

# TABLE OF CONTENTS

## CHAPTER 1

### Contracting in the Electronic Environment

§ 1.01	Introduction . . . . .	1-2
	[1] Sources of Law . . . . .	1-3
	[a] The Uniform Commercial Code (UCC) . . . . .	1-3
	[b] The Uniform Computer Information Transactions Act (UCITA) . . . . .	1-4
	[c] The Uniform Electronic Transactions Act (UETA) . . . . .	1-6
	[d] The Electronic Signatures in Global and National Commerce Act (E-Sign) . . . . .	1-7
	[2] The Statute of Frauds. . . . .	1-11
§ 1.02	Nontraditional Means of Contracting. . . . .	1-14
	[1] Agreements Formed in Earlier Times via Telegram, Telex and Tape Recordings . . . . .	1-14
	[a] Telegrams and Telexes . . . . .	1-15
	[b] Recorded Verbal Messages . . . . .	1-17
	[2] The Modern Approach to Signatures . . . . .	1-18
	[a] Facsimile Transmissions . . . . .	1-18
	[b] E-Mail and Electronic Messaging . . . . .	1-19
	[3] Shrink-Wrap, Click-Wrap, Browse-Wrap, Scrollwrap, and Sign-in-Wrap Agreements . . . . .	1-20
	[a] History of “Wrap” Agreements . . . . .	1-20
	[b] Current Status of “Wrap” Agreements . . . . .	1-23
	[4] Hybrid Agreements . . . . .	1-37
	[5] Blockchain Technology and Smart Contracts . . . . .	1-39
	[a] Early “Smart Contracts” . . . . .	1-39

## INTERNET AND ONLINE LAW

[b]	Blockchain-Based Contracting . . . . .	1-39
[c]	The Future of Blockchain-Based Technology . . . . .	1-42
[6]	Contractual Issues of Particular Concern in an Online Context . . . . .	1-44.1
[a]	The “Battle of the Forms” . . . . .	1-44.1
[b]	The Parol Evidence Rule . . . . .	1-45
[c]	The “Mailbox” Rule . . . . .	1-47
[d]	Unilateral Modification Clauses and Disclaimers . . . . .	1-48
[e]	Forum Selection and Choice-of-Law Clauses . . . . .	1-50
[f]	Authority to Bind, Legal Capacity, and Minors Who Contract Online . . . . .	1-54

## CHAPTER 2

## The Online Transformation of Defamation Law

§ 2.01	Common Law Defamation . . . . .	2-2
	[1] Publication . . . . .	2-2
	[2] False Statement . . . . .	2-5
	[3] Malice . . . . .	2-6
	[4] Injury to Reputation . . . . .	2-7
	[5] Not Privileged . . . . .	2-8
§ 2.02	State Codification of Various Aspects of Defamation Law . . . . .	2-10.2
§ 2.03	First Amendment Constraints on Common Law Defamation . . . . .	2-18
§ 2.04	Section 230 of the Communications Decency Act: How a Defamation Case Transformed the Internet . . . . .	2-21
	[1] CDA Immunity Applies to All Types of “Providers” . . . . .	2-28
	[2] CDA Immunity Applies to Ordinary Users as Well as Online Providers . . . . .	2-32
	[3] CDA Section 230(c): Immunity for Blocking “Objectionable” Content . . . . .	2-33
	[4] Statutory Exceptions to CDA Immunity . . . . .	2-36
	[5] Limits of CDA Immunity . . . . .	2-39
	[a] Provider Helps Create or Post the Content . . . . .	2-39
	[b] Provider Is Not Being Held Liable as a Publisher or Speaker . . . . .	2-40

## TABLE OF CONTENTS

xxi

	[c] Provider Does Not Act in “Good Faith” When Removing Material . . . . .	2-42
	[6] CDA Immunity as a Basis for a 12(b)(6) Motion to Dismiss . . . . .	2-42.1
§ 2.05	The State of Online Defamation Law . . . . .	2-42.2
	[1] Online Journalism . . . . .	2-42.2
	[2] Reputation Management . . . . .	2-44

