

Electronic Discovery and Ethics in 2016 and Beyond

A Post Rules Amendments Overview

**Florida Business Law Section
Electronic Discovery and Digital
Evidence Committee
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There is now an International Standard Definition of Electronically Stored Information

- ISO/IEC Standard 27040
 - **Electronically Stored Information** - Data or information of any kind and from any source, whose temporal existence is evidenced by being *stored* in, or on, any electronic medium:
 - Electronically Stored Information (“ESI”) includes traditional e-mail, memos, letters, spreadsheets, databases, office documents, presentations, and other electronic formats commonly found on a computer. ESI also includes system, application, and file-associated *metadata* (3.26) such as timestamps, revision history, file type, etc.
 - Electronic medium can take the form of, but is not limited to, *storage devices* (3.45) and *storage elements* (3.47).



Florida's Rules of Civil Procedure – A Quick Summary Comparison

- The Florida eDiscovery rules became effective in 2012.
- They are nearly identical with the Federal Rules of Civil Procedure.
- There are some very pronounced differences.
 - No meet and confers.
 - No mandatory case management conference/order.
 - No Rule 502 equivalent.
 - No duty to supplement.
- Florida courts will be influenced by Federal decisions until there is a body of Florida State decisional authority.
- We will compare and contrast the Florida rules in passing.



Florida 2012 Amendments – Where are the Changes?

1.200 (Pretrial Procedure)	1.201 (Complex Litigation)
1.280 (General Provisions Governing Discovery)	1.340 (Interrogatories)
1.350 (Production of Documents)	1.380 (Failure to Make Discovery; Sanctions)
1.410 (Subpoena)	1.285 (Inadvertent Disclosures)



But Wait. Newsflash, December 1 2015:

Discovery at the Brink of Change

In 2006, the Federal Rules of Civil Procedure, were amended to expressly permit electronic discovery.

On December 1, 2015, additional amendments to the Federal Rules of Civil Procedure took effect. Several of the amendments have a direct impact on the conduct of discovery, including electronic discovery.



Summary of Amendments

- (1) Foster effective judicial case management early on in the action;
- (2) Keep discovery proportional to the underlying action; and
- (3) Achieve better cooperation among counsel in regard to preservation and production of e-discovery and ESI.



Federal Amendments in 2015 Relating to ESI and eDiscovery

- **Rule 1 (Scope and Purpose)**
- **Rule 16 (Pretrial Conferences, Scheduling, Management)**
- **Rule 26 (Duty to Disclose; General Provisions Governing Discovery)**
- **Rule 34 (Producing Documents, Electronically Stored Information)**
- **Rule 37 (Failure to Make Disclosures or to Cooperate in Discovery; Sanctions)**



The Federal Rules in Transition

Rule 1: “[These rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy and inexpensive determination of every action and proceeding.”



Amended Rule 26: Proportionality Considerations Take Preeminence

Rule 26(b)(1): Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any non-privileged matter that is relevant to any claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties resources, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope need not be admissible to be discoverable.

The old standard of “reasonably calculated to lead to the discovery of admissible evidence” is gone.



Amended Rule 26: Electronic Discovery

– Rule 26(b)(2)(b):

- A party need not provide discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost.
- On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that information is not reasonably accessible because of undue burden or cost.
- If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, **considering the limitations of 26(b)(2)(c)**. The court may specify the conditions for the discovery.



Amended Rule 26: Limitations on Electronic Discovery

Rule 26(b)(2)(C): On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- **(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1)**



Amended Rule 26 Considerations

- How to decide “proportional” discovery?
 - How much eDiscovery, preservation will depend on the nature of the litigation, with factors including:
 - Simple Cases
 - Complex Cases – mass tort, class actions
 - Patent, Trademark, Copyright
 - Commercial Disputes
 - Discrimination cases
 - HIPAA, Sarbanes Oxley, Data Breach
 - Whistleblower (Dodd-Frank) case

An Extreme Example?

