



## ELECTRONIC DISCOVERY WRITING SEMINAR

Professor Andrew Pardieck  
Fall 2022, SIU Law 575-3  
Tues/Thurs 1:30-2:45

### I. COURSE INTRODUCTION

Judges, practitioners, and scholars have stated without equivocation “[c]ivil litigation is primarily about discovery” and “paper discovery is a thing of the past.”<sup>1</sup> Judges and practitioners working in the criminal justice system have suggested that law enforcement “will assert that almost every crime today involves a computer.”<sup>2</sup> Experts now estimate that less than 1% of all communications will ever appear in paper form,<sup>3</sup> and common sense suggests that only the ill-advised ignore 99% of the potential evidence.

It is a “brave new world” for those that litigate, and this course is an introduction to that world. We will discuss, research, and write on issues ranging from preservation to production of electronically stored information (ESI).

The goals for this course, which satisfies the senior writing requirement, are for those who participate to leave with (a) an ability to spot issues and identify relevant legal standards and tools for dealing with ESI, and (b) improved research and writing skills that include an ability to produce written work product related to electronic discovery (eDiscovery).

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<sup>1</sup> SCHEINDLIN ET AL., SUPPLEMENTARY MATERIALS ON ELECTRONIC DISCOVERY iii (2009).

<sup>2</sup> Barbara Endicott-Popovsky & Donald J. Horowitz, *Unintended Consequences: Digital Evidence in Our Legal System*, WASHINGTON STATE BAR NEWS 11 (Aug. 2012).

<sup>3</sup> See, e.g., William P. Barnette, *Ghost in the Machine: Zubulake Revisited and Other Emerging E-Discovery Issues Under the Amended Federal Rules*, 8 RICH. J. L. & TECH. 13 (2012), <http://jolt.richmond.edu/v18i3/article11.pdf>.

## II. COURSE MATERIALS

### A. Required Texts

1. SCHEINDLIN ET AL., *ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE: CASES AND MATERIALS* (3<sup>rd</sup> ed. 2015).
2. Supplementary materials posted to D2L.

### B. Recommended Reading

1. CRAIG BALL, *ASSORTED WRITINGS, SEE BALL IN YOUR COURT*, available at <https://ballinyourcourt.wordpress.com/>
2. ARKFELD ON *ELECTRONIC DISCOVERY AND EVIDENCE* (most recent edition, available on Lexis);
3. MAREAN BROWNING ET AL., *ELECTRONIC DISCOVERY AND RECORDS MANAGEMENT GUIDE: RULES, CHECKLISTS AND FORMS* (most recent edition, available on Westlaw).
4. RALPH C. LOSEY, *E-DISCOVERY FOR EVERYONE* (2016)
5. CHRISTINE BROUCEK, *EDISCOVERY FOR THE LEGAL PROFESSIONAL* (2020)

### C. D2L

The D2L page for this course contains a copy of the syllabus, as well as supplementary materials for this course. Sign-up sheets, presentation assignments, and meeting schedules will be posted there. Writing assignments should also be submitted via D2L.

## III. GRADES

Grades are based on a series of writing assignments (70%); review & skills exercises (25%); and an in-class presentation (5%).

### A. Writing Assignments (70 points total)

There are a series of graded writing assignments during the semester: four (4) short writing assignments; and, at the end of the semester, a final memorandum of law with three (3) separate deadlines.

The short writing assignments are each worth up to ten (10) points, for a total of forty (40). The final memorandum is worth a total of thirty (30) points: with the outline worth five (5) points; the draft worth ten (10) points and the final worth fifteen (15) points. Due dates and additional instructions for the writing assignments are set out in appendix to this syllabus posted on D2L.

B. Class Presentations (5 points total)

Each student will present their research for their final legal memorandum in class at the end of the semester. Due dates and additional instructions are set out in appendices to this syllabus posted on D2L.

C. Quizzes & Skills Exercises (25 points total)

There will be weekly quizzes and/or skills exercises. They will include exercises such as quizzes on vocabulary and concepts from the reading and class discussions and exercises using eDiscovery software. Collectively, they are worth twenty-five (25) points. Due dates and additional instructions are set out in appendices to this syllabus posted on D2L.

D. Plagiarism

Plagiarizing another's work, in whole or in part, is a violation of the Honor Code and can lead to serious penalties, including expulsion.

