ITEM 9.09 | INSPECTION OF CLIENT COMPUTERS AND EQUIPMENT

One important issue in e-discovery concerning the limits on forensic examinations of a party's computers has already been addressed in Florida.[79] It follows without discussion, or much mention, a large body of federal and foreign state case law on the subject. Menke holds consistent with this law and protects a responding party from over-intrusive inspections of its computer systems by the requesting party.[80] The law generally requires a showing of good cause before such an inspection is allowed. The rules, both state and federal, only intend for parties, or third-parties, to make production of the ESI stored on electronic devices, not the devices themselves. This is a common novice mistake. Generally, the actual devices are only subject to inspection in unusual cases where you can prove that the party's search and production has not been reasonably or honestly performed or other even more rare circumstances.[81] The background and reasoning for this law are set out well in Menke:

Today, instead of filing cabinets filled with paper documents, computers store bytes of information in an "electronic filing cabinet." Information from that cabinet can be extracted, just as one would look in the filing cabinet for the correct file containing the information being sought. In fact, even more information can be extracted, such as what internet sites an individual might access as well as the time spent in internet chat rooms. In civil litigation, we have never heard of a discovery request which would simply ask a party litigant to produce its business or personal filing cabinets for inspection by its adversary to see if they contain any information useful to the litigation. Requests for production ask the party to produce copies of the relevant information in those filing cabinets for the adversary.

Menke contends that the respondent's representative's wholesale access to his personal computer will expose confidential communications and matters entirely extraneous to the present litigation, such as banking records. Additionally, privileged communications, such as those between Menke and his attorney concerning the very issues in the underlying proceeding, may be exposed. Furthermore, Menke contends that his privacy is invaded by such an inspection, and his Fifth Amendment right may also be implicated by such an intrusive review by the opposing expert.[82]

The appeals court agreed with Menke and granted certiorari to quash the administrative law judge's order requiring production of Menke's computers. The court held that production and search of a computer is to be conducted by the producing party so as to protect their confidential information. Menke suggests that the production of the computer itself is a last resort only justified "in situations where evidence of intentional deletion of data was present."[83] The Menke court concluded with these words, which also seem a good note on which to end this article:

Because the order of the administrative law judge allowed the respondent's expert access to literally everything on the petitioner's computers, it did not protect against disclosure of confidential and privileged information. It therefore caused irreparable harm, and we grant the writ and quash the discovery order under review. We do not deny the Board the right to request that the petitioner produce relevant, non-privileged, information; we simply deny it unfettered access to the petitioner's computers in the first instance. Requests should conform to discovery methods and manners provided within the Rules of Civil Procedure.

Disclosure of confidential information is not the only potential harm when a party is permitted access to the opposing party's computers. Another consideration relating to a request for access to the client's computers, equipment, or software is the potential of harm to the client's hardware, software, and data. Any foray permitted by the court must balance the need for the level of access sought versus the potential harm to the party producing access. This is another reason for using neutral, qualified experts to assist in discovery.

One infrequent exception to the high bar protecting access to a party's computer or personal device may be when there is a showing that the device may contain relevant information, and there is no less intrusive means of discovery other than access to the device. In Antico v. Sindt Trucking, Inc.,[84] evidence was presented in a wrongful death auto negligence case that showed that the decedent-driver was texting or talking on her iPhone at the time of the automobile accident at issue in the case. Over vague "privacy" objections, the trial judge ordered that the defense (requesting party) expert could examine the information on the decedent's iPhone over a 9-hour period around the accident, but the order strictly controlled how the confidential inspection must proceed.[85] The first district upheld the order as a proper balance of the need for the discovery and protection of privacy interests.[86]

However, the decision of the appellate court was apparently influenced by the plaintiff's failure to advance any less intrusive alternatives for discovery than access as prescribed by the trial court.[87]

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Footnotes

[79] *Menke v. Broward County School Board*, 916 So. 2d 8 (Fla. 4th DCA 2005).

[80] See: *Peskoff v. Faber*, 2008 WL 2649506 (D.D.C. July 7, 2008); *Bro-Tech Corp. v. Thermax, Inc.*, 2008 WL 724627 (E.D. Pa. March 17, 2008); *Sterle v. Elizabeth Arden, Inc.*, 2008 WL 961216 (D. Conn. Apr. 9, 2008); *Xpel Technologies Corp. v. Am. Filter Film Distribs*; 2008 WL 744837 (W.D. Tex. Mar. 17, 2008); *Henry v. Quicken Loans, Inc.*, 2008 WL 474127 (E.D. Mich. Feb. 15, 2008); *In re Honza*, 2007 WL 4591917 (Tex. App. Dec. 28, 2007); *Coburn v. PN II, Inc.*, 2008 WL 879746 (D. Nev. Mar. 28, 2008); *Ferron v. Search Cactus, LLC*, 2008 WL 1902499 (S.D. Ohio Apr. 28, 2008); *Johnson v. Wells Fargo Home Mortgage, Inc.*, 2008 WL 2142219 (D. Nev. May 16, 2008); *Anadarko Petroleum Corp. v. Davis*, 2006 WL 3837518 (S.D. Tex., Dec. 28, 2006); *Hedenburg v. Aramark American Food Services*, 2007 U.S. Dist. LEXIS 3443 (W.D. Wash. Jan. 17, 2007); *In re Ford Motor Co.*, 345 F.3d 1315, 1316 (11th Cir. 2003); *Ameriwood v. Liberman*, 2006 WL 3825291, 2006 U.S. Dist. LEXIS 93380 (E.D. Mo., Dec. 27, 2006).

[81] Menke supra n. 78 at 12. See also Antico, supra note 16 discussed below (defense made a showing of need for information on iPhone and plaintiff offered no less intrusive means for providing relevant information).

[82] Id. at 10.

[83] Id. at 8.

[84] Antico, supra n. 16.

[85] Antico, supra n. 16 at 167 ("[the trial court's order] limits the data that the expert may review to the nine-hour period immediately surrounding the accident; it gives Petitioner's counsel a front-row seat to monitor the inspection process; and it allows Petitioner the opportunity to interpose objections before Respondents can obtain any of the data."

[86] Id.

[87] Id. at 168.