

ITEM 9.00 | CHAPTER INTRO

Florida litigators increasingly confront discovery involving electronic documents and other types of electronically stored information ("ESI")¹ and the hardware and media on which ESI is created, transferred, communicated, and stored. Because far more than 95% of today's documents are created, transferred, or maintained electronically, and because computers, phones, and other electronic devices pervade our culture, e-discovery can crop up in almost any case from a simple negligence case to commercial litigation. The fundamental issues regarding ESI involve (1) disclosure and protection of client ESI and hardware, (2) preservation of ESI by the client and the opposing parties and third parties, (3) access to ESI of opposing parties and third parties, (4) maintaining privacy and privilege, (5) costs of discovery, and (6) application of Florida's existing discovery rules and common law in an arena that changes virtually every day as technology advances.

Competent representation of the client requires the legal skill, knowledge, thoroughness, and preparation necessary for the representation.² Competence in ESI discovery is essential to successfully manage such discovery in an effective, economical, efficient, and balanced fashion. Since the law lags behind emerging and changing technology and because of the increasing availability of discoverable ESI, it is incumbent on lawyers and judges to make special efforts to become competent and stay current on ESI fundamentals and discovery. Staying current entails up-to-date knowledge of the culture of information: how information is created, used, managed, stored, communicated, and manipulated. New technology and information cultures are rapidly evolving, including new types of social media, small personal computer devices such as watches, cloud storage websites of all kinds where information may be kept indefinitely, and even appliances such as online security systems that are part of what is called the Internet of Things. All of these new products and information sources can create relevant evidence in a variety of cases. The volume of potentially relevant electronic evidence also continues to increase at an exponential level.

One of the foremost challenges in this kind of complex environment is protection of the client's confidential information, included personal protected information and privileged communications. This requires counsel to ensure that client information is protected and is disclosed only to the extent required by law or reasonably

necessary to serve the client's interest.³ Court recordkeeping and filing is now done in electronic format in Florida courts. This makes unfettered third party electronic access to court records, including client information in the record, far easier than ever before. Accordingly, counsel should only put in the record that which is required or reasonably necessary to serve the client's interest. If necessary, invoke the process of sealing private or sensitive information before the record becomes available as a public record.⁴ In anticipation of electronic recordkeeping and the need for protection of privacy interests of parties and non-parties, the Florida Supreme Court enacted rules requiring lawyers to analyze and screen information for certain confidential information before it is placed in the court record.⁵ At a minimum, pursuant to Fla. R. Civ. P. 1.280(g), information should not be filed with the court absent good cause, which is satisfied only when the filing of the information is allowed or required by another applicable rule of procedure or by court order.⁶ The lawyer is obligated to know enough about the client's ESI and the locations where it may be found to fully comply with discovery without making unnecessary disclosures. The client's equipment, data, and software should be protected from damage or destruction. The client should also be fully informed on the extent, if any, of the obligation to preserve information. At the same time, the client's business processes and handling of data should be protected from unnecessary intrusion from perceived court-related obligations. Finally, counsel and the court should be sufficiently informed of the ESI technology systems likely to contain relevant information in order to assist counsel to obtain permitted discovery of ESI from the opposing party and third parties.

Rulemaking for electronic discovery nationwide and in Florida has lagged behind the technology of how data is created, stored, and communicated. Nonetheless, Florida Civil Procedure and Judicial Administration Rules now expressly address issues caused by the use of digital technology in Florida Courts⁷ and discovery of ESI.⁸ Effective September 1, 2012, the Florida Supreme Court adopted several amendments to the Florida Rules of Civil Procedure⁹ largely modeled on the 2006 Amendments to the Federal Rules of Civil Procedure.¹⁰ Compatibility with federal rules enables use of federal decisions on electronic discovery as persuasive authority¹¹ in the absence of Florida cases and ensures harmony of e-discovery law between cases in Florida state courts and cases in federal court and other states. The Florida electronic discovery rules contain some improvements and adjustments from their federal



counterparts that arguably make the rules better suited to the broader range of state court jurisdiction in size and subject matter. A chart comparing the Florida electronic rules and the federal rules is attached to this chapter as Appendix A.

