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Florida's Journey Into the Age of Electronic Discovery Providing Uniformity With the Federal Approach (… for the Most Part)

The Florida Supreme Court just approved new civil procedure rules addressing the discovery of electronically stored information (ESI) in Florida state courts. The new rules are set to take effect September 1. The Florida Civil Rules Electronic Discovery Subcommittee proposed the new rules following years of study of how to remedy the conspicuous silence regarding all things eDiscovery under the current Florida Rules of Civil Procedure. As the significance of ESI in modern litigation continues to grow, the new rules will provide some needed guidance in Florida state courts.

Summary of Key Amendments

The changes to the rules specifically address or touch upon topics concerning the discoverability, retrieval, review and production of ESI and how they should be handled by Florida state courts and parties.[1] The changes are entirely incorporated into existing rules and specifically include amendments to address eDiscovery within Rules 1.200, 1.201, 1.280, 1.340, 1.350, 1.380 and 1.410 of the Florida Rules of Civil Procedure. Some of the key changes to the rules are as follows:

1. **Adoption of limitations on the discovery of ESI that is not "reasonably accessible."** Rule 1.280(d) essentially adopts the two-tiered standard for the discovery of ESI found in FRCP 26(b)(2)(B). That is, a person from whom discovery is sought may object to the discovery request on grounds that the information sought or the format requested is not readily accessible because of undue burden or cost. Then, either in response to a motion to compel or for a protective order, the person has the burden of making such showing. Even if such showing is made, the court may still order the discovery if the requesting party shows "good cause." In ordering production in those circumstances, the court may specify conditions of discovery, including that some or all of the expenses incurred by the producing party be paid by the requesting party. This change is intended to encourage early, meaningful and reasonable cooperation and communication among parties and attempt to avoid unduly burdensome discovery. In addition, while minimizing the frequency with which disputes must be resolved by the courts, the change will also provide the court with a framework for resolving disagreements about such information.
2. **Adoption of the federal proportionality rule, but only as to ESI.** This is perhaps the most highly anticipated change to the rules. Existing Florida rules do not contain any explicit discovery proportionality language, although some courts have applied proportionality considerations in practice. Other Florida courts, however, have simply relied on the general relevance or "reasonably calculated to the discovery of admissible evidence" standard in ordering very broad-based discovery of ESI. The new rule will bring uniformity in Florida by requiring that the burden and expense of discovery of ESI be weighed against its likely benefit. It is notable, however, that, unlike the federal rule, the Florida proportionality rule applies only to discovery of ESI and not all documentary discovery.

[1] "Proposed Changes to the Florida Rules of Civil Procedure to Address the Discovery of Electronically Stored Information."

Specifically, the revised rule instructs the court – in determining any motion involving discovery of ESI – to limit the frequency or extent of discovery otherwise allowed under the rules if it determines that (a) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source or in some other manner that is more convenient, less burdensome or less expensive; or (b) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action and the importance of the discovery in resolving the issues.

While the Subcommittee intended this change to help protect smaller parties from being overwhelmed by excessive discovery requests from parties with greater resources, the change should also offer some relief to those parties with large amounts of ESI (regardless of the amount of resources). In any event, this change is consistent with the core principle of keeping eDiscovery issues from being unnecessarily outcome-determinative due to resource imbalances.

3. **Adoption of the safe harbor found in Federal Rule 37(e) regarding the routine, good-faith operation of a computer system.** This change is not intended to excuse knowing or reckless destruction of relevant evidence. Rather, the amendment is in keeping with federal precedent, which makes clear that such spoliation does not constitute "routine, good-faith operation" of a computer system. In determining what constitutes good faith, the court may consider any steps taken by the party to comply with court orders, party agreements or requests to preserve such information.
4. **Protection from overbroad or unduly burdensome discovery for nonparties who are subjected to subpoenas for the production of documents.** The new rules harmonize Rule 1.410 (governing subpoenas) with Rule 1.280(d). Thus, the subpoena rule now includes specific safeguards for nonparties to object to the discovery of ESI based on undue burden or cost. This rule also includes the new "good cause standard" in Rule 1.280(d) as discussed above.

In developing these changes, the Subcommittee focused on enhancing predictability by tracking language and principles used in the federal rules so that existing federal precedent can be applied by Florida state courts and parties. Although federal court decisions interpreting the federal rules are not binding on Florida judges, they are nonetheless persuasive.[2] The new state rules will enable attorneys to more confidently refer to existing federal precedent for guidance on similar issues in state courts.

