

**OSGOODE**

OSGOODE HALL LAW SCHOOL  
YORK UNIVERSITY

## Professional Development CLE

*"Excellent blending of  
the legal issues with the  
technological aspects"*

Lori Patyk, Ministry of the  
Attorney General, Finance and  
Revenue, Legal Services

# The Osgoode Short Course in Obtaining, Producing and Presenting Electronic Evidence

Returning for the third time with updates, this practical short course will give you a comprehensive and in-depth understanding of the key issues, including:

- Identifying what you are looking for and where to find it: location, source, custodians
- The practical impact of 2010 Rule changes
- Getting electronic evidence from your client, opposing parties and non-parties
- How to avoid and deal with spoliation
- Email: authentication, admissibility, threads, attachments, and more
- Strategies for managing the volume of data in front of you
- Cost-saving strategies, including shifting and sharing

### Plus!

- Model e-discovery precedents annotated to the Sedona Canada Principles
- An introduction to two new and important Sedona Canada commentaries, on proportionality and on the privacy implications of e-discovery

### Chairs

Kelly Friedman, Davis LLP  
Melanie Schweizer, Senior Counsel, Litigation, Bell Canada

### Judges' and Master's Panel

The Hon. Justice Mary Lou Benotto, Superior Court of Justice (Ontario)  
The Hon. Justice Colin L. Campbell, Superior Court of Justice (Ontario)  
Master B. Calum Macleod, Case Management Master, Superior Court of Justice (Ontario)



### DATES & TIME

January 24 - 25, 2011  
9:00 a.m. - 4:30 p.m. EDT/EST

### LOCATION

Osgoode Professional  
Development Centre  
1 Dundas St. W., 26th Floor  
Toronto, ON

Webcast  
available

Sponsored by



Public CLE Seminars

Customized CLE Programs

Skills Training & Certification

ITAW

Professional LLM

Register now at  
[www.osgoodepd.ca](http://www.osgoodepd.ca)

**YORK**  
UNIVERSITÉ  
UNIVERSITY  
**U**  
redefine THE POSSIBLE.



# The Osgoode Short Course in Obtaining, Producing and Presenting Electronic Evidence

## What past attendees said ...

*"A good conference on a very important area of law... Speakers were excellent and clearly experts in their areas"*

*"[Materials] excellent, comprehensive, good templates"*

*"A first rate program and materials!"*

*"Excellent and very informative program"*

*"The speakers were very knowledgeable and provided excellent practical tips"*

The rapid development of new information technologies requires litigators to adapt quickly and thoughtfully to new forms of evidence. Texting, websites, memory keys and hard drives are examples of electronically-stored information that is increasingly being relied upon in litigation. **Electronic data is shifting how lawyers interact, changing how information is collected and used, and transforming courtrooms.** To specifically address these complexities, recent amendments to the *Ontario Rules of Civil Procedure* have fundamentally changed the process for dealing with e-evidence. To get the best results for your clients, it is imperative that you understand these and other, ongoing changes.

This *Osgoode Professional Development* short course was developed to provide civil litigators, law clerks and other members of the litigation team with concrete guidance in this increasingly thorny area. An expert faculty will provide clear, cogent and practical coverage of what you need to know. Topics include:

- Understanding the types and sources of e-evidence
- Identifying issues prior to e-discovery: the initial client meeting, drafting your pleadings, etc.
- Understanding e-discovery issues with regard to the Sedona Canada Principles
- Privacy, privilege, cross-border and confidentiality issues
- Protecting trade secrets, electronically-stored information in the workplace and other confidential information
- Admissibility of e-evidence
- Spoliation and the destruction of e-evidence
- How to prepare and present electronic evidence in court
- Mastering best approaches for e-record management and retention

**Register now by visiting [www.osgoodepd.ca](http://www.osgoodepd.ca), calling 416.597.9724 or 1.888.923.3394, emailing [opd-registration@osgoode.yorku.ca](mailto:opd-registration@osgoode.yorku.ca) or faxing 416.597.9736.**

