

IN THE CIRCUIT COURT OF THE ____
____ JUDICIAL CIRCUIT IN AND
FOR _____ COUNTY, FLORIDA

Circuit Civil Division

Case No.:

Plaintiff(s),

v.

Defendant(s).

_____ /

STANDING ORDER ON ESI DISCOVERY

Pursuant to Florida Rule of Civil Procedure 1.200 [and based upon the matter designation appearing on the Form 1.997 (Civil Cover Sheet) filed with this action] the Court hereby *sua sponte*

ORDERS and ADJUDGES:

1. Plaintiff's/Petitioner's counsel shall serve this Order upon counsel for Defendant(s)/Respondent(s) within ten (10) days of the first appearance of counsel for each such Defendant/Respondent, and shall schedule a Meet and Confer with, and among, all such counsel within 60 days of the first Defendant/Respondent being served.

2. Unless good cause otherwise exists, the parties should not seek the Court's intervention on matters involving ESI discovery prior to completion of the initial Meet and Confer. Such matters should be initially addressed before the Court at a Case Management Conference to be scheduled on the Court's Uniform Motion Calendar no later than ten (10) days after the Meet and Confer. Subsequent hearings for determination of more complex ESI matters may be scheduled at that time. **[This provision may be left out if alternative provision 32, below, is preferred]**

3. *As a general matter, this Standing Order is not intended to establish that every consideration raised herein is applicable to each and every case.* It remains largely upon counsel to conduct good-faith, ESI discovery with the appropriate level of professional competence aimed at achieving the reasonably efficient and proportionate results required under the Florida Rules of Civil Procedure. However, if the parties determine by mutual agreement that, owing to the limited nature of the issues and/or circumstances likely involved in the case, the ESI discovery procedures and considerations outlined below are inapplicable, the parties may opt out of compliance with this Order after service of the same has been completed. Election to opt out shall be by written stipulation signed by all counsel and filed with the Court within sixty (60) days of the first Defendant/Respondent being served with the Order. Counsel's signature shall constitute a certification as officer of the Court that he/she is sufficiently familiar with the issues and/or circumstances likely involved in the case and has made an independent determination that the ESI discovery topics and considerations outlined below are substantially inapplicable.

Before the Meet and Confer, counsel for the parties shall:

4. Make an initial assessment regarding whether the client's personal/business smart phone(s) or other mobile computing and storage devices (e.g. tablets, laptops, smart watches, Fitbits, thumb drives, on-board data recorders, etc.) are likely to contain discoverable ESI, and consider taking steps to preserve the same.

5. Make an initial assessment regarding whether the client's social media accounts (FaceBook, SnapChat, Twitter, Linked-In, Tumblr, WhatsApp, etc.) or other internet-based, third-party service provider accounts (e.g. mobile banking, Paypal, eBay, Shutterfly, Box, Office 365, etc.) are likely to contain discoverable ESI, and consider taking steps to preserve

the same. Because many of these applications involve an ever-increasing level of functionality and cross-platform or device integration, it is particularly important for counsel to understand how the applications being used by the client operate and the use the client routinely makes of each, if any. It is also important for counsel to understand that some data, such as with SnapChat and WhatsApp, may only be stored on the client's mobile device and for only a short time.

6. Make an initial assessment of any other types and/or sources of ESI within the possession, custody or control of the client that is likely to be discoverable.

7. With respect to business clients, identify the client's IT management personnel and discuss with them how relevant ESI is routinely generated, shared and stored by the business, with an emphasis on understanding the likely process(es) and challenges inherent in locating and retrieving such information, including the client's in-house capability/capacity to realistically/appropriately assist with performing these functions.

8. Make an initial assessment of the client's document retention plan (including routine deletion/archiving schedules) or default data management habits and practices, and consider the need for any temporary suspensions as part of a litigation hold. This determination extends to individual clients in non-commercial contexts who may routinely use Internet-based email accounts (e.g. Gmail, Yahoo, Hotmail, etc.) or other data-hosting services (e.g. DropBox, One Drive, Google Drive, Amazon AWS, etc.) with default and customizable deletion, retention and/or archiving functions and settings.

