

The Legal Technology “Disconnect”

• Technology Timeline

- 1985 – Desktop computers
- 1985 – Networking & e-mail
- 1990 - Laptops
- 1994 – Internet (web & e-mail)
- 1998 – Google
- 1999 – Blackberry (two-way pager)
- 2004-2005 - Social Networking (Facebook, MySpace, etc.)

• Legal Timeline

- 1969 - “[I]t is immaterial that the business record is maintained in a computer rather than in company books.” *United States v. De Georgia*, 420 F.2d 889, 893 (9th Cir. 1969)
- 1985 - “Computers have become so commonplace that most court battles now involve discovery of some type of computer-stored information.” *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 462 (D. Utah 1985).
- 2003 – The Awakening – *Zubulake* decision
- 2006 – eDiscovery Federal Rules
- 2008 – Second Awakening – eDiscovery State Rules
- 2010 – *Pension Committee* decision

20 years of resisting change

The “disconnect” is the failure to understand and apply information technology and ESI concepts to legal issues.

Agenda – eDiscovery Initiative Project

- Change
 - Cultural and technological change
 - Law schools – comment by a top law school officer
 - Legal profession – 99% of lawyers and judges
 - Trend we see is that litigators across the country have stepped back from advocating their client's position in a zealous manner because they do not understand ESI, storage, etc.
- Sample assessment
- State of eDiscovery today and tomorrow - where are we headed?
- Purpose of meeting
- Workbooks – vision, goals and strategies
- Next steps



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Sample Assessment

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Assessment - Electronic Discovery and Evidence 00:55 30:00

Question 1 of 10 Point Value: 10

Choose the correct statements relating to hash. (Choose multiple answers if appropriate)

- A hash value can be used for authentication purposes.
- A hash value will only change if more than two characters in a computer file is changed from the original file.
- The most commonly used hash algorithms are MDX3 and SHA69.
- A hash value can be generated at a file or drive level.



Score so far: 0 points out of 0

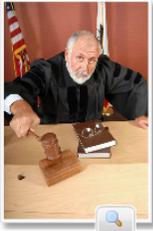
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Assessment - Electronic Discovery and Evidence 01:57 30:00

Question 2 of 10 Point Value: 10

In the *Aquilar* decision what were the three major types of metadata discussed by the Court?

- Hidden, embedded and accessible
- Embedded, substantive and ambient
- Embedded, application and residual
- Substantive, embedded and system



Score so far: 0 points out of 10

SUBMIT

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Assessment - Electronic Discovery and Evidence 02:29 30:00

Question 3 of 10 Point Value: 10

SQL is important to know for databases because it

- Allows for the packing of databases before disclosure
- Defines the schema for a database
- Determines whether database is a flat file or a relational database
- Sets the key field for a database to relate it to another
- None of the above



Score so far: 10 points out of 20

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Assessment - Electronic Discovery and Evidence 02:56 30:00

Question 4 of 10 Point Value: 10

Which statement(s) is correct? (Choose multiple answers if appropriate)

- A "backup" copy of a hard drive will copy deleted information for restoration.
- A forensic copy of a hard drive will copy only "active" files for examination.
- Hashing is used to determine the date a computer file was created.
- A "mirror" image will copy data from the unallocated space of a hard drive to another storage media.



Score so far: 10 points out of 30

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Assessment - Electronic Discovery and Evidence 03:31 30:00

Question 5 of 10 Point Value: 10

In the *Zubulake* decision the Court found which of the following ESI inaccessible? (Choose multiple answers if appropriate)

- Backup tapes and erased and fragmented ESI
- Online, near-line and offline ESI
- Backup tapes, offline and erased, fragmented or damaged data
- Damaged data



Score so far: 20 points out of 40

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Assessment - Electronic Discovery and Evidence 03:54 30:00

Question 6 of 10 Point Value: 10

Though the volume of ESI can be large, the burden of producing it can be significantly reduced by : (Choose multiple answers if appropriate)

- Using a deduplication process
- Converting only responsive ESI into TIFF images
- Not agreeing to a FRE 502 stipulation
- Entering into a "clawback" agreement



Score so far: 20 points out of 50

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Assessment - Electronic Discovery and Evidence 04:22 30:00

Question 7 of 10 Point Value: 10

The earliest a legal hold should be implemented is (Choose multiple answers if appropriate)

- Only when a complaint is filed
- When a triggering event occurs
- After interrogatories are filed
- When a lawsuit is reasonably anticipated
- When a party is angry with another party about how they are being treated in a business transaction.