CASE IN POINT

by Tom Fishburne

OUT-OF-PROPORTIONALITY



© 2010

CASECENTRAL.COM / CASE IN POINT



Amended Rule 26 Considerations

- **Rule 26(a)(1)**
 - **Initial Disclosures**
 - Persons having discoverable information (and subjects of that information) in support of claims or defenses.
 - Copy, or description by category and location of, all documents and electronically stored information a party has in its custody, control or possession and may use to support its claim or defense (unless for impeachment).
 - **Parties required to supplement.**



Amended Rule 26 Considerations

- **Timing of Discovery**
 - **Commencement:** Only after parties meet and confer pursuant to Rule 26(f).
 - Unless otherwise permitted by stipulation or court order.
 - **Early Rule 34 Requests (new)**
 - Service on party permitted >21 days after service of summons and complaint.
 - Considered served at FIRST Rule 26(f) meet and confer.
 - **The Lawyers Meet and Confer**
 - Attorneys for parties must “meet and confer” before starting discovery.
 - Counsel must discuss any issues about disclosure or discovery of ESI.



Amended Rule 26 Considerations

- **Rule 26(f) Meet and Confer Obligations**

- **Timing:**

- As soon as practicable, but at least 21 days before scheduling conference or Rule 16(b) scheduling order due date

- **Topics Required for Discussion (NEW)**

- Phasing?
 - Disclosure, discovery or preservation of ESI
 - Form or format of ESI production
 - Privilege/Work Product Issues and whether to request order pursuant to Fed.R.Evid. 502



Amended Rule 26 Considerations

- **Rule 26 Counsel Meet and Confer (cont'd):**
 - Consider having a technology expert present to discuss discovery context (about your records management program).
 - You, as counsel, will (hopefully) have an IT expert present (that might be you) to discuss discovery context.
 - Opportunity to negotiate eDiscovery to ensure production transparency.
 - Must learn about your client's ERM program.



Amended Rule 26 Considerations

- **Rule 26(g) Certification**

- Disclosure

- Complete and correct as of time made.

- Request/Response/Objection

- Consistent with rules and warranted by existing law (or non-frivolous argument for change).

- Not interposed for improper purpose (to delay, harass, increase cost, etc.).

- Neither unreasonable nor unduly burdensome...

- Sanctions for Improper Certification

- May be imposed on party, counsel or both.



Contrast with 2012 Amendment to Rule 1.200 and Rule 1.201

- Rule 1.200 was amended to allow the trial court to consider various ESI (and other) issues related to electronic discovery during a pretrial conference, but did not add a meet and confer.
- Rule 1.201 (Complex Litigation) was amended to require the parties in a complex civil case to address how ESI should be preserved and the form in which it should be produced.



Rule 29 - Stipulations About eDiscovery

- Parties can agree to limit or expand scope.
- The parties might enter into an stipulation for ESI production protocol:
 - What data is to be searched? (active, archived, back-up tapes, legacy systems)
 - What media is to be searched? (servers, cloud, individual laptops, cellular telephones)



Rule 26(d) –Service of Discovery Requests

- Discovery requests may be served with summons and complaint, but 30 day response time does not commence until after the first Rule 26(f) conference.
- Different than the Florida Rules of Civil Procedure, which permits service of discovery with summons and complaint, but defendant has 45 days from service date to respond.



Privilege and Waiver: Fed.R.Evid. 502 Orders

- Parties required to discuss whether to seek orders “under Federal Rules of Evidence 502” regarding privilege waiver.
- ESI is always ripe for a claw-back type provision.
- There is no Florida Rule of Civil Procedure exactly the same but you do have Rule 1.285 dealing with the inadvertent disclosure of privileged materials.



Rule 16(b) Pre-Motion Conferences

- Rule 16(b)(3)(B)(v) – The scheduling order may now “direct that before moving for an order relating to discovery, the movant must request a conference with the court.”