## CHAPTER 3

### Online Crimes and Abuses

§ 3.01	Introduction . . . . .	3-2
§ 3.02	Criminal Federal Law Regarding Electronic Communications . . . . .	3-3
	[1] Wiretap Act . . . . .	3-3
	[2] Electronic Communications Privacy Act . . . . .	3-3
	[3] Stored Communications Act . . . . .	3-6
	[4] The Pen Register Act . . . . .	3-8
	[5] The Computer Fraud and Abuse Act . . . . .	3-9
	[a] Determining What “Without Authorization or Exceeding Authorized Access” Means . . . . .	3-12
	[b] “Damage, Loss, or Wrongfully Acquired Value” . . . . .	3-14
	[c] Can Violations of a Private Company’s Online Terms of Service Constitute a Criminal Violation of the CFAA? . . . . .	3-16
	[6] Identity Theft and Assumption Deterrence Act . . . . .	3-17
	[7] The CAN SPAM Act . . . . .	3-18
	[8] The Telephone Consumer Protection Act (TCPA) . . . . .	3-20
	[9] The Economic Espionage Act . . . . .	3-22
	[10] Access Device Fraud Statute . . . . .	3-24
§ 3.03	The Current State of Online Crimes and Abuses . . . . .	3-25
	[1] Online Crimes and Abuses Based on Hacking . . . . .	3-25
	[a] Generally . . . . .	3-26
	[b] The Goals of Hackers . . . . .	3-28

**INTERNET AND ONLINE LAW**

[2]	Online Crimes and Abuses Not Necessarily Involving Hacking . . . . .	3-33
[a]	Platform-Based Cybercrime and the Dark Web . . . . .	3-33
[b]	Cybercrime for Reasons Other than Financial Gain . . . . .	3-34
[c]	Abuses Targeting Masses of People . . . . .	3-34

**CHAPTER 4**

**Obscenity, Child Pornography,  
Revenge Porn, Electronic Voyeurism,  
and Other Sex-Related Issues**

§ 4.01	Introduction . . . . .	4-2
§ 4.02	The Cessation of Obscenity Prosecutions and the Shift to Child Pornography Prosecutions . . . . .	4-5
§ 4.03	The Current Statutory Framework . . . . .	4-6
	[1] Title 18 Criminal Statutes . . . . .	4-8
	[2] Title 18 Provisions Applicable to Online Service Providers . . . . .	4-12
§ 4.04	Section 230(d) Obligation of Online Providers to Provide Notice Regarding Filters . . . . .	4-14
§ 4.05	Revenge Porn . . . . .	4-15
§ 4.06	Types of Online Activities That Could Trigger Liability for Violations of Obscenity, Indecency or Child Pornography Laws . . . . .	4-20.1
	[1] Uploading and Downloading of Child Pornography . . . . .	4-20.1
	[2] Providing Access to Third Party Materials or Servers Through an Online Provider's Network . . . . .	4-20.1
	[3] Receiving, Sending or Storing E-Mail . . . . .	4-21
	[4] Selling Products Online . . . . .	4-22
	[5] Facilitating Criminal Activity . . . . .	4-22
§ 4.07	Approaches to Complying with Obscenity, Indecency, and Child Pornography Laws . . . . .	4-23
	[1] Doing Nothing . . . . .	4-23
	[2] Providing Warnings to Users . . . . .	4-24
	[3] Providing Filtering Software to Users . . . . .	4-24

**TABLE OF CONTENTS**

[4] Special Considerations for Libraries  
and Schools . . . . . 4-26

§ 4.08 Sexting and the Culture Clash Between  
Technology and Law . . . . . 4-29

§ 4.09 Online Sexual Harassment . . . . . 4-38

**CHAPTER 5**

**Privacy, Data Protection and Related Issues**

§ 5.01 Introduction . . . . . 5-3

§ 5.02 The Constitutional and Statutory  
Framework . . . . . 5-10

[1] Fourth Amendment. . . . . 5-10

    [a] Transformation of “Search and  
    Seizure” from Physical to  
    Conceptual. . . . . 5-10

    [b] Development of the Content/  
    Non-Content Distinction . . . . . 5-12

[2] Fifth Amendment . . . . . 5-21

    [a] Cases Holding that the Fifth  
    Amendment Privilege Applies . . . . . 5-24

    [b] Cases Rejecting Fifth Amendment  
    Privilege Claims . . . . . 5-27

        [i] Generally . . . . . 5-27

        [ii] Distinguishing Between  
        Password and Fingerprint  
        or Other Biometrics . . . . . 5-28.1

