### CONTENTS

Publisher’s Note ................................................................. xvii
Acknowledgments .............................................................. xix
Foreword The Hon. Barbara Jacobs Rothstein ........................ xxi
Editor’s Note ................................................................ xxv

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td></td>
</tr>
<tr>
<td><em>Michael D. Berman</em></td>
<td></td>
</tr>
<tr>
<td>Part One: The legal groundwork</td>
<td>2</td>
</tr>
<tr>
<td>Part Two: A primer on buzzwords, information technology, and corporate management policies</td>
<td>3</td>
</tr>
<tr>
<td>Part Three: The duty to preserve—trigger, scope, limits, termination, and sanctions for breach</td>
<td>4</td>
</tr>
<tr>
<td>Part Four: Production—initial disclosures and discovery</td>
<td>5</td>
</tr>
<tr>
<td>Part Five: Unique aspects of privilege</td>
<td>6</td>
</tr>
<tr>
<td>Part Six: Discovery—conferences of the parties, search methodology, depositions, and evidentiary issues</td>
<td>7</td>
</tr>
<tr>
<td>Part Seven: Costs, cost reduction, cost shifting, and ADR</td>
<td>9</td>
</tr>
<tr>
<td>Part Eight: Ethics, cooperation, and reasonableness</td>
<td>9</td>
</tr>
<tr>
<td>Conclusion</td>
<td>10</td>
</tr>
</tbody>
</table>

**PART ONE**  
**Evolution of E-Discovery Rules: From Seminal Case Law to the 2006 Federal Civil Procedure Amendments and Beyond**  

Chapter 1  
**A History of Electronic Discovery**  
*The Hon. John M. Facciola*

1. Introduction: Did anyone get the license plate of the rocket ship that hit me?  

---
# E-Discovery

2. The New York judge—Shira A. Scheindlin 15  
3. The *Zubulake* decisions 17  
4. The Sedona Conference 22  
5. 2006 Amendments to the Federal Rules 26  
6. E-discovery in the criminal context: The new frontier 28

## Chapter 2

**The ESI Amendments to the Federal Rules of Civil Procedure: A Rule-by-Rule Look**  
*Ronald J. Hedges*  
1. Introduction 31  
2. Rule 34: Producing ESI for inspection and other purposes 32  
3. Rule 26(a)(1): Initial disclosures by parties 33  
4. Rule 26(f): The “meet and confer” requirement 33  
5. Rule 16: Developing a discovery plan 36  
6. Rule 26(b)(5)(B): The clawback provision 37  
7. Rule 26(b)(2)(B): “[N]ot reasonably accessible because of undue burden or cost” 38  
8. Rule 33(d): Producing ESI as “business record” in response to interrogatories 41  
9. Rule 34: Requests for production of ESI 42  
10. Rule 45: Subpoenaing ESI 45  
11. Rule 37(e): “Safe harbor” or “uncharted minefield” on sanctions for lost ESI? 47  
12. Conclusion 48

## Chapter 3

**The States: What Are the Laboratories of Federalism Doing?**  
*Robert Dale Klein and The Hon. Joseph F. Murphy, Jr.*  
1. Introduction: Laboratories of federalism versus national uniformity and standard 49  
2. Early discussion of e-discovery issues 52
3. Two-tiered approach where ESI is not reasonably accessible because of undue burden or cost 56
4. Postproduction assertion of privilege or protection 60
5. Sanctions and safe harbors 70
6. FRCP 26(g) certifications 71
7. Conclusion 72

PART TWO Understanding ESI Systems and Policies in the Context of E-Discovery 79
Chapter 4 Introduction to Information Technology for the Attorney Addressing E-Discovery Issues 81
Scott Fischer, Richard E. Davis, and Michael D. Berman
1. Introduction 82
2. Overview of computer systems 83
3. “Writing” data on disks 87
4. Computer networks 88
5. Backup tapes: The paradigm of offline storage 89
6. Email systems 91
7. Conclusion 96

Chapter 5 Computer Usage Policies, Records Management, And Corporate It Infrastructure: A Guide For Attorneys Before & During Litigation 97
By William A. McComas and Michael D. Berman
1. Introduction 98
2. Computer usage policies 110
3. Records management policies 142
4. Conclusion 158
Chapter 6  Introduction to Metadata and Form of Production under Rule 34  159
Kate Paslin  159
1. What is metadata?  159
2. Why does metadata matter?  166
3. Metadata in discovery  167
4. Metadata in practice  173
5. Metadata in the clouds  179
6. Conclusion  181

Chapter 7  The Discovery of Structured Data  183
David Kessler and Daniel L. Regard II  183
1. Introduction  183
2. What is structured data?  184
3. How is the discovery of structured data treated under the law?  189
4. Conclusion  222

Chapter 8  Duty to Preserve: Best Practices, Spoliation, Sanctions, and the Safe Harbor Provision  225
Leslie Wharton and Stephanie Weirick  225
1. Introduction  225
2. The duty to preserve  226
3. Sanctions and evidence spoliation  234
4. Conclusion  246

