

Summary of Contents

Volume 1

PART I. THE NATURE OF ESI

Chapter 1. Introduction

Chapter 2. The Nature and Characteristics of Electronically Stored Information

PART II. PRE-LITIGATION MANAGEMENT OF ESI

Chapter 3. Electronic Records

Chapter 4. Obligation to Preserve ESI in Contemplation of Litigation

PART III. MANAGING ESI AFTER A PROCEEDING HAS BEEN INITIATED

Chapter 5. The Obligation to Disclose ESI

Chapter 6. Managing the Production of ESI

Chapter 7. Managing the Production of ESI in Criminal Proceedings

Chapter 8. Spoliation

Chapter 9. Ensuring Preservation of ESI Held by Others

Chapter 10. Pre-Trial Authentication of ESI

PART IV. USE AND PRESENTATION OF ESI AT TRIAL

Chapter 11. Admissibility of ESI Generally

Chapter 12. Admissibility of ESI as Real Evidence

Chapter 13. Admissibility of ESI as Documentary Evidence

Chapter 14. Admissibility of ESI as Demonstrative Evidence

Chapter 15. Working with ESI at Trial

Volume 2

Appendices

Appendix A. The Sedona Canada Principles: Addressing Electronic Discovery, Second Edition

Appendix B. Guidelines for the Discovery of Electronic Documents in Ontario

- Appendix C. National Model Practice Direction for the Use of Technology in Civil Litigation
- Appendix D. National Generic Protocol for Use with the National Model Practice Direction for the use of Technology in Civil Litigation
- Appendix E. The Sedona Canada Commentary on Proportionality in Electronic Disclosure — Discovery
- Appendix F. Model E-Discovery and E-Trial Precedents
- Appendix G. Toronto Region Commercial List e-Delivery Pilot Project - Guidelines for Preparing and Delivering Electronic Documents requested by Judges, June 2012

Table of Cases

Index

Table of Contents

Volume 1

PART I. THE NATURE OF ESI

CHAPTER 1. INTRODUCTION

- § 1:1 Generally
- § 1:2 The need to record information
- § 1:3 ESI subject to rules of evidence
- § 1:4 Relationship between ESI and other forms of evidence

CHAPTER 2. THE NATURE AND CHARACTERISTICS OF ELECTRONICALLY STORED INFORMATION

- § 2:1 Overview
- § 2:2 Nature of electronically stored information
- § 2:3 Digital and analog ESI
- § 2:4 —Digital ESI
- § 2:5 —Analog ESI
- § 2:6 Permanently stored ESI
- § 2:7 Semi-permanent ESI
- § 2:8 Transient ESI
- § 2:9 Organization of ESI—Analog or digital ESI recorded to tape
- § 2:10 —Transient ESI in computers
- § 2:11 —Digital ESI stored in files
- § 2:12 —Electronic records
- § 2:13 —Physical devices used to record ESI
- § 2:14 —Recording digital files and records in storage devices
- § 2:15 Characteristics of ESI
- § 2:16 —ESI is imperceptible in its native form
- § 2:17 —Digital ESI is easy to duplicate
- § 2:18 —ESI is easy to modify
- § 2:19 —ESI is difficult to destroy
- § 2:20 —ESI is pervasive
- § 2:21 —Metadata
- § 2:22 Factors affecting admissibility of ESI

PART II. PRE-LITIGATION MANAGEMENT OF ESI

CHAPTER 3. ELECTRONIC RECORDS

I. INTRODUCTION; ELECTRONIC RECORDS GENERALLY

- § 3:1 Introduction
- § 3:2 Electronic records generally

II. CHARACTERISTICS OF AN ELECTRONIC RECORD

- § 3:3 Introduction
- § 3:4 Authenticity
- § 3:5 Reliability
- § 3:6 Integrity
- § 3:7 Usability

III. RECORDS MANAGEMENT

- § 3:8 Introduction
- § 3:9 Reliability
- § 3:10 Integrity
- § 3:11 Compliance with legal and business requirements
- § 3:12 Comprehensiveness
- § 3:13 Systematic nature

IV. CLASSIFICATION OF RECORDS

- § 3:14 Introduction
- § 3:15 Transitory and permanent records
- § 3:16 Administrative and operational records

V. DISPOSITION OF ELECTRONIC RECORDS

- § 3:17 Introduction
- § 3:18 Destruction of electronic records
- § 3:19 Disposition of electronic records