9. Ensure that the client has been issued notice of any necessary litigation holds regarding the need to preserve identified categories of ESI and follow up to confirm the client's initial and ongoing compliance. An effective litigation hold notice is one that provides the client with clear and definitive instructions at the ESI custodian's level for identifying and designating

targeted ESI for preservation/non-deletion and requires the complying custodian to affirmatively indicate his or her compliance in response. Effective compliance may be an iterative process depending on nature and complexity.

10. Determine the extent to which any relevant hard copy documents or ESI may have already been deleted, lost or destroyed, including the specific circumstances surrounding any such deletion, loss or destruction.

11. Discuss with the client the identity and character of all known or anticipated ESI to be requested from the opposing party and/or relevant third parties, including ESI types, sources, quantity, locations, accessibility, relevant time frames and the extent to which the ESI sought is still being actively utilized in the ordinary course.

12. Make an initial assessment as to whether the complexity or extent of ESI issues likely involved in the case requires hiring a third-party eDiscovery expert and/or eDiscovery co-counsel to ensure compliance with professional standards of competency in this area of the law.

To further prepare for the Meet and Confer, counsel shall:

13. Determine and be prepared to discuss foreseeable personal privacy issues implicated by potential ESI sources such as the client's personal mobile computing and storage devices or the client's personal online social media activity. Adequate preparation should include identification of primary or alternate sources of the same ESI that limit or do not implicate privacy concerns; identification of the make (e.g. iPhone or Samsung) and operating system/version (e.g. iOS 10 or Android 9.0) of the relevant computing devices in use; determination of the features and functionality of relevant social media/mobile applications in use; and understanding of the client's historical utilization of any such relevant devices or applications, including for limited or multiple purposes, degree of connectivity with other devices and management of privacy and back-up

settings.

14. Identify witnesses and records custodians (specifically or categorically) who are believed to have generated, received, and/or maintained potentially discoverable categories of ESI relevant to the claims and/or defenses set forth in the pleadings. In complex or large business enterprise contexts, designate a client ESI liaison through which to manage and supervise compliance with eDiscovery-related tasks and obligations.

15. Further define the nature and extent of the client's sources of potentially discoverable ESI, and determine whether any such sources should be identified as not "reasonably accessible" within the meaning of Fla. R. Civ. P. 1.280(d)(1). This designation must be based upon counsel having an adequate understanding of the specific barriers to accessibility involved, including logistical, technological and economic considerations.

16. Determine the methodology/technical protocol likely best suited for the efficient and timely collection of the client's ESI under the circumstances, including the ability to provide auditable proof that collection has been properly performed. Unsupervised or poorly-directed client self-collection is rarely appropriate and can constitute a breach of counsel's professional obligations even in the presence of sophisticated client-IT personnel. Consider whether the complexity or extent of the client's likely ESI collection, review or production issues require hiring a third-party eDiscovery expert and/or eDiscovery co-counsel to ensure compliance with professional standards of competency in this area of the law.

17. Make an initial assessment as to the preferred format in which to produce your client's ESI and the preferred format in which to receive ESI production from the opposing party, taking into account such factors as: (a) whether dynamic file formats (e.g. Excel, PowerPoint, etc.) or proprietary, video or internet file formats (e.g., CAD, AVI, HTML, etc.) are anticipated; (b) the

amount of data likely to be produced; (c) the relevance of metadata to authenticity and searchability; (d) the flexibility of hosting tools and review platforms to be used, if any; (e) the use of legal service and/or eDiscovery vendors; (f) and costs.

18. Determine whether potentially discoverable ESI important to the case is generated or maintained by the client or opposing party in a business database application (e.g. QuickBooks, CAD, Timberline, SAP, NextGen, Salesforce, etc.) and confer with client custodian as to the application's ability/flexibility to run and generate informational reports. Consider whether a snapshot-in-time report(s) should be taken where important data is changing over time.

