

Arkfeld on Electronic Discovery & Evidence - Second Edition

By Mark S. Sidoti¹

When former Assistant US attorney, trial lawyer and electronic discovery expert Michael Arkfeld published the first edition of this incredibly useful and informative text several years ago, it quickly became the “Bible” for ediscovery for practitioners, jurists and all interested in this exploding area of the law. Reviews of the first edition were uniformly glowing, and it became an invaluable resource for getting acclimated to the case law, rules and practice pointers that allowed the reader to navigate through e-discovery challenges that seemed to be multiplying exponentially.

And multiply they have. In the few years since the first edition was published, there has been an explosion of legal developments in electronic discovery, and practitioners have come to understand that these issues touch every aspect of modern litigation and regulatory practice. In December of 2006, the Federal Rules of Civil Procedure (“the Rules”) were amended significantly to address ediscovery practices and concerns. In mid-2007, the now well known “Sedona Principles: Best Practices Recommendations and Principles for Addressing Electronic Document Production” - the principles underlying the Rules amendments - were released in a second edition which included discussion new Rules and ediscovery-related decisional law. And perhaps most significantly, in the past two years, literally hundreds of important legal opinions have been released from federal (and some state) courts throughout the country addressing, interpreting and expounding on e-discovery principles, laws and rules.

What more appropriate time, then, for the release of the Second Edition of Arkfeld’s Electronic Discovery and Evidence. And if all it offered was an updated discussion of the new Rules and recent case law and procedural developments into its preexisting user friendly framework, it would be well worth the very reasonable cost. But this Second Edition - complete with its included Best Practices Guide and companion CD -ROM - offers far more.

Comprehensive Treatise

The Second Edition of the Treatise has retained the user friendly structure of the original text. Again, the format is three ring loose-leaf allowing for easy updating and navigation. Its 850 pages of easy-to-read, clearly designated narrative sections, cross

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references and citations are divided into eight chapters, including Electronic Information in Litigation (Chapter 1), Creation and Storage of Electronic information (Chapter 2), Structure and Types of Electronic Information (Chapter 3), Computer Forensics, Experts and Service Bureaus (Chapter 4), Search, Technology and Cost Issues in Managing Electronically Stored information (Chapter 5), Discovery and Production Process (Chapter 6), Court Procedural Rules and Case Law (Chapter 7) and Admissibility of Electronic Information (Chapter 8).

Each chapter is divided into multiple subsections and presented in brief but informative, easy-to-digest and understand narrative which is tremendously helpful in this sometimes obtuse and technical area. For example, Section 2.3 is Chapter's 2's treatment of Storage and Retrieval of Electronic Information, and presents subtopics on "How Information Storage and Retrieval Works," "Unit of Measurement/Storage Unit," and "Types of External Storage Technology," among others. Chapter 6's thorough treatment of "Discovery Steps" includes discussions of "Nature of Case and Type of Information Sought," "Type of Storage Media, Devices and Locations," "Scope and Specificity of Request," "Computer and Forensic Expert Assistance," "Preservation Request," "Waiver of Privileges," "Search Efforts," "Sampling," and "Form of Discovery," and many other topics.

The beauty of this work is that it provides enough for a thorough understanding of each area it tackles, yet stays within its mission, never attempting to over analyze or too densely treat any subject. Each section is cross-referenced to other related sections in the Treatise, and many are replete with references to other scholarly works (such as the Sedona Principles) and, perhaps most helpfully, relevant case law. In short, if one needs to explore further any of the topics address throughout the treatise, there are always clear and accessible supplemental sources identified.

