

Index

ADMISSIBILITY

See also TRIAL USE AND PRESENTATION OF ESI

Authenticity and reliability, see AUTHENTICITY AND RELIABILITY

Best evidence rule, § 11:40

Demonstrative evidence, see DEMONSTRATIVE EVIDENCE

Documentary evidence, see DOCUMENTARY EVIDENCE

Exclusionary rule, see EXCLUSIONARY RULE

Factors affecting, § 2:22

Legal relevance, § 11:3

Logical relevance, § 11:3

Materiality, § 11:2

Real evidence, see REAL EVIDENCE

Relevance, § 11:2

ADMISSIONS

See PRE-TRIAL AUTHENTICATION OF ESI

AUDIOTAPES

See REAL EVIDENCE

AUTHENTICITY AND RELIABILITY

See also ADMISSIBILITY

Contrasted, § 11:8

Demonstrative evidence

generally, § 14:3 to § 14:11

authenticity, § 14:4

threshold reliability, § 14:4

Documentary evidence

generally, § 13:2 to § 13:7

authentication, § 13:4

threshold reliability, § 13:5

Influence of ESI life cycle

generally, § 11:11 to § 11:17

authentication of original ESI, § 11:13

creation of original ESI, § 11:21 to § 11:24

obtaining copy of original ESI, § 11:16

proof of continuity (chain of custody), § 11:17

AUTHENTICITY AND RELIABILITY

—Cont'd

Influence of ESI life cycle—Cont'd

provenance of original ESI, § 11:15

reliability of original ESI, § 11:14

Logical relevance and, § 11:4 to § 11:24

Meaning of authenticity, § 11:6

Meaning of reliability, § 11:7

Preliminary assessment of, § 11:5

Proof of, generally, § 11:9

Proof of authenticity

generally, § 11:18 to § 11:20

context, § 11:19

standard of proof, § 11:20

Proof of reliability

generally, § 11:21 to § 11:24

importance of purpose, § 11:21

threshold reliability (automated systems), § 11:23

threshold reliability (generally), § 11:22

threshold reliability (human sources), § 11:24

Real evidence

generally, § 12:6 to § 12:10

authenticity of ESI in possession, § 12:8

proof of authenticity, § 12:7

threshold reliability, § 12:10

Voir dire to determine admissibility, § 11:10

BEST EVIDENCE RULE

See also ADMISSIBILITY

Generally, § 11:40

CIVIL PROCEEDINGS

Disclosure

generally, § 5:9 to § 5:26

devices as documents, § 5:19

factors considered when requiring disclosure, § 5:22

redact irrelevant information, § 5:19.50

sources of disclosure obligation, § 5:10

Exclusion of evidence, § 11:29

CIVIL PROCEEDINGS—Cont'd

Production

- generally, § 5:9 to § 5:26
- devices as documents, § 5:19
- limiting scope of production
 - generally, § 5:20
 - cost/benefit analysis, § 5:23
 - intrusive nature of production, § 5:24
 - proportionality, § 5:21
 - redact irrelevant information, § 5:19.50
- scope of production obligation, § 5:11

CRIMINAL PROCEEDINGS

Disclosure

- generally, § 5:4 to § 5:8
- consequences of failure to disclose, § 5:8
- privacy interests, § 5:7
- scope of disclosure obligation, § 5:6
- source of disclosure obligation, § 5:5

Production, see PRODUCTION OF ESI (CRIMINAL PROCEEDINGS)

DEMONSTRATIVE EVIDENCE

See also TRIAL USE AND PRESENTATION OF ESI

Admissibility of ESI as

- generally, § 14:3 to § 14:11
- assessing utility
 - generally, § 14:5
 - cost, § 14:8
 - determining utility, § 14:9
 - necessity, § 14:7
 - reliability, § 14:6
- authenticity and threshold reliability, § 14:4
- balancing utility and potential prejudice, § 14:11
- weighing potential prejudice, § 14:10

Animations

- generally, § 14:16
- admissibility of, § 14:16
- computer generated illustrations of facts, § 14:13
- demonstrative ESI illustrating facts, § 14:16
- distinct from simulations, § 14:15

