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Florida Courts Adopt Rules Specifically Addressing Electronic Discovery

While some of the rules overlap with existing federal provisions, there are some differences—key among them Florida's absence of a mandatory "meet and confer" rule.

The Sunshine State joins a growing list of states adopting rules specifically addressing electronic discovery in their courts. In a July 5 decision, the Florida Supreme Court unanimously approved amendments to the Florida Rules of Civil Procedure addressing discovery of electronically stored information (ESI).[1] Specifically, the court adopted amendments to seven rules as been recommended by the Florida Bar, with all changes effective September 1, 2012.

Discovery of ESI

Discovery of ESI is now expressly authorized under the amendments to Rule 1.280 (General Provisions Governing Discovery). The rule, however, also contains good cause limitations under subdivision (d)(1), where a party can object to a discovery request for ESI upon a showing that the target of the request is "not reasonably accessible because of undue burden or cost"—a rule similar to Federal Rule of Civil Procedure 26(b)(2)(B). If the showing is made, the court can still order discovery if the requesting party "makes good cause," but the court is also given the discretion to shift costs to the requesting party. Subdivision (d)(2), though, adopts proportionality and reasonableness principles, whereby the court has the obligation to limit discovery of ESI if it is "unreasonably cumulative or duplicative"; it can be obtained in a "more convenient, less burdensome, or less expensive" manner; or the burden outweighs the likely benefit.

Rule 1.410 (Subpoena) was amended to allow for a subpoena requesting ESI, but also contains the same good cause and proportionality limitations listed in Rule 1.280.

Rules 1.340 (Interrogatories to Parties) and 1.350 (Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes) were both amended to allow for the production of ESI "in the form in which it is ordinarily maintained or in a reasonably usable form" in response to interrogatories and specific requests. These provisions generally mirror Federal Rule of Civil Procedure 34(b)(2)(E).

The "Meet and Confer" Process

One of the biggest differences between the federal rules and those adopted in Florida is the absence of a mandatory rule requiring parties to "meet and confer" to address ESI, as required under Federal Rule of Civil Procedure 26(f). The amended Florida rules do, however, allow trial courts to consider electronic discovery issues during pretrial conferences. Rule 1.200 (Pretrial Procedure) makes these allowances, including latitude for the court to consider the "possibility of an agreement between the parties regarding the extent to which such information should be preserved and the form in which it should be produced." Similarly, Rule 1.201 (Complex Litigation) was amended "to require the parties in a complex civil case to address the possibility of an agreement between them addressing the extent to which electronic information should be preserved and the form in which it should be produced."

1. The full decision is available online at http://www.floridasupremecourt.org/decisions/2012/sc11-1542.pdf.

Sanctions

Similar to Federal Rule of Civil Procedure 37(e), sanctions for inadvertent destruction of ESI are limited under Rule 1.380 (Failure to Make Discovery; Sanctions), which states that sanctions will not be imposed on a party that fails to provide ESI that was "lost as a result of a routine, good-faith operation of an electronic information system."

Otherwise, the amendments are silent on mandatory sanctions, noting that other Florida rules of civil procedure provide the court with the authority to sanction a party for discovery violations.

Preservation

One hot topic not addressed in Florida's amendments is preservation. Although the Federal Advisory Committee on Rules of Civil Procedure and its Discovery Subcommittee have been discussing options that would bring preservation into the context of the federal rules, Florida has not chosen to address the issue at this time. Florida's committee notes reference preservation but only do so in the context of parties discussing the scope of preservation; there is no rule or detail discussing preservation generally.

Conclusion

Litigants and their attorneys practicing in Florida should familiarize themselves with these amendments and the impact they may have on their matters. While there is overlap with the federal rules, there are some key areas of difference, the most marked being the optional "meet and confer" process. Litigants that are prepared to address these topics and that are well versed in these amendments may have an opportunity to reduce their burden during discovery.

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