CHAPTER 4. OBLIGATION TO PRESERVE ESI IN CONTEMPLATION OF LITIGATION

- § 4:1 Introduction
- § 4:2 Scope of the obligation
- § 4:3 Litigation holds
- § 4:4 Failure to preserve

PART III. MANAGING ESI AFTER A PROCEEDING HAS BEEN INITIATED

CHAPTER 5. THE OBLIGATION TO DISCLOSE ESI

I. INTRODUCTION

- § 5:1 Introduction
- § 5:2 What must be disclosed?
- § 5:3 Where electronic “documents” are found

II. THE CRIMINAL CONTEXT

- § 5:4 Introduction
- § 5:5 Source of the obligation to make disclosure
- § 5:6 Scope of the obligation to disclose
- § 5:7 Privacy Interests
- § 5:8 Consequences of a failure to disclose

III. IN CIVIL LITIGATION

- § 5:9 Introduction
- § 5:10 Sources of the obligation to disclose ESI
- § 5:11 Scope of the obligation to produce ESI
- § 5:12 —Alberta
- § 5:13 —Nova Scotia
- § 5:14 —Ontario
- § 5:15 —British Columbia
- § 5:16 —Saskatchewan
- § 5:17 —Manitoba
- § 5:18 —Other Canadian Jurisdictions
- § 5:19 Devices as documents
- § 5:20 Limiting the scope of production
- § 5:21 —Proportionality
- § 5:22 —Factors to be considered
- § 5:23 — —Cost/benefit analysis
- § 5:24 — —The standard is not perfection
- § 5:25 — —Intrusive nature of production
- § 5:26 Consequences of failure to disclose

IV. JURISDICTIONAL CONSIDERATIONS

- § 5:27 Generally

CHAPTER 6. MANAGING THE PRODUCTION OF ESI

I. INTRODUCTION

- § 6:1 Generally

II. PROTOCOLS PRESCRIBING THE MANNER OF PRODUCTION

- § 6:2 Introduction
- § 6:3 Sedona Principles
- § 6:4 Ontario Guidelines
- § 6:5 B.C. and Alberta Practice Directions
- § 6:6 Saskatchewan and Manitoba
- § 6:7 Nova Scotia Practice Memorandum
- § 6:8 Ontario Model Precedents
- § 6:9 Uniform Electronic Document Rules

III. PROCESS

- § 6:10 Introduction
- § 6:11 Ground Rules
- § 6:12 Advising the client
- § 6:13 Communicating with opposing counsel
- § 6:14 Capturing relevant ESI
- § 6:15 Software choice
- § 6:16 Transfer media
- § 6:17 Effective coding and standards
- § 6:18 Standards for coding
- § 6:19 Standards for imaging
- § 6:20 Identification and treatment of duplicate and parent documents
- § 6:21 Special considerations when government is a party
- § 6:22 Producing ESI in native or other prescribed formats
- § 6:23 Obligation to provide assistance or proprietary software

IV. MINIMIZING REVIEW

- § 6:24 Introduction
- § 6:25 Discovery planning—Agreement on the scope of production
- § 6:26 Rules of court
- § 6:27 Limiting review of your own documents

V. REQUESTS FOR FURTHER PRODUCTION; CONFIDENTIALITY CONCERNS

- § 6:28 Requests for further production
- § 6:29 Confidentiality concerns

VI. PRIVILEGE

- § 6:30 Introduction
- § 6:31 Is ESI privileged?
- § 6:32 Adequate description of privileged documents
- § 6:33 Inadvertent waiver of privilege
- § 6:34 Preserving privilege
- § 6:35 Sanctions for improper dealings with privileged documents

