#### **Table of Contents**

#### CHAPTER 1. DISCOVERY OF ELECTRONICALLY STORED INFORMATION

#### A. INTRODUCTION

- § 1:1 Generally
- § 1:2 Electronically stored information defined
- § 1:3 Ethics and sanctions

#### B. FEDERAL RULES OF CIVIL PROCEDURE

#### 1. 2006 AMENDMENTS

- § 1:4 Generally
- § 1:5 Rule 16
- § 1:6 Rule 26
- § 1:7 Rule 33
- § 1:8 Rule 37

#### 2. 2015 AMENDMENTS

- § 1:9 Generally
- § 1:10 Rule 1
- § 1:11 Rule 16
- § 1:12 Rule 26
- § 1:13 Rule 30
- § 1:14 Rule 31
- § 1:15 Rule 33
- § 1:16 Rule 34
- § 1:17 Rule 37

#### C. BEST PRACTICES

- § 1:18 The Sedona Principles
- § 1:19 Electronic Discovery Reference Model Project (EDRM)
- § 1:20 ABA eDiscovery Standards
- § 1:21 Pocket Guide for Judges

# CHAPTER 2. ELECTRONICALLY STORED INFORMATION

#### A. INTRODUCTION

§ 2:1 Generally

- § 2:2 Characteristics of electronically stored information
- § 2:3 Metadata
- § 2:4 Environmental dependence and obsolescence of electronically stored information
- § 2:5 Dispersal and searchability of electronically stored information

#### B. SOURCES OF ESI—GENERALLY

- § 2:6 Introduction
- § 2:7 Networks
- § 2:8 Removable media
- § 2:9 Temporary files
- § 2:10 Swap files
- § 2:11 Mirror disks
- § 2:12 Program files
- § 2:13 Embedded or metadata
- § 2:14 Audit trails and computer logs
- § 2:15 Access control lists
- § 2:16 Electronic data interchange
- § 2:17 GPS
- § 2:18 Enterprise intranets
- § 2:19 Laptops and home computers
- § 2:20 Smart phones and tablets
- § 2:21 Archival data
- § 2:22 Disaster recovery
- § 2:23 Vendors
- § 2:24 BYOD
- § 2:25 Wearable technology

### C. SOURCES OF ESI—E-MAIL AND OTHER MESSAGING METHODS

- § 2:26 Generally
- § 2:27 Perceived impermanence
- § 2:28 Parts
- § 2:29 Spoofing and anonymous remailers
- § 2:30 Text messages
- § 2:31 Snapchat
- § 2:32 Slack
- § 2:33 Twitter
- § 2:34 WhatsApp
- § 2:35 Viber
- § 2:36 iMessage
- § 2:37 Google Hangouts Meet and Google Hangouts Chat

#### § 2:38 Encrypted applications

#### D. SOURCES OF ESI—RECOVERABLE DATA

- § 2:39 Generally
- § 2:40 Deleted files
- § 2:41 Information stored in peripherals
- § 2:42 Source code escrows
- § 2:43 Discovery of nontextual material

### E. SOURCES OF ESI—INTERNET-RELATED INFORMATION

- § 2:44 Generally
- § 2:45 Blogs
- § 2:46 Public databases
- § 2:47 Cookies
- § 2:48 Website log files
- § 2:49 Cache files
- § 2:50 History files
- § 2:51 Employee monitoring software
- § 2:52 Mirror sites
- § 2:53 Instant messaging
- § 2:54 Web-based e-mail accounts
- § 2:55 Backup services
- § 2:56 Social media
- § 2:57 Archives

# CHAPTER 3. INFORMATION MANAGEMENT

#### A. INTRODUCTION

- § 3:1 Generally
- § 3:2 Compared with litigation holds

#### B. DEVELOPING AN INFORMATION-MANAGEMENT PROGRAM

- § 3:3 Generally
- § 3:4 The team
- § 3:5 Determining organizational needs
- § 3:6 Training and publicizing

#### C. ELEMENTS OF AN INFORMATION-MANAGEMENT PROGRAM

§ 3:7 Generally

§ 3:8	Coverage
§ 3:9	Written approval
§ 3:10	Disposition of records
§ 3:11	—Establishing retention periods
§ 3:12	Documentation
§ 3:13	Monitoring and managing
§ 3:14	Suspension of destruction of records