## Chairs

**Kelly Friedman, Davis LLP**  
**Melanie Schweizer, Senior Counsel, Litigation, Bell Canada**

## Faculty

**Duncan C. Boswell, Gowling Lafleur Henderson LLP**

**The Hon. Justice Colin L. Campbell**  
Superior Court of Justice (Ontario)

**Alex Cameron, Fasken Martineau DuMoulin LLP**

**Robert Castonguay, CISSP, Associate Partner**  
Advisory Services, KPMG Canada, National Director  
Forensic Technology and eDiscovery Services  
KPMG LLP

**Peg Duncan, Independent Information Technology**  
and eDiscovery Consultant

**John D. Gregory, General Counsel, Policy Division**  
Ministry of the Attorney General (Ontario)

**Karen B. Groulx, Pallett Valo LLP**

**Dominic Jaar, Ledjit Consulting Inc.**

**Master B. Calum Macleod, Case Management**  
Master, Superior Court of Justice (Ontario)

**Daniel J. Michaluk, Hicks Morley Hamilton Stewart**  
Storie LLP

**Susan Nickle, Wortzman Nickle Professional**  
Corporation

**Sandra Potter, Potter Farrelly & Associates**

**Chuck Rothman, Wortzman Nickle Professional**  
Corporation

**Berkley D. Sells, Fasken Martineau DuMoulin LLP**

**Glenn Smith, Lenczner Slaght Royce Smith**  
Griffin LLP

**Michael Statham, WeirFoulds LLP**

**Susan Wortzman, Wortzman Nickle**  
Professional Corporation

# Agenda

Day One: Monday, January 24, 2011

**8:30 Registration and Continental Breakfast**

**9:00 Welcome and Introduction from the Chairs**

**9:05 E-Record Management and Retention: A Checklist for Managing Compliance and Minimizing Risk**

**Peg Duncan, Independent Information Technology and eDiscovery Consultant**

- How to minimize risk in electronic records management and retention, while ensuring your legal obligations are met
- E-document management – what are the unique characteristics, challenges and problems?
- Capturing *all* records within the scope of business activity
- Organizational tips for your record-retention system
- Litigation holds – ensuring that your system allows the interruption of the destruction when the writ is dropped
- Best means of avoiding common pitfalls
- Ensuring that the goals of the records-retention system are met

**10:15 Refreshment Break**

**10:30 Admissibility: Understanding Types and Sources of Electronic Evidence**

**Karen B. Groulx, Pallett Valo LLP**

**Chuck Rothman, Wortzman Nickle Professional Corporation**

- The habitat of electronic evidence – Blackberries, cell phones, memory keys, laptops, hard drives, ISP, offsite storage, cross border sources, etc.
  - active data, archival data, backup data
  - hidden data – metadata, residual data, replicant data
  - dynamic electronic data: data in RAM (TorrentSpy)
- The benefits and risks of metadata
- Jurisdictional issues of location and ownership of information
- Considerations in deciding where to start and what to collect
- Admissibility issues: authenticating data, application of the Best Evidence rule, hearsay and business records, the chain of custody, etc.
- Privileged communications
- Legislative amendments addressing electronic evidence
- How to challenge an opponent's electronic evidence

**Newly added! E-Discovery & Social Networking**

As more young people enter the workplace, the use of social networking sites such as Twitter, Facebook, etc. to conduct business will continue to grow. Litigators need to be aware of the nature of this form of communication in order to be able to deal with it, both from a records management and discovery perspective.

- How do you collect information from social networking sites?
- How do you effectively review it?
- How do you manage it as business records?

**11:45 The Law on Discovery and Production of Electronic Evidence: Where Are We Now? Where Are We Going?**

**Glenn Smith, Lenczner Slaght Royce Smith Griffin LLP**

- Nature and impact of the January 2010 Ontario Civil Procedure *Rules* changes
  - requirement for a discovery plan, r. 29.1
  - proportionality in discovery, r. 29.2 and the issue of voluminous documents
  - relevance test, r. 30: replacement of “semblance of relevance” test with a simple relevance test “relevant to any matter in issue”
  - oral examinations for discovery, r. 31: time limited examinations
    - simplified procedure, r. 30, 31 & 76
- Civil Justice Reform Project recommendations
- The Canadian Judicial Council's National Model Practice Direction for the Use of Technology in Civil Litigation
- Understanding e-discovery issues in light of the Sedona Canada Principles
- Practical analysis of your case
  - determining whether settlement or litigation is the best approach in each case
  - proportionality, costs and settlement dynamics
  - the “smoking gun” document and practical implications for your case
  - model precedent – Advice Memo to client

**12:30 Luncheon Speaker**

**Duncan C. Boswell, Gowling Lafleur Henderson LLP**

***The Ontario E-Discovery Implementation Committee's (EIC's) Most Recent Additions to Its Model E-Discovery Precedents***

The EIC is mandated to provide concrete assistance to civil litigators and the judiciary in adapting to the requirements of e-discovery and the related Ontario Rule amendments.