TABLE OF CONTENTS

§ 6:36 Litigation Privilege in databases

VII. COSTS

§ 6:37 Introduction

§ 6:38 Cost shifting

§ 6:39 Taxable items

CHAPTER 7. MANAGING THE PRODUCTION OF ESI IN CRIMINAL PROCEEDINGS

§ 7:1 Introduction

§ 7:2 Sufficiency of electronic disclosure

§ 7:3 Requirement to disclose electronically

§ 7:4 Requirement to provide software

§ 7:5 Lack of perfection

§ 7:6 Special circumstances

CHAPTER 8. SPOILIATION

§ 8:1 Introduction

§ 8:2 Elements of spoliation

§ 8:3 Consequences of a finding of spoliation

§ 8:4 —Practice Considerations

§ 8:5 The emerging tort of spoliation

§ 8:6 How to avoid a finding of spoliation

CHAPTER 9. ENSURING PRESERVATION OF ESI HELD BY OTHERS

§ 9:1 Introduction

§ 9:2 Anton Piller orders

§ 9:3 Preservation orders

§ 9:4 Privilege issues

§ 9:5 Norwich Pharmacal orders

§ 9:6 Discovery against non-parties

CHAPTER 10. PRE-TRIAL AUTHENTICATION OF ESI

I. AUTHENTICATION OF ESI BY AGREEMENT

§ 10:1 Introduction

§ 10:2 Nature of an agreement to admit the authenticity of ESI

§ 10:3 Effect of an agreement respecting ESI at trial

II. GAINING PRE-TRIAL ADMISSIONS WITH RESPECT TO ESI

§ 10:4 Introduction

§ 10:5 What needs to be admitted

- § 10:6 Permissible scope of pre-trial admissions relating to ESI
- § 10:7 Seeking admissions with respect to the authenticity of ESI
- § 10:8 What admissions to seek with respect to ESI — and how to seek them
- § 10:9 Use of pre-trial admissions at trial

III. USING ESI AT PRE-TRIAL EXAMINATIONS OF PARTIES

- § 10:10 Introduction
- § 10:11 Exploring the opponent's case
- § 10:12 Gaining admissions on oral examinations
- § 10:13 Identifying ESI on pre-trial examinations
- § 10:14 Using ESI at trial

PART IV. USE AND PRESENTATION OF ESI AT TRIAL

CHAPTER 11. ADMISSIBILITY OF ESI GENERALLY

I. INTRODUCTION; RELEVANCE AND MATERIALITY; LOGICAL RELEVANCE AND LEGAL RELEVANCE

- § 11:1 Introduction
- § 11:2 Relevance and materiality
- § 11:3 Logical relevance and legal relevance

II. AUTHENTICITY AND RELIABILITY OF ESI AS PART OF LOGICAL RELEVANCE

A. INTRODUCTION; PRELIMINARY ASSESSMENT OF AUTHENTICITY AND RELIABILITY

- § 11:4 Introduction
- § 11:5 Preliminary assessment of authenticity and reliability

B. DEFINITIONS

- § 11:6 Meaning of “authenticity”
- § 11:7 Meaning of “reliability”
- § 11:8 Authenticity and reliability contrasted

C. PROOF OF AUTHENTICITY AND RELIABILITY GENERALLY; VOIR DIRE TO DETERMINE ADMISSIBILITY

- § 11:9 Proof of authenticity and reliability generally
- § 11:10 Voir dire to determine admissibility

**D. AUTHENTICITY AND RELIABILITY INFLUENCED
BY LIFE CYCLE OF ESI**

- § 11:11 Introduction
- § 11:12 Creation of original ESI
- § 11:13 —Authentication of original ESI
- § 11:14 —Reliability of original ESI
- § 11:15 —Provenance of original ESI
- § 11:16 Obtaining a copy of the original ESI
- § 11:17 Proof of continuity—Chain of custody

E. PROOF OF AUTHENTICITY

- § 11:18 Introduction
- § 11:19 Proof of authenticity is contextual
- § 11:20 Proof of authenticity — standard of proof

F. PROOF OF RELIABILITY

- § 11:21 Purpose dictates nature of evidence required to establish reliability
- § 11:22 Threshold reliability required and standard of proof
- § 11:23 —Threshold reliability of ESI from automated systems
- § 11:24 —Threshold reliability of ESI from human sources

**III. EVIDENCE NOT OTHERWISE SUBJECT TO AN
EXCLUSIONARY RULE**

A. INTRODUCTION

- § 11:25 Generally

**B. COMMON LAW DISCRETION TO EXCLUDE
EVIDENCE WHEN PREJUDICIAL EFFECT
OUTWEIGHS PROBATIVE VALUE**

- § 11:26 Introduction
- § 11:27 History of the evolution of the discretion
- § 11:28 Interaction with the Charter — the constitutional imperative
- § 11:29 Exclusion of evidence in civil matters

**C. WEIGHING PROBATIVE VALUE AND PREJUDICIAL
EFFECT**

- § 11:30 Introduction
- § 11:31 Three-stage test
- § 11:32 Probative value—Value in relation to an issue
- § 11:33 —Reliability of evidence affects its probative value
- § 11:34 —‘Probative value’ in relation to demonstrative evidence
- § 11:35 Evaluating prejudicial effect
- § 11:36 Meaning of “prejudice”

**D. BALANCING PROBATIVE VALUE AGAINST
PREJUDICIAL EFFECT**

- § 11:37 Introduction
- § 11:38 Balancing act
- § 11:39 Can prejudice be offset by a direction to the jury?