Conclusion, § 14:31

Meaning of, § 14:2

Re-enactments, § 14:26

DEMONSTRATIVE EVIDENCE

—Cont'd

Simulations

- generally, § 14:12 to § 14:16
- admissibility of, § 14:19, § 14:25
- computer-generated
 - generally, § 14:18
 - output is fair and valid representation, § 14:24
 - proper functioning of program with data supplied, § 14:23
 - validity of computer program, § 14:21
 - validity of data, § 14:22
- determining reliability of, § 14:20
- distinct from animation, § 14:15
- illustrate opinions, § 14:17 to § 14:25
- videotape re-enactments, § 14:19

Use of demonstrative aids at trial

- generally, § 14:26
- during trial, § 14:29
- in closing, § 14:30
- in opening, § 14:28

DIGITAL PHOTOGRAPHS

See REAL EVIDENCE

DISCLOSURE OF ESI

See also MANAGEMENT OF ESI ONCE PROCEEDING INITIATED; PRODUCTION OF ESI

Civil proceedings

- generally, § 5:9 to § 5:26
- devices as documents, § 5:19
- limiting scope of production
 - generally, § 5:20
 - cost/benefit analysis, § 5:23
 - intrusive nature of production, § 5:25
 - proportionality, § 5:21
 - redact irrelevant information, § 5:19.50
 - standard is not perfection, § 5:24
- scope of production obligation
 - generally, § 5:11
 - Manitoba, § 5:17
 - Other Canadian Jurisdictions, § 5:18
 - redact irrelevant information, § 5:19.50
- sources of disclosure obligation, § 5:10

Criminal proceedings

- generally, § 5:4 to § 5:8

DISCLOSURE OF ESI—Cont'd

- Criminal proceedings—Cont'd
 - requirement to disclose electronically, § 7:3
 - scope of disclosure obligation
 - generally, § 5:6
 - Alberta, § 5:12
 - British Columbia, § 5:15
 - Nova Scotia, § 5:13
 - Ontario, § 5:14
 - Saskatchewan, § 5:16
 - source of disclosure obligation, § 5:5
 - sufficiency of electronic disclosure, § 7:2
- Documents, § 5:2
- Failure to disclose, § 5:26
- Jurisdictional considerations, § 5:27
- What must be disclosed, § 5:2
- Where electronic “documents” are found, § 5:3

DOCUMENTARY EVIDENCE

- See also TRIAL USE AND PRESENTATION OF ESI
- Electronic documents, specific instances of
 - generally, § 13:8 to § 13:18
 - emails, § 13:9
 - engineering drawings, § 13:15
 - instant messages, § 13:9
 - internet ESI
 - generally, § 13:10
 - ESI from Facebook, § 13:12
 - ESI from internet as documentary evidence, § 13:11
 - ESI from internet as real evidence, § 13:13
 - ESI from social media, § 13:12
 - Possession of ESI from internet sources, § 13:14
 - PDFs, § 13:15
 - spreadsheets
 - generally, § 13:16
 - used to summarize evidence, § 13:17
 - use in court, § 13:18
 - text messages, § 13:9
 - word processing documents, § 13:8
- Electronic documents generally
 - generally, § 13:2 to § 13:7
 - authentication of ESI, § 13:4
 - hearsay nature, § 13:6

DOCUMENTARY EVIDENCE—Cont'd

- Electronic documents generally—Cont'd
 - purposes for tendering, § 13:7
 - threshold reliability, § 13:5
 - treatment of, § 13:3
- Electronic records
 - generally, § 13:19 to § 13:25
 - business records
 - generally, § 13:21
 - documentary electronic records as, § 13:22
 - proper functioning of computer used to store, § 13:24
 - real electronic records as, § 13:23
 - characteristics and classification of, § 13:20
 - print-outs of, § 13:25

ELECTRONICALLY-STORED INFORMATION (ESI)

