

ITEM 9.08 | CONFERRING WITH OPPOSING COUNSEL

Counsel are well advised to speak with each other at the commencement of the case concerning the preferred methods and format of production,⁷⁷ including topics as to what metadata fields are desired by the requesting party and the proposed preservation, culling, and search methods. Counsel should also discuss confidentiality concerns and attempt to reach agreement on these issues, as well as the related issues concerning the consequences of the inadvertent disclosure of privileged information. It is now common in the federal system for parties to enter into “Claw-Back” agreements protecting both sides from waiver from unintentional disclosure.⁷⁸ Florida now has a nearly identical rule that went into effect on January 1, 2011, in the form of Rule 1.285, Florida Rules of Civil Procedure (Inadvertent Disclosure of Privileged Materials). Clawback Agreements under the Florida Rule are anticipated and should be encouraged by courts and strengthened by court order. Since these agreements and protections are completely reciprocal, it is difficult to foresee legitimate grounds for opposition to this important safety net.

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

Footnotes

⁷⁷ See Rule 34(b)(2), Federal Rules of Civil Procedure, governing form of production. This essentially requires production of ESI in its original native format, or in another “reasonably useable” format, at the producer’s choice, unless the request specifies the form.

⁷⁸ See Rule 26(b)(5)(B), Federal Rules of Civil Procedure, and Rule 502, Federal Rules of Evidence.