        [iii] “Foregone Conclusion”  
        Doctrine. . . . . 5-28.2

§ 5.03 Major Federal Privacy Statutes . . . . . 5-28.5

    [1] Wiretap Act . . . . . 5-28.5

    [2] Electronic Communications  
    Privacy Act . . . . . 5-28.6

    [3] Stored Communications Act . . . . . 5-29

        [a] Making Sense of the Distinction  
        Between “in Electronic Storage”  
        and “in a Remote Computing  
        Service”. . . . . 5-32

        [b] Disclosures of Transactional Data . . . . . 5-35

    [4] Computer Fraud and Abuse Act . . . . . 5-37

    [5] Communications Assistance for  
    Law Enforcement Act (CALEA) . . . . . 5-41

    [6] USA Patriot Act. . . . . 5-42

	[7] Foreign Intelligence Surveillance Act . . . . .	5-43
	[8] Privacy Protection Act . . . . .	5-43
§ 5.04	Other Federal Statutes Relevant to Online Privacy . . . . .	5-44
	[1] Federal Trade Commission Act . . . . .	5-44
	[2] Federal Communications Commission Act . . . . .	5-44
	[3] Privacy Act . . . . .	5-45
	[4] Children’s Online Privacy Protection Act . . . . .	5-46
	[5] Family Education Rights and Privacy Act . . . . .	5-52
	[6] Cable Privacy Act . . . . .	5-52
	[7] Video Privacy Protection Act . . . . .	5-53
	[8] Telephone Records and Privacy Protection Act . . . . .	5-55
	[9] Health Insurance Portability and Accountability Act . . . . .	5-55
	[10] Health Information Technology for Economic and Clinical Health Act . . . . .	5-56
	[11] Fair Credit Reporting Act . . . . .	5-58
	[12] Fair and Accurate Credit Transactions Act . . . . .	5-60
	[13] Gramm-Leach-Bliley Act . . . . .	5-61
	[14] Restore Online Shoppers’ Confidence Act . . . . .	5-65
	[15] Driver’s Privacy Protection Act (DPPA) . . . . .	5-66
	[16] REAL ID Act . . . . .	5-68
	[17] E-Government Act . . . . .	5-70
§ 5.05	State Privacy Laws . . . . .	5-72
	[1] Generally . . . . .	5-72
	[2] California . . . . .	5-72
	[a] The California Online Privacy Protection Act (CALOPPA) . . . . .	5-73
	[b] The California Consumer Privacy Act (CCPA) . . . . .	5-74
	[i] When the CCPA Does Not Apply . . . . .	5-75
	[c] Other California Privacy Laws . . . . .	5-124
	[3] Other State Privacy Laws . . . . .	5-128
	[4] Biometric Privacy Laws . . . . .	5-129
	[5] State Data Breach Laws . . . . .	5-132
§ 5.06	The Common Law of Privacy . . . . .	5-135

## TABLE OF CONTENTS

xxv

§ 5.07	Online Privacy and Public Policy	
	Issues . . . . .	5-139
	[1] Anonymity . . . . .	5-139
	[2] Clashes Between the Private Sector and Government . . . . .	5-150
	[3] Consumer Privacy . . . . .	5-151
	[4] Workplace Privacy . . . . .	5-156
	[5] Journalism and Privacy . . . . .	5-159
	[6] Expungement . . . . .	5-161