IV. BEST EVIDENCE RULE

- § 11:40 Generally

**CHAPTER 12. ADMISSIBILITY OF ESI AS REAL
EVIDENCE**

I. INTRODUCTION; MEANING OF REAL EVIDENCE

- § 12:1 Introduction
- § 12:2 Meaning of real evidence

II. CLASSIFICATION OF ESI AS REAL EVIDENCE

- § 12:3 Introduction
- § 12:4 Distinguishing ESI that is real evidence from other forms of evidence
- § 12:5 Non-hearsay nature of ESI from automated processes

**III. PROOF OF AUTHENTICITY AND THRESHOLD
RELIABILITY OF ESI WHEN TENDERED AS REAL
EVIDENCE**

- § 12:6 Introduction
- § 12:7 Proof of authenticity
- § 12:8 Authenticity of ESI in possession
- § 12:9 Proof of authorship of electronic documents
- § 12:10 Proof of threshold reliability

IV. ESI TENDERED FOR OTHER PURPOSES

- § 12:11 Generally

V. SPECIFIC TYPES OF ESI AS REAL EVIDENCE

- § 12:12 Introduction
- § 12:13 Metadata
 - § 12:14 —System metadata
 - § 12:15 —Substantive metadata
 - § 12:16 —Embedded metadata
- § 12:17 ESI on the Internet as real evidence
- § 12:18 ESI in possession of an individual
- § 12:19 Digital photographs
- § 12:20 Audiotapes

TABLE OF CONTENTS

- § 12:21 —Admissibility of audiotapes
- § 12:22 —Authentication of audiotapes
- § 12:23 —Complete recording of the transaction
- § 12:24 —Recording not misleading or confusing
- § 12:25 —Quality of recording
- § 12:26 —Probative value not overborne by prejudicial effect
- § 12:27 —Use of transcripts of audiotapes
- § 12:28 Video recordings
- § 12:29 —Admissibility of video recordings
- § 12:30 —Authenticity of video recordings
- § 12:31 —The quality of the video reproduction
- § 12:32 —Presence or absence of inadmissible material, and the ability to eliminate objectionable material by editing
- § 12:33 —Displaying admissible video recordings at trial
- § 12:34 —Discretion to exclude - prejudice to the fairness of the trial
- § 12:35 —Video recordings under the Canada Evidence Act
- § 12:36 Transient ESI
- § 12:37 Evidence of location

CHAPTER 13. ADMISSIBILITY OF ESI AS DOCUMENTARY EVIDENCE

I. INTRODUCTION

- § 13:1 Generally

II. ELECTRONIC DOCUMENTS GENERALLY

- § 13:2 Introduction
- § 13:3 Treatment of electronic documents is similar to conventional documents
- § 13:4 Authentication of ESI when offered as documentary evidence
- § 13:5 Threshold reliability of electronic documents
- § 13:6 Hearsay nature of electronic documents
- § 13:7 Purposes for tendering electronic documents

III. SPECIFIC INSTANCES OF ELECTRONIC DOCUMENTS

- § 13:8 Word processing documents
- § 13:9 Emails and instant messages (text messages)
- § 13:10 ESI from the Internet
- § 13:11 —ESI from the Internet as Documentary Evidence
- § 13:12 —ESI from Facebook or other social media sites
- § 13:13 —ESI from the Internet as Real Evidence
- § 13:14 —Possession of ESI from Internet Sources
- § 13:15 Pdfs, engineering drawings
- § 13:16 Spreadsheets and summaries of information
- § 13:17 —Spreadsheets used to summarize evidence
- § 13:18 —Use of spreadsheets in court

IV. ELECTRONIC RECORDS

- § 13:19 Introduction
- § 13:20 Characteristics and classification of electronic records
- § 13:21 Business records
- § 13:22 —Documentary electronic records as business records
- § 13:23 —Real electronic records as business records
- § 13:24 —Proper functioning of the computer used to store records
- § 13:25 Print-outs of electronically-stored records

