

**Arkfeld on
ELECTRONIC
DISCOVERY AND
EVIDENCE**

Third Edition

Michael R. Arkfeld

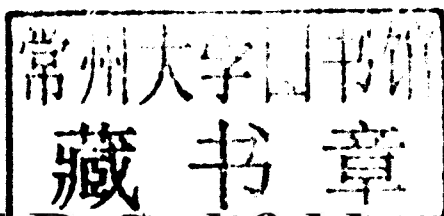


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**ELECTRONIC
DISCOVERY AND
EVIDENCE**

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Michael R. Arkfeld

Member of the State Bar of Arizona

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As a former assistant United States Attorney for the District of Arizona, Michael handled multimillion-dollar cases involving personal injury, medical malpractice, wrongful termination, and a host of other tort claims. He has appeared before both federal and state appellate courts and has extensive experience in jury (over 30 trials) and bench trials.

Since 1985, Michael has incorporated personal computers extensively in his legal practice and lectures throughout North America and internationally on the impact of technology on the practice of law and the discovery and admission of electronic evidence. Michael is also the primary instructor for several online courses on electronic discovery and digital evidence.

Michael is the author of *Arkfeld on Electronic Discovery and Evidence* (3rd ed.) treatise and numerous Best Practice Guides. The treatise is cross-referenced with the *Best Practices Guides for Electronic Discovery and Evidence*; *ESI Pretrial Discovery Strategy and Tactics*; *Legal Hold*; and *IT Primer for Legal Professionals*. In addition, Michael authored *The Digital Practice of Law* (5th ed.): *A Practical Reference for Applying Technology Concepts to the Practice of Law* (2001 ed.).

Michael was the recipient of the national 2004 E-Evidence Thought Leading Scholar Award and was presented the President's Award from the State Bar of Arizona in 1996.

Michael is a licensed attorney in the state of Arizona. He was the past chairman of the Task Force on Integrating Technology into the Justice System for the State Bar of Arizona.

Michael has been the editor of the E-Discovery Supplement to the *American Lawyer* and *Corporate Counsel* magazines published by American Lawyer Media. He is a past columnist for the *Arizona Attorney* magazine and a contributing writer to the *American Bar Association Journal* and a variety of other legal publications.

Michael received his J.D. from the University of Nebraska College of Law in 1975.

Michael can be reached by e-mail at Michael@Arkfeld.com. His web sites at Arkfeld and Associates (www.arkfeld.com) and eLawExchange (www.elawexchange.com) feature electronic discovery and other litigation and law office resources.

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Special thanks are extended here to my family, friends and supporters for their encouragement as I continue to pursue my passion for *Electronic Discovery and Evidence* and all its intricacies. In particular, to my children, Dawn, Adam and Colby who fill me with awe and inspire me constantly — a parent could not be prouder. To my daughter Dawn, whose love of animals and persistence in life is always admired. To my son Adam, whose search for adventure is inspirational and maturity as a businessman is a delight to observe. To my son Colby, whose sensitivity keeps me reminded of the important things in life.

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E-Discovery Resources

Law Partner Publishing and Lexis are pleased to provide you with *Arkfeld on Electronic Discovery and Evidence* (3rd ed.). Building on the well-organized and acclaimed second edition of this treatise, the third edition is revised, enhanced in both substance and format, and expanded to cover the latest issues affecting e-discovery. These include: search types, protocol, and certification of search methodology; “legal hold” detailed analysis regarding “triggering events”; FRE 502 section analyzing inadvertent disclosure as well as a host of other ediscovery issues. This expanded edition builds upon the sections providing detailed analysis of technological concepts, and a CD-ROM, library of forms, checklists, and practical pointers.

Arkfeld’s Best Practices Guides — Accompanying the treatise are four Best Practices Guides. These Guides provide a practical and succinct checklist for the legal and technological issues affecting your e-discovery decisions with critical cross-references to the *Electronic Discovery and Evidence* (3rd ed.) treatise.