## CHAPTER 6

### Copyright

§ 6.01	Introduction . . . . .	6-4
§ 6.02	What Is, and Is Not, Copyrightable . . . . .	6-5
	[1] Originality and Fixation . . . . .	6-5
	[2] Uncopyrightable Ideas and Facts Versus Copyrightable Expressions . . . . .	6-6
	[3] Distinguishing Copyrightable Material from Uncopyrightable Material . . . . .	6-9
§ 6.03	Copyright Formalities . . . . .	6-14
	[1] Notice . . . . .	6-14
	[2] Registration . . . . .	6-15
§ 6.04	Duration of Copyright Protection . . . . .	6-16.2
	[1] Works Created on or After January 1, 1978 . . . . .	6-16.2
	[2] Works Created But Not Published or Copyrighted Before January 1, 1978 . . . . .	6-16.2
	[3] Works Published or Otherwise Copyrighted Prior to January 1, 1978 . . . . .	6-17
§ 6.05	Categories of Works of Authorship . . . . .	6-18
§ 6.06	Copyright Ownership . . . . .	6-21
	[1] Initial Ownership . . . . .	6-21
	[2] Works Made for Hire . . . . .	6-23
	[3] Contributions to Collective Works . . . . .	6-24
	[4] Transfers of Ownership . . . . .	6-25
§ 6.07	Copyright Owner's Exclusive Rights . . . . .	6-27
	[1] The Right of Reproduction . . . . .	6-27
	[2] The Right of Preparation of Derivative Works . . . . .	6-29
	[3] The Right of Public Distribution . . . . .	6-29
	[a] Generally . . . . .	6-29

## INTERNET AND ONLINE LAW

	[b]	The First Sale Doctrine and Digital File Transfers. . . . .	6-30
	[c]	Digital Content Distribution on the Internet. . . . .	6-31
	[i]	A Brief History of the Music Industry's Online Copyright Wars . . . . .	6-34
	[4]	The Right of Public Performance . . . . .	6-40
	[a]	Transmission or Other Communication . . . . .	6-42
	[b]	Of a Performance of the Work. . . . .	6-42
	[c]	To Members of the Public . . . . .	6-44
	[d]	Who Are Capable of Receiving the Performance. . . . .	6-44
	[e]	Where the Transmission Is Either to a Public or Semi-Public Place, or to Members of the Public Who May Be Separated Geographically or Temporally, or Both. . . . .	6-44
	[5]	The Right of Public Display . . . . .	6-45
	[6]	The Right of Public Digital Performance in Sound Recordings . . . . .	6-47
	[7]	Common Law Copyright and Preemption . . . . .	6-50
§ 6.08		Copyright Infringement. . . . .	6-52
	[1]	Direct, Contributory, Vicarious, and Intentional Inducement Liability. . . . .	6-52
	[2]	Remedies for Infringement . . . . .	6-57
	[a]	Registration as a Prerequisite for an Infringement Suit. . . . .	6-57
	[b]	Types of Remedies for Infringement . . . . .	6-59
	[c]	Availability of Statutory Damages and Attorney Fees Depends on Timing of the Registration . . . . .	6-60
	[d]	Injunctive Remedies and Writs of Seizure . . . . .	6-61
	[e]	Amount of Damage Awards. . . . .	6-62
	[f]	Limitation of Actions . . . . .	6-64
	[g]	Criminal Copyright Infringement . . . . .	6-65
	[3]	The CASE Act and Alternative Resolution of Copyright Disputes. . . . .	6-66
§ 6.09		Defenses to Infringement . . . . .	6-69
	[1]	Generally. . . . .	6-69
	[2]	The Fair Use Doctrine . . . . .	6-69
	[3]	<i>De Minimis</i> Use . . . . .	6-75



**TABLE OF CONTENTS**

xxvii

	[4] “Unclean Hands” .....	6-76
	[5] Fair Use and the DMCA .....	6-76
	[6] Copyright Misuse .....	6-77
	[7] Fair Use and the Teach Act .....	6-78
§ 6.10	Copyright Implications of Online Activities ...	6-81
	[1] User Uploads .....	6-81
	[2] Granting Public Access to a Work .....	6-82
	[3] Browsing .....	6-82
	[4] Downloading .....	6-83
	[5] E-Mail and List Servers .....	6-83
	[6] Caching, Mirroring and Ephemeral Copies .....	6-84
	[7] Hyperlinking .....	6-86
	[8] Framing (Embedding) and Scraping .....	6-88
	[9] Pop-Up Advertising .....	6-91
§ 6.11	Copyright Liability of Online Service Providers .....	6-93
	[1] Direct Infringement .....	6-93
	[2] Contributory Infringement and the Safe Harbor Provisions of the DMCA .....	6-94
	[a] Pre-DMCA Decisions .....	6-94
	[b] DMCA Title II: Notice-and- Takedown Safe Harbor .....	6-97
	[c] Early Post-DMCA Decisions .....	6-102
	[d] The Current State of the DMCA Safe Harbor .....	6-106
	[i] Service Provider Eligibility ...	6-107
	[ii] Reasonably Implemented Repeat Infringer Policy .....	6-109
	[iii] Actual Knowledge of Infringement or Awareness of Facts or Circumstances That Would Make Infringement Apparent .....	6-112
	[iv] Acting Expeditiously to Remove or Disable Access .....	6-116
	[v] No Direct Financial Benefit If the Service Provider Has the Right to Control the Online Activity .....	6-117
	[vi] Works That May Be the Subject of a Valid Takedown Notice .....	6-118
	[vii] Who May Send a Valid Takedown Notice .....	6-123

