BUSINESS LAW SECTION
OF THE FLORIDA BAR

eDiscovery and Electronic Evidence Case Law Update

August 26, 2016

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Florida State Court Decision

Acevedo v. State
2016 WL 3659802 (Fla. 5th DCA 2016)

Evidence from defendant's electronic monitoring device was insufficient to prove that defendant committed the offense of loitering and prowling because (i) the electronic record only established a general physical location of the defendant, rather than what the defendant was actually doing at any given time, and (ii) the police department reviewed the defendant's activity long after the activity actually occurred.

Florida Federal Court Decisions

Herman, et al. v. Sea World Parks & Entertainment, Inc.
Case No. 8:14-cv-030228 (M.D.Fla. July 13, 2016)

Requesting party failed to establish that additional information requested was within the scope of discovery. The Court determined that the additional material requested was not relevant and not proportional to the needs of the case, based on the proportionality factors described in amended Rule 26(b)(1).

Bingham v. Baycare Health System
2016 WL 3917513 (M.D.Fla. July 20, 2016)

Email communications between plaintiff and his attorneys regarding the pending litigation were not protected by attorney-client privilege to the extent that the emails were forwarded by the plaintiff to his work email account and then accessed by the plaintiff on his employer's communication system. The Court held that plaintiff had no reasonable expectation of privacy regarding the emails because the employer had a policy that (i) expressly limited personal use of the employer's communication systems, (ii) banned the use of the communication system for personal business or personal gain, (iii) reserved the employer's right to access and monitor employee use for any purpose (iv) warned employees that they had no expectation of privacy in emails transmitted over the company system and (v) required employees, including plaintiff, to certify compliance with the policy by signing an acknowledgement form.

Omni Healthcare, Inc. v. Health First, Inc.
Case No. 6:13-cv-01509 (M.D.Fla. August 19, 2016)

Counsel for plaintiff found in contempt and fined $500 for using the Internet during jury selection, in contravention of the Court's pretrial order.

Eleventh Circuit Court Decision

Sergeeva v. Tripleton International
2016 WL 4435616 (11th Cir. August 23, 2016)

The requesting party served a subpoena for documents and ESI pursuant to a Section 1782 action (which provides Federal court assistance in obtaining evidence in cases pending in foreign tribunals). The responding party argued that Section 1782 does not reach documents and ESI located in foreign countries. The Eleventh Circuit affirmed the District Court's order compelling the producing party (an American company) to produce responsive documents and ESI—even if responsive material was located outside the United States—as long as the producing party had possession, custody, or control of the responsive material.

Selected Non-Florida Federal Court Decisions

GN Netcom, Inc. v. Plantronics
2016 WL 3792833 (D.Del. July 12, 2016)

The Court granted $3 million in punitive sanctions, an adverse inference jury instruction and other evidentiary sanctions against a defendant company whose senior executive intentionally and permanently deleted thousands of emails relevant to pending litigation (approximately 40% of his email account). The senior executive also instructed other company employees to take similar action. The Court rejected the defendant company's argument that the company itself had acted reasonably in notifying its employees of their duty to preserve ESI and in taking immediate action after the legal department became aware of the senior executive's unauthorized and improper conduct.

Fulton v. Livingston Financial, LLC
2016 WL 3976558 (W.D.Wash. July 25, 2016)

The Court sanctioned defense counsel's "inexplicable" and "inexcusable" misrepresentation of the scope of discovery. The sanctioned attorney cited to and relied on case law interpreting the version of Rule 26(a)(1) that existed prior to the December 2015 amendments, which the Court stated were "highly publicized" amendments that "dramatically changed" the information that was discoverable in the case.

Hyles v. New York City
2016 WL 4077114 (S.D.N.Y. August 1, 2016)

The Court denied a requesting party's motion to compel a producing party to utilize technology assisted review (predictive coding)—rather than keyword searching—to identify discoverable information. The Court also stated, however, that the producing party may be forced to conduct additional searches if the requesting party later demonstrates deficiencies in the producing party's production.