- *Arkfeld’s Best Practices Guide for Electronic Discovery and Evidence* provides the steps for requesting and producing electronic discovery in a convenient condensed format including a “meet and confer” planning guide.
- *Arkfeld’s Best Practices Guide for ESI Pretrial Discovery — Strategy and Tactics* contains strategy and tactics for handling specific ESI issues throughout pretrial discovery.
- *Arkfeld’s Best Practices Guide for Legal Hold* provides the critical court imposed duties and tasks to ensure that outside counsel and their clients properly identify and preserve ESI.
- *Arkfeld’s Best Practices Guide: Information Technology Primer for Legal Professionals* provides a focused discussion of information technology as it pertains to electronic discovery.

Companion CD-ROM — Built on the Folio platform, the companion CD-ROM is fully searchable and easy to navigate. It contains the full text of the treatise, *Best Practices Guides* with hypertext links to the full text of referenced case law and statutes, and practice forms and other resources. All the materials, including the full text of cases, are contained on the CD-ROM itself — no need to go online!

Networked Version — Now use the treatise, guides and other resources for your internal organization-wide ediscovery electronic guide. Use this valuable networkable content as the foundation for your ediscovery policies and procedures.

E-Discovery Educational Presentations (live, video or audio) — LawCLECenter (www.lawclecenter.com) offers educational programs based on these publications.

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PREFACE

My experiences as a trial attorney and computer enthusiast have convinced me of the necessity, obligation and importance of discovering electronic evidence. We have changed from a paper-based to an electronic-based information society. Now, every use of a computer (or other electronic device) creates potential electronic evidence.

As practitioners, we are being challenged to apply procedural rules and case law to the discovery and subsequent admission of electronic information. It will not be an easy transformation. Not only will we have to understand how electronic information is generated, stored and retrieved; but we will also have to understand authentication, hearsay and other evidentiary obstacles for its admission.

Disclosing electronic information will require new skills to prevent sanctions from being imposed on you and your clients. New issues will have to be addressed such as when does the duty to preserve arise, what electronic information needs to be retained and what obligation does outside counsel have to ensure that their client actually preserves the data. You will discover that even the simple act of booting up a computer destroys electronic information.

However, there is a new “mini-industry” of forensic specialists who are willing to assist in the discovery and disclosure of electronic information. Their level of expertise varies, but they can assist in your discovery efforts.

Eventually, electronic discovery standardization will occur. Just as standards and procedures were developed for the taking of videotaped depositions, so will the discovery and disclosure process for electronic discovery.

One immense benefit that will also eventually be derived from this transition is the realization that a computer’s capacity to store, assemble, retrieve and manipulate information and images will provide an advantage for the attorneys who use it in their cases. It decreases the amount of time spent organizing your case and instead, allows you to focus on the analysis and presentation of your cases.

Without a doubt, electronic discovery is here to stay. We will not be going back to earlier paper-based discovery — we are firmly entrenched in the future.

My hope is this book will assist, in some way, to lessen the changeover obstacles to electronic discovery. If so, then my efforts will have been rewarded.

Cross-References

All cross-references are to the *Arkfeld on Electronic Discovery and Evidence* (3rd ed.) treatise, unless specifically referencing a *Best Practices Guide*. The *Best Practices Guides* which accompany the treatise include the *Best Practices Guide for Electronic Discovery and Evidence* (2012-2013 ed.); *Best Practices Guide for ESI Pretrial Discovery — Strategy and Tactics* (2012-2013 ed.); *Arkfeld's Best Practices Guide for Legal Hold* (2012-2013 ed.), and *Best Practices Guide — Information Technology Primer for Legal Professionals* (2012-2013 ed.).

The cross-reference abbreviations for the treatise and *Best Practices Guides* are as follows:

TREATISE	ABBREVIATION
<i>Arkfeld on Electronic Discovery and Evidence</i>	EDE § _____, _____
BEST PRACTICES GUIDES	
<i>Electronic Discovery and Evidence</i>	BPG EDE § _____, _____
<i>ESI Pretrial Discovery — Strategy and Tactics</i>	BPG Strategies § _____, _____
<i>Information Technology Primer for Legal Professionals</i>	BPG IT Primer § _____, _____
<i>Legal Hold</i>	BPG Legal Hold § _____, _____

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