The SIU Honor Code defines plagiarism as:

passing off another's ideas, words, or work as one's own, including written, oral, multimedia, or other work, either word for word or in substance, unless the student author credits the original author and identifies the original author's work with quotation marks, footnotes, or other appropriate designation in such a way as to make clear the true author of the work.

An Honor Code investigation must be reported to the Bar Examiners, even if you are cleared of any violation.

#### E. Attendance & Participation

Please note this course adheres to SIU Law's attendance policy. This is a three-credit course meeting only two times per week, with time off for individual meetings. As a result, absent accommodation, if you accumulate more than four (4) class absences, you may be subject to the sanctions set out in the law school rules.

There is a reason for requiring attendance. Studies showing a strong relationship between attendance and GPA. See, e.g., Crede et al., *Class Attendance in College: A Meta-Analytic Review of the Relationship of Class Attendance with Grades & Student Characteristics*, REVIEW OF EDUCATIONAL RESEARCH (June 2010). Class attendance is a better predictor of grades than any other known predictor of academic performance. *Id.*

If you show up after the attendance sheet has passed your seat, you will be counted absent for the day. There is a reason for requiring law students to show up on time is that courts sanction and clients fire attorneys who show up late. See, e.g., George Khoury, *Lawyer's Tardiness Should Not Result in Case Dismissal* (Dec. 8, 2017), <https://www.findlaw.com/legalblogs/second-circuit/lawyers-tardiness-should-not-result-in-case-dismissal/>

If you have a disability requiring an accommodation, please see Disability Support Services to make the necessary arrangements. We will follow their guidance regarding attendance and participation, as well as other course requirements. See also the Disability Statement *infra*.

#### F. Mobile Phone Policy

Mobile phone use is prohibited during class unless it is used as part of an instructor-directed class exercise, e.g. completion of an online exercise. Whether you are using a laptop or cell phone, sending text messages, hanging out on Facebook, and the like, it distracts you and others around

you. Some research even suggests it makes you stupid! See Rochelle Garner, *Your smartphone makes you stupid, study shows* (June 26, 2017), <https://www.cnet.com/news/smartphone-makes-you-stupid-university-of-texas/>

#### IV. CONTACT INFORMATION

Office hours 3 – 5 p.m. on Tuesdays or by appointment. If you'd like to set up a time to meet, feel free to email me at [apardieck@law.siu.edu](mailto:apardieck@law.siu.edu).

For those emailing, please note my response may not come immediately as the carpal tunnel syndrome periodically makes typing difficult.

You should, however, receive a response to every email you send me, either directly or if it raises a question applicable to all via an email to the class.

If you don't hear from me, in one form or another, please follow up. I may have missed or not gotten the email.

#### IV. LEARNING OBJECTIVES

At the end of this semester, students who do the work will be able to recognize issues that arise with the discovery of ESI and produce work product necessary to complete that discovery.

Students will understand the vocabulary of eDiscovery and be able to articulate the differences between, e.g., accessible and inaccessible ESI; keyword search, data analytics, and predictive coding; and native and static image productions.

Students will understand the role of and be able to research and draft preservation letters; litigation holds; requests and responses related to discovery of ESI; and analyses of search protocols and costs.

Students will develop basic skills to meet, confer, and negotiate the identification; preservation; collection; processing; review; analysis; production; and presentation of ESI.

Finally, using software made available by widely used eDiscovery vendors, students will develop basic search skills necessary for the early case assessment that informs the identification, preservation and collection of ESI and then latter its review, analysis and production.

## V. READING AND WRITING ASSIGNMENTS

The traditional wisdom is that preparing for each hour of class requires three hours of preparation outside of class. The ABA has established a *minimum* standard requiring at least two hours of out-of-class work for each credit hour. Writing well will require much more. Please understand that, done right, this is a time-intensive course.

For the first week, plan on the following reading and writing assignments:

August 23. Read Introduction, pp. 1-23.

August 25. Read Electronic Discovery: Types & Sources, 51-75. Prepare a written data map for discussion in class.

Additional information regarding the data map and the reading and writing assignments for the remainder of the semester are set out in the appendix to this syllabus. The syllabus is tentative and subject to change depending on how we progress. If you have questions about what to read or prepare for the next class, ask.

## VI. FINAL NOTES

**CLASS RECORDING POLICY:** Classes may be recorded by the instructor or SIU as an accommodation for students. Absent advance approval of the instructor, audio or video recording by any student of any class is prohibited.