Score so far: 20 points out of 60

SUBMIT

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Assessment - Electronic Discovery and Evidence 06:34 30:00

Question 9 of 10 Point Value: 10

What are questions you should ask in determining what "form or forms" to request or disclose ESI? (Choose multiple answers if appropriate)

- Will metadata be included?
- Can one authenticate the author's signature by using the binary signature information in the computer file
- Can one redact privileged information?
- Can I use the deNisting function to hash the ESI?
- Is it searchable?
- Can one bates stamp the document?

Score so far: 20 points out of 80

SUBMIT





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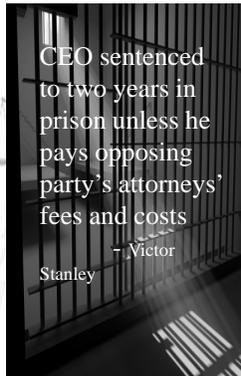


Overview – eDiscovery Obligations and Duties



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Current State of Affairs



Six attorneys referred to state bar for disciplinary proceedings
- Qualcomm

\$8,500,000 in costs and sanctions paid by law firm
- Qualcomm



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Current State of Affairs (cont.)

IT Manager given immunity from prosecution for prior misleading and inaccurate affidavits

- Maggette



Court issues "wake-up" call to attorneys re keyword searching
- Gross Construction

Judge issues an adverse inference instruction against *plaintiffs* for failure to preserve ESI

- Pension Committee



Court orders waiver of privileged documents after ediscovery vendor inadvertently disclosed them to the opposing party
- Amersham Biosciences



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Deleted Files Restored
Oliver North

Personal Injury – social
networking sites

Presidential Indiscretion
Monica Lewinsky

Trademarks and Trade Secrets

Securities Fraud

Sexual Harassment and Retaliation

Antitrust - Microsoft
E-mails

Domestic Relations

Bankruptcy Suit

ESI can be found in all cases

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Competence – AZ Ethical Rules – effective January 1, 2015 

- **Rule 1.1 Competence**
 - A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- **Maintaining Competence**
 - Comment to rule - [6] 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 proposed amendment, which appears in a Comment, **does not impose any new obligations on lawyers**. Rather, the amendment is **intended to serve as a reminder** to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer’s general ethical duty to remain competent.”

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State Bar Of California Formal Opinión No. 2015-193 (cont.)

What are an attorney's ethical duties in the handling of discovery of electronically stored information?

An attorney lacking the required competence for e-discovery issues has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation. Lack of competence in e-discovery issues also may lead to an ethical violation of an attorney's duty of confidentiality.



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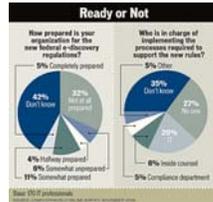
State Bar Of California Formal Opinión No. 2015-193 (cont.)

- Attorneys handling e-discovery should be able to perform (either by themselves or in association with competent co-counsel or expert consultants) the following:
 - initially assess e-discovery needs and issues, if any;
 - implement/cause to implement appropriate ESI preservation procedures; analyze and understand a client's ESI systems and storage;
 - identify custodians of relevant ESI;
 - perform data searches;
 - collect responsive ESI in a manner that preserves the integrity of that ESI;
 - advise the client on available options for collection and preservation of ESI;
 - engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan; and
 - produce responsive ESI in a recognized and appropriate manner.



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Client Agencies' Failure to Prepare for eDiscovery



96% - unprepared or do not know if prepared for new rules

62% - No one or don't know who is in charge of processes for new rules.

Source: Computerworld Online Survey, Nov. 2006

Business - Four Years Later

Not Confident in Legal Hold Process	77%
Data Inventory is Incomplete	56%
Have Tested Their Policy	38%
Do Not Know if Policies Tested	45%

Kroll Survey – Oct. 4, 2010



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Employee Training on Preservation

WHILE 7 OUT OF 10 TRAIN EMPLOYEES ON LEGAL HOLDS, LESS THAN HALF BELIEVE EMPLOYEES 'GET IT'

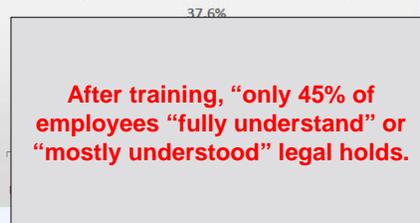
Two questions focused on the level of training within the respondents' organizations. Of those that gave responses, most have some training for employees but less than half responded that employees are tuned into their obligations which suggests more training is necessary.