#### D. INFORMATION-MANAGEMENT SOFTWARE

§ 3:15 Generally

#### E. RECORDS RETENTION

§ 3:16	Generally
§ 3:17	Definition of record
§ 3:18	Definition of vital records
§ 3:19	Record capture
§ 3:20	Document declaration
§ 3:21	Websites
§ 3:22	E-mail
§ 3:23	Cloud Computing
§ 3:24	Data maps

### F. DESTRUCTION OF ELECTRONICALLY STORED INFORMATION

§ 3:25	Generally
§ 3:26	Statutes
§ 3:27	Identification and review

## G. DISPOSITION OF ELECTRONICALLY STORED INFORMATION

§ 3:28	Generally
§ 3:29	After electronic imaging
§ 3:30	E-mail
§ 3:31	Duplicates
§ 3:32	Destruction of electronically stored information

# CHAPTER 4. ELECTRONICALLY STORED INFORMATION AND SECURITY

#### A. INTRODUCTION

§ 4:1 Generally

#### Table of Contents

- § 4:2 Shadow information technology
- § 4:3 Software updates
- § 4:4 Passwords
- § 4:5 Computer viruses
- § 4:6 Spyware and firewalls
- § 4:7 Backup storage
- § 4:8 Phishing
- § 4:9 Encryption
- § 4:10 On the road
- § 4:11 Voice-activated electronic devices

#### B. COMPUTER USE POLICIES

- § 4:12 Generally
- § 4:13 Mobile devices at work (BYOD)
- § 4:14 System access
- § 4:15 USB ports
- § 4:16 Peer-to-peer file sharing
- § 4:17 Extent of usage
- § 4:18 E-mail usage

# CHAPTER 5. PRESERVATION AND LITIGATION HOLDS

#### A. INTRODUCTION

- § 5:1 Generally
- § 5:2 Initial considerations
- § 5:3 Foreseeablity of litigation
- § 5:4 Scope of duty to preserve
- § 5:5 Basic considerations for a litigation hold process
- § 5:6 Possession, custody or control

#### **B. PRESERVATION PLANS**

§ 5:7 Generally

#### C. PRESERVATION ORDERS

§ 5:8 Generally

### D. PRESERVATION LETTERS OR LITIGATION HOLD NOTICES

- § 5:9 Generally
- § 5:10 Timing

- § 5:11 Contents
- § 5:12 Discoverability of litigation hold letters

#### E. CONSEQUENCES

- § 5:13 Preservation
- § 5:14 Failure to preserve

#### F. IMPLEMENTING A LITIGATION HOLD

- § 5:15 Generally
- § 5:16 Identifying
- § 5:17 Preserving
- § 5:18 Collecting

# CHAPTER 6. DISCOVERY AND DISCLOSURE OF ELECTRONICALLY STORED INFORMATION

#### A. INTRODUCTION

- § 6:1 Generally
- § 6:2 Producing and exchanging electronically stored information
- § 6:3 Saving time and money
- § 6:4 Types of discoverable electronically stored information
- § 6:5 Discovery plan
- § 6:6 Discovering who does computer work
- § 6:7 Disclosure
- § 6:8 Seeking expert assistance

#### B. DISCOVERY CONFERENCES

- § 6:9 Generally
- § 6:10 Preparing for the conference
- § 6:11 Attendance at the conference
- § 6:12 Conference Topics—Generally
- § 6:13 Conference topics—Form of production
- § 6:14 —Privilege
- § 6:15 —Accessibility
- § 6:16 Failure to resolve issues
- § 6:17 Failure to participate in framing discovery plan
- § 6:18 Scheduling conference
- § 6:19 Cooperation

### C. REQUESTS FOR PRODUCTION AND INSPECTION

§ 6:20 Generally
§ 6:21 Making production requests—Generally
§ 6:22 —Form and contents
§ 6:23 Production requests—Email
§ 6:24 —Videoconferencing and voicemail
§ 6:25 Requests to produce—Databases
§ 6:26 Requests to inspect—Generally
§ 6:27 —Requirement of expert assistance

#### D. REQUESTS FOR ADMISSIONS

- § 6:28 Generally
- § 6:29 Role of requests for admissions
- § 6:30 Authentication of documents and electronically stored information