CHAPTER 14. ADMISSIBILITY OF ESI AS DEMONSTRATIVE EVIDENCE

I. INTRODUCTION; THE MEANING OF “DEMONSTRATIVE EVIDENCE”

- § 14:1 Introduction
- § 14:2 The meaning of “demonstrative evidence”

II. ADMISSIBILITY OF ESI AS DEMONSTRATIVE EVIDENCE

- § 14:3 Introduction
- § 14:4 Authenticity and threshold reliability of demonstrative ESI
- § 14:5 Assessing the utility of demonstrative ESI
- § 14:6 —Reliability of demonstrative ESI
- § 14:7 —Necessity of demonstrative ESI
- § 14:8 —Cost of demonstrative ESI
- § 14:9 —Determining the utility of demonstrative ESI
- § 14:10 Weighing the potential prejudice of demonstrative ESI
- § 14:11 Balancing utility and potential prejudice

III. CLASSIFICATION OF DEMONSTRATIVE ESI — FACTUAL MATTERS AND OPINION EVIDENCE

- § 14:12 Introduction
- § 14:13 Animations: computer-generated illustrations of factual matters
- § 14:14 Simulations: computer-generated ESI in support of opinion evidence
- § 14:15 Distinction between animations and simulations

IV. ANIMATIONS — DEMONSTRATIVE ESI ILLUSTRATING FACTUAL MATTERS

- § 14:16 Generally

V. DEMONSTRATIVE ESI TO ILLUSTRATE OPINIONS — SIMULATIONS

- § 14:17 Introduction

TABLE OF CONTENTS

- § 14:18 Computer-generated simulations
- § 14:19 Two approaches to the admissibility of simulations
- § 14:20 Determining the reliability of simulations
- § 14:21 —Validity of the computer program
- § 14:22 —Validity of the data
- § 14:23 —Proper functioning of the program with the data supplied
- § 14:24 —Output is a fair and valid representation
- § 14:25 Other aspects of admissibility of simulations

VI. RE-ENACTMENTS

- § 14:26 Generally

VII. USE OF DEMONSTRATIVE AIDS AT TRIAL

- § 14:27 Introduction
- § 14:28 Demonstrative aids in opening
- § 14:29 Use of demonstrative aids during the trial
- § 14:30 Use of demonstrative aids in closing

VIII. CONCLUSION

- § 14:31 Concluding Remarks

CHAPTER 15. WORKING WITH ESI AT TRIAL

I. INTRODUCTION

- § 15:1 Generally

II. COMMUNICATING WITH THE COURT

- § 15:2 Introduction
- § 15:3 Federal Courts
- § 15:4 Alberta
- § 15:5 British Columbia
- § 15:6 Newfoundland and Labrador
- § 15:7 Nova Scotia
- § 15:8 Ontario
- § 15:9 Prince Edward Island
- § 15:10 Saskatchewan
- § 15:11 Nunavut
- § 15:12 Manitoba
- § 15:13 Other Provinces and Territories

III. PRACTICE DIRECTION; PREPARATION FOR TRIAL

- § 15:14 Practice direction
- § 15:15 Preparation for trial

IV. TRIAL

- § 15:16 Introduction

- § 15:17 Preliminary considerations
- § 15:18 Preparation
- § 15:19 Equipment
- § 15:20 Software and database
- § 15:21 Technician
- § 15:22 Transcripts
- § 15:23 Digitized mapping
- § 15:24 External communication
- § 15:25 The trial record
- § 15:26 Written argument
- § 15:27 Afterword

Volume 2

APPENDICES

- Appendix A. The Sedona Canada Principles: Addressing Electronic Discovery, Second Edition
- Appendix B. Guidelines for the Discovery of Electronic Documents in Ontario
- Appendix C. National Model Practice Direction for the Use of Technology in Civil Litigation
- Appendix D. National Generic Protocol for Use with the National Model Practice Direction for the use of Technology in Civil Litigation
- Appendix E. The Sedona Canada Commentary on Proportionality in Electronic Disclosure — Discovery
- Appendix F. Model E-Discovery and E-Trial Precedents
- Appendix G. Toronto Region Commercial List e-Delivery Pilot Project - Guidelines for Preparing and Delivering Electronic Documents requested by Judges, June 2012

Table of Cases

Index