**INTERNET AND ONLINE LAW**

	[viii] What Constitutes a Valid Takedown Notice . . . . .	6-123
	[ix] Invalid Takedown Notices . . . . .	6-124
	[x] Sending Takedown Notices (and Subpoenas) . . . . .	6-127
	[e] DMCA Title II: Counter- Notification . . . . .	6-129
	[f] Liability for Bogus Takedown Notices and Counter-Notifications . . . . .	6-131
	[3] Vicarious Liability . . . . .	6-132
	[4] Intentional Inducement Liability . . . . .	6-132
	[5] The Appropriate Standard of Liability for Online Service Providers . . . . .	6-133
§ 6.12	Statutory Protections for Copyright Owners Not Based on Infringement . . . . .	6-134.4
	[1] DMCA Section 1201 Prohibition of Circumventing Technological Protective Measures . . . . .	6-134.4
	[2] DMCA Section 1202 Prohibition of Falsifying or Removing Copyright Management Information . . . . .	6-135
	[3] Declaratory Judgment Action . . . . .	6-140
	[4] Anti-Bootlegging Statute . . . . .	6-140

**CHAPTER 7****Trademark and Unfair Competition Issues**

§ 7.01	Introduction . . . . .	7-3
§ 7.02	Trademark Infringement . . . . .	7-6
	[1] Federal Trademark Infringement and False Advertising . . . . .	7-6
	[a] Pleading a Cause of Action . . . . .	7-6
	[i] Subject Matter Jurisdiction . . . . .	7-11
	[ii] Personal Jurisdiction and Venue . . . . .	7-14
	[iii] Likelihood of Confusion . . . . .	7-23
	[iv] Intent . . . . .	7-28
	[b] Defenses . . . . .	7-28.1
	[i] No Rights to Trademark . . . . .	7-28.2
	[ii] No Likelihood of Confusion . . . . .	7-35
	[iii] Fair Use . . . . .	7-39
	[iv] Innocent Infringement . . . . .	7-41
	[v] First Amendment . . . . .	7-43

**TABLE OF CONTENTS**

	[vi] Trademark Exhaustion (First-Sale Doctrine) . . . . .	7-44
	[vii] Statutory Defenses . . . . .	7-45
	[viii] Equitable Defenses . . . . .	7-46
	[c] Remedies for Lanham Act	
	Violations . . . . .	7-51
	[i] Equitable Relief . . . . .	7-51
	[ii] Damages, Attorneys’ Fees and Costs . . . . .	7-53
	[2] State Trademark Infringement Laws . . . . .	7-56
§ 7.03	Trademark Dilution . . . . .	7-56.2
	[1] Pleading a Cause of Action . . . . .	7-57
	[a] Fame . . . . .	7-57
	[b] Distinctiveness . . . . .	7-59
	[c] “Use in Commerce” . . . . .	7-59
	[d] “Blurring” and “Tarnishment” . . . . .	7-60
	[e] Application of Dilution Act to Internet-Related Cases . . . . .	7-62
	[2] Defenses . . . . .	7-64.1
	[3] Remedies . . . . .	7-64.3
§ 7.04	False Advertising . . . . .	7-69
	[1] Federal Cause of Action Under Section 43(a) of the Lanham Act . . . . .	7-69
	[a] Pleading a Cause of Action . . . . .	7-70
	[i] False Statement of Fact in Commercial Advertising . . . . .	7-70
	[ii] Likelihood of Confusion . . . . .	7-72
	[b] Defenses to a Section 43(a) False Advertising Claim . . . . .	7-75
	[c] Remedies . . . . .	7-77
	[i] Equitable Relief . . . . .	7-77
	[ii] Monetary Relief . . . . .	7-78
§ 7.05	Right of Publicity . . . . .	7-80
	[1] Pleading a Cause of Action . . . . .	7-90.5
	[2] Defenses . . . . .	7-90.8
	[3] Remedies . . . . .	7-90.16
§ 7.06	Misappropriation and Other Common Law	
	Unfair Competition Claims . . . . .	7-91
	[1] Passing Off . . . . .	7-91
	[2] Misappropriation . . . . .	7-92
	[3] Other Anticompetitive Practices . . . . .	7-95
§ 7.07	Unique Trademark Issues . . . . .	7-97
	[1] Domain Names . . . . .	7-97
	[a] Early History . . . . .	7-97

