

ITEM 9.07 | "SELF-HELP" DISCOVERY

Self-help discovery refers to the informal search and collection of electronically stored information outside the formal discovery process. Valuable information may be accessed without alerting the opponent or witnesses from whom or about whom the information is collected. A simple example of self-help discovery is obtaining information available on the internet about a party, witness, opposing counsel, issue in the case, industry or organization, or obtaining facts pertaining to the case. Using a Google or other search engine or a service or accessing social media⁷⁰ to get publicly available information through self-help methods can be cost-effective if properly done, but there are some caveats and cautions.

As with any collection of ESI for use in litigation, copying of the computer files should be done in a manner that does not alter or delete relevant information, such as contextual material or the metadata in or associated with the ESI. Self-collection by attorneys, attorney staff, or clients may be a dangerous practice due to technical limitations and increased risk of accidental or intentional deletion of electronic evidence. Further, the person who searches, finds, and collects information may end up being a witness to introduce the information. If the information is important enough to the litigation, it should be properly collected, stored, and preserved properly, and the collection should include information necessary for ultimate introduction of the ESI into evidence. This may require sophisticated or expert involvement.

Example: In an employment case, your employee client finds a government website that contains data in a spreadsheet form about the employer's industry that are relevant to issues in the case. The client takes a "screenshot" of the portions of the spreadsheet that apply to the employer and brings it to you. You put the information in your file in paper form for potential use in the case. What other steps may be considered with regard to this evidence? Answer: At this point, the file contains essentially a "picture" of a portion of ESI, so the client may ultimately need to testify at a minimum that the screenshot is a true and accurate depiction of what appeared on the website on the date and time of the screenshot. The client as well as the completeness and accuracy of the document are subject to challenge and cross-examination unless there is an admission on authenticity or admissibility from the opposing party. Spreadsheets may contain metadata, internal



calculations, footnotes, and other information that may be essential to the case. The data on the government website may change at any time or may not otherwise be available in the future, so a full and proper collection should be done right away by a sophisticated person, including contextual information and metadata. If necessary, use competent and effective witnesses to obtain publically available evidence. Proper collection, storage, and preservation of databases and spreadsheets can be technically challenging.

Self-help collection of information that is not clearly public information can be problematic. Self-help is only productive if it is done within the law.⁷¹ Efforts to access a computer or device of a party or witness or a person's email account may lead to sanctions or challenges on admissibility⁷² and potential disqualification of counsel in egregious cases, as where counsel has accessed privileged documents of the opposing party.⁷³ One basis for disqualification counsel is if counsel has obtained privileged documents of the opposing party.⁷⁴

Social media is a prolific source of information and a potential candidate for self-help discovery. Counsel should be familiar with the technology and characteristics of social media so as to be able to properly find, collect, and preserve information. For example, if discretion is needed when getting information from a party or witness' LinkedIn account, it is important to know that the target person will know who viewed their account unless the requesting person's LinkedIn settings are set to not disclose such access. Another example involves privacy settings on Facebook. Only limited information is available about a Facebook subscriber except for persons accepted as "Friends." However, it may be unethical to "Friend" an opposing party or witness for the sole purpose of extracting additional information from them on Facebook.⁷⁵ It may be necessary to request information subject to Facebook privacy settings through formal rather than self-help discovery.⁷⁶

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



Footnotes

⁷⁰ See DISCOVERY OF SOCIAL MEDIA ESI *infra*.

⁷¹ *O'Brien v. O'Brien*, 899 So. 2d 1133, 1137–38 (Fla. 5th DCA 2005)(where wife installed spyware on her husband's computer and retrieved the husband's on-line chats with other women, the trial judge correctly ruled that the evidence was not admissible because the conversations were illegally intercepted under the **Security of Communications Act**, Fla. Stat. § 934.03).

⁷² *Id.* Attorneys implicated in such improper behavior may be subject to discipline. *Fla. Bar v. Black*, 121 So. 3d 1038 (Fla. 2013)(attorney reprimanded for obtaining and keeping opposing party's iPhone which contained confidential and privileged information).

⁷³ *Castellano v. Winthrop*, 27 So. 3d 134 (Fla. 5th DCA 2010)(attorney disqualified after client illegally obtained opposing party privileged information and provided it to her attorney). The assessment and remedies vary depending on the findings and circumstances of the case after an evidentiary hearing to determine (1) whether counsel for a party possessed privileged materials, (2) the circumstances under which disclosure occurred, and (3) whether obtaining the privileged materials gave counsel an unfair advantage on material matters in the case. *Id.*

⁷⁴ *Id.*

⁷⁵ See *The Philadelphia Bar Assoc. Professional Guidance Committee, Op.* 2009-2 (Mar. 2009). Presumably the decision in Florida would be the same under Florida Rules. See Fla. R. of Prof. Cond. 4-4.1 (Truthfulness in Statements to Others) and 4-4.4 (Respect for Rights of Third Persons).

⁷⁶ Nucci, *supra* n. 16 (a personal injury case plaintiff's photographs on Facebook are discoverable regardless of privacy settings because there is no expectation of privacy for such information posted to others on Facebook).