19. Determine what resources will be needed to perform relevancy and privilege reviews of ESI, the method for electronic redaction and/or designation of confidential materials, document control identification (electronic Bates numbering), and what would constitute a duplicate or near-duplicate for purposes of excluding or including in the collection or production phases.

20. Compile a list of proposed keyword search terms and phrases for discussion at the Meet and Confer as well as any other search parameters, such as Boolean modifiers, limiting time frames, custodian or user groups, and excludable file types. Experience has shown that the use of even well-designed keyword searches, alone, often fails to capture a significant amount of responsive information while at the same time collecting far too much irrelevant material. It is the obligation of both the requesting party and the receiving party to collaboratively construct a thoughtful search protocol that includes testing of initial collection/culling efforts for agreeable precision and recall rates in advance of final production. Also, consider whether there is a basis for suggesting the parties pursue a phased or prioritized approach to some or all the likely ESI at issue and whether a more sophisticated or hybrid search methodology should be considered, such

as algorithm-based technology assisted review.

21. Consider and prepare proposed confidentiality agreements and claw back agreements for consideration at the Meet and Confer and whether one eDiscovery vendor can be shared between the parties to centralize processing and review and cut down on costs.

NOTE: An informative model Stipulation Establishing Electronic Discovery Protocol developed by members of the Florida Bar and former members of the Florida judiciary be found at: <http://www.flabizlaw.org/files/esiprotocols2014.pdf>.

At the Meet and Confer, counsel shall:

22. Meet and Confer: The intensity of the reasonably anticipated ESI issues should generally dictate the scope of the Meet and Confer in terms of time set aside, necessary persons in attendance, and prepared materials and information on hand. A client representative with appropriate knowledge should almost always be in attendance or immediately available by phone. The Meet and Confer ***is not*** the first time counsel should be considering or gathering readily available information concerning the items listed in provisions 3 through 21 of this Order, *supra*.

23. ESI in general: Determine the extent to which discovery will likely include ESI, including a fulsome discussion of the clients' relevant use of mobile communication and computing devices, social media activity and accounts, home computing devices and cross-platform, cross-device and/or cloud computing usage. In commercial contexts, counsel should also discuss the basic structure of their clients' computing systems/environment, relevant software, database and data distribution issues, any relevant Internet presence or activity, and any implicated data privacy compliance concerns. Counsel shall attempt to agree upon steps each side will take to segregate and preserve ESI to avoid accusations of spoliation or the creation of unnecessary and avoidable burden and/or expense. This discussion may require the voluntary disclosure of types and sources of responsive or likely discoverable ESI maintained by or on behalf of the client and/or

the steps already taken to segregate and/or preserve such ESI. Counsel should also determine whether this matter should be considered Complex Litigation pursuant to Rule 1.201.

24. E-mail: Counsel shall attempt to agree upon the scope of e-mail discovery and e-mail search protocol through initial search terms/concepts/parameters and other search methodologies, including technology assisted review. At the very least, counsel must be prepared to intelligently discuss the following: (a) the basic characteristics of the client's email technology, distribution and use; (b) initial search parameters/concepts such as date ranges, key email user/custodian addresses, unique terms, nomenclature and proper nouns, and any known terms or criteria prone to false hits; (c) likely importance or value of email threading and maintaining parent/child relationships with email attachments; (d) importance of searchability within email attachments; (e) and specific fields of metadata to be captured.

25. Deleted information: Counsel shall attempt to agree on whether there is responsive or likely discoverable information that has, or may have been, deleted (as opposed to irretrievably lost or destroyed), the extent to which recovery of this deleted information is important to the determination of a material fact at issue in the case, and how the costs of restoration of such deleted information shall initially be borne subject to taxation at the end of the case, if appropriate. Whether the information was deleted as a result of the routine, good faith operation of an electronic information system will have bearing on the latter determination. It is the Court's expectation that deleted information will rarely pose a significant issue in the vast majority of the cases that come before it.