**INTERNET AND ONLINE LAW**

[b]	The Theory Behind Application of Trademark Law to Domain Names . . . . .	7-100
[c]	Anti-Cybersquatting Consumer Protection Act . . . . .	7-103
[d]	ICANN's Uniform Dispute Resolution Policy . . . . .	7-115
[e]	Potential Defenses to Cybersquatting Claims . . . . .	7-121
[2]	Metatags . . . . .	7-122
[3]	Linking and Framing . . . . .	7-125
[4]	Gripe Sites and Fan Sites . . . . .	7-127
[5]	Unsolicited Commercial E-Mail . . . . .	7-138

**CHAPTER 8****Social Networking**

§ 8.01	Introduction . . . . .	8-1
§ 8.02	[Reserved] . . . . .	8-4
§ 8.03	Social Networking and the First Amendment . . . . .	8-5
	[1] Student Free Speech Online: the <i>Tinker</i> Standard . . . . .	8-11
	[2] Student Social Media Posts Not Protected By the First Amendment . . . . .	8-19
	[3] Online Posts Where the First Amendment Never Applies . . . . .	8-22
§ 8.04	Social Networking in the Workplace . . . . .	8-24
	[1] Employee Use of Social Networking . . . . .	8-24
	[2] Employer Use of Social Networking . . . . .	8-24.4
§ 8.05	Commercial Use of Social Networking . . . . .	8-24.6
§ 8.06	Children Online . . . . .	8-30
§ 8.07	Other Legal Aspects of Social Networking . . . . .	8-31

**CHAPTER 9****eCommerce**

§ 9.01	Government Regulation . . . . .	9-2
	[1] Federal Trade Commission Act . . . . .	9-2

**TABLE OF CONTENTS**

xxxi

	[1A] State “Mini-FTC” Acts . . . . .	9-8
	[2] Electronic Funds Transfer Act of 1978 . . . . .	9-9
	[3] The Fair and Accurate Credit Transactions Act . . . . .	9-10
	[4] The Restore Online Shoppers’ Confidence Act . . . . .	9-11
	[5] Americans with Disabilities Act . . . . .	9-13
	[6] E-Warranty Act . . . . .	9-18
	[7] Sales and Use Taxes . . . . .	9-18
	[8] “Net Neutrality” . . . . .	9-20
§ 9.02	Private Industry Regulation . . . . .	9-21
§ 9.02A	Lanham Act. . . . .	9-22
§ 9.03	Regulation of Specific Types of eCommerce . . . . .	9-23
	[1] Alcohol Sales . . . . .	9-23
	[2] Cigarettes, e-Cigarettes and Vapes . . . . .	9-24
	[2A] Cannabis . . . . .	9-26
	[3] Payday Lending . . . . .	9-27
	[4] Contact Lenses . . . . .	9-27
	[5] Prescription Drugs . . . . .	9-28
	[6] Automobiles . . . . .	9-30
	[7] Appliance Sales . . . . .	9-31
	[8] Gambling . . . . .	9-31
	[9] Securities. . . . .	9-38
	[a] Crowdfunding . . . . .	9-38
	[b] Other Online-Specific Aspects of Securities Law . . . . .	9-41
	[10] Penny Auctions . . . . .	9-42
	[11] Online Ticket Sales . . . . .	9-43
	[12] Online Dating Services and International Marriage Brokers . . . . .	9-43
§ 9.04	Virtual Currencies . . . . .	9-46
	[1] Introduction . . . . .	9-46
	[2] How Virtual Currencies Work . . . . .	9-48
	[3] Virtual Currencies in the Real World . . . . .	9-51
	[4] Legal and Regulatory Framework . . . . .	9-64
§ 9.05	Product Liability . . . . .	9-65
	[1] Online Marketer Defenses to Strict Product Liability . . . . .	9-66
	[2] Cracks in the Dike . . . . .	9-71
	[3] The Dike Bursts . . . . .	9-72

