

Contents

Foreword	ix
Acknowledgments	xiii
Dedication	xv
Introduction	xvii
CHAPTER 1 Discovery of Electronic Evidence	1
I. The Evolution of E-discovery	3
II. The Rules of E-discovery	11
A. Electronically Stored Information Is Discoverable	12
B. Parties Must Give Early Attention to E-discovery	16
1. Initial Disclosures	17
2. Conference of the Parties	21
3. Discovery Planning Conference	23
C. Two Tiers of Discoverable Information—Data That Is Not Reasonably Accessible	28
1. Approaches to Cost Allocation	37
2. Another Approach to Cost Allocation	46
3. Sampling as a Factor in Cost Allocation	46
4. Cost Allocation in Practice	47
D. Privilege and the Discovery of Electronically Stored Information	49
E. Written Discovery	53
1. Testing and Sampling	53
2. Form of Production	53
3. Rule 33(d)—Interrogatories	56
4. Subpoenas	56
F. Sanctions and the Spoliation “Safe Harbor”	57
III. The Practical Side of E-discovery	59
A. Counsel Must Acquire a Working Understanding of Potentially Relevant ESI	59
1. Build an E-discovery Team	61

2. Understand and Improve Information Technology Architecture	62
3. Develop a Preservation Process	63
4. Developing a Retention Plan	73
5. Issuing Instructions to Custodians to Preserve Potentially Relevant Records	75
6. Design and Implement E-discovery Guidelines	76
7. Identify a Preferred Vendor Network	76
8. Consider Acquiring or Licensing Appropriate Tools	77

CHAPTER 2 **Spoliation**79

I. Overview	80
II. The Basics	86
A. When Does the Duty to Preserve Arise?	89
B. Does the Client's Obligation to Preserve Create Duties for Legal Counsel?	101
C. What Must Be Retained and Preserved?	106
1. Privileged Materials	116
2. Duration of the Duty to Preserve	118
D. Prejudice to Discovering Party	120
III. Is Bad Faith Required?	133
IV. Consequences of Spoliation	153
A. Spoliation Is an Implied Admission by Conduct	168
B. Logical Inference Instructions	172
C. The Strange Spoliation Presumption	172
D. Authority for Penalizing Destruction	176
V. Burden of Persuasion	179
VI. Choice of Law Question	180
VII. Proving the Claim of Spoliation—You're Not Bound By the Rules of Evidence	180
VIII. Evidence of Spoliation—Evidence of One's Conduct to Prove the Truth of Its Implied Message—Is It Hearsay?	181
IX. Spoliation and the Attorney-Client Privilege	182
X. Standard of Appellate Review	183
XI. Computers and the Internet Expand Every Possibility	183
A. Do Not Delete Records or Destroy Equipment	186
B. Save the Hard Drives	188
C. Don't Forget Personal Digital Assistants and Jump Drives ...	188
D. Informal Encouragement to Others to Preserve Data	189

CHAPTER 3 **Confidentiality and the Attorney-Client Privilege** .191

I. The Attorney-Client Privilege and Its Elements	193
A. History of the Confidentiality Requirement	195
B. Evolution of the Confidentiality Requirement	198

1. Ever-Expanding Circle	198
2. Ignoring Confidentiality	201
a. Stolen documents	201
b. Judicially compelled disclosures	203
c. The unauthorized agent exception	206
d. Inadvertent disclosures—the “oops” rule	207
e. Disclosures under protective orders or with reservations	210
3. Confidentiality Must Be Maintained and Documented— The Increasing Problem of Outside Agents Functioning as Employees	215
C. E-mail—An Extension of Existing Services and Technology	221
1. From Face-to-Face Communications to Letters	221
2. From Letters to Telephones	221
3. From Telephones to Computers	222
D. Employees’ Personal Expectation of Confidentiality in E-mail Communications	224
E. Data Behind Electronic Evidence—Metadata	234
F. Electronic Presentations	236
G. Measures to Preserve Confidentiality?	239
H. Asserting Attorney-Client Privilege for E-mails: The Practical Details, a Growing Concern	243
1. Expanding the Role of In-House Counsel—Jeopardizing the Applicability of the Privilege	244
2. Complicating the Distinction Between Communications and Information	248
3. How Is the Document Described in a Privilege Log?	252
4. Are Operating Assumptions About the Purpose of Communications Appropriate Based on the Individuals to Whom They Have Been Disseminated?	258
a. When business and legal communications can be separated	261
b. When business and legal advice are inextricably intertwined	264
I. Spoliation and the Crime/Fraud Exception to the Attorney- Client Privilege	289
J. Work Product Immunity Vis-à-Vis E-evidence	291

CHAPTER 4	Best Evidence/Original Writing Rule	297
I.	The Basics	298
II.	E-Evidence and the Original Writing Rule	303
III.	The Added Complexity of Summaries of Voluminous Materials ...	307
A.	The Hearsay Dimensions of Summaries	308

