Supplement to casebook: There is a 2011 Supplement to the casebook. A pdf of that supplement is on my assignment website. If it is important to some of you for me to arrange to have it photocopied and sold through the bookstore, I can do that but it will probably be necessary to charge for it and may involve some delay.

Examination: There will be an in-class exam. in the course, about two hours long and probably entirely or mostly in traditional essay style. It will be open book, and you should have with you the FRCP and CCP provisions cited below in the assignment sheet. You may have with you any other written materials you wish to bring to the exam.

Contact information: I am usually around during regular business hours (except midday when I try to get over to the gym) and am happy to talk unless it is the hour before class. My other class meets on Monday through Thursday from 9:40 to 10:40 a.m. Here is contact information:

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Missed classes: Occasionally I have to attend out-of-town meetings that require me to miss class. Presently I am aware of two occasions when that may happen -- On three Thursdays, Jan. 26

and March 22 and 29. I intend to try to arrange makeup times to make up for those missed classes, hopefully at about the time the missed classes occur. One possibility is to try to arrange an extra hour during a "dead hour" the same week as the missed class so there are the same number of class hours that week.

Learning goals of course: Particularly because this is a new offering, it seems useful to set out the goals of the course. One overarching goal, of course, is to gain familiarity with the material involved in the course. But it is possible to be much more particular:

(1) Achieving general mastery of the discovery rules: The discovery issues that bear on E-Discovery build on the discovery issues that bear on all discovery. Though you should have encountered those rules in prior courses, this course will hopefully reinforce your familiarity with those rules and provide a solid foundation for your analysis of how they work in this new realm.

(2) Developing familiarity with pertinent technical issues: More than other discovery, E-Discovery requires lawyers to appreciate, if not to master, technical issues. Ultimately you will likely have to rely on IT personnel for the truly technical issues, but they need to be aware of what those issues are and where they might be hidden.

(3) Learning the specific E-Discovery rules and statutes: Over the last half-decade, new rule and statutory provisions that build on the general discovery provisions mentioned in (1) above have been adopted for the federal courts and for the California courts. The assignment sheet below identifies most of the pertinent specific provisions, which we will cover when we address the related casebook coverage.

(4) Becoming sensitive to the pervasive importance of technological change to E-Discovery: One of the things lawyers will increasingly need to do is to recognize when technological developments may have an impact on their clients in terms of discoverability or preservation of electronically stored information. One goal of this course is to begin to acquaint you with those issues so you can spot them.

(5) Learning to recognize (and hopefully to overcome) the "client education" challenges of E-Discovery: E-Discovery poses distinctive and challenging client education problems for lawyers. In part, this involves trying to sensitize clients to the extent to which their digital activities produce evidence. Relatedly, it involves making clear to them that they have an obligation to produce (and sometimes to preserve) that digital information.

Show and tell feature: In part to serve goal (4), I hope to have a "show and tell" feature to the course. When I was in grammar school, that was a time when students would share something informative with the class. The idea here is that all of you probably will encounter things in your daily lives (particularly in newspapers and magazines) that relate to E-Discovery issues. I hope people will either send them to me or bring them to class so we can learn from them. Below are a bunch of examples I've encountered that seem to me useful illustrations:

S.F. Daily Journal (Dec. 19, 2011): "Your co-worker has a status update":

Despite efforts to keep client lists secret, Silicon Valley companies find that their nonsolicitation agreements can be circumvented by posting on social media websites like Facebook, Twitter, and LinkedIn. One lawyer working on such matters "says departing employees can essentially have conversions with colleagues through social media that they'd be prohibited from having in person."

National Law Journal (Nov. 28, 2011):

Full-page ad on p. 33 for CLE program put on by Corporate Counsel entitled "Social Media: Risks and Rewards," at the Harvard Club in New York City. Topics include "Strategies for Developing a Defensible Social Media e-Discovery Strategy," "Social Media Rules (and Risks) of Engagement," "Protecting the Social Side of Business," and "Best Practices for Crafting an Effective Social Media Policy."

Muzzling Teachers on Facebook, by Prof. Vivian Berger (p. 38) describes a state statute adopted in Missouri designed to limit teacher-student "friending" by forbidding teachers to create web sites or engage in other activities on social media.

National Law Journal (Oct. 26, 2011): "Law Schools Use Google and Facebook to Screen Applicants":

"Survey data of 128 ABA-accredited law schools released Monday by Kaplan Test Preparation found that 41 percent of law school admission administrators used Google to learn more about candidates while 37 percent used Facebook."

