

Advocacy and Technology Tips When Working From Home During COVID-19 And Beyond

Outline for eDiscovery Portion of Webinar

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- A. How is data being handled, stored, managed and used?
 - a. What technology measures do you have in place for your law practice to ensure client confidentiality and proper handling of sensitive client information and communications?
 - b. Are you storing documents locally, on the cloud, or back on your main servers at the office?
 - c. Attorneys and clients mishandle or store data inappropriately if working outside of their usual environment
 - d. Questions you should be asking yourself, asking your clients, and possibly asking in discovery requests to the opposing party:
 - i. Who has possession, custody, and control over data?
 - ii. Are there policies in place for remote team functions like Slack and Microsoft teams?
 - iii. What policies are in place for preserving the data your clients have, or worse that you as their attorney have, flowing through your home devices and network?
 - iv. What efforts are being done to identify, implement or adjust document destruction policies?

- B. eDiscovery Sources: Devices/Hardware/Tools
 - a. What if you or your client are using a personal device because there is no company device available?
 - b. Creating or updating the “bring your own device” (BYOD) policy for each kind of device, desktops, laptops, tablets, cellphones etc.
 - c. Are employees storing documents locally because of difficulties connecting remotely?
 - d. Are you or your client using consumer level communication tools, Wechat, Whatsapp Facebook messenger?

- C. eDiscovery Sources: Software, Social Media, Apps and Platforms:

- a. Facebook, Skype , Whatsapp, Snapchat, Instagram, Twitter, LinkedIn, TikTok, Vine, Pintrest, SoundCloud, Waze
 - i. You and your clients need to be aware of the terms and conditions of these different Software, Social Media, Apps and Platforms
- b. In an actual discovery gathering process during the pandemic, how can you get access to someone’s devices? Are there password protections put into place? Many organizations are set up to specifically prohibit remote data collection. Others are turning to VPN connections that would require administrator level permissions.

D. Discovery Process and Requests:

- a. This is the time to start using proper eDiscovery vendors and tools.
 - i. Using a vendor for authenticated collection of discovery is considered among best practices now.
 - ii. The Florida Bar has a technology competency requirement, so you can no longer pretend that eDiscovery doesn’t really factor into your client’s case.
 - iii. During and likely “after” COVID you should consider using a vendor who can conduct remote contactless collection of data. The key is to establish that they can do so in a secure and verifiable fashion that would be admissible in court.
- b. Cell Phones/Tablets:
 - i. Cell Phones and Tablets are some of the most used devices, and often rank high on topics of discovery disputes amongst the courts.
 - ii. Important Florida Cases for you to know about:
 1. Menke v. Broward County School Bd, 916 So. 2d 8 (Fla. 4th DCA 2005) – requesting party not entitled to unfettered access to Plaintiff’s computers.
 2. Holland v. Barfield, 35 So. 3d 953 (Fla. 5th DCA 2010)- trial court caused irreparable harm to defendant by ordering defendant to produce her hard drive and phone.
 3. Weaver v. Myers, 229 So. 3d 1118 (Fla. 2017)- Constitutional right to privacy in cellphone continue after death
 4. Antico v. Sindt Trucking Inc., 148 So. 3d 163 (Fla. 1st DCA 2014)- Trial court did not err by allowing company's expert to retrieve data from driver's cellphone under limited and controlled conditions
 - iii. Cell Phone preservation issues:
 1. Present different challenges in preservation, collection, processing, review & production
 2. Is device the source of unique data
 3. Sequester in “airplane mode”

4. Is software available to do the job
 5. Hire a pro to image
 6. Celebrite, Micro Systemation, Oxygen Forensic Suite
 7. Encryption may be insurmountable
- c. Note that some Florida State judges have standing orders and Early Case Management (ECA) requirements on eDiscovery, so be prepared.
- i. Are you required to make a Case Management report and to confer with opposing counsel.
 - ii. Given these COVID scenarios of remote work, the “no anticipated ESI” answer is likely no longer a valid one. Expect now that there is absolutely ESI available.
 - iii. Example: In Palm Beach County 15th Judicial Circuit divisions/judges with ESI Standing or Proposed Orders:
 1. Judge Burton—Family (FX) and Probate (IY)
 2. Judge Ticktin—Family (FZ) and Probate (IZ)
 3. Judge Coates—Civil (AN)
 4. Judge Kastrenakes—Civil (AF)
- d. Those of you who practice in Federal Court more often are likely aware of FRE 502(d), and should expect that there is going to be more of that rule being called upon.