#### CHAPTER 7. DISCOVERY FROM NON-PARTIES

#### A. INTRODUCTION

§ 7:1 Generally

#### B. SUBPOENAS

- § 7:2 Generally
- § 7:3 Issuance
- § 7:4 Service

#### C. DEPOSITIONS

§ 7:5 Depositions

## D. PRODUCTION OF ELECTRONICALLY STORED INFORMATION

- § 7:6 Generally
- § 7:7 Social networks
- § 7:8 Form of production

#### E. CHALLENGING A SUBPOENA

- § 7:9 Generally
- § 7:10 Protecting privileges or work product

#### § 7:11 Protection from undue burden or expenses

#### CHAPTER 8. RESPONDING TO DISCOVERY

#### A. INTRODUCTION

- § 8:1 Generally
- § 8:2 Responses and objections
- § 8:3 Using vendors and consultants

#### **B. IDENTIFYING**

- § 8:4 Generally
- § 8:5 Business function
- § 8:6 Technology
- § 8:7 Possible impediments to production
- § 8:8 Costs and time to complete production

#### C. PRESERVING

- § 8:9 Generally
- § 8:10 Technical assistance
- § 8:11 Archive media

#### D. COLLECTING

- § 8:12 Generally
- § 8:13 Planning
- § 8:14 Security
- § 8:15 Scope
- § 8:16 Methodology

#### E. PROCESSING

- § 8:17 Generally
- § 8:18 Pre-planning
- § 8:19 Specifications
- § 8:20 Stages
- § 8:21 Quality control
- § 8:22 Data conversion
- § 8:23 Reporting
- § 8:24 Evaluating
- § 8:25 Audit and chain of custody
- § 8:26 Culling, prioritizing, and triage
- § 8:27 Searching
- § 8:28 Document search results
- § 8:29 Validation of results

#### Table of Contents

§ 8:30 Cost drivers

#### F. REVIEWING

- § 8:31 Generally
- § 8:32 Planning
- § 8:33 Selecting a vendor
- § 8:34 Managing the process
- § 8:35 Technology assisted review
- § 8:36 Privileges

#### G. ANALYZING

- § 8:37 Generally
- § 8:38 Techniques and tools
- § 8:39 Pitfalls

#### H. PRODUCING

- § 8:40 Generally
- § 8:41 Negotiation considerations
- § 8:42 Form
- § 8:43 Redactions

#### I. PRESENTING

- § 8:44 Generally
- § 8:45 Metadata

#### CHAPTER 9. PRIVILEGE AND PRIVACY

#### A. INTRODUCTION

- § 9:1 Generally
- § 9:2 First Amendment protection
- § 9:3 Constitutional right to privacy

### B. STATUTES PROTECTING ELECTRONICALLY STORED INFORMATION

- § 9:4 Health Insurance Portability and Accountability Act
- § 9:5 Federal Wiretapping and Electronic Surveillance Act
- § 9:6 Electronic Communications Privacy Act
- § 9:7 —Stored Communications and Transactional Records
  Act
- § 9:8 Computer Fraud and Abuse Act
- § 9:9 Judicial privacy policy

- § 9:10 European Data Protection Directive
- § 9:11 Trade secrets and proprietary information
- § 9:12 General Data Protection Regulation (GDPR)
- § 9:13 Children's Online Privacy Protection Act of 1998
- § 9:14 American Data Privacy and Protection Act
- § 9:15 EU-U.S. Data Privacy Framework

#### C. WORK PRODUCT

§ 9:16 Generally

#### D. PRIVILEGES

- § 9:17 Generally
- § 9:18 Metadata
- § 9:19 Privilege log
- § 9:20 Reviewing documents

#### E. INADVERTENT PRODUCTION

- § 9:21 Generally
- § 9:22 Recovery of produced material
- § 9:23 Rule 502 of the Federal Rules of Evidence
- § 9:24 Application of Rule 502—Generally
- § 9:25 Application of Rule 502—Inadvertence
- § 9:26 Application of Rule 502—Precautions
- § 9:27 Application of Rule 502—Prompt remedial measures
- § 9:28 Quick peek agreements

# CHAPTER 10. SOCIAL MEDIA, EMOTICONS AND EMOJIS

- § 10:1 Generally
- § 10:2 Duty to preserve
- § 10:3 Ethics
- § 10:4 Discoverability
- § 10:5 Privacy issues
- § 10:6 Emoticons and emojis
- § 10:7 Proportionality
- § 10:8 Authentication and admissibility