New Yorker cartoon (Oct. 17, 2011): Mother sitting on sofa with son, looking at photo album:

"And this was the man I thought was your father until E-ZPass records proved that he was in New Jersey when you were conceived."

N.Y. Times story "When Data Disappears" (8/7/11):

"We generate over 1.8 zettabytes of digital information a year. By some estimates, that's nearly 30 million times the amount of information contained in all the books ever written."

2010 survey of American Academy of Matrimonial Lawyers
(N.L.J., 9/20/10):

"[T]he survey cited Facebook as the 'unrivaled leader for online divorce evidence,' noting that 66% of those surveyed cited it as a primary source"

May 15, 2011, N.Y. Times Weddings Announcements -- "Divorce Lawyers' New Friend: Social Networks":

"'It has changed the way we do business,' said Gary L. Nickelson, a matrimonial lawyer in Fort Worth. 'Before, we would hire private investigators, have opposing spouses followed, try to interview acquaintances and friends. We would strive forever to get evidence, and now people can't wait to post on MySpace or Facebook who they are out drinking with. We just come along and scoop that up.'"

A South Dakota lawyer: "Facebook has become an open book of people's lives. They write things as though they were having a conversation with one friend, so they say the most outrageous and private things. You can't get better evidence than what comes from their own mouths or their own computers."

Trial Magazine (Oct. 2010, p. 23) "Is your Client an Online Social Butterfly?"

"Defense lawyers view online social networks like Facebook and Twitter as breeding grounds for damaging discoverable information. What you don't know about how courts are shaping discovery of 'wall' postings, instant messages, and 'tweets' could be your client's downfall."

The Economist (March 11, 2006, Technology Quarterly p. 8)

"Listening to the Internet": "[T]he direct, unfiltered, brutally honest nature of much online discussion is gold dust to big companies that want to

spot trends, or find out what customers really think of them. As a result, many firms now monitor online chatter as an adjunct to more traditional forms of market research."

Reference works: There are by now quite a few reference works for E-Discovery. I am listing below several that are in our Library, which I hope to arrange to have on course reserve. I can't claim to be conversant in detail with all of them:

Michael Berman, Courtney Barton, Paul Grimm, Managing E-Discovery and ESI: From Pre-litigation Through Trial (ABA 2011)

Adam Cohen, Electronic Discovery: Law and Practice (Kluwer Law & Business 2009)

George Paul, Foundations of Digital Evidence (ABA 2008)

Jeffrey Fowler & William Dance, Preserving Electronically Stored Information: A Practical Approach (BNA Books 2009)

Michele Lange, Electronic Evidence and Discovery: What Every Lawyer Should Know Now (ABA 2009)

Ralph Losey, Electronic Discovery: New Ideas, Case Law, Trends, and Practices (West 2010)

Jonathan Redgrave (ed.), The Sedona Principles: Best Practices Recommendations (Sedona Conf. Working Group Series 2007)

Barbara Rothstein, Managing Discovery of Electronic Information: A Pocket Guide for Judges (Fed. Jud. Ctr. 2007)

Assignments

Below are my intended assignments. I may have to adjust them as the semester moves forward. CB refers to the Casebook. Supp. refers to the Supplement available on my assignment website. FRCP refers to the Federal Rules of Civil Procedure. CCP refers to the California Code of Civil Procedure. Cal. R. Ct. refers to the California Rules of Court.

I am not certain we will have time to cover all the items listed below. Admissibility, for example, may end up being beyond the scope of our concerns. I sometimes identify additional possible reading. That is not assigned, but is available for those who want more background.

I am fairly certain I will be making modifications to the

assignments below as the semester moves forward, probably including dropping some topics that seem less important. On occasion, I have indicated at least some things to think about in relation to assigned material. That does not mean that other topics will not be discussed.