There are many good reasons for specialized rules for ESI discovery. ESI is ephemeral; sometimes easily hidden, mislabeled, or destroyed; available from multiple sources in a variety of forms; capable of electronic search, analysis and compilation; sometimes accompanied by information or availability not apparent to the creator or user, such as metadata; and frequently misunderstood by persons lacking in expertise. ESI also exists in incredibly large quantities. One Thousand gigabyte (One Terabyte) computer hard-drives are now standard issue on many computers, whereas a single gigabyte of information is equivalent to a truckload of paper documents. Many people today receive hundreds of e-mails and text messages a day and they may store them indefinitely in a variety of locations, some of which may be unknown to them. It is not uncommon in business today for management personnel to each keep hundreds of thousands of emails and attachments. Large enterprises commonly store trillions of emails and attachments, and in many cases may have to search through millions of emails to try to locate relevant evidence. There are often accessibility problems for some of the ESI stored, including backup systems. The places on which ESI can be stored or located are manifold and ever changing, and include the over one-trillion websites that now exist on the Internet. ESI may sometimes be easier and cheaper to search and to produce in electronic form than the same quantity of paper documents, but it is often much more difficult to locate and retrieve relevant ESI. Again, that is largely because of the high volume of total ESI maintained on a multiplicity of systems that may contain relevant information. The problem is compounded by the need to review most of the material for privilege, privacy, and trade secrets before it is disclosed. For these reasons it is today far more difficult and more expensive to access, search, categorize, compile, and produce relevant ESI than in the past when most records were only in paper form, were easily organized and accessed in centralized locations, and were far, far fewer in number and type.

Issues related to the spiraling cost issues of e-discovery contribute to the special treatment for ESI provided in the new rules and case law. Florida rules expressly provide that ESI is discoverable,¹² but they also require proportionality of expense.¹³ Florida rules help maintain cost proportionality by providing an



express framework for dealing with issues of preservation, production, and protection for hard-to-find and retrieve ESI and the media, equipment, and third party Internet “cloud” storage websites that hold ESI.¹⁴ A person may object to discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of burden or cost. The person from whom discovery is sought has the initial burden of showing that the information sought or the format requested is not reasonably accessible because of undue burden or cost. If that showing is made by specific evidence, the court may nonetheless order the discovery upon a showing of good cause. The court may specify conditions of the discovery, including ordering that some or all of the expenses incurred by the person from whom discovery is sought be paid by the party seeking the discovery.¹⁵

In *Zubulake v. UBS Warburg LLC*, 217 FRD 309 (S.D.N.Y. 2003), the court set forth an analytical framework for determining whether it is appropriate to shift the costs of electronic discovery. If the responding party is producing data from “inaccessible” sources, i.e. data that is not readily useable and must be restored to an accessible format, the court identified seven factors to be considered in determining whether shifting the cost of production is appropriate.¹⁶

The scope of discovery may also be limited by the producing party or person’s privacy rights, as when the relevance or need for the information requested does not exceed the privacy interests of the person or party from whom it is sought.¹⁷

Florida rules also provide additional protection for confidential and privileged information not discoverable that may be inadvertently produced with discoverable material.¹⁸ Rule 1.285, Florida Rules of Civil Procedure, establishes a process by which a party, person, or entity may retroactively assert privilege as to inadvertently disclosed materials, regardless of whether the inadvertent disclosure was made pursuant to “formal demand or informal request.”¹⁹ The privilege must be asserted within ten days of actual discovery of the inadvertent disclosure by serving a prescribed written notice of the assertion of privilege on the party to whom the materials were disclosed.²⁰ A party receiving notice under Fla. R. Civ. P. 1.285(a) must promptly (1) return, sequester, or destroy the materials and any copies of the materials, (2) notify any other party, person, or entity to whom it has disclosed the materials of the fact that the notice has been served and of the effect of the rule, and (3) take reasonable



steps to retrieve the materials disclosed.²¹ Rule 1.285 prescribes the manner in which a receiving party may challenge the assertion of privilege²² and the effect of a court determination that privilege applies.²³

Because ESI and the modern equipment that creates, holds, communicates, or manipulates it are complex and constantly evolving, sometimes expert assistance is needed by clients, counsel, or the court to search and prepare ESI for production. Such expert assistance may involve legal as well as technical issues and tasks. The parties and Court should consider the appointment of Special Masters or Third Party Neutral experts in appropriate cases.

The developing principles for electronic discovery and the Committee Notes to the Florida Rules of Civil Procedure encourage cooperation and transparency by the parties during meetings between counsel early in a case to try to agree on the scope of preservation and discovery and methods of production.²⁴ Counsel are encouraged to bring any areas of disagreement to the courts for resolution early in a case. These issues may also be addressed in a Rule 1.200 or Rule 1.201 case management conference.²⁵ Specific mention of case management for electronically stored information is found in Rule 1.200, Fla. R. Civ. P.²⁶ and in Rule 1.201 for cases that are declared complex.²⁷ In resolving these disputes courts must balance the need for legitimate discovery with principles of proportionality and the just, speedy and efficient resolution of the case.²⁸

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Footnotes

¹ Electronically stored information, “ESI,” is the nomenclature adopted in the Florida and federal rules to refer to computer files of all kinds. See Fla. R. Civ. P. 1.280(b)(3); Rule 34, Federal Rules of Civil Procedure. The term ESI is not defined in the Florida and federal rules on purpose because of the ever-changing nature of such information. The Comments to the Federal Rules explain that the term ESI should be construed expansively “to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.”