**EMERGENCY PROCEDURES:** *We ask that you become familiar with Emergency Preparedness @ SIU. Emergency response information is available on posters in buildings on campus, on the Emergency Preparedness @ SIU website, and through text and email alerts. To register for alerts, visit: <http://emergency.siu.edu/>.*

**DISABILITY POLICY.** *SIU Carbondale is committed to providing an inclusive and*

accessible experience for all students with disabilities. Disability Support Services coordinates the implementation of accommodations. If you think you may be eligible for accommodations but have not yet obtained approval please contact DSS immediately at 618-453-5738 or [disabilityservices.siu.edu](http://disabilityservices.siu.edu). You may request accommodations at any time, but timely requests help to insure accommodations are in place when needed. Accommodations and services are determined through an interactive process with students and may involve consideration of specific course design and learning objectives in consultation with faculty. Upon completion of a Disability Accommodation Agreement with DSS, students should bring the agreements for each course to the School of Law Registrar's Office to ensure the School of Law provides the proper classroom and examination accommodations. Accommodation [request](#) and [renewal](#) forms can be found by clicking on the links here.

SALUKI CARES. The purpose of Saluki Cares is to develop, facilitate and coordinate a university-wide program of care and support for students in any type of distress—physical, emotional, financial, or personal. By working closely with faculty, staff, students and their families, SIU will continue to display a culture of care and demonstrate to our students and their families that they are an important part of the community. For Information on Saluki Cares: (618) 453-2461, or [siucares@siu.edu](mailto:siucares@siu.edu), <https://salukicare.siu.edu/>. At the School of Law, Assistant Dean Judi Ray is also available to help students access university resources. Her email is [judiray@siu.edu](mailto:judiray@siu.edu), and her phone number is 618- 453-3135.

COVID-19. SIUC's policy on face masks and social distancing is consistent with the guidance from the Centers for Disease Control and Prevention and the Illinois Department of Public Health. For up-to-date information, students, faculty, and staff should visit SIUC's COVID website (<https://siu.edu/coronavirus>), which includes the Saluki Safety Plan. People can also send email to [pandemicinfor@siu.edu](mailto:pandemicinfor@siu.edu).

**EDISCOVERY APPENDIX I**  
**TENTATIVE COURSE OUTLINE**

<b>Wk</b>	<b>Date</b>	<b>Subject</b>	<b>Reading Assignments</b>	<b>Reading Pages</b>	<b>Writing &amp; Other Assignments</b>
1	8/23	Introduction	Introduction	1-23 (22)	
	8/25	I. Electronic Discovery: Types and Sources	A. Types through E. Information Governance	51-75 (24)	<b>All – Quiz</b> <b>All -- Data Map</b>
2	8/30	I. Electronic Discovery: Types and Sources	<i>What Every Lawyer Should Know &amp; Getting your Arms around the ESI Elephant</i>	11 pp. on D2L	<b>All -- Prepare for in-class IT interview</b>
	9/1	Chapter II. Preservation	A. Amended Rules; B. Trigger Dates	77-97 (20)	<b>All – Quiz</b> <b>P- Preservation Letter Due</b>
3	9/6	Chapter II. Preservation	C. Possession, Custody or Control	97-118 (21)	<b>All -- RAP. Sec. 1 The Relativity Platform, pp. 6-9</b>
	9/8	Chapter II. Preservation	H. Implementng Duty to Preserve: Lit. Holds & Monitoring; Record Retentn Policies	193-203; 208-228 (30)	<b>All – Quiz</b> <b>D--Litigation Hold Due</b>
4	9/13	Chapter III. Cooperation & The Discovery Plan	A. Meet and Confer & B. Local Rules & Pilot Projects	245-268 (23)	<b>All --Prepare for in-class Rule 26(f) meet and confer</b>
	9/15	Chapter III. Cooperation & The Discovery Plan	C. Cooperation in Practice	268-287 (19)	<b>All – Quiz</b> <b>All - Memo re Mt &amp; Confer Due</b>