Rule 34 – ESI Discovery Requests, Responses and Objections

- Rule 34 Requests
 - Rule 34(a)(1)(A)
 - ESI Discovery Requests for any designated documents or ESI
 - Rule 34(a)(2) – ESI Discovery Requests
 - Inspect, measure, test or sample
 - Rule 34(b)(1)(c) – ESI Discovery Requests
 - Requesting party may designate ESI format
- Rule 34 Responses/Objections
 - Rule 34(b)(2)(b) – Responding party must produce as requested or permit inspection OR
 - State with specificity the grounds for objection
 - May state that it will produce copies of ESI instead of permitting inspection
 - Rule 34(b)(2)(c) – Must state basis for withholding



Rule 34 – ESI Discovery Requests, Responses and Objections

- **Rule 34(b)(2)(D) ESI Production –**
 - Response may state objection to ESI request but must be specific
 - If Objection is made, or no form specified then:
 - Producing party must state form or forms it intends to use (think cram-down)
 - Must also state when production will actually be made.
- **Rule 34(b)(2)(E) ESI Production – Unless otherwise stipulated or ordered by court....**
 - **Rule 34(b)(2)(E)(i):** ESI must be produced as kept in usual course of business **OR** organize or label them to correspond to categories in request
 - **Rule 34(b)(2)(E)(ii):** If no ESI form requested, as ordinarily maintained **OR** reasonably usable
 - **Rule 34(b)(2)(E)(iii):** A party need not produce ESI in more than one form



Rule 34 – ESI Discovery Requests

- **Rule 34 – ESI Discovery Requests (amended)**
 - ~~All relevant ESI or information that could lead to the discovery of relevant ESI-OLD~~
 - Any non-privileged matter that is relevant to any claim or defense **and proportional to the needs of the case...**
 - Producing Party can object as overbroad but must state whether anything is being withheld on the basis of the objection.
 - An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been “withheld.”



Compare Florida Rules of Civil Procedure

- Rule 1.280 (General Provisions Governing Discovery) was amended to expressly authorize discovery of ESI.
- Rule 1.280 was also amended to add new subdivision (d), which provided some specific limitations on discovery of ESI. The producer of the ESI can assert undue burden or cost but court may order production anyway based on good cause. Also, court can provide for cost shifting.



Production Under New Florida Rules

- Summary of production process for ESI under revised Rule 1.350:
 1. Request for ESI may specify the form in which ESI is to be produced.
 2. Producing party can object and state form it intends to use.
 3. If no form specified, the producing party must produce the ESI in form in which it is ordinarily maintained or in a reasonably usable form.



Rule 37, Then and Now

- **Rule 37 and Evidence Destruction**
 - **UNTIL DECEMBER 1, 2015:** If ESI has been destroyed, and...
 - if it turns out that your client has a poorly designed, enforced, or monitored ERM program, sanctions may be imposed on your enterprise (think \$\$\$ and losing)
 - if it turns out that your client has a defensible ERM program directed to records retention and destruction, and that program is operated in good faith, you can take shelter under a “safe harbor” rule and no sanctions will be imposed
 - **POST-DECEMBER 1, 2015**
 - The amended rules may engender new interpretive decisional authority BUT...
 - Bad faith and prejudice will remain sanctionable behavior



Rule 37(e) Failure to Preserve - Spoliation

- If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
 - (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
 - (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
 - (A) presume that the lost information was unfavorable to the party;
 - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.



Rule 37 –Sanctions – ~~Provide~~ Preserve ESI

- **Rule 37(e):** Failure to ~~Provide~~ Preserve ESI:
- **OLD:** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide ESI lost as a result of the routine, good faith operation of an electronic information system.
- **NEW:** It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures.



Florida Rule 1.380 as Amended in 2012

- (e) Electronically Stored Information; Sanctions for Failure to Preserve. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.

But see, League of Women Voters of Fla. v. Detzner, 40 Fla. L. Weekly S 432 (July 9, 2015).



ESI

- Because electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere.
- The new rule applies only if the lost information should have been preserved in the anticipation or conduct of litigation and the party failed to take reasonable steps to preserve it.