1. Non-hearsay Argument	309
2. Residual Exception Solution	310
B. Insurmountable Hearsay Problems Created by Summaries of Voluminous Materials from the Internet	311
C. The Evidentiary Status of Summaries under the Voluminous Writings Exception to the Original Writing Rule	312
CHAPTER 5 Presumptions	315
I. The Basics	317
II. Common Law Presumptions That Can Be Relevant to Authenticating E-commerce and E-mail	323
A. Receipt of Mailed Letters	323
B. Authority to Transact Business	325
C. Authority to Use an Instrumentality	325
D. Responsibility for Damage or Loss	326
III. Authentication of E-commerce—Problems with Presumptions under the Federal Rules of Evidence	326
CHAPTER 6 Authentication	333
I. The Basics	335
II. Methods of Authentication	339
A. Self-identification	348
1. Self-identification by the <i>Sender</i> : Establishing That a Letter Was Actually Written by the Person Named as Author	348
2. Self-identification by the <i>Recipient</i> : Establishing That a Message Was Received by the Fact That It Was Sent to That Individual's Address and He Responded to It	350
B. Content	352
C. Extrinsic Circumstances	354
III. Authenticating Digital Photographs	357
A. The Key Is the Chain of Custody	360
B. Desirable Enhancement Versus Unacceptable Manipulation ...	362
C. Authenticate the Computer Program Too	367
D. The Internet Complication	367
E. A Spoliation Problem	368
IV. Authentication of Web Page Postings from the Internet	369
A. Relaxation of Authentication Requirements	374
B. Self-authentication and the Internet	376
1. Public Document Under Seal	381
2. Business Solicitations and Postings	382
3. Government Postings	384
4. Newspapers and Periodicals	385
5. Limits of Self-authentication	385

C. Authenticating with Technology	386
1. Data Trails	386
2. Electronic Signatures	387
3. Public Key Infrastructure	390
4. Biometric Authentication	391
V. Authentication of Computer Animations, Models, and Simulations	391
VI. Authentication of Authenticating Technology	393
VII. Other Issues Relating to Authentication of E-evidence	395
A. Chain of Custody	395
B. Expanded Pretrial Discovery May Justify a Lesser Foundation	399
C. Admissibility and Weight: Two Bites at the Same Apple	400
D. A Reality Check	400
 CHAPTER 7 Hearsay	401
I. The Basics	403
A. Two Truths of Hearsay	404
II. Hearsay Admissible Through Exceptions	409
A. Multiple Levels of Hearsay	410
B. Writings Are Like Another Person Speaking, Repeating the Out-of-Court Declarations of the Author	412
III. Why Is It Relevant?	414
IV. Mechanically Produced Statements Are Not Hearsay	415
V. Evidence from the Internet	417
A. Nonhearsay from the Internet	417
B. Hearsay from the Internet	421
C. Admissible Hearsay under Applicable Exceptions	422
VI. A Reality Check on Hearsay	430
A. The Internet as Part of Business or Government Records	430
B. Web Pages Are Not Business Records of the Internet Service Provider (ISP)	433
C. Government Records and Reports	433
VII. Constitutional Dimensions of Hearsay	435
A. The Accused's Right of Confrontation	436
1. Two-Prong <i>Ohio v. Roberts</i> Test	438
2. The "Testimonial" Standard of <i>Crawford v. Washington</i> ..	439
3. Why "Testimonial"?	441
4. Does the "Testimonial" Label Give an Absolute Right? ..	443
B. Due Process	446
1. Due Process Before <i>Crawford</i>	446
a. Excluding hearsay offered by an accused	446
b. Excluding hearsay offered by the government	447
2. Due Process After <i>Crawford</i>	448
C. Constitutional Wild Card	449

CHAPTER 8	Science and Technology	463
I.	Judicial Screening Under the Common Law	464
A.	The Advent of the <i>Frye</i> "General Acceptance" Test	465
B.	Expanding the Scope of <i>Frye</i>	466
II.	Judicial Screening Under the Federal Rules of Evidence	467
A.	Out of the <i>Frye</i> ing Pan, Into the Fire?	468
B.	The Logic of <i>Daubert</i>	468
III.	Consequences for E-science and E-technology	472
CHAPTER 9	Judicial Notice	477
I.	The Basics	478
II.	Judicial Notice Under the Federal Rules of Evidence	479
A.	Things <i>Not</i> Addressed in Rule 201	481
B.	Distinguishing Judicial Notice of Adjudicative Facts/Jury Notice of Facts/Judicial Notice of Legislative Facts	481
III.	Judicial Notice and E-commerce	483
IV.	Evidence from Web Pages: A Practical Assessment	484
CHAPTER 10	Future's Challenge	491
	Index	495