- 70 percent of respondents affirmed that their organization trains employees about legal holds.
- When asked about their perception of whether employees understand, only 45 percent selected "fully understand" or "mostly understand."

Does Organization Train Employees on Legal Holds?



Do Employees Understand Preservation Obligation?



Legal Hold Pro™

LEGAL HOLD AND DATA PRESERVATION BENCHMARK SURVEY 2013 | 13



Duty to Monitor Compliance

What lessons did we learn from Qualcomm?



- *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004)
- *Plunk v. Vill. of Elwood*, No. 07-88, 2009 U.S. Dist. LEXIS 42952 (N.D. Ill. May 20, 2009)
- *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs, LLC*, No. 05-9016, 2010 U.S. Dist. LEXIS 4546 (S.D.N.Y. Jan. 15, 2010), as corrected, Docket # 358 (May 28, 2010)

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Duty to Understand Your Client's Computer System

“Moreover, outside counsel did not obtain sufficient information from any source to understand how Qualcomm’s computer system is organized: where emails are stored, how often and to what location laptops and personal computers are backed up, whether, when and under what circumstances data from laptops are copied into repositories, what type of information is contained within the various databases and repositories, what records are maintained regarding the search for, and collection of, documents for litigation, etc.”

Qualcomm Inc. v. Broadcom Corp., No. 05-1958, 2008 U.S. Dist. LEXIS 911, at *64 (S.D. Cal. Jan. 7, 2008), *affd in part, vacated in part*, 2008 U.S. Dist. LEXIS 16897 (S.D. Cal. Mar. 5, 2008)

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ESI Types

- In general
- Types

Metadata	Database
System - Audit trails, logs and registries	Spreadsheet
Substantive and embedded	Text (Word Processing)
E-Mail	Fax
Internet	Graphic
Web Pages	Multimedia
Text and Instant Messaging	Presentation
Chat Room	Video
Newsgroups	Spyware
Listserv	Conferencing - text, audio, data and video
Cookies	Audio
Internet History Logs	Photograph & Image
Cache Files	Computer virus
Firewalls	Indexing content
Web Logs	

Sources of Data

Media and Devices

- Floppy disk
- Hard drive - external and internal
- CD-ROM
- DVD
- Jaz and Zip disks
- LS -120
- PC cards
- MD (mini disk)
- Pen drives
- Magnetic tape
- DAT - digital audio tape
- Smart cards
- Microfilm/microfiche
- Memory stick
- **RFID tags**

Storage Devices

- Computers
- Servers
- PDA's
- Glasses and watches
- **Smart Phones - GPS**
- Fax Machines
- Pagers
- Household appliances
- "Ball" point pens
- Printers/Scanners and copiers
- Digital cameras
- Cell Phones
- Answering machines & voice mail
- Caller ID devices
- **Automotive – major systems and airbags**

Locations

- Service providers
- Internet (cloud computing)
- Application
- Satellite
- Pager
- **Telephone**
- **Wireless/cellular**
- Financial institution/credit card issuer
- Cable service provider of
- Gas utility and
- Electric utility
- Water utility
- Backup computer files
- Archives
- Legacy data
- Internet
- World Wide Web
- Web pages
- Internet relay chat (IRC) (chat rooms)
- Newsgroups
- Listserv
- Cookies
- Internet history logs
- Cache files
- Firewalls
- Audit trails and logs
- Media & Devices
- **Other lawsuits**

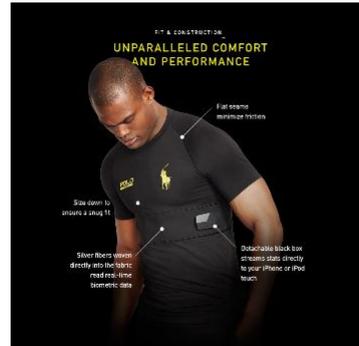


The Polo Tech Shirt

Ralph Lauren



Silver fibers woven directly into the fabric read heart rate, breathing depth and balance, calories burned, steps taken, activity level are streamed to your device via a detachable, Bluetooth-enabled black box. Created exclusively for use with the shirt, the PoloTech App (available from the US App Store only) offers live biometrics, adaptive workouts and more.