- Analog ESI, § 2:5
- Characteristics of
 - generally, § 2:15
 - difficult to destroy, § 2:19
 - easy to duplicate, § 2:17
 - easy to modify, § 2:18
 - imperceptible in its native form, § 2:16
 - metadata, § 2:21
 - pervasive, § 2:20
- Digital ESI, § 2:4
- Factors affecting admissibility of, § 2:22
- Internet and social media sites, § 13:10
- Nature of, § 2:2
- Need to record information, § 1:2
- Organization of
 - generally, § 2:9 to § 2:14
 - analog or digital ESI recorded to tape, § 2:9
 - digital ESI stored in files, § 2:11
 - physical devices used to record ESI, § 2:13
 - recording digital files and records in storage devices, § 2:14
 - records, § 2:12
 - transient ESI in computers, § 2:10
- Other forms of evidence and, § 1:4
- Overview, § 2:1
- Permanently stored ESI, § 2:6
- Purpose of tendering ESI, § 1:2
- Rules of evidence and, § 1:3
- Semi-permanent ESI, § 2:7

**ELECTRONICALLY-STORED
INFORMATION (ESI)—Cont'd**
Transient ESI, § 2:8, § 12:36

ELECTRONIC DOCUMENTS

Generally, see DOCUMENTARY EVIDENCE
Ediscovery, § 6:10 to § 6:20, § 6:24 to § 6:27
Identification and treatment of duplicate documents, § 6:20
Identification and treatment of parent documents, § 6:20
Proof of authorship, § 13:7.5
Sanctions for improper dealings with privileged documents, § 6:35
Specific instances of, see DOCUMENTARY EVIDENCE
Where electronic “documents” are found, § 5:3

ELECTRONIC RECORDS

See also PRE-LITIGATION MANAGEMENT OF ESI
Generally, § 2:12, § 3:2
Characteristics of
generally, § 3:3 to § 3:7
authenticity, § 3:4
integrity, § 3:6
reliability, § 3:5
usability, § 3:7
Classification of
generally, § 3:14 to § 3:16
administrative and operational records, § 3:16
transitory and permanent records, § 3:15
Disposition of
generally, § 3:17 to § 3:19
destruction of, § 3:18
disposition of, § 3:19
Documentary evidence, see DOCUMENTARY EVIDENCE
Management of
generally, § 3:8 to § 3:13
compliance with legal and business requirements, § 3:11
comprehensiveness, § 3:12
integrity, § 3:10
reliability, § 3:9
systematic nature, § 3:13

EXAMINATIONS

See PRE-TRIAL AUTHENTICATION OF ESI

EXCLUSIONARY RULE

See also ADMISSIBILITY
Balancing probative value against prejudicial effect
generally, § 11:37 to § 11:39
balancing act, § 11:38
offset of prejudice by direction to jury, § 11:39
Prejudicial effect outweighs probative value
generally, § 11:26 to § 11:29
civil matters, § 11:29
evolution of discretion, § 11:27
interaction with Charter, § 11:28
Weighing probative value and prejudicial effect
generally, § 11:30 to § 11:36
meaning of “prejudice,” § 11:36
prejudicial effect, § 11:35
probative value
generally, § 11:32 to § 11:34
effect of reliability of evidence, § 11:33
in relation to demonstrative evidence, § 11:34
in relation to issue, § 11:32
three-stage test, § 11:31

LITIGATION HOLDS

See PRESERVATION OF ESI

**MANAGEMENT OF ESI ONCE
PROCEEDING INITIATED**

Disclosure of ESI, see DISCLOSURE OF ESI
Preservation of ESI held by others, see PRESERVATION OF ESI HELD BY OTHERS
Pre-trial authentication of ESI, see PRE-TRIAL AUTHENTICATION OF ESI
Production of ESI, see PRODUCTION OF ESI
Production of ESI in criminal proceedings, see PRODUCTION OF ESI (CRIMINAL PROCEEDINGS)
Spoliation, see SPOLIATION

INDEX

MATERIALITY

- See also **ADMISSIBILITY**
- Generally, § 11:2
- Authenticity and reliability, § 11:4 to § 11:24
- Logical relevance, § 11:3

METADATA

- See **REAL EVIDENCE**

ONTARIO GUIDELINES

- Generally, § 6:4, APP B

ORDERS

- See **PRESERVATION OF ESI HELD BY OTHERS**

PRACTICE DIRECTIONS

- Generally, § 6:5, § 15:14, APP C

PRE-LITIGATION MANAGEMENT OF ESI

- Electronic records, see **ELECTRONIC RECORDS**
- Preservation of ESI, see **PRESERVATION OF ESI**

PRESERVATION OF ESI

- See also **PRE-LITIGATION MANAGEMENT OF ESI**
- Litigation holds, § 4:3
- Scope of obligation, § 4:2