## CHAPTER 9A

## Online Legal Ethics

§ 9A.01	Introduction . . . . .	9A-2
§ 9A.02	Multijurisdictional Practice (MJP). . . . .	9A-4
§ 9A.03	The Decreasing Relevance of Geographic Location. . . . .	9A-10
	[1] Virtual Law Practice . . . . .	9A-10
	[2] The Physical Location of the Lawyer. . . . .	9A-13
	[3] The Physical Location of the Client . . . . .	9A-16
	[4] The Physical Location of the “Practice” . . . . .	9A-17
	[5] The Jurisdiction Regarding Which the Lawyer Gives Advice . . . . .	9A-18
	[6] The Future of Multijurisdictional Practice . . . . .	9A-19
§ 9A.04	Online Communications and Confidences . . . . .	9A-20
	[1] Competent Use of Electronic Communications. . . . .	9A-21
	[2] Use of Cloud Computing. . . . .	9A-26
	[3] Online Disclosure of Public Information. . . . .	9A-29
	[4] Online Disclosure or Receipt of Non-Public Information. . . . .	9A-32
	[5] Client Accesses Opposing Party’s Privileged Communications. . . . .	9A-37
	[6] Accessing Another’s Online Information Without Authorization . . . . .	9A-38
§ 9A.05	Metadata . . . . .	9A-39
§ 9A.06	Online Advertising and Solicitation. . . . .	9A-42
	[1] Generally. . . . .	9A-42
	[2] Online Lawyer Directories and Listings. . . . .	9A-45
	[3] Lawyer Websites . . . . .	9A-46.3
	[4] Online Newsletters, Articles, Videos and Web Links. . . . .	9A-46.4
	[5] Promotion via Social Networking. . . . .	9A-46.6
	[6] Promotion via Blogging and Chat Rooms. . . . .	9A-46.8
	[7] Responding to Adverse Online Reviews . . . . .	9A-46.10
	[8] Online Discount Coupons . . . . .	9A-46.14
	[9] Texting . . . . .	9A-46.15
	[10] Non-Advertising Use of Social Media . . . . .	9A-46.16
	[a] Identifying Clients and Discussing Client Issues . . . . .	9A-46.19

**TABLE OF CONTENTS**

xxxiii

[b] Criticizing Other Attorneys . . . . . 9A-49  
[c] Harassing Other Attorneys . . . . . 9A-50  
[d] Other Types of Comments in  
Social Media . . . . . 9A-50  
§ 9A.07 Duty to Refrain from, and to Refrain from  
Assisting Clients in, Wrongful Conduct . . . . . 9A-52  
§ 9A.08 Other Online Ethical Issues . . . . . 9A-54

**CHAPTER 10**

**Procedural Issues**

§ 10.01 Jurisdiction . . . . . 10-2  
§ 10.02 Basis for Exercise of *in Personam*  
Jurisdiction . . . . . 10-4  
[1] General Jurisdiction . . . . . 10-5  
[2] Specific Jurisdiction . . . . . 10-5  
[3] No Jurisdiction . . . . . 10-6  
§ 10.03 Jurisdiction in an Online Context . . . . . 10-8  
§ 10.04 Venue . . . . . 10-12.1  
§ 10.05 Online Service of Process and Service  
of Documents . . . . . 10-16  
§ 10.06 Estate Planning in an Age of Online Assets . . . . . 10-17  
[1] Gathering Information About the  
Client’s Assets . . . . . 10-17  
[a] Identifying the Assets . . . . . 10-18  
[2] Determining the Client’s Wishes . . . . . 10-19  
[3] Analyzing the Legal and Tax Issues . . . . . 10-19  
[a] UFADAA . . . . . 10-21  
[b] RUFADAA . . . . . 10-22  
[c] PEAC . . . . . 10-23  
[4] Configuring the Client’s Assets to  
Enable Their Transfer and Otherwise  
to Carry Out the Client’s Wishes . . . . . 10-24  
[a] Ensuring Postmortem Access . . . . . 10-24  
[b] Preventing Unauthorized  
Postmortem Access . . . . . 10-26  
[5] Taking a Stealthy Approach . . . . . 10-26  
[6] Ethical Considerations . . . . . 10-27  
[7] Drafting Estate Planning Documents . . . . . 10-28.1  
§ 10.07 Bring-Your-Own-Device (BYOD) . . . . . 10-29  
§ 10.08 Employees Working Remotely and the  
Gig Economy . . . . . 10-32