26. Embedded data and metadata: Counsel shall discuss whether embedded data or metadata exists with respect to any responsive or likely discoverable information, whether it will be (or has been) requested and produced, and how to handle determinations of privilege or

protection of work product. It is the Court's expectation that counsel will understand the difference between "file" metadata, which is often relevant or even critical to complete ESI production, and "system" metadata, which, with a few exceptions, is not.

27. Back-up and archival data: Counsel shall attempt to agree on whether responsive or likely discoverable back-up and/or archival data exists, the extent to which such data is needed, the issues known or to be determined with respect to the restoration and search of such data and who will initially bear the cost of obtaining such data subject to taxation at the end of the case, if appropriate. Please also refer to provision 29 of this Order, *infra*.

28. Format: Counsel shall attempt to agree on the format or formats to be used in the production of ESI and on Bates numbering or other document control identifiers. Based upon the ESI likely to be produced, counsel may consider the use of an internet-based repository or review platform where ESI from all parties can be hosted and reviewed and the costs shared subject to taxation at the end of the case, if appropriate.

29. Reasonably accessible information and costs: The Court expects that most parties' discovery needs will be satisfied from reasonably accessible sources. Counsel shall attempt to determine if responsive ESI is not reasonably accessible because of undue burdens and costs, including whether the burden/cost are the result of ordinary course circumstances or otherwise. If either side intends to seek discovery of ESI that is not reasonably accessible, counsel shall discuss: (a) the burdens and costs of accessing and retrieving the information; (b) the needs that may establish good cause to require production of all or part of the information, bearing in mind controlling concepts of proportionality; and (c) conditions to obtain and produce this type of information such as scope, time frame and allocation of costs.

30. Privileged or trial preparation materials: Counsel shall attempt to reach an

agreement about what will happen in the event that privileged or trial preparation materials are inadvertently disclosed. *See* Fla.R.Civ.P. 1.285. Counsel may agree to employ a “quick peek” methodology whereby the responding party provides certain requested materials for initial examination without waiving any privilege or objection. Counsel may also agree to a “clawback agreement” whereby materials that are inadvertently disclosed are returned to the responding party.

31. Sequence of Production: Counsel shall address the most efficient process(es) to search, collect, preserve and produce ESI. A rolling production should be considered if the volume of production is likely to be significant. Further, the parties should consider phasing discovery by first producing ESI from sources and custodians that have the most relevant information.

For the Joint Case Management Report, counsel shall:

32. At least five (5) business days prior to the initial Case Management Conference required by provision 1 of this Order, *supra*, counsel shall draft and file a joint report regarding all matters involving the anticipated course of discovery, including the results of their initial ESI Meet and Confer. Any stipulations reached at the Meet and Confer regarding the scope, conditions or protocol for preserving, searching, collecting, and/or producing ESI in this case should be filed prior to the initial Case Management Conference as well. *See* Fla.R.Jud.Admin. 2.505(d).

33. To the extent the parties are not able to resolve or adequately address all identified or reasonably anticipated preliminary discovery issues involving ESI at the initial Meet and Confer, the joint report shall contain a detailed description of the unresolved or open issues, the specific circumstances believed to be inhibiting resolution, and, where possible, any proposed courses of action or “next steps.”

Alternatively:

32. Counsel for the parties shall **jointly** prepare, execute and file a short Notice of

Compliance confirming that they have met the requirements of this Order. If the Notice of Compliance is filed within ten (10) days of the Meet and Confer, counsel for the parties need take no further action to comply with this Order, absent further motion by the parties or order of this Court. If Notice of Compliance is not filed within the ten days, Plaintiff/Petitioner shall notice a Case Management Conference pursuant to 1.200(a) for Uniform Motion Calendar to address the specific issues that have resulted in the lack of compliance.

ORDERED in Chambers at _____, Florida on _____, 2018.