PRESERVATION OF ESI HELD BY OTHERS

- See also **MANAGEMENT OF ESI ONCE PROCEEDING INITIATED**
- Anton Piller orders, § 9:2
- Discovery against non-parties, § 9:6
- Failure to preserve, § 4:4
- Norwich Pharmacal orders, § 9:5
- Preservation orders, § 9:3
- Privilege issues, § 9:4

PRE-TRIAL AUTHENTICATION OF ESI

- See also **MANAGEMENT OF ESI ONCE PROCEEDING INITIATED**
- Authentication by agreement
 - generally, § 10:1 to § 10:3
 - effect of agreement at trial, § 10:3
 - nature of agreement, § 10:2
- Pre-trial admissions
 - generally, § 10:4 to § 10:9
 - how to seek admissions, § 10:8

PRE-TRIAL AUTHENTICATION OF ESI—Cont'd

- Pre-trial admissions—Cont'd
 - permissible scope, § 10:6
 - seeking admissions respecting authenticity, § 10:7
 - use of pre-trial admissions at trial, § 10:9
 - what admissions to seek, § 10:8
 - what needs to be admitted, § 10:5
- Pre-trial examinations of parties
 - generally, § 10:10 to § 10:14
 - exploring opponent's case, § 10:11
 - gaining admissions on oral examinations, § 10:12
 - identifying ESI on pre-trial examinations, § 10:13
 - use of ESI at trial, § 10:14

PRIVILEGE

- See **PRODUCTION OF ESI; PRESERVATION OF ESI HELD BY OTHERS**

PRODUCTION OF ESI

- See also **MANAGEMENT OF ESI ONCE PROCEEDING INITIATED; DISCLOSURE OF ESI**
- Confidentiality concerns, § 6:29
- Costs
 - generally, § 6:36 to § 6:39
 - taxable items, § 6:39
- Devices as documents, § 5:19
- Limiting scope of production
 - generally, § 5:20
 - cost/benefit analysis, § 5:23
 - intrusive nature of production, § 5:24
 - proportionality, § 5:21
 - redact irrelevant information, § 5:19.50
- Minimizing review
 - generally, § 6:24 to § 6:27
 - agreement on scope of production (“meet and confer”), § 6:25
 - limiting review of own documents, § 6:27
 - redact irrelevant information, § 5:19.50
 - rules of court, § 6:26
- Obligation to provide assistance, § 6:23
- Obligation to provide proprietary software, § 6:23
- Privilege
 - generally, § 6:30 to § 6:35

PRODUCTION OF ESI—Cont'd

Privilege—Cont'd

- adequate description of privileged document, § 6:32
- inadvertent waiver of, § 6:33
- preserving, § 6:34
- sanctions for improper dealings with privileged documents, § 6:35
- whether ESI is privileged, § 6:31

Process

- generally, § 6:10 to § 6:20
- advising client, § 6:12
- capturing relevant ESI, § 6:14
- communicating with opposing counsel, § 6:13
- effective coding and standards, § 6:17
- ground rules, § 6:11
- identification and treatment of duplicate documents, § 6:20
- identification and treatment of parent documents, § 6:20
- software choice, § 6:15
- standards for coding, § 6:18
- standards for imaging, § 6:19
- transfer media, § 6:16

Producing ESI in native formats, § 6:22

Producing ESI in other prescribed formats, § 6:22

Protocols and orders prescribing manner of production

- generally, § 6:2 to § 6:9
- Nova Scotia, § 6:8
- Ontario Guidelines, § 6:4, APP B
- Ontario Model Precedents, § 6:7
- Practice Directions, § 6:5, APP C
- Saskatchewan and Manitoba, § 6:6
- Sedona Principles, § 6:3, APP A, APP C

Uniform Electronic Document Rules, § 6:9

Requests for further production, § 6:28

Scope of production obligation, § 5:11, § 5:19.50

Special considerations when government is a party, § 6:21

PRODUCTION OF ESI (CRIMINAL PROCEEDINGS)