Since parties are now required to “consult and have regard to” the Sedona Canada Principles, the EIC has prepared model e-discovery precedents – included in the course materials – which are all systematically annotated to those Principles. Mr. Boswell, a member of the EIC, will provide valuable commentary on the precedents (with particular reference to those which have been added most recently), pointing out key methods for reducing costs, streamlining the e-discovery process, and running e-trials.

**1:30 Getting Relevant Electronic Evidence & the Discovery Process**

**Susan Wortzman, Wortzman Nickle Professional Corporation**

**Susan Nickle, Wortzman Nickle Professional Corporation  
Discovery Plan**

- Duties under the new Rules
- Consequences for failing to agree to a plan
- Model precedent letter confirming discovery agreement
- Who needs to attend the discovery plan meeting? What are their roles?
- Reasons for not asking for everything – cost, delay, volume, etc.
- Written discovery benefits – tailoring your questions appropriately with regard to opposing party's use and structure of their electronic systems

# Agenda

- Strategies for discovery and production
- Identifying the version of the electronic data that is the best evidence, testifying that the electronic data has not been altered
- Production: agreeing on a readable, meaningful and consistent format for the production and delivery of electronic evidence

## Getting Information from the Opposing Party

- Model precedent – tailoring your preservation letter to opposing counsel, sample preservation order
- Getting and reviewing the opposing counsel's affidavit of documents
  - determining whether you need a motion and preservation order
  - further documentary production from opposing counsel

## Getting Information from Your Client

- Advising your client on terminology and concepts arising from electronic evidence and the potential costs involved
- Identifying data sources
- Identifying key custodians
- How to obtain the best evidence relevant to the litigation
  - preservation issues
  - proper use of the litigation hold mechanism including to non-parties
- Strategies and tips on how to obtain electronic records efficiently
- Balancing preservation of electronically stored information and your client's right to carry on business, *Dulong v. Consumer Packaging Inc.*
- Determining whether experts are needed (for the collection process, the culling process, computer forensics, etc.)
- Discussing the allocation of costs for preserving and producing relevant electronic documents, strategies for limiting the cost of carrying out your e-discovery obligations
- Addressing privacy and privilege issues including professional negligence, motions to remove counsel, *Zubulake*
- Unintended waivers of privilege and reclaiming privilege
- Determining relevance parameters
- Ontario Rules of Professional Conduct r. 4.01
- Working with your client's IT department

## 2:30 Refreshment Break

## 2:45 Obtaining Relevant Electronic Evidence from Non-Parties

### Alex Cameron, Fasken Martineau DuMoulin LLP

- Planning for e-discovery of non-parties
- Norwich orders, the Rules and the Family Law Rules
- Scope of production and non-party requests for compensation
- Privacy, privilege, cross border and confidentiality issues
- Relevance of the Sedona Canada Principles
- Recent case law and developments

## 3:20 The Special Case of Email

Daniel J. Michaluk, Hicks Morley Hamilton Stewart Storie LLP

John D. Gregory, General Counsel, Policy Division, Ministry of the Attorney General (Ontario)

- Authentication issues specific to emails
- Recognized standards relevant to finding electronic evidence admissible
- Emails in the course of carrying on business
- Privacy issues including email attachments
- Privilege calls including forwarded emails and group emails
- Issues surrounding email threads, mass emails
- Getting emails into evidence or keeping them out
- Employee communications and ESI in the workplace – control, access, privacy expectations and privacy rights
  - Canadian privacy legislation: Federal and Provincial
  - *Criminal Code*
  - *Canadian Charter of Rights and Freedoms*
  - Common-law torts

## 4:30 Program Adjourns

**Day Two: Tuesday, January 25, 2011**

## 8:30 Continental Breakfast

## 9:00 Chairs' Opening Remarks

## 9:05 Early Case Assessment and Review of Electronic Documents

Dominic Jaar, President, Ledjit Consulting Inc.

