

# Electronic Discovery Final Exam

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## Massachusetts School of Law

Student Number \_\_\_\_\_

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Essay Exam  
Open Book, Open Notes

Instructions: Read Carefully

1. You should receive this exam by 6:00 PM Wednesday, May 9<sup>th</sup>. I will also post a copy of this exam to our website in case your spam filter rejects my email.

You have three (3) hours from the sent time to complete this exam. When you are done, email your exam to [cheesman@msslw.edu](mailto:cheesman@msslw.edu). Do not wait until the last minute to do so. Late papers will be penalized. Any lateness will result in a minimum deduction of one full letter grade.

I will send confirmation once I have received your exam. Make sure to allow enough time for your exam to be transmitted. Exams are not considered received until I send you email confirmation. No time exceptions will be granted due to computer, equipment or power failures, or for failures transmitting the exam.

Of course, students with medical exemptions who have been cleared with the registrar's office will be allotted additional time as permitted. If you have been allotted extra time or if you have been cleared by the Dean's office to take the exam on a different date, you should notify me ASAP. I do not expect to be notified the day of (or the week of) the exam.

When I have received your exam I will send you an email confirmation after I have confirmed the document is printable and that you have followed the instructions properly. Your exam is not considered officially received until I send this email confirmation. Again, you should allot sufficient time for this process as well as equipment and Internet delays in submitting your answer.

2. This is an open book exam; however, you may only use materials on our website or those materials directly linked to from our website. However, during the exam, you may not communicate about the exam or any of your answers with anyone (orally, electronically or otherwise). If you refer to any material that is not your unique work product, it must be properly cited. Failure to reference quoted, paraphrased or otherwise unoriginal material on your exam is an honor violation and will be dealt with accordingly.

While I do not expect Blue Book formatting on a timed exam, you should at least indicate the name of the work and the author you are referencing (*e.g.*, "John Smith's treatise on E-Commerce taxation originally proposed the theories of X, Y and Z"). You can mention your reference in the body of your writing, as a footnote or endnote. Just make sure you give credit where credit is due!

3. Submit your answers to me in .doc, .docx or .rtf format only. **I will not accept other formats.**

4. Write your exam number at the top of this exam.

5. Leave the call of all questions as-is but boldface or change the font color of your answer to help me more easily identify and read your work product.

6. Answer all questions to the best of your ability. Allocate adequate time for each question. A great answer on question one will not make up for your leaving question two blank.

7. **Do not address material we did not cover in class. If you talk about legal issues we did not discuss, I will deduct points from your exam. You could lose a lot of points this way.**

Other guidance:

- Unless stated otherwise, assume that all relevant parties are, and all relevant actions take place, in the US.
- Spend adequate time reading the question and outlining a response.
- Read each question very carefully. Answer the questions actually asked. Do not answer questions that I did not ask.
- Prioritize your discussion. Extensive discussion of irrelevant issues may hurt your score.
- If you think additional information would help your analysis, explain what information you would like (and why it would help) and then state your assumptions to continue with your analysis. Similarly, if you need to assume any further information in order to answer a question, explain what information you are assuming and the consequences this has for your answer.
- Bullet points and abbreviations are not acceptable. Use your best legal writing.
- Please quote statutes or cases only as necessary to make your point. However, if you do reference any material that is not your own work product, you must reference it.
- While generally your answer should be based on legal principles, you are also welcome to address other perspectives and concerns such as public policy.
- If you have questions or concerns during the exam, please email me and I will reply ASAP.
- Failure to follow the instructions, of course, will adversely affect your grade.
- Where appropriate, you should carefully analyze the situation and choose the best answer to each question. As you think through the problem, try to think through it methodically. Consider all the elements and possible defenses or counter-arguments.

Good luck and have a great Summer!

Answer all six of the following questions.

### Question One:

"Welcome onboard," Oswald Cobblepot says. He's the Chief Executive Officer of Digicom, a leader in international digital communications and you are the new General Counsel. You've been in private law firms for years and this is your first day in the new spot. Cobblepot doesn't sit in your office, even though there is a chair. He clearly wants to tell you something. He leans in... "Listen, about a year ago, I started a blog on our external website. I call it Digital Bites! Get it? Digital Bites!"

You smile...politely. He continues, "You see, on this site, I would publish about once a week, and the topics would usually be tied to something going on at the company. We have been fairly careful to limit our topics to the same things that are in our press releases. You know, we just wrapped up that whole multi-year SEC investigation, so we wanted to be careful about what we are saying out there. In fact, we have always moderated the comments, just so we could control the message on the site further. In other words, if someone tried to say something bad, we would either delete that comment or we would never let it be posted on the blog. That's where the problem has come in."