See also MANAGEMENT OF ESI ONCE PROCEEDING INITIATED

Lack of perfection, § 7:5

PRODUCTION OF ESI (CRIMINAL PROCEEDINGS)—Cont'd

Requirement to disclose electronically, § 7:3

Requirement to provide software, § 7:4

Special circumstances, § 7:6

Sufficiency of electronic disclosure, § 7:2

REAL EVIDENCE

See also TRIAL USE AND PRESENTATION OF ESI

Audiotapes

- generally, § 12:20
- admissibility of, § 12:21
- authentication of audio recording, § 12:22
- complete recording of transaction, § 12:23
- probative value not overborne by prejudicial effect, § 12:26
- quality of recording, § 12:25
- recording not misleading or confusing, § 12:24
- use of transcripts of audiotapes, § 12:27

Classification of ESI as

- generally, § 12:3 to § 12:5
- distinction between ESI that is real evidence and other forms of evidence, § 12:4
- non-hearsay nature of ESI from automated processes, § 12:5

Digital photographs, § 12:19

ESI from internet, § 13:10

ESI in possession of individual, § 12:18

Establishing location, § 12:37

Internet ESI, § 12:17

Meaning of, § 12:2

Metadata

- generally, § 12:13
- embedded, § 12:16
- substantive, § 12:15
- system, § 12:14

Proof of authenticity and threshold reliability

- generally, § 12:6 to § 12:10
- authenticity of ESI in possession, § 12:8
- proof of authenticity, § 12:7
- proof of authorship of electronic documents, § 13:7.5

INDEX

REAL EVIDENCE—Cont'd

- Tendered for other purposes, § 12:11
- Transient ESI, § 12:36
- Video recordings
 - generally, § 12:28
 - admissibility of, § 12:29
 - authentication of, § 12:30
 - Canada Evidence Act, § 12:35
 - discretion to exclude, § 12:34
 - display video evidence at trial, § 12:33
 - editing, § 12:32
 - quality of video and audio reproduction, § 12:31

RE-CREATIONS

- See DEMONSTRATIVE EVIDENCE

RELEVANCE

- See also ADMISSIBILITY
- Generally, § 11:2
- Authenticity and reliability, § 11:4 to § 11:24
- Legal relevance, § 11:3
- Logical relevance, § 11:3

RELIABILITY

- See AUTHENTICITY AND RELIABILITY

SEDONA PRINCIPLES

- Generally, § 6:3, APP A

SIMULATIONS

- See DEMONSTRATIVE EVIDENCE

SPOILIATION

- See also MANAGEMENT OF ESI
ONCE PROCEEDING INITIATED
- Avoiding problem of, § 8:6
- Consequences of finding of, § 8:3
- Elements of, § 8:2
- Emerging tort of, § 8:5
- Practice Considerations, § 8:4, § 8:4.50

TORONTO REGION COMMERCIAL LIST E-DELIVERY PROJECT

- Generally, APP G

TRANSIENT ESI

- Generally, § 2:8

TRANSIENT ESI—Cont'd

- Organization of transient ESI in computers, § 2:10
- Real evidence, § 12:36

TRIAL USE AND PRESENTATION OF ESI

- Admissibility generally, see ADMISSIBILITY
- Afterword, § 15:27
- Communicating with the court
 - generally, § 15:2 to § 15:13
 - Alberta, § 15:4
 - British Columbia, § 15:5
 - Federal Courts, § 15:3
 - Manitoba, § 15:12
 - Newfoundland and Labrador, § 15:6
 - Nova Scotia, § 15:7
 - Nunavut, § 15:11
 - Ontario, § 15:8
 - Other Provinces and Territories, § 15:13
 - Prince Edward Island, § 15:9
 - Saskatchewan, § 15:10
 - Yukon, § 15:12.50
- Demonstrative evidence, see DEMONSTRATIVE EVIDENCE
- Documentary evidence, see DOCUMENTARY EVIDENCE
- Practice Direction, § 15:14, APP C
- Preparation for trial, § 15:15
- Real evidence, see REAL EVIDENCE
- Trial
 - generally, § 15:16 to § 15:24
 - digitized mapping, § 15:23
 - equipment, § 15:19
 - external communication, § 15:24
 - preliminary considerations, § 15:17
 - preparation, § 15:18
 - software and database, § 15:20
 - technician, § 15:21
 - transcripts, § 15:22
- Trial record, § 15:25
- Written argument, § 15:26

VIDEO EVIDENCE

- See REAL EVIDENCE