5	9/20	Chapter IV. Collection	A. Searching all Sources; D. The Role of Outside Counsel	289-315 (26)	
	9/22	Processing	Chapter V.C Metadata	338-359 (21)	<b>All – Quiz</b> <b>P—RFP Due</b>
6	9/27	Chapter VI. Search	A. Search methods; B. Use of Technology	425-442; 445-455 (27)	<b>RAP Secs.4, 5, 6: pp. 26- 46</b>
	9/29	Chapter VI. Search	C. TAR; E. Negotiating Search Protocols	456-469; 504-519 (28)	<b>All – Quiz</b> <b>D--RFP Answer Due</b>
7	10/4	Chapter V. Production Issues	A. Form; B. Organization; C. Metadata	317-327; 327-338; 349-359 (31)	<b>RAP Sec. 7, pp. 48 – 52 – Reviewing &amp; Tagging Docs.</b>
	10/6	Chapter VII. Costs	A. Costs; B. Cost sharing and Shifting	535-567 (27)	<b>All – Quiz</b> <b>P--Memo re Search Protocol</b>
8	10/11	Chapter VII. Costs	C. Producing Inaccessible Data; D. Good Cause; F. Recovering Costs as a Prevailing Party	584-598; 610-623 (27)	
	10/13	Chapter VIII. Spoliation	A. New Rules; B. Elements	625-657 (32)	<b>All – Quiz</b> <b>D--Memo re Costs Due</b>
9	10/18	Chapter VIII. Spoliation	C. Default Judgments; Dismissal; Adverse Inferences	658-670; 687-706 (31)	<b>All – Final Memo Topic Due</b>
	10/20	Chapter XI. Privilege	A. Risks of Waiver; B. Agreements to Control Costs; C. Precautions; D. FRE 502	871-892; 911-923 (33)	<b>All – Quiz</b>

10	10/25	Chapter XII. Admissibility	A. Introduction; B. General Approach; C. Authentication 1-3	925-952 (27)	<b>Final Memo Outline Due</b>
	10/27	Chapter XII. Admissibility	C. Authentication 4-5; D. Best Evidence Rule; E. Hearsay and ESI; New FRE 902 Commentary	952-975 (23 + excerpt)	<b>All – Quiz</b>
11	11/1	Chapter IX. Ethical Issues	A. Duty of Competence; B. Duty of Candor; C. Duty of Fairness; D. Duty of Supervision;	717-740 (33)	<b>Prepare for Final Meet and Confer</b>
	11/4	Chapter IX. Ethical Issues	D.6. Metadata; E. Social Media	740-750; 767-775 (18)	<b>All – Quiz</b> <b>All Complete Draft of Final Memo Due</b>
12	11/8	Election Day Holiday			
	11/10	Work on Final Memo. Individual Meetings re Final Memo			Sign-up on D2L
13	11/15	Work on Final Memo. Individual Meetings re Final Memo			Sign-up on D2L
	11/17	Work on Final Memo. Individual Meetings re Final Memo			Sign-up on D2L
14	11/19-27	Thanksgiving Week			
15	11/29	Presentations	Prepare for Final Presentations		<b>Presentations</b>
	12/1	Presentations	Prepare for Final Presentations		<b>Presentations</b>
	12/2	Tentative Date for Make-up Class from Veteran's Day Holiday	Prepare for Final Presentations		<b>Presentations</b>
16	12/5	Reading Day			<b>All--Final Memo Due</b>

## EDISCOVERY APPENDIX II—WRITING ASSIGNMENTS

### I. General Instructions

#### A. Assume all writing assignments are done for a partner's review:

1. All writing assignments should include a separate, written bibliography of research materials cited or reviewed. This list should include any templates or forms used as a starting point.
2. The bibliography is not included in the word counts for the assignment. It should be submitted along with your written work product for review and grading.
3. Citation format should follow either the Bluebook or ALWD requirements for legal memoranda. In either case, pinpoint citations are required.
4. All writing assignments should conform to accepted formatting practices for the work product required. All writing assignments should follow typography best practices. See, e.g., Seventh Circuit Court of Appeals, *Requirements And Suggestions For Typography, In Briefs And Other Papers*, <http://www.ca7.uscourts.gov/ftips/type.pdf>

Writing assignments should be submitted as follows:

1. Written assignments are before the start of class on the date assigned in the course schedule.
2. The short writing assignments should be submitted via D2L. D2L will assign an anonymous ID for that assignment to the submission. Please do not including identifying information in your writing.
3. The final memorandum should also be submitted via D2L. The multiple drafts and in-class presentation, however, will preclude completely anonymous grading.