² Rule 4-1.1, Florida Rules of Professional Conduct. See also ABA Model Rules of Professional Conduct, Rule 1.1 Competence—Comment, Para. (8) found at <http://bit.ly/NZsya6>.

³ Rule 4-1.6, Florida Rules of Professional Conduct. See also Fla. Prof. Ethics Op. 10-2 (obligation of lawyers with regard to confidentiality of client information when employing devices with hard drives and other media); 06-2 (responsibility for confidentiality and other obligations regarding metadata).

⁴ Fla. R. Jud. Admin. 2.420.

⁵ Fla. R. Civ. P. 1.280(g); 1.310(f)(3); 1.340(e); 1.350(d); and Fla. R. Jud. Admin. 2.420; 2.425.

⁶ Rule 1.280(g) provides: “Information obtained during discovery shall not be filed with the court until such time as it is filed for good cause. The requirement of good cause is satisfied only where the filing of the information is allowed or required by another applicable rule of procedure or by court order. All filings of discovery documents shall comply with Florida Rule of Judicial Administration 2.425. The court shall have authority to impose sanctions for violation of this rule.”

⁷ Id.

⁸ See *In re Amendments to the Florida Rules of Civil Procedure -- Electronic Discovery*, 95 So. 3d 76 (Fla. 2012). See also Fla. R. Civ. P. 1.285 (inadvertent disclosure of privileged material). In addition, Florida’s 9th, 11th, 13th, and 17th Circuits have business or commercial litigation sections with special local administrative rules and processes for more complicated cases. These local rules include special handling of electronically stored information. Refer to local rules and comply with all requirements when handling cases assigned to a special commercial or business court.

⁹ Id.

¹⁰ Fed. R. Civ. P. 16, 26, 33, 34, 37 and 45. The Federal Rules of Civil Procedure were amended, effective December 1, 2015.

¹¹ Federal courts have generated copious numbers of cases under the federal e-discovery rules since 2007, because federal district judges and magistrates regularly enter published discovery opinions and orders, which creates a body of useful written law that is largely absent in Florida state court.

¹² Fla. R. Civ. P. 1.280(b)(3) (“A party may obtain discovery of electronically stored information in accordance with these rules).

¹³ Fla. R. Civ. P. 1.280(d)(2)(ii) (“the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that... the burden or expense of the discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”).

¹⁴ Fla. R. Civ. P. 1.280(d)(2)(ii).



¹⁵ *Id.*

¹⁶ *Zubulake*, *id.*, 217 FRD at 322.

¹⁷ Compare *Root v. Balfour Beatty Const., LLC*, 132 So. 3d 867,869 (Fla. 2d DCA 2014) (order compelling the production of social media discovery that implicates privacy rights demonstrates irreparable harm), with *Nucci v. Target Corp.*, 162 So. 3d 146 (Fla. 4th DCA 2015) (photographs posted on a social networking site are neither privileged nor protected by any right of privacy, regardless of any privacy settings that the user may have established).

¹⁸ Fla. R. Civ. P. 1.285.

¹⁹ Fla. R. Civ. P. 1.285(a).

²⁰ *Id.* The notice must include specifics on the materials in question, the nature of the privilege asserted, and the date on which inadvertent disclosure was discovered. The process applies to any privilege cognizable at law, including the attorney-client, work product, and the several other types of privileges recognized in the Florida Evidence Code. See Fla. Stat. § 90.501–.510 (journalist, lawyer-client, psychotherapist-patient, sexual assault counselor-victim, domestic violence advocate-victim, husband-wife, clergy, accountant-client, and trade secret privileges). *Id.*

²¹ Fla. R. Civ. P. 1.285(b). Nothing in Rule 1.285 diminishes or limits any ethical obligation with regard to receipt of privileged materials pursuant to Fla. R. Prof. Conduct 4-4.4(b). *Id.*

²² Fla. R. Civ. P. 1.285(c).

²³ Fla. R. Civ. P. 1.285(d).

²⁴ See Fla. R. Civ. P. 1.280, 2012 Committee Notes (“The parties should consider conferring with one another at the earliest practical opportunity to discuss the reasonable scope of preservation and production of electronically stored information.”).

²⁵ See Fla. R. Civ. P. 1.280, 2012 Committee Notes.

²⁶ Fla. R. Civ. P. 1.200(a)(5)-(7).

²⁷ Fla. R. Civ. P. 1.201(b)(1)(J).

²⁸ Fla. R. Civ. P. 1.010; 1.280(d).