## CHAPTER 11

**International Aspects of Internet Law**

§ 11.01	Introduction . . . . .	11-3
§ 11.02	International Treaties and Legal Conventions Applicable to Online Activity . . . . .	11-5
	[1] World Intellectual Property Organization Treaties . . . . .	11-5
	[a] Berne Copyright Convention . . . . .	11-5
	[b] Rome Convention . . . . .	11-8
	[c] Paris Convention . . . . .	11-8
	[d] Trademark Law Treaty . . . . .	11-8
	[e] Singapore Treaty . . . . .	11-9
	[f] WIPO Copyright Treaty . . . . .	11-9
	[g] WIPO Performances and Phonograms Treaty (WPPT) . . . . .	11-9
	[h] Madrid System . . . . .	11-10
	[2] The World Trade Organization Agreements . . . . .	11-10
	[3] U.N. Convention on Contracts for the International Sale of Goods . . . . .	11-10.1
	[4] Hague Convention on Money Judgments . . . . .	11-10.1
	[5] New York Convention . . . . .	11-10.2
	[6] Online Dispute Resolution . . . . .	11-10.2
	[7] Convention Regarding Automatic Processing of Personal Data . . . . .	11-10.3
§ 11.03	International Conflicts of Law: Online Aspects . . . . .	11-10.4
	[1] Procedural Issues Not Involving Jurisdiction . . . . .	11-11
	[a] Outbound: Subpoenas, Warrants, and Discovery Orders Directed at Persons, or Involving Information Located Abroad . . . . .	11-11
	[i] The Microsoft and Google Warrant Cases . . . . .	11-13
	[ii] The CLOUD Act . . . . .	11-22
	[b] Inbound: Subpoenas, Warrants, and Discovery Orders from Abroad Directed at Persons Located in the United States . . . . .	11-23
	[2] Jurisdictional Issues . . . . .	11-26
	[a] Outbound: International Long-Arm Jurisdiction of American Courts . . . . .	11-26



**TABLE OF CONTENTS**

xxxv

	[b] Inbound: Foreign Court Jurisdiction over Persons Within the United States . . . . .	11-33
[3]	Substantive Issues. . . . .	11-35
	[a] Outbound: Extraterritorial Applicability of American Substantive Law . . . . .	11-35
	[b] Inbound: Applying Foreign Substantive Law to Persons Within the United States. . . . .	11-38
	[i] Suppression of Online Information . . . . .	11-39
	[ii] Challenges to Traditional Limits . . . . .	11-47
[4]	Enforcement . . . . .	11-102
	[a] Outbound . . . . .	11-102
	[b] Inbound . . . . .	11-103
§ 11.04	Other Foreign Legal Provisions Affecting International Online Commerce. . . . .	11-106
	[1] Foreign Anti-Spam and Data Protection Laws . . . . .	11-106
	[a] Canadian Anti-Spam Law. . . . .	11-106
	[2] Foreign Data Retention Laws . . . . .	11-106
	[3] Foreign Consumer Protection Laws . . . . .	11-107
	[a] Consumer Goods and Guarantees Directive . . . . .	11-108
	[b] Directive on Consumer Rights . . . . .	11-108
	[c] Other Laws and Rulings. . . . .	11-108
	[4] Other Foreign Legal Provisions of Interest . . . . .	11-109
	[a] EU Legislation. . . . .	11-109
§ 11.05	Resolution of International Disputes: Online Aspects . . . . .	11-111
§ 11.06	Other International and Cross-Border Issues. . . . .	11-112
	[1] Border Crossings . . . . .	11-112
	[2] Border Searches . . . . .	11-112
<b>INDEX</b>	. . . . .	I-1