#### B. Grading

1. The short writing assignments are graded on a scale of 0 – 10, with 10 being reserved for professional work product that is ready, or close to ready, to email

to a partner. The final memorandum will be graded on a scale of 0 – 15, with 15 being reserved for professional work product.

2. Written assignments containing multiple spelling, grammatical, and or punctuation errors will receive a 0.
3. Absent accommodation, late submissions will be marked down two (2) points if submitted during the first twenty-four (24) hour period after it is due, four (4) points if submitted during the second twenty-four (24) hour period after it is due, and so on until no points are awarded.
4. One (1) extra credit point will be offered for re-writing each assignment and addressing writing concerns noted on the graded assignment. The focus on the re-write should be on the writing, though additions or corrections to the substance are welcome.

## II. Short Writing Assignments

- A. Short Writing Assignment 0. For the first assignment, all students should research and define the term data map, and then prepare a data map of their own ESI for the past three (3) years. This assignment is not graded or handed in but will be shared in class.
- B. The remaining short writing assignments are based on the following hypothetical:

In May of 2021, a SIU law student, Mary Smith, filed suit in federal court in the Southern District of Illinois alleging that over the course of the 2019-2020 academic year she was subject to sexual harassment and an assault by another SIU law student, Tom Jones. Ms. Smith named both Mr. Jones and Southern Illinois University (SIU) as defendants in the suit. Ms. Smith alleged the harassment began in the fall of her 1L year with Mr. Jones sending inappropriate email, texts, and Facebook posts, which culminated in Mr. Jones engaging in unwanted and inappropriate physical contact with Ms. Smith in the law school lounge one evening shortly before Spring 2020 exams began. Ms. Smith alleged that she informed the Associate Dean at the law school in the fall of 2020 of the harassment and the law school failed to take proper steps to

eliminate the harassment and prevent the assault. Both Defendants deny the allegations made.

- C. The class will be divided up into Counsel for Plaintiff and Counsel for Defendant. Each writing assignment will require a minimum of 1,000 words to satisfy the senior writing requirement; most can be completed using 2,000 or fewer words. Opposing counsel will read and respond to your work product.

Specific assignments include producing the following:

#### Short Writing Assignment 1

- a) Plaintiff's Preservation Letter. Plaintiffs prepare a preservation letter to send to the SIU Defendant.
- b) Defendant's Litigation Hold. Defendants prepare a litigation hold to issue to SIU employees.

#### Short Writing Assignment 2

- c) Both Parties' Memo re Mt & Confer. Following the in-class meet and confer, write a short memo detailing, *inter alia*, agreements reached with opposing counsel.

#### Short Writing Assignment 3

- d) Plaintiff's RFPs. Plaintiffs prepare requests for production to the SIU Defendant.
- e) Defendant's Answer to RFPs. Defendants prepare responses to the RFPs.

#### Short Writing Assignment 4

- f) Plaintiff's Memo re Search Protocol. Plaintiffs prepare a memo recommending a search protocol to review ESI produced by Defendant.
- g) Defendant's Memo re Costs. Defendants prepare a memo estimating costs for the production of ESI in this case.

Additional instructions for the above writing assignments will be provided in class.

### III. Final Legal Memorandum

- A. There are four assignments related to the final legal memorandum:
  - 1. Topic & Thesis Statement;
  - 2. Final Memo Outline;
  - 3. Complete Draft (at least 3,750 words);
  - 4. Final Memo (at least 3,750 words).
- B. The outline for the legal memorandum is free-form. You can submit a thesis statement and standard outline; thesis statement and mind-map; or thesis statement and other organizational aid.
- C. Drafts and the final memorandum are not free-form. Drafts must be complete drafts in order to receive full credit. The general writing instructions set out above apply to both the draft and final.

### IV. Final Presentations

- A. Presentations will take place at the end of the semester.
- B. The length of the presentation will depend on the number of students enrolled, with a likely presentation length of between ten (10) and twenty (20) minutes.
- C. The format is up to you. You may use Powerpoint, other presentation software, handouts, or other visuals.
- D. Grades for the presentations will be based on the information you impart. Have you added to the discussion of the topic? Will your colleagues leave with an understanding of the issue?

To obtain credit for any presentation materials or handouts, email them in advance of the presentation to [apardieck@law.siu.edu](mailto:apardieck@law.siu.edu).