

## ITEM 9.02 | FRAMEWORK FOR THE TRIAL LAWYER FACING E-DISCOVERY

1. Familiarize yourself with the client's electronic records and computer systems used for storing this ESI, including how they are distributed, maintained, deleted, and backed-up. If the client has a routine destruction policy for hard copies, or also for ESI (and most companies now do), address the issue of preservation immediately. Failure to preserve records, including ESI, may result in severe sanctions for the client and possibly counsel.

2. Ensure that written preservation hold notices are provided by the client to any key players within their control that instructs them to preserve any potentially relevant ESI in their custody, and to not alter or destroy potentially relevant ESI pending the conclusion of the lawsuit. Notice should also be provided to third parties who are believed to hold or control ESI that is likely to be relevant to issues in the case. Counsel should follow-up on these written notices by prompt personal communications with key players, and then periodic reminder notices thereafter. Caution should be exercised is relying upon key players to locate or collect potentially relevant ESI. In some circumstances such self-collection should not be permitted, or should be supplemented by bulk collection of all the custodian's ESI. Today bulk collection of all a custodian's email within a certain date range is the rule in all but small cases. Keyword filtering of bulk collection is also disfavored in all but smaller cases because of the known unreliability of keywords and concern that important evidence will be omitted. Mistakes are easily made in ESI preservation and collection, and counsel has a personal duty to supervise the preservation, search and collection of potentially relevant ESI. If counsel is not competent to carry out these responsibilities in a particular matter, then they should affiliate with other counsel who are competent. The hiring of non-law firm vendors in e-discovery cannot discharge an attorney's duty of competence and personal responsibility.

3. Inform the client of all obligations for discovery by both sides and develop a plan to protect privileged or private information. Again, counsel should be actively involved in client's ESI preservation and collection efforts.

4. Work with the client and IT experts, if required, to develop a plan to collect and review ESI for possible



production, including a review for private, privileged, or trade secret information that may be entitled to protection from open disclosure. Determinations of responsiveness, relevance, or qualification for confidentiality or privilege protections should not be delegated to the client, IT expert, or vendor as these are uniquely legal determinations for which counsel is responsible.

5. Determine the preferred format to make and receive production of ESI, typically either in the original native format, which would necessarily include all internal metadata of a document, or in some type of flat-file type PDF or TIFF format, with a load file containing the file's internal metadata. Metadata is an inherent part of all ESI and should be included in most productions. The removal of internal metadata from a document, which would include such information as who created the document, the date of creation, last date it was accessed, blind copy of an email, and the like, constitutes an alteration of the original electronic version of that document and is typically not desired or necessary. If there is a particular type of metadata of concern to the requesting or responding party, specific requests or objections should be made.

6. Determine whether expert legal or technical assistance, or both, may be needed to sort out legal or practical issues involving ESI and its media or equipment. Reach out to opposing counsel early to attempt to coordinate and cooperate on technical issues and set up lines of communication and cooperation between the IT technicians that may be retained by both sides to assist in the e-discovery efforts. It may be appropriate for the parties to retain third-party neutral experts in some cases with unusual or complex technical issues, or other e-discovery challenges, such as search of large disorganized collections of ESI.

7. Find out what information may be discoverable from the opponent and seek disclosure of their preservation efforts and intended production formats, and what ESI they will seek discovery of, including their metadata demands, if any. Send a request for the opponent to preserve electronically stored information as soon as possible and include a formal discovery request for such information at the earliest possible date.<sup>41</sup>

8. Evaluate the reasonability and suitability of the opponent's preservation, collection, and production plans,



including any search or production issues, and attempt early resolution of any disputes. This should be accomplished before any large productions are actually made so as to avoid expensive do-overs. Beware of preservation, collection, and search based on keyword matching alone. This approach is frequently ineffective and far better technological solutions are now available.<sup>42</sup> When keyword terms are used as part of a search and review protocol they should always be carefully tested, and should never be negotiated in the blind based on mere intuition by counsel that they will include most of the relevant evidence.

9. Determine whether discoverable ESI is available from multiple sources, including third parties. Frequently ESI documents, such as e-mail or draft contracts that have been communicated to or handled by multiple parties will contain useful additional or even conflicting information. Some sources of information are more accessible than others, meaning they are easier or less costly to access. Upon a proper showing under the rules, parties must be required to obtain information from the least burdensome source, and the court must limit unreasonably cumulative or duplicative discovery.<sup>43</sup>

10. Weigh the cost of ESI discovery and determine whether costs may be shifted to protect the client or whether the cost of discovery outweighs the potential benefit.<sup>44</sup>

11. Electronic discovery is typically conducted in phases wherein the most easily accessible and likely relevant ESI are searched and produced first, and then the necessity for further discovery is evaluated. Limiting factors for the first pass include accessibility, date range, custodians, volume, and secondary ESI storage.

12. Ensure to the extent possible that the value of the discovery sought and produced is proportional in the context of the case at hand.<sup>45</sup>

13. If any of the foregoing steps require expert consultation or assistance, find a suitable expert and involve the expert early enough in the process that preservation obligations for the client and opponent are timely invoked.<sup>46</sup> Again, parties should consider the advisability of sharing a neutral third-party expert, which can realize substantial cost and time savings.



*Trial Lawyers Section of the Florida Bar  
Conference of Circuit Court Judges  
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### Footnotes

<sup>41</sup> *Osmulski*, supra n. 29 (preservation obligations may occur before case is filed).

<sup>42</sup> *William A. Gross Construction Associates, Inc. v. American Manufacturers Mutual Insurance Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009); Losey, R. *Adventures in Electronic Discovery, Chapter Child's Game of "Go Fish" is a Poor Model for e-Discovery Search*, (West Thomson Reuters, 2011); *Da Silva Moore v. Publicis Groupe*, 2012 WL 607412 (S.D.N.Y. Feb. 24, 2012).

<sup>43</sup> Fla. R. Civ. P. 1.280(d) (the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that the discovery sought is unreasonably cumulative or duplicative, or can be obtained from another source or in another manner that is more convenient, less burdensome, or less expensive).

<sup>44</sup> Fla. R. Civ. P. 1.280(d)(1); (d)(2).

<sup>45</sup> Fla. R. Civ. P. 1.280(d)(2)(ii).

<sup>46</sup> For preservation triggers, see *Osmulski*, supra n. 29; *Gayer v. Fine Line Constr. & Elec., Inc.*, 970 So. 2d 424, 426 (Fla. 4th DCA 2007).