"You see, last month we got sued in a class action about the deleted comments. Basically, the complaint says that we have been hiding information from our shareholders because we have been deleting truthful comments from the blog – or just not posting them. I have heard of spolcreation or something like that, but I don't know what we should be doing to prevent it, or what we should say when the other side accuses us of this stuff. I mean, they are looking for these comments which never really appeared on the web. Who keeps those?"

"Give me some advice about the steps we should be considering, but, I have a call in a few minutes, so just give me the high points. I'm on medication for heart palpitations, and it makes it hard for me to concentrate. What were we talking about anyway?"

## Question Two:

Cobblepot leaves your office satisfied, counting the hairs on the back of his hand. It's almost lunchtime, so you pull out your peanut butter and jelly sandwich, but as you look up, Edward Nigma is in your doorway. He's your Chief of Security.

"Do you have a minute to read this email?" You think, no, but say yes. "Oh, let me just show you."

Next thing you know, your sandwich has been tossed aside, and he's at your computer, digging through your inbox. He clicks on a message from him. It opens to show a short message and an attachment, a video.

"The video is surveillance footage from the garage, level G3 to be specific. It's footage from last night, just watch this." He clicks a button, and the video comes alive showing two shadowy figures breaking in to two cars. They reach inside and take something from each car and then take off running.

"I don't know who these people are, but I think they are the same people who assaulted Pamela Isley last week in the same parking garage. Even though she works with us in Security, Pamela's filed a formal complaint and is just being plain mouthy about how we have 'mishandled' her situation. I think she'll sue, but me and the other guys in Security thinks she's nuts. It just isn't our fault. And we've told her that plenty of times."

Seeing the look on your face, Nigma laughs and says "Don't worry. Most of us keep those conversations on our personal phones and pagers. The volume restrictions on our mailboxes are such a problem these days. That's how we worked around it."

You open your mouth to start to give advice as to how to handle this situation. What do you say?

## Question Three:

Shortly after Mr. Nigma leaves your office, Harvey Dent walks in. Dent is an associate general counsel at Digicom, in charge of overseeing all litigation for the company. You ask him to sit, but he refuses. Instead he closes the door and begins...

"I need to update you on a new case we have against Omnicron Corporation. It's basically a breach of contract action, but we are in federal court because of diversity jurisdiction. The judge in our case is Jason Todd, who I guess you used to work with."

You have actually had lunch with Judge Todd during the previous week. He had just gotten back from Sedona, Arizona, and was sporting a new tan.

"So basically," Dent continues. "I need some advice on how to approach this matter with the judge. My initial pre-trial conference is in 25 days. I don't practice much in federal court. The guy on the other side has already called me, but I haven't gotten him on the phone yet. I have already spent a lot of time with our IT people. They seem to know what they are doing and I trust them."

"What other steps would you like me to take when talking to my opposing counsel about this case? How can I best get ready for the meeting with the Court? I know about setting the dates on the scheduling order. I'm more worried about the other things that I might need to know about."

## Question Four:

Dent, armed with copious notes, leaves your office, just as the phone rings. The call is from Dr. Victor Fries, the leading technologist of Acme Discovery Solutions. You have heard of his company, and he knows about the case that Harvey Dent was just discussing with you.

"I realize it's your first day at the company, but I would really appreciate an opportunity to discuss the new case against Omnicron. I want you to know that we are an open book here at Acme, so ask me anything you want about our company and our products."

(a) What sort of things do you ask for? You don't want to be on the phone with Dr. Fries for a long time, so you know that you'll want to get something in writing from him, the question is what.

(b) Notably, while you are on the phone, your assistant sends you two phone messages: one from Professor Achilles Milo of Electronic Data Managers and one from Dr. Karl Helffern of Optimal EDD. From a quick scan of the messages, both want the same thing: to talk about the Omnicron case. What approach do you take now with regard to hiring the right team for the job

## Question Five:

Can destruction of records under a records retention policy before those records can be reasonably anticipated to be relevant to a particular future litigation constitute spoliation? If so, under what circumstances? Should a very short retention period for e-mail necessarily give rise to a presumption of spoliation? Why or why not? What steps can a party with such a short retention period take to defend its policy?

## Question Six

Part A. Your firm, Dark Suits, is trial counsel representing Record Company in an employment discrimination case. Dark Suits will coordinate the litigation with Record Company's in-house counsel. Record Company will handle all of the discovery and Dark Suits will manage the merits of the litigation. As a result, Dark Suits will have to certify compliance with discovery orders although it has not participated in much of the discovery. How should the parties divide up the work and ensure that all certifications are accurate and truthful?

Part B. Your firm, Dark Suits, is hired in a pending litigation by Colonial, a Fortune 500 Company. Early in discovery, Dark Suits realizes Colonial does not have an e-mail retention system in place. Implementing a retention system and reviewing the subsequent paperwork will cost Colonial hundreds of thousands of dollars. What should Dark Suits do?