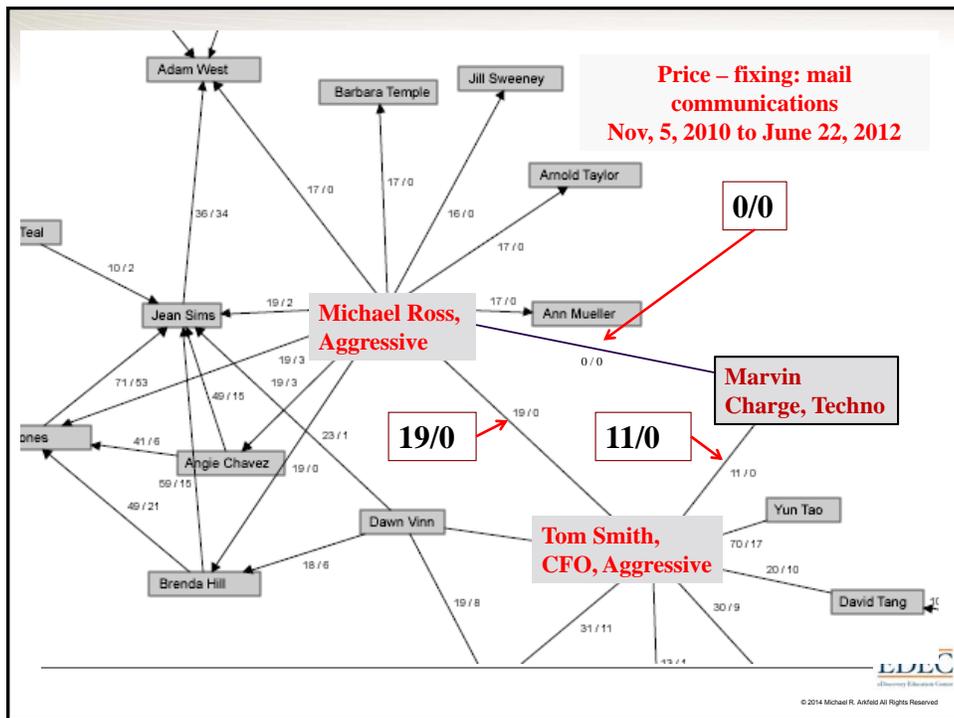
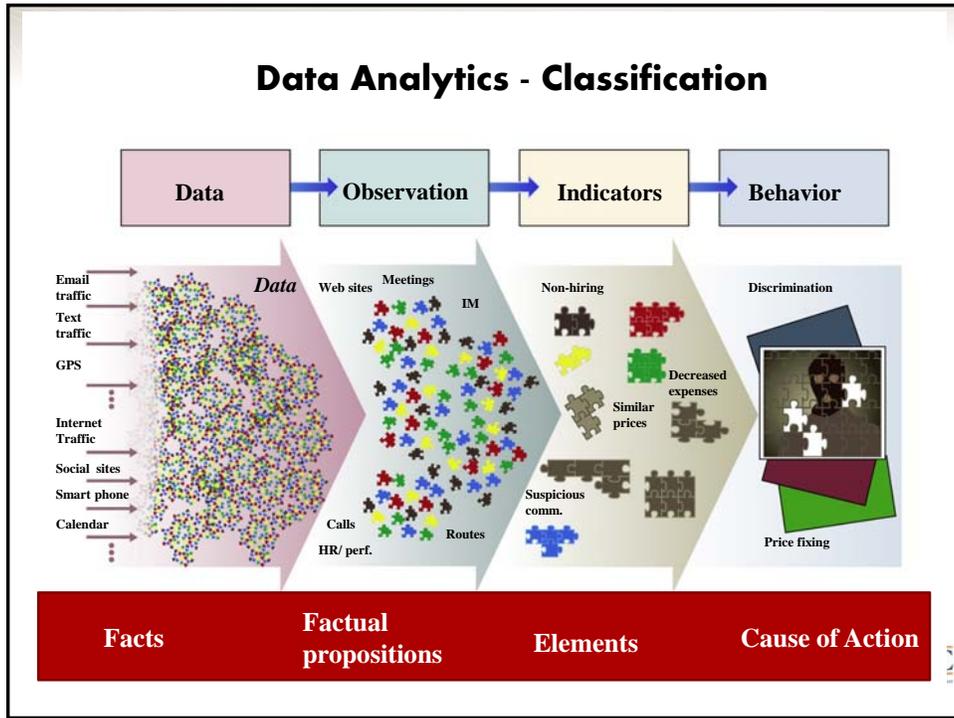


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eDiscovery Treasure Trove - Smart Phones



Of all mobile subscribers, 56% use smart phones, up from 35% two years ago, while the number of adults with no cell phone at all has fallen to 9%. (Forbes, June 2013)



Booking.com Michael Arkfeld Home

city, region or hotel Search

Where will you travel to next?

