

SUMMARY OF CONTENTS

PREFACE	V
TABLE OF CASES	XXV
TABLE OF STATUTES	XXXIII
TABLE OF RULES.....	XXXV
Introduction.....	1
The Federal Rules of Civil Procedure Adapt to Discovery of Electronically Stored Information.....	1
2015 Federal Discovery Rules.....	25
Chapter I. Electronic Discovery: Types & Sources	51
A. Types of ESI.....	52
B. Where Electronic Information Is Stored.....	64
C. How Electronic Information Is Stored	69
D. Fundamental Computer Forensic Issues.....	71
E. Information Governance as a Solution	74
Chapter II. Preservation of Electronic Information	77
A. Amended Rule 26 Governing Scope of Discovery	77
B. Trigger of the Duty to Preserve.....	82
C. Scope of the Duty to Preserve: “Possession, Custody, or Control”	97
D. Bring Your Own Device (“BYOD”)	129
E. Cloud Computing and Social Media.....	138
F. Accessible/Not Reasonably Accessible Information	157
G. Proportionality in the Preservation Context	170
H. Implementing the Duty to Preserve.....	193
I. Preservation Orders	228
J. Preserving ESI Held by Non-Parties	239
Chapter III. Cooperation and the Discovery Plan	245
A. Meet and Confer (Rule 26(f)) and Initial Scheduling Conference (Rule 16).....	245
B. Local Rules and “Pilot Projects”	259
C. Cooperation in Practice.....	268
Chapter IV. Data Collection.....	289
A. Searching All Appropriate Sources	289
B. Collecting Data from Social Networking Sites.....	292
C. “Custodian-Based” Collection	299
D. The Role of Outside Counsel.....	303

Chapter V. Production Issues	317
A. Rule 34: Form of Production (Paper, Images, Native, or Other Forms)	317
B. How Production Should Be Organized.....	327
C. Metadata	338
D. On-Site Inspections—Neutral Experts, Confidentiality Protection, Inspection Protocols	360
E. Discovery from Rule 30(b)(6) Witness with Knowledge of Document Retention and Production	373
F. Production from Non-Parties Pursuant to Rule 45.....	379
G. Cross-Border Production Issues	390
Chapter VI. Search of Electronically Stored Information	425
A. Search Methods	425
B. Use of Technology for Search and Review	445
C. Technology-Assisted Review.....	456
D. Party Agreement on Search Protocols	495
E. Should Search Protocols Be Negotiated?	504
F. Should Expert Testimony Be Required to Explain to the Trier of Fact How Search Protocols Were Constructed?	519
G. Validation of Search Efforts	529
Chapter VII. Costs, Cost Sharing, and Cost Shifting	535
A. The Costs of Ediscovery	535
B. Cost Sharing and Cost Shifting—The <i>Zubulake</i> Factors	542
C. When Must “Not Reasonably Accessible” Data Be Produced?	584
D. Determining Whether a Source of ESI Is Not Reasonably Accessible—Or Good Cause Exists for Discovery	592
E. Shifting the Costs of Non-Parties Responding to Rule 45 Subpoenas.....	598
F. Recovering Ediscovery Costs as a Prevailing Party.....	610
Chapter VIII. Spoliation and Sanctions	625
A. New Rule Governing Sanctions (Rule 37(e)) and Committee Note.....	625
B. Elements of Spoliation	631
C. Default Judgments, Dismissal, and Adverse Inferences	658
Chapter IX. Ethical Issues in Ediscovery	717
A. Duty of Technological Competence	717
B. Duty of Candor	722
C. Duty of Fairness	733
D. Duty of Supervision.....	750
E. Ethical Issues in Discovery from Social Media Sources	767
Chapter X. Electronic Discovery in Criminal Cases	777
A. Collection of ESI by Law Enforcement	778
B. Fifth Amendment Protections Against Self-Incrimination	828
C. Pre-Trial Discovery	832

Chapter XI. Privilege Issues Arising During Electronic Discovery	871
A. The Risks of Waiver and the Costs of Pre-Production Privilege Review of Electronic Data.....	871
B. Agreements Between the Parties to Control the Cost of Pre-Production Privilege Review of Electronic Data.....	875
C. What Precautions Should Be Employed?	877
D. Legislative Solution to Limit the Costs of Review of Electronic Data for Privilege: Federal Rule of Evidence 502	882
E. Ethical Questions Involved in Receiving Mistakenly Disclosed Privileged Information.....	918
Chapter XII. Admissibility of Digital Evidence	925
A. Introduction	925
B. General Approach.....	936
C. Application of Authenticity Rules to Digital Evidence	942
D. Applications of the Best Evidence Rule to Digital Evidence	964
E. Application of the Hearsay Rule (and Hearsay Exceptions) to Digital Evidence.....	970
F. Application of Rule 403 to Digital Evidence.....	976
G. Application of Rules on Expert Testimony to Digital Evidence	981
H. Expert Testimony on Electronic Discovery Issues	989
I. Summary on Admissibility of Digital Evidence	1002
Appendix I. 2006 Committee Notes to Electronic Discovery Amendments	1019
Appendix II. 2015 Committee Notes to Electronic Discovery Amendments	1035
Appendix III. The <i>Sedona Principles</i>	1049
Appendix IV. The Sedona Conference® Glossary: Commonly Used Terms for E-Discovery and Digital Information Management (Fourth Edition)	1051
INDEX	1123