Chapter 9  Proportionality Limits on the Scope of Preservation  247
The Hon. Paul W. Grimm, Michael D. Berman, Conor R. Crowley, and Leslie Wharton  248
1. Introduction  248
2. The federal rules, and the protections of Rules 26(b)(2)(c) and 37(e), do not directly apply to prelitigation conduct, presenting an anomaly  251
3. Source of the duty to preserve 253
4. Scope of the duty to preserve 254
5. Generic proportionality limits on the scope of the duty to preserve 257
6. Giving meaning to “proportionality” 261
7. Conclusion 264

Chapter 10  The Secondary Evidence Rule in Avoidance of Spoliation Sanctions 265
by Michael D. Berman and Rachel A. Shapiro
1. Introduction 265
2. Definitions of primary and secondary evidence 266
3. Use of secondary evidence under FRE 1004(1) 267
4. Use of secondary evidence to “fill the gap” under FRE 1004(3) 268
5. A hypothetical example of “filling the gap” under FRE 1004(3) 271
6. Conclusion 274

Chapter 11  When Does A Litigation Hold End? 277
by Michael D. Berman
1. Some hypotheticals 278
2. In search of a standard 280
3. Other considerations 283
4. Hypotheticals resolved 283
5. Back to basics 284

PART FOUR  Disclosing and Producing ESI to Another Party 285
Chapter 12  Litigation Preparedness Through The E-Discovery Process 287
by Catherine L. Muir and Meghan A. Podolny
1. Introduction 288
2. Roles and responsibilities 290
3. E-discovery protocol, generally 295
E-Discovery

Chapter 13  Initial disclosures  313
by Courtney Ingraffia Barton
1. Introduction  313
2. History of Rule 26(a)(1)(A)  315
3. Timing and scope of disclosure  317
4. Duty to supplement and failure to disclose  319

Chapter 14  Gathering, Reviewing, and Producing ESI: An Eight-Stage Process  321
By Scott Fischer, Richard E. Davis, and Michael D. Berman
1. Overview  321
2. Stages 1 and 2: The litigation hold and data mapping  322
3. Stage 3: Responsive information is gathered, collected, and preserved  325
4. Stage 3 (continued): Preservation and collection—Methodologies  329
5. Stage 4: Culling, de-duplication, and indexing  332
6. Stage 5: Processing for first review  335
7. Stage 6: Preparation for the 26(f) conference  338
8. Stage 7: Preparation for second review  338
9. Stage 8: Second review and production  339
10. Summary  340

PART FIVE  Privilege and Waiver Issues in E-Discovery  341
Chapter 15  Privilege Logs and Email Chains  343
by Michael D. Berman and Melissa E. Goldmeier
1. The requirement of a privilege log  343
Chapter 16 Are Attorney-Client Communications Imposing a Legal Hold and Implementing Preservation Efforts Privileged?

by The Hon. Paul W. Grimm, Michael D. Berman, Leslie Wharton, Jeanna Beck, and Conor R. Crowley

1. Introduction
2. The privilege, work product, and the duty to preserve
3. Discoverability of a client’s actions implementing the duty to preserve
4. Discoverability of counsel’s communications in fulfilling the duty to preserve
5. Basis of court’s power to consider the content of some attorney-client communications where duty to preserve was breached
6. The outer limit: “Pure” legal advice
7. Practical considerations
8. Conclusion

2. Differing schools of thought regarding email chains or strands present a dilemma to practitioners: Substantial cost versus risk of waiver 346
3. The “separate document, separate listing” solution to avoid “stealth” claims of privilege 347
4. The “cost-saving approach”: Comparing an email chain to an oral conversation 350
5. The middle ground between Scylla and Charybdis 352
6. How to avoid shooting a mouse with an elephant gun or fighting a dragon with a cardboard sword 354
7. Practice tips 359
Chapter 17  Protection from ESI Waiver under FRE 502  387
by David D. Cross, Jared S. Hosid, and Courtney Ingraffia Barton
1. Introduction  387
2. History of FRE 502  391
3. Applicability of FRE 502  393
4. Key Provisions of FRE 502  394
5. The rewards (and risks) of FRE 502  406
6. Conclusion and practice tips  408

Chapter 18  The 10 Most Important Things You Need to Remember about FRE 502  411
by The Hon. Paul W. Grimm
1. FRE 502’s scope is limited  412
2. FRE 502 applies only in the context of actual disclosure of privileged information  413
3. FRE 502 does not define when information is privileged  413
4. FRE 502 applies across the board  413
5. FRE 502 has important legislative history  413
6. FRE 502 has two primary purposes  414
7. FRE 502 establishes a “default” rule against subject matter waiver  415
8. FRE 502 incorporates the concept of preproduction and postproduction reasonableness  416
9. FRE 502 provides for court orders that expand its protection  417
10. It is important to read the entire rule  418