Our travel scientists are at it again! Now they are trying to predict where you'll go for your next trip. They've analysed your past destinations, scrutinised what those places are endorsed for, cooked it all up in the Booking.com test tube ... and have come up with ...

Relaxation

- High probability: Dubai
- Medium probability: Bergen
- Low probability: Stuttgart

What do you think?
Find your future destination

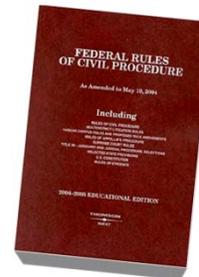
The Internet of Things

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Court Procedural Rules, Case Law and Regulatory Mandates

- Federal Rules and Reported Decisions
 - December 1, 2015 – proposed changes
 - December 1st, 2006 – changes to Rules 16, 26, 33, 34, 37, 45 and Form 35
 - FRE 502
 - Local Rules of Practice
 - Numerous court decisions
 - Criminal cases
 - Government agencies
- State Rules and Reported Decisions
 - At least 30 states have passed rules patterned after federal rules
 - See eDiscovery Education Center (www.edec.com) for state rules and cases

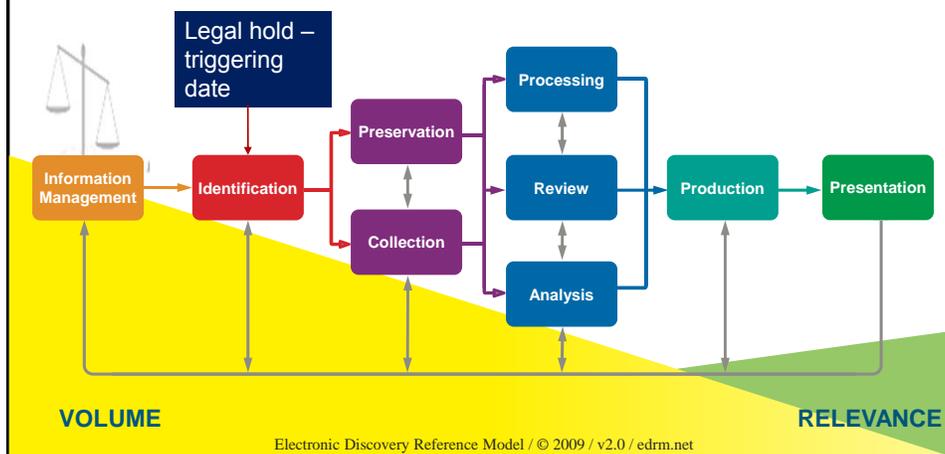


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Understanding the EDRM

A Conceptual View of the E-Discovery Process

Electronic Discovery Reference Model



eDiscovery Strategic Planning



Vision Statement or Guiding Principles

Goals

Strategies

Objectives

Committing to our Goals



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SWOT

- Strengths (Internal)
- Weaknesses (Internal)
- Opportunities (external)
- Threats (external)



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eDiscovery Initiative Plan

- What is the vision and goals for your office?
- How do we implement the vision and goals?
- Signup sheet

- eDiscovery committee
 - Overall direction and leadership
 - **Procedures, policies and checklists**
 - **eDiscovery Center - Intranet development**

- Subcommittees
 - Practice Forms, Protocols and Procedures
 - **Training**
 - Client Agency Communications
 - Public Records
 - Rapid Response
 - Litigation Support Services
 - **Law**
 - Communications



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Procedures, policies, forms and checklists

Office of the Attorney General
E-Discovery and Document Management Handbook



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SAMPLE – AG’s eDiscovery Center – Intranet web site

