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What You Need to Know About the Recent Amendments to the Florida Rules of Civil Procedure Regarding Electronically Stored Information

By John Miller, Esq.

On July 5, 2012, the Florida Supreme Court amended seven of the Florida Rules of Civil Procedure to address issues related to electronically stored information (ESI)¹. These amendments were proposed by the Florida Bar's Civil Procedure Rules Committee and were subject to a comment period from practitioners and legal organizations following their proposal. Specifically, the Florida Supreme Court amended Rules 1.200, 1.201, 1.280, 1.340, 1.350, 1.380, and 1.410. These amendments bring the Florida Rules of Civil Procedure more in line with the Federal Rules of Civil Procedure as they relate to discovery and production of electronically stored information. As the use of technology becomes more widespread in today's society, the prevalence of issues related to electronically stored information will only increase. These amendments attempt to deal with many of the issues that may arise with the production of discovery of electronically stored information in litigation. Below you will find a summary of the amendments to the above rules and several practice pointers you may want to consider as a result of these recent amendments.

Rules 1.200 (Pretrial Procedure) and 1.201 (Complex Litigation): The Supreme Court amended Rule 1.200 to allow the trial court to consider various issues related to electronic discovery during a pretrial conference. These issues include the possibility of obtaining admissions of fact, the voluntary exchange of documents and electronically stored information, and stipulations regarding the authenticity of documents and electronically stored information. The amendment to Rule 1.200 also discusses the need for advanced rulings on the admissibility of some documents or electronically stored information and specifically discusses the possibility of agreement between the parties regarding the extent to which electronically stored information should be preserved and the form in which it should be produced. Rule 1.201 was amended to require the parties in a complex civil case to explore the possibility of reaching an agreement regarding preservation and the form of production of electronically stored information prior to the start of discovery.

Rule 1.280 (General Provisions Governing Discovery):

Rule 1.280 has been amended to now expressly allow for the discovery of electronically stored information. Prior to this amendment, there were no express provisions within Rule 1.280 which authorized discovery of this type of information. The amendments also add a new subsection (d) which discusses limitations on the discovery of electronically stored information. Pursuant to the new subsection (d), any party may make a request of electronically stored information. On a Motion to Compel or Motion for Protective Order, the party opposing the discovery request must make a showing that the electronic information sought or the format in which the information is sought is not reasonably accessible because of undue burden or cost. If the opposing party is successful in making this showing, the Court must then determine whether the requesting party can show good cause for the request. Under the new subsection (d), the court is permitted to specify certain conditions of the discovery of the electronically stored information including ordering that the requesting party bear some or all of the expenses of complying with the discovery request. The amendments also dictate that the court must limit the frequency or the extent of the discovery of electronically stored information if it determines that the discovery is a) unreasonably cumulative or duplicative or can be obtained from another source or in another manner that is more convenient, less burdensome, or less expensive; or b) the burden or expense of the discovery outweighs the likely benefit.

Rule 1.340 (Interrogatories to Parties) and Rule 1.350 (Production of Documents and Things and Entry Upon Land for Inspection of Other Purposes):

These rules have now been amended to expressly allow for the production of electronically stored information as both an answer to an Interrogatory or response to a Request to Produce. Pursuant to the amendments, the production of the electronically stored information should be in the form in which it is ordinarily maintained or in a reasonably usable form.

Rule 1.380 (Failure to Make Discovery; Sanctions):

Rule 1.380 has been amended to require that, absent exceptional circumstances, the court is not permitted to impose sanctions

¹In re Amendments to Florida Rules of Civil Procedure, 37 Fla. L. Weekly S442 (Fla. 2012).

on a party for failing to provide electronically stored information that was lost as a result of the routine good faith operation of the electronic information system.

Rule 1.410 (Subpoena): The final amendment relating to electronically stored information specifically allows for a subpoena requesting electronically stored information. Like the amendments to Rule 1.280, the person receiving the subpoena may object to the discovery of the electronically stored information. The person from whom the discovery is sought must show the information or form of the information requested is not reasonably accessible because of undue cost or burden. If the party from whom the discovery is sought is able to carry that burden, the party requesting the information must show good cause for the request. Again, like the amendments to Rule 1.280, the court is permitted to place conditions on the discovery, including having some or all of the expenses to paid by the party seeking the discovery.

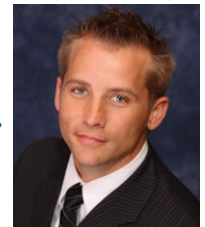
Practice Pointers

I. The discovery of electronically stored information is now expressly permitted by the Florida Rules of Civil Procedure. As such, use of electronically stored information in litigation will likely become more prevalent in the coming years. This means that information such as emails, social networking data, internet history, and other related information will more frequently be requested in cases where such information is relevant. Beware of what information you include in your electronic communications

and how you utilize electronic applications as this material will, no doubt, become a more regular source of discovery in litigation. Likewise, be prepared to utilize the new discovery rules to obtain favorable electronically stored information from your opponent or third parties.

2. Under the new rules, the party seeking discovery of electronically stored information may be required to bear some of the financial burden of the production thereof. When requesting electronically stored information, beware that you may bear some of the costs of obtaining said production if voluminous or time consuming to produce.

3. Pursuant to the committee notes regarding this amendment, in cases where the electronically stored information is voluminous or overly burdensome to produce, the requesting party may only be entitled to a sampling of the sources of the electronically stored information in order to determine what exists. This sampling will allow the parties to discover what the stored information contains, what the costs and burdens are in retrieving, reviewing, and producing the information, and how valuable the information sought may be to the litigation in light of use for discovery.



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