I. INTRODUCTION TO ISSUES

CB 1-15

Skim (this does not mean skip) CB 39-57; Supp. 2-10

FRCP 26(a); 26(b)(1); 26(b)(2); 26(d); 26(e); 26(f); 34;
37(e)

O'Donnell & Dean, E-Discovery: New to California (2009) (on Marcus course assignment webpage)

II. PRESERVATION

A. Records Retention Policies

CB 67-78

Supp. 11; 24

B. The duty to preserve -- in general

CB 78-92

FRCP 37(e); Committee Note (CB 591-92)

CCP § § 1985.8(k); 2031.060(i)

For a huge amount of additional information (400 pages or so), one can check the web site containing materials generated by the Dallas mini-conference of the Advisory Committee on Civil Rules regarding preservation and sanctions. This site contains a variety of submissions about these topics, which are very hot right now. It can be found at:

www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011.aspx

C. Trigger Date

CB 96-104

Supp. 12-23

D. Breadth of preservation

CB 111-35

Supp. 47-49

FRCP 26(b)(1)

FRCP 26(b)(2)(B) and 37(e[f]) Committee Notes (CB 580-81; 591-92)

There are a number of challenging things to consider in connection with this material. How should preservation be done for electronically stored information on handheld devices and/or devices owned by employees that are used for personal or business purposes? What should an employer do

with what's on the office hard drive of an employee who leaves the firm? How should social media be treated, particularly if employees use them to communicate to one another and/or the employer uses them in some way?

- E. Possession, Custody, and Control
FRCP 34(a)
CCP § 2031.010(a)
Supp. 61-63
CB 164-85
Consider "cloud" computing and social media. For further information, see Mix, *Discovery of Social Media*, 5 Fed. Cts. L. Rev. 119 (2011), available online at www.fclr.org/articles.
- F. Litigation Holds and Monitoring
FRCP 37(e) and Committee Note to Rule 37(f)
Supp. 50-60
CB 136-52
- G. Preservation Orders
CB 152-63
FRCP 16(b)

III. MEET AND CONFER -- NEGOTIATING SPECIFICS

- FRCP 26(f); 16(b)
Cal. R. Ct. 3.724
CB 55-56; 186-202; 276-84; 453-60
Supp. 4-8; 64-65
Consider how to handle these issues before formal litigation begins. What incentive is there for plaintiffs (often called "demanding parties") to be flexible. What method is there for organizational parties (corporate or governmental) to avoid over-preserving. Should there be a method for getting a judge to review disputed specifics? How does "proportionality" apply?

IV. DATA COLLECTION AND PRODUCTION

- A. Searching All Appropriate Sources
CB 203-05
Supp. 66
CCP § 2031.230
- B. The Role of Outside Counsel and Outsourcing
CB 205-17
Supp. 142-49
CB 425-42; 476-85
- C. Search Methods & Use of Technology

CB 226-44
Supp. 69-71
Additional background: Grossman & Cormack, cited in
no. 40 on Supp. 70

- D. Privilege Review
Supp. 150-200
CB 486-516
FRCP 26(b)(5)(A) & (B)
Fed. R. Evid. 502
CCP §§ 2031.240(b)(2); 2031.285
- E. Form of Production and Metadata
CB 218-26; 249-66; 443-53
Supp. 67-68; 72-77
FRCP 34(b)(1)(C); 34(b)(2)(D) & (E)
CCP §§ 2031.030(a); 2031.280(a) & (b)
- F. On-Site Inspections
CB 267-76
Supp. 78-79; 86-88
FRCP 34(a)(1); Committee Note (CB 588-89)
CCP § 2031.011 et seq.
- H. Producing "Inaccessible" Information
CB 57-66; 284-99
Supp. 39-46; 56-67; 91-94
FRCP 26(b)(2)(B)
CCP §§ 2031,219(d); 2031.310; 2031.060(c)
- I. Cost Sharing
CB 300-25
CCP § 2031.060(e); 2031.280(e) [Note the effect of
Toshiba Am. Elec. Components, Inc. v. Superior
Court, 21 Cal.Rptr.3d 532 (Cal.Ct.App. 2004)]
- V. SPOILIATION AND SANCTIONS
- A. What Constitutes Spoliation?
CB 362-93
- B. Sanctions
CB 393-403; 421-25
Supp. 25-37; 47; 101-26
FRCP 26(a); 26(e); 37(b)(2); 37(c)(1); 37(e)
CCP § 2031.300(d)
Note, in terms of culpability, that Rule 37(b) is
limited on its face to disobedience of court
orders, and that "inherent authority" can be used
if there is no such court order. Most courts say
inherent authority sanctions can be imposed only
on a showing of bad faith or willfulness.

VI. ADMISSIBILITY OF DIGITAL EVIDENCE

CB 517-61

Supp. 202-09

Fed. R. Evid. 801; 803; 804; 901; 1001-03

[Recall that we may not have time for this material]