Contact Information
Contact Information for Litigation Support

Search eDiscovery

Start Here
Start your eDiscovery experience

Practice Templates
Motions, checklists, and protocols

Glossary
eDiscovery lexicon

eDiscovery Publications
Publications and manuals

eDiscovery Law
Rules, cases, and ethical opinions

Education
Videos, on-demand

Tests
Basic and advanced eDiscovery tests

Latest News
Most recent activity on eDiscovery

Frequently Asked Questions
Complete list of FAQ's about eDiscovery

Training - eDiscovery Education Center

Start Here
Start your eDiscovery experience here

eDiscovery Videos
OnDemand 24/7

eDiscovery Forms Library
Model forms, checklists, and protocols

eDiscovery Publications
Publications, manuals, and references

State Law Database
Case digests, rules, and ethics opinions

Federal Law Database
Selected case digests and rules

Arkfeld Online Classes
Interactive, live, and assessments

eDiscovery Glossary
Legal and technological terms

eDiscovery Blog and Resources
Blogs and newsletters

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Online eDiscovery Course

English - United States (en_US) Michael Arkfeld (instructor)

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Arkfeld Online eDiscovery and Digital Evidence Course

Home » eDiscovery Course Turn editing on

NAVIGATION

Home

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 - eDiscovery Course**
 - Participants
 - Badges
 - Class News
 - Syllabus/Scenarios
 - Live Classroom
 - Online Videos
 - Resources
 - My Journal
 - Discussions
 - Tests
 - Instructors
 - Guide
 - Publications
 - Badges
 - Surveys
 - My courses

Class News Syllabus/Scenarios Live Classroom Online Videos Resources My Journal

Discussions Tests Instructors Guide Publications Badges Surveys

Weekly Assignments Your progress

- Weekly Assignments
- Syllabus - Online eDiscovery and Digital Evidence
- Factual Scenario - David Devoted

Class News Live Classroom

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Information Technology (IT) Series (Basic or Advanced)

- 001 - Overview of Information Technology (IT) and Electronic Discovery (eDiscovery)
- 002 - Creating Electronically Stored Information (ESI), Directories and Forms
- 003 - Electronically Stored Information (ESI) Characteristics, Terminology and Classifications
- 004 - Electronically Stored Information (ESI) Types - Metadata and E-Mail: Part I
- 005 - Electronically Stored Information (ESI) Types - Internet, Databases, Spreadsheets and More
- 006 - Computer Forensics - Restoring and Concealing Electronically Stored Information (ESI)
- 007 - Infrastructure: People, Procedures and Technology
- 008 - Storage Locations: Media, Devices, Networks and Servers: Part I
- 009 - Storage Locations: Cloud, Back-Up System, Archival and Legacy: Part II
- 010 - Managing and Producing Electronically Stored Information (ESI): Technological, Search and Cost Issues

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(ESI) Pretrial Discovery Series (Basic or Advanced)



- 011 - Nature of Claims, Scope of Discovery, Terminology and Classification
- 012 - Legal Holds and Controlling Costs
- 013 - Search Methodology and Protocol, Inspection of Computer Systems and Chain of Custody
- 014 - Electronically Stored Information (ESI) Format Disclosure Requirements
- 015 - Privileged Electronically Stored Information (ESI), Nonwaiver Agreement and FRE 502
- 016 - Limitations on Discovery - Cost Allocation (Proportionality), Protective Orders, Burdensome and Relevancy
- 017 - Certification of Production Efforts
- 018 - Spoliation and Sanctions

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Instruction - Advanced and Basic

Advanced – online only

- Starting date
- 18 hours on demand video
- 12 hours live, online interactive instruction
- Test 50 questions

Basic – Live and on-demand

- Starting date
- 6-7 hours on-demand or live training
- Test 25 questions



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Law

- Intranet web site
- Arkfeld on Electronic Discovery and Evidence treatise
- Demo
- Best Practice Guides
 - Electronic Discovery and Evidence (cliff notes)
 - Information Technology Primer for Lawyers
 - Legal Hold
 - ESI Pretrial Discovery - Strategy and Tactics



“It is not the strongest or most intelligent that survive; it is those who are the most [persistent and] adaptable.”

—Charles Darwin

The next steps

- Selection of additional Committee members
- eDiscovery Committee Meeting
 - Intranet web site development
 - Policies, procedures, checklists and forms
 - Draft of Committee’s vision, goals and strategies
- Selection of subcommittee members and initial meetings
- Training schedule
- Communications