Robert Castonguay, CISSP, Associate Partner Advisory Services, KPMG Canada National Director Forensic Technology and eDiscovery Services KPMG LLP

Melanie Schweizer, Senior Counsel, Litigation, Bell Canada

- Cost – the ever-present issue
  - considerations arising from size of case
  - manual vs. electronic review
- Preparation for review
  - gathering electronic documents
  - conversion vs. native review
  - specialized software
  - the other side's documents
    - agreeing on format and coding and other issues
    - exchange of coding
- Linear vs. non-linear review
  - with or without specialized software
  - issues arising from non-linear review
  - challenging the other side's review technique (or not)
- Privilege and privacy
  - review for privilege
  - agreements re: privilege
  - how to address privacy concerns
- Specialized tools
  - case management and analysis tools
  - review tools

# Agenda

## 10:30 Refreshment Break

## 10:45 Collection and Processing of Electronic Information Demystified: What Happens in the Black Box?

**Dominic Jaar, President, Ledjit Consulting Inc.**

**Robert Castonguay, Associate Partner Advisory Services, KPMG Canada, National Director, Forensic Technology and eDiscovery Services, KPMG LLP**

### Collecting Electronic Data

- Means of collection
- Forensic imaging
- Logical collection
- Manual collection
  - what about metadata?
- Preservation, collection
- Available technologies

### Processing Electronic Data

- DeNISTing
- Metadata extraction
- Filtering
- Searches (keyword/thesaurus/concept/semantic)
- Deduping and near-deduping
- Email threading
- Clustering

## 11:20 Spoliation in Canada

**Michael Statham, WeirFoulds LLP**

- Applicable rules and principles
- Relevant case law, including *McDougall v. Black & Decker Canada Inc.* and *Jay v. DHL Express (Canada) Ltd.*
- Sanctions for the intentional and unintentional destruction of evidence, including adverse inference, dismissal, exclusion of evidence and costs
- Best practices to reduce your risks during litigation

## 12:00 Luncheon

## 1:00 Obtaining Electronic Evidence Through Motions and the New Rules of Civil Procedure

**Berkley D. Sells, Fasken Martineau DuMoulin LLP**

- How your motions practice is impacted as a result of the recent Rule changes
- Tactics for tailoring the discovery process

### Pleadings

- defining relevance and the scope of document preservation and disclosure obligations
- timely use of amended statements of claim
- motions to strike and motions for particulars

### Documentary and Oral Discovery

- motions for further and better affidavits of documents
- motions to compel production of electronic evidence and metadata
- impact of the new discovery Rules

### Anton Piller Orders

- as a "civil search warrant"
- procedural considerations

- appropriate terms of the order
- seizing electronic evidence
- lessons from orders gone wrong – *Celanese Canada Inc. v. Murray Demolition Corp.*
- checklist of steps and issues to consider

Sample precedents will be used to reinforce key principles.

## 1:45 Making the Most of Metadata

**Sandra Potter, Potter Farrelly & Associates**

- Metadata from a litigator's perspective
- How to think about metadata
  - content, context and structure
- Tips for metadata production and the Sedona Canada Principles
  - when it *must* be produced
  - when it *may* be produced
- Thinking practically about proportionality
  - risk management and cost/benefit analyses

## 2:30 Refreshment Break

## 2:45 Judges' and Master's Panel – The Role of Electronic Evidence in Legal Proceedings

**The Hon. Justice Mary Lou Benotto**  
Superior Court of Justice (Ontario)

**The Hon. Justice Colin L. Campbell**  
Superior Court of Justice (Ontario)

**Master B. Calum Macleod, Case Management Master**  
Superior Court of Justice (Ontario)

**Kelly Friedman, Davis LLP (Moderator)**

- Current and future trends
  - the use of electronics to manage your case from the filing of the first pleading to the receipt of judgment
  - impact of the Rule changes
- Ensuring the admissibility of electronic evidence at trial
- Making the most of the e-courtroom

## 4:15 Chairs' Wrap-up and Concluding Remarks

## 4:30 Program Ends

## Who Should Attend

- Civil litigators
- In-house counsel
- Litigation support professionals
- Law clerks

# Registration

Please complete all registrant information.

