

ITEM 9.01 | LAW, POLICY, AND PRINCIPLES OF ELECTRONIC DISCOVERY

The complexity in application of discovery rules and policies to ESI and hardware and media is creating a burgeoning body of common law, primarily in federal court.²⁹ Case law in Florida on this subject is currently limited, but useful.³⁰ Most importantly, current Florida civil procedure rules for e-discovery were developed by selecting the best of the federal rules and distilling Florida common law authority into practical and balanced rules appropriate for the wide array of types and size of cases in Florida state courts that apply the civil rules.³¹ The rules provide a useful framework for anticipating and addressing prominent e-discovery issues. Based on the similarity between Florida and federal rules, Florida trial courts are likely to refer to federal courts and the extensive body of case law in the federal system³² as well as cases arising in states with rules similar to Florida and federal rules. State court judges are also likely to be influenced by the publications of The Sedona Conference®,³³ a private research group of lawyers, judges and e-discovery vendors dedicated to the development of standards and best practices in this evolving field of law and policy. The Sedona Conference® writings have been widely cited in the federal courts, especially its Sedona Principles,³⁴ and Cooperation Proclamation.³⁵ Also especially helpful are its Glossary³⁶ of e-discovery related terms, and its commentaries on Search and Retrieval Methods,³⁷ Achieving Quality,³⁸ and Litigation Holds.³⁹ Many excellent text and trade publications, including free online resources, are also available.⁴⁰

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Footnotes

²⁹ This chapter focuses on Florida state court e-discovery. Discussion of federal law herein is undertaken only because of the availability of federal law for guidance in state court cases and is not intended to provide practitioners with a manual for discovery in federal court cases. See *supra* n. 11.

³⁰ See, e.g., *Nucci v. Target Corp.*, *supra* n. 16 (no expectation of privacy in photos posted on Facebook regardless of privacy settings used by producing party); *Root v. Balfour Beatty Const., LLC*, *supra* n. 17 (privacy interest in Facebook postings upheld against overbroad request); *Antico v. Sindt Trucking, Inc.*, 148 So. 3d 163 (Fla. 1st DCA 2014) (access to decedent's iPhone granted to determine whether she was texting during automobile accident in which she was killed); *E.I. DuPont De Nemours & Co. v. Sidran*, 140 So. 3d 620, 650 (Fla. 3d DCA 2014) (sanctions not appropriate for fraud on the court in the manner in which ESI was collected and stored by defendant for discovery in multiple suits); *Osmulski v. Oldsmar Fine Wine, Inc.*, 93 So. 3d 389 (Fla. 2d DCA 2012), rev. den., 109 So. 3d 781 (Fla. 2013) (preservation obligations before case is filed are explained in this case); *Holland v. Barfield*, 35 So. 3d 2010 Fla. App. LEXIS 6293; 35 Fla. L. Weekly D 1018 (Fla. 5th DCA May 7, 2010) (order granting opposing expert in wrongful death case unrestricted access to review petitioner's hard drive and SIM card quashed as violative of privacy); *Menke v. Broward County School Board*, 916 So. 2d 8 (4th DCA 2005) (establishing basis and limits on access to opposing party's hardware in order to search for discoverable information); *Strasser II: Strasser v. Yalamanchi*, 783 So. 2d 1087 (Fla. 4th DCA 2001) (spoliation of electronic records); *Strasser I: Strasser v. Yalamanchi*, 669 So. 2d 1142 (Fla. 4th DCA 1996) (designating Florida procedural rules giving rise to discovery of ESI and the equipment that holds them and setting limits on scope of such discovery); *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.* 2005 WL 674885, (Fla. Cir. Ct., 2005) (one of the best known e-discovery opinions in the country, primarily because the sanctions for ESI spoliation resulted in a default judgment for \$1.5 Billion. The judgment was reversed on other grounds).

³¹ See In re Amendments to the Florida Rules of Civil Procedure -- Electronic Discovery, *supra* n. 8.

³² See the following Federal Rules of Civil Procedure and accompanying rule commentary pertaining to the 2015 amendment: Rule 16(b), 26(a)(1)(B), 26(b)(2)(B), 26(f), 26(b)(5), 33, 34, 37(f) and 45. Also see the large and rapidly growing body of opinions by United States Magistrate Judges and District Court Judges in Florida and elsewhere around the country. Federal law is far more developed than Florida e-discovery law and provides useful guidance for lawyers and judges. That is not likely to change because Florida trial court decisions are seldom published.

³³ The Sedona Conference® publications are all available online without charge for individual use. See <http://www.thesedonaconference.org/>. As of 2013, judges have exclusive access to special judicial resources developed by The Sedona Conference® which are based on the aforementioned Sedona Principles and writings but tailored to the judicial perspective. Accordingly, lawyers who use, conform to, and cite pertinent materials from The Sedona Conference® will hopefully find judges enlightened on relevant policies and principles referenced *infra* notes 32-37.

³⁴ This can be downloaded after registration at: <http://www.thesedonaconference.org/dltForm?did=2007SummaryofSedonaPrinciples2ndEditionAug17as sent forWG1.pdf>.

³⁵ See "The Sedona Conference® Cooperation Proclamation," 10 Sedona Conf. J. 331 (2009 Supp.).

³⁶ http://www.thesedonaconference.org/dltForm?did=TSCGlossary_12_07.pdf.



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http://www.thesedonaconference.org/dltForm?did=Best_Practices_Retrieval_Methods_revised_cover_and_preface.pdf.

³⁸ http://www.thesedonaconference.org/dltForm?did=Achieving_Quality.pdf

³⁹ http://www.thesedonaconference.org/dltForm?did=Legal_holds.pdf.

⁴⁰ See e.g.: Ralph Losey's weekly blog: e-discovery team found at <http://www.e-discoveryteam.com> and his several books and law review articles on electronic discovery that are referenced there.