What Do The Parties Really Want?

- **FOR REQUESTING PARTIES:** Relevant, non-privilege information and relevant facts (including ESI) for the client's case.
- **FOR PRODUCING PARTIES:** A defensible eDiscovery project management policy so that the client can defensibly (and with minimum burden and cost) avoid discovery abuse or evidence destruction practice before the court.



Ethics – Evolution or Revolution

- Ethical obligations remain the same (and may be heightened or mitigated by the addition or amendment of the Florida Bar's Rules of Professional Conduct).
 - The application of ethical obligations to the digital world presents new challenges.
 - Competency in technology is on the horizon.



Ethics Rules Relevant to e-Issues

- 4-1.1: “Competence”
- 4-1.3: “Diligence”
- 4-1.6: “Confidentiality of Information”
- 4-3.2: “Expediting Litigation”
- 4-3.3: “Candor Toward the Tribunal”
- 4-3.4: “Fairness to Opposing Party and Counsel”
-
- 4-4.4: “Respect for Rights of Third Persons”
- 4-5.3: “Responsibilities Regarding Non Lawyer Assistants”



Adopted Ethics Opinion 14-1

- A lawyer may advise a client, pre-litigation, to change privacy settings on the client's social media pages so that they are not publicly accessible. The lawyer also may advise that a client to remove information as long as the social media information or data is preserved.
- Note: This opinion was approved by The Florida Bar Board of Governors on October 16, 2015.



The Use of the Cloud (Op. 12-3)

- Lawyers may use cloud computing if they take reasonable precautions to ensure that confidentiality of client information is maintained, that the service provider maintains adequate security, and that the lawyer has adequate access to the information stored remotely.
- Note: This opinion was affirmed by the Board of Governors with slight modification on July 26, 2013.



Use Caution with Legacy Media

- A lawyer must take reasonable steps to ensure that client confidentiality is maintained and that devices are sanitized before disposition, including: (1) identification of the potential threat to confidentiality along with the development and implementation of policies to address the potential threat to confidentiality; (2) inventory of the devices that contain hard drives or storage media; (3) supervision of non-lawyers to obtain adequate assurances that confidentiality will be maintained; and (4) responsibility for sanitization of the device by requiring meaningful assurances from the vendor...and confirmation or certification of the sanitization at the disposition of the device.
- Ethics Opinion 10-2



The Duty of Competence

- Florida Rule of Professional Conduct 4-1.1 (Competence):
“A lawyer shall provide competent representation to a client....”
- August 2012 – ABA Model Rules amended – Comment added regarding Rule 1.1
 - Maintaining Competence: To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology....



Competence – (cont'd)

- **Thoroughness and Preparation**

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.



California Ethics Opinion 2015-193 eDiscovery Competence

- Computers; Discovery; Competence; Confidentiality; Attorney client privilege; Communication with clients.
 - A lawyer who represents a client in litigation **must evaluate the case at the outset for potential e-discovery issues and must have a basic understanding of electronically stored information (ESI) and issues that may arise in e-discovery.** If the lawyer lacks sufficient knowledge or skills to competently address the e-discovery issues that arise, the lawyer must consult or associate with and competently supervise other lawyers or technical professionals. The lawyer must use reasonable care to avoid disclosing the client's confidential or privileged information. Opinions 1988-96, 2004-165, 2010-179; San Diego County Opinion 2012-1; Cal. Bus. & Prof. Code §6068(e); Cal. Civ. Proc. Code §2031.010(a); Cal. Evid. Code §§952, 954, 955; Rules 3-100, 3-110; ABA Rule 1.1.



Attorney Competency and Technology

- **Both ABA Model Rules and the Rules Regulating the Florida Bar**
 - Require attorneys to maintain adequate competency to practice law.
- Competency includes competency in the knowledge of and use of technology, i.e., how to:
 - Identify potential electronic evidence.
 - Preserve, process, review and produce electronic evidence.
 - Admit and use electronic evidence at trial.