Departure From Federal Rules

No Meet and Confer Requirement

In large part, the Florida rule changes substantively track the federal rules; however, the new Florida rules differ from the federal rules in at least one important respect. The new Florida rules do not require an early "meet and confer"-type conference regarding eDiscovery as required under Rule 26(f) of the federal rules. The Subcommittee elected not to incorporate this provision in part citing the great variety of litigation in state court, the concern that the requirement could cause delay in otherwise routine matters that need to move forward on an expedited basis, and the likelihood that many cases will simply not necessitate that the parties engage in discovery of ESI.[3] Further, the Subcommittee noted that meet and confers are already required in larger Florida counties for

[2] *Dinter v. Brewer,* 420 So. 2d 932 (Fla. 3d DCA 198) citing *Gross v. Franklin,* 387 So. 2d 1046 (Fla. 3d DCA 1980).

[3] Id.

business cases under local court rules (e.g., circuit court rules in Miami), and therefore present either the requirement or opportunity to discuss ESI issues. Similarly, in "complex" designated cases, Florida already has a special rule that mandates Rule 26(f)-type conferences authorizing parties to discuss ESI issues (FRCP 1.201).

Although choosing not to make an ESI conference mandatory under the new rules, the Subcommittee did opine that ESI topics are entirely appropriate for discussion at a Rule 1.200 case management conference in non-complex cases as well. As such, the general case management list of topics in Rules 1.200 and 1.201 now includes the ability to address topics such as considering the voluntary exchange of ESI and stipulations for authenticity; considering the need for advance rulings from the court on admissibility; and discussing the possibility of agreements (whether by parties or by referral to a special magistrate, master, other neutral party or mediation) on preservation of evidence, the form in which such evidence should be produced, and whether discovery of such information should be conducted in phases or limited to particular individuals, time periods or sources. Certainly, these matters, if discussed early in the case, can make a significant difference in avoiding discovery disputes and other costs relating to the preservation, collection, review and production of ESI.

No Adoption of Pre-Suit Preservation Requirements

There also remains a significant discrepancy regarding preservation requirements in Florida and federal courts. The Subcommittee specifically highlighted the inconsistency between the trigger for the duty to preserve under Florida law and federal law. As held by the landmark eDiscovery decision *Zubulake v. UBS Warburg,* federal law makes it clear that the duty to preserve is triggered when a party reasonably should anticipate the likelihood of litigation.[4] Under Florida law, however, the general duty to preserve is triggered only "by contract, by statute, or by a properly served discovery request (after a lawsuit has been filed)."[5] This disparity between Florida and federal law can result in dangerous and inconsistent circumstances for litigators. Indeed, the conflict between these two standards makes it difficult for counsel to properly advise clients regarding their preservation obligations, especially given that the forum in which a litigation matter may be filed is usually not predictable.

Ultimately, the Subcommittee concluded that it lacked the authority to alter the common-law test regarding the duty to preserve evidence and recognized that this conflict will ultimately have to be addressed by the Florida Supreme Court. However, litigants should take note that the Florida common law spoliation remedy is still in effect. Under Florida case law, a party may be entitled to traditional common-law spoliation remedies when another party intentionally destroys known relevant information, either before or during litigation. The doctrine of spoliation arises when it is alleged that a crucial piece of evidence is unavailable because of the intentional actions of one of the parties in a case. A claim for spoliation of evidence compensates the plaintiff for the loss of recovery in the underlying case due to the inability to prove the case because of the intentionally lost or destroyed evidence.[6] Thus, this spoliation threat should serve sufficient to encourage the preservation of ESI in line with federal standards. Indeed, the Subcommittee's call for the Supreme Court to resolve this conflict and Florida's adoption of new eDiscovery rules may spur new jurisprudence more closely aligned with *Zubulake* and its progeny.

Overall, the amendments to the Florida rules are a vast improvement on the current state of the rules and will provide much-needed guidance for Florida lawyers and judges.

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[4] *Zubulake,* 220 F.R.D. 212 (S.D.N.Y, 2003) ("The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation").

[5] *Royal & Sunalliance v. Lauderdale Marina,* 877 So. 2d 843 (Fla. 4th DCA 2004) (holding that Florida cases do not establish a duty to preserve when litigation is "merely anticipated"); see also *Gayer v. Rind Line Constr. & Elec., Inc.,* 970 So. 2d 424, 426 (Fla. 4th DCA 2007).

[6] *Vegas v. CSCS Int'l, N.V.,* 795 So. 2d 164 (Fla. 3d DCA 2001).

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