Get strategic and practical insights from judges, a master, litigation lawyers and experts in this constantly developing area

Register me for:  *The Osgoode Short Course In Obtaining, Producing and Presenting Electronic Evidence*

I will attend:  On site  Via webcast (single viewer)

I am unable to attend. Please send me information about ordering program materials.

## Fee Per Delegate

**\$1595 plus 13% HST for a total of \$1802.35.**

Fees include attendance, program materials, continental breakfast, lunch and break refreshments. Group discounts are available for both on site and webcast participants. Visit [www.osgoodepd.ca](http://www.osgoodepd.ca) for details. Please inquire about financial assistance and CPD credits.



Approved in accordance with the requirements of the **LSUC CPD program** for 11.5 credit hours, **LSUC EPPM** credits hours (pending); the **Barreau du Québec, BC CPD, Law Society of New Brunswick, Northwest Territories, Nunavut and Manitoba**

**CPD Credits** for 11.5 credit hours for CPD requirements; the **New York CLE Board** for 13.5 credit hours in the Area of Professional Practice for transitional and non-transitional lawyers. Eligible for CLE/Insurance Premium Credits Program offered by the **Law Society of PEI** and for Alberta CPD credit with the **Law Society of Alberta**. Questions? E-mail: [cpd@osgoode.yorku.ca](mailto:cpd@osgoode.yorku.ca) or refer to the program website.

## Interested in Custom and In-house Programs?

Osgoode Professional Development also offers many of its programs in-house and can customize some programs to your specific needs. If you would like further information, please contact Heather Gore, Program & Business Development Lawyer, at 416.597.8847 or [custom@osgoode.yorku.ca](mailto:custom@osgoode.yorku.ca) or visit [www.osgoodepd.ca](http://www.osgoodepd.ca).

## Program Changes

We will make every effort to present the program as advertised, but it may be necessary to change the date, location, speakers or content with little or no notice. In the event of program cancellation, York University's and Osgoode Hall Law School's liability is limited to reimbursement of paid fees.

## Cancellations and Substitutions

Substitution of registrants is permitted at any time. If you are unable to find a substitute, a full refund (less \$50 administration fee) is available if a cancellation request is received in writing 14 days prior to the program date. No other refund is available.

## Dates & Time

**January 24 - 25, 2011  
9:00 a.m. - 4:30 p.m. EDT/EST**

Please arrive a half hour early for sign-in and material pick-up.

Dress is business casual.

## Location

**Osgoode Professional Development  
Downtown Toronto Conference Centre**

1 Dundas St. W., 26th Floor  
Toronto, ON M5G 1Z3

## Registrant Information

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Firm/Company: \_\_\_\_\_

Practice Area: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ Prov: \_\_\_\_\_ Postal Code: \_\_\_\_\_

Telephone: \_\_\_\_\_ Fax \_\_\_\_\_

Email: \_\_\_\_\_

- Add me to your mailing list  
 Delete me from your mailing list  
 I do not wish to be contacted by e-mail

Priority Service Code  
(from mailing label below)

1 0 3 4 0 L

## Payment Options

- Cheque enclosed (payable to York University — HST# R119306736)  
 Bill my credit card:  VISA  Mastercard

Card# \_\_\_\_\_ Expiry: \_\_\_\_\_

Signature: \_\_\_\_\_ Payment amount: \$ \_\_\_\_\_

Public CLE Seminars

Customized CLE Programs

Skills Training & Certification

ITAW

Professional LLM

**OSGOODE**

OSGOODE HALL LAW SCHOOL  
YORK UNIVERSITY

**Professional Development**  
**CLE**

## 4 Convenient Ways to Register

- MAIL** your registration form to:  
Osgoode Professional Development  
Downtown Toronto Conference Centre  
1 Dundas St. W., 26th Floor  
Toronto, ON M5G 1Z3
- ONLINE** at  
[www.osgoodepd.ca](http://www.osgoodepd.ca)
- FAX** your registration to  
416.597.9736
- CALL US** at 416.597.9724  
or 1.888.923.3394