Updates to the Second Edition include discussions of the new Rules and how they have impacted ediscovery practice, a more thorough discussion of "litigation hold" triggers and sanctions for failure to properly implement holds, more discussion of procedural rules and techniques for how to protect electronic information (including the thorny "not reasonably accessible" issue), the new "meet and confer" obligations on parties under Amended Rule 26, and ethical concerns for practitioners who fail to properly address ediscovery issues. Brand new sections include discussions of Audit Trails, Logs and Registries (§3.8), Computer Viruses (§3.22); Selection of E-Discovery Vendors (§4.6), Chain of Custody and Hash Value (§5.5) and Ways to Limit Your Cost Exposure (§5.7). Another very welcome addition to the Second Edition is its inclusion of an appendix of extremely helpful sample practice forms, including e-discovery checklists, preservation letters, stipulated orders, discovery demands and more.

Best Practices Guide

I was happy to see that the Second Edition of the Treatise is accompanied by a Best Practices Guide for Electronic Discovery and Evidence ("the Guide"), a pamphlet of slightly more than 100 pages designed to provide portable thumbnail guidance on all the topics addressed at length in the Treatise. The Guide is fully cross referenced to the main

Treatise, yet treats its several main topics – including the Basics of Electronic Discovery, Is it Necessary to Have a Discovery Plan?, Requesting Electronic Information, Responding to Electronic Discovery Requests, Admission of Electronic Evidence -- with enough depth to make is a useful portable guide for client meetings, Rule 26 conferences and court appearances. In addition, the Guide includes an appendix with a black lined version of the amended Rules, complete with Committee Notes. In sum, the Guide is an extremely practical and useful adjunct to the Treatise (and a lot easier to carry to court!).

Companion CD-ROM

No review of the Electronic Discovery & Evidence's Second Edition would be complete without mention of its phenomenal companion CD-ROM. The CD is about as comprehensive an e-discovery resource as one can find anywhere. It contains the full text of the Treatise and the Guide and can easily be fully downloaded onto a laptop or desktop hard drive, such that there is no need to carry the disc around or have it occupy your disc drive.

Once the reader becomes familiar with the Folio® 4 format, which is relatively user friendly, it is easy to navigate through all chapters and subchapters of the Treatise or Guide, as well as hyperlink quickly to all references throughout each, including related sections and cited decisional law. If you are at a web enabled computer, many of the reference links will take you to helpful resources located online. Amazingly, when you click on a reported case cite, you are linked to the *full* opinion, which resides in a chronologically organized and fully searchable appendix of hundreds of relevant *full text* court opinions spanning the past 100 years (what could be relevant to this area from so long ago? Try clicking, for example, on the link to the full text of the seminal 1946 US Supreme Court privilege opinion in *Hickman v. Taylor*). Of course, all of the most relevant e-discovery decisions of the past decade, including the influential *Zubulake* opinions, and many others - are only a click away. (Need a key decision from early 2004 but you can't recall the full title. Simply go to the case law appendix and scan the list of 140 (!) fully cited decisions from that year, and pick the full text opinion you're looking for). In addition, you will find links to additional reference content in the Selected Statutes section of the CD-ROM, including complete annotated versions of relevant U.S. Code and Code of Federal Regulation provisions, as well as complete versions of the (of course Amended) Federal Rules of Civil Procedure and Federal Rules of Evidence. And when I say complete I mean Rules, Credits, History, Official Commentary, Research references and Case annotations for every rule (i.e, everything you would get by paging through your official rules books)!

Again with the disc fully loaded on your laptop, you have at your fingertips a portable reference set the likes of which I have not seen available elsewhere. Given the very reasonable suggested retail price of \$205 for all of these materials, it is obvious that Mr. Arkfeld and the people at LexisNexis worked hard to create the most comprehensive, practical and affordable e-discovery reference resource currently on the market.

Summary

Arkfeld's Electronic Discovery and Evidence (Second Edition) does justice and then some to the excellent original work. This new offering provides a current, topical and comprehensive guide to all things ediscovery, and supplemental materials that allow for extraordinary portability and practical use. If ediscovery issues and challenges are becoming an inescapable part of your every day practice, as is the case for most of us, I unreservedly recommend that this Treatise package be on the top of your bookshelf, in your briefcase and loaded onto to your computer.