PART SIX  Seeking and Using Electronically Stored Information  419
Chapter 19  The Rule 26(f) Conference of the Parties  421
by Michael D. Berman
1. What is a Rule 26(f) conference?  421
2. What does Rule 16 have to do with it?  426
## Chapter 20 Using Electronic Search Tools and Search-Methodology Experts in E-Discovery: A Discussion of Recent Case Law and Other Authorities

*by David D. Cross and Sanya Sarich Kerksiek*

1. Introduction 440
2. Background 443
3. Guidance from the bench on electronic searches in three key decisions: *O’Keefe, Equity Analytics, and Victor Stanley I* 453
4. The *Rhoads* decision 460
5. What attorneys can do 462
6. Conclusion 477

## Chapter 21 Designing a “Reasonable” E-Discovery Search: A Guide for the Perplexed

*by Jason R. Baron and Michael D. Berman*

1. Introduction 479
2. The cost of manual review and the growing necessity of using automation 481
3. Using “common sense” and applying proportionality principles in deciding on a search methodology 483
4. Design of an effective search 491
5. Are experts required? 493
6. Final words 496

## Chapter 22 Rule 30(B)(6) Depositions Directed to ESI Issues

*by Michael B. MacWilliams*

1. Purposes of an ESI-focused Rule 30(b)(6) deposition 497
2. Deciding whether to pursue an ESI-focused deposition 505
3. Timing of an ESI-focused deposition 507
4. Mechanics of an ESI-focused deposition 509
5. Content of the ESI-focused deposition notice 511
6. Taking an ESI-focused deposition 513
7. Defending an ESI-focused deposition 515
8. Conclusion 517

Chapter 23  Use of ESI in Depositions 519
By Michael D. Berman
1. Introduction 519
2. Use of part of a paper letter in deposition:
   A hypothetical 520
3. Forms of ESI that may be used in a deposition 522
4. The rules 524
5. Examples 528
6. Conclusion and practice points 529

Chapter 24  Admissibility of Electronically Stored Information 531
By Kevin F. Brady and Bryant L. Young
1. Evidentiary hurdles 532
2. FRE 104(a) and 104(b)—rules governing the initial admissibility of evidence 533
3. Relevance 535
4. Authentication 536
5. Determine whether the authenticated evidence is hearsay 540
6. Determine any exceptions to hearsay rule 541
7. Considerations under the original writing rule 545
8. Practice tips 546
9. Illustrations of the admissibility of electronic evidence 548
10. Conclusion 555
PART SEVEN Cost, Burdensomeness, and Resolving Disputes Regarding E-Discovery Requests 561

Chapter 25 Rule 26(b)(2)(B): Not Reasonably Accessible because of Undue Burden or Cost 563

By Jared S. Hosid and Courtney Ingraffia Barton

1. Introduction 563
2. Rule 26(b)(2)(b) 564
3. History of the rule 569
4. The court’s two-step analysis 571
5. Cost shifting 577
6. Conclusion and practice tips 578

Chapter 26 Crawling and Indexing: Have Technological Innovations Made Data More Accessible and Bypassed Portions of Zubulake? 581

By Michael D. Berman, Scott Fischer, and Richard E. Davis

1. Introduction 581
2. Backup-tape technology at the time of Zubulake and today 583
3. Identification, collection, and preservation 586
4. Conclusion 589

Chapter 27 Cost Shifting in E-Discovery 591

By The Hon. James C. Francis IV 591

1. Overview 591
2. Traditional cost allocation 592
3. The electronic environment 593
4. The courts’ response 595
5. Open questions 606
6. Practicalities 616
7. Conclusion 617

Chapter 28 Alternative Dispute Resolution of E-Discovery Issues 619

By Michael D. Berman

1. Introduction 620
2. Use of masters 621
3. Private mediation 626
4. Conclusion 627

PART EIGHT Professional Conduct and the Duty to Cooperate in E-Discovery 629
Chapter 29 Ethics in E-Discovery 631
   By Dennis P. Duffy and Courtney Ingraffia Barton
1. Introduction 631
2. Competent representation 633
3. Ethical rules regarding metadata 639
4. The ethics of vendor oversight and outsourcing 645
5. Electronic files: Who owns them? 648
6. Conclusion 649

Chapter 30 The Sedona Conference Cooperation Proclamation 673
   By Michael D. Berman 673

Chapter 31 Rule 26(g): The “Stop and Think,” or “Pause and Consider,” Rule in the ESI Environment 683
   By The Hon. Paul W. Grimm and Michael D. Berman
1. Introduction 684
2. Rule 26(g), the Model Rules of Professional Conduct, and the duty to cooperate 690
3. Recent studies regarding discovery 694
4. The impact of Rule 26(g) on specific discovery issues: A road map to Rule 26(g) compliance through a “discovery budget” 701
5. Qualcomm, Inc. v. Broadcom, Inc. 707
6. Reliance on the client, cocounsel, or an expert 721
7. The future direction 723

Appendices 727
Reprints 763
Table of Cases 765
Index 793
About the Contributors 829

xvi