# CHAPTER 11. SPOLIATION AND SANCTIONS

#### A. INTRODUCTION

§ 11:1 Generally

§ 11:2 Federal Rule of Civil Procedure 37(e)

#### B. DUTY TO PRESERVE

- § 11:3 Generally
- § 11:4 Information under party's control
- § 11:5 Foreseeability of future litigation
- § 11:6 Ethical considerations

# C. DETERMINING WHETHER MEASURES TO CURE THE SPOLIATION SHOULD BE ORDERED

- § 11:7 Generally
- § 11:8 Trial by jury
- § 11:9 Safe harbor
- § 11:10 Culpability
- § 11:11 Prejudice to the discovering party

### D. DETERMINING WHAT MEASURES TO CURE THE SPOLIATION SHOULD BE APPLIED

- § 11:12 Generally
- § 11:13 Further discovery
- § 11:14 Measures addressing spoliation of electronically stored information—Generally
- § 11:15 Measures where party acted with intent to deprive—Generally
- § 11:16 —Adverse inference jury instructions
- § 11:17 —Dismissal of action or entering default judgment
- § 11:18 Independent cause of action

#### CHAPTER 12. NOT REASONABLY ACCESSIBLE ELECTRONICALLY STORED INFORMATION

#### A. INTRODUCTION

- § 12:1 Generally
- § 12:2 Two-tiered analysis

### B. CLAIM INFORMATION NOT REASONABLY ACCESSIBLE

- § 12:3 Responding party
- § 12:4 Order requiring discovery of information not reasonably accessible

#### C. SOURCES

- § 12:5 Backup tapes
- § 12:6 Legacy systems
- § 12:7 Deleted information
- § 12:8 Databases

#### D. TAXATION OF COSTS

§ 12:9 Generally

# CHAPTER 13. PROTECTIVE ORDERS AND COST SHIFTING

#### A. INTRODUCTION

§ 13:1 Generally

#### **B. PROTECTIVE ORDERS**

- § 13:2 Generally
- § 13:3 Good cause
- § 13:4 Procedure for obtaining
- § 13:5 Good cause standard

#### C. OBJECTIONS TO SCOPE OR FREQUENCY

- § 13:6 Relevance
- § 13:7 Frequency or extent of discovery

#### D. UNDUE BURDEN AND PROPORTIONALITY

- § 13:8 Undue burden or cost
- § 13:9 Proportionality

#### E. COST SHIFTING

- § 13:10 Generally
- § 13:11 Determining when cost shifting may be appropriate
- § 13:12 Resisting and avoiding cost sharing

## F. NOT REASONABLY ACCESSIBLE ELECTRONICALLY STORED INFORMATION

§ 13:13 Sampling

# CHAPTER 14. ETHICS AND PROFESSIONALISM

#### A. INTRODUCTION

§ 14:1 Generally

#### B. FEDERAL RULES

- § 14:2 Reasonable inquiry—Generally
- § 14:3 Reasonable inquiry—Good faith
- § 14:4 Failure to participate in framing a discovery plan

#### C. MODEL RULES OF PROFESSIONAL CONDUCT

#### 1. COMPETENCE

- § 14:5 Generally
- § 14:6 Ethical duties in handling electronically stored information

#### 2. REASONABLE INQUIRY

- § 14:7 Generally
  - 3. RECEIPT OF UNAUTHORIZED OR INADVERTENTLY PRODUCED MATERIAL
- § 14:8 Generally
- § 14:9 Intentional, unauthorized transmission of information

#### 4. METADATA

- § 14:10 Generally
  - 5. MISCELLANEOUS
- § 14:11 Untruthfulness in discovery
- § 14:12 Advising clients with regard to social media
- § 14:13 Lawyer's use of social media
- § 14:14 Cloud computing
- § 14:15 E-mail

#### D. ARTIFICIAL INTELLIGENCE

§ 14:16 Introduction

#### § 14:17 Generative artificial intelligence tools

#### **APPENDICES**

Appendix A. Federal Rules of Civil Procedure Relating to
Discovery of Electronically Stored Information

Appendix B. Checklists Appendix C. Forms Appendix D. Glossary

Appendix E. Managing Discovery of Electronically Stored

Information

**Table of Laws and Rules** 

**Table of Cases** 

Index