25 ESI and E-Discovery Terms *(in 75 minutes!)* for Mediators

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Christopher’s practice involves a wide range of emerging technologies including cyber security, internet crimes, policy drafting, privacy, and social media discovery.
Topics

- What is ESI / e-Discovery?
- How Do You Do This?
- What Are the Rules?
- Walk Me Through the Steps
- Social Media Discovery
Why Do You Need To Know?

- Probably new to you
- COST
- Sanctions
- Need for e-Discovery Mediators
- No case law on point (parties need help)
What is ESI & e-Discovery?
Electronically Stored Information (ESI) [noun]

- Information created, modified, transmitted via software and hardware. “Stuff on a computer”

- *Emails, IM/Texts, Word, Photos, Excel, Video…*

- **Hard drive** – little “platter” in your PC or laptop

- **Phone** – solid state drive (SSD)

- **Server** – “serves” the “client” (your device).

- **Cloud** – server based somewhere else (vs local)
Metadata

- **Data about data** / “meta” (self-referential, conscious of self)
- Descriptive, structure, administrative
- **Word doc** – who created, modified, what changed?
- **Image** – GPS, device, etc
- Generally used to authenticate, time-stamp, or find people who “touched” the data
- This is why people want “native” format
**Native format**

- file that is maintained in its original format

- Example: you created a document in WORD, but you e-mailed it as a PDF. Which is the Native format?

- Look for the step of *converting* to a “foreign” format

- In production, ESI is often converted to PDF or TIFF formats

- Native preserves the original metadata
**PST file [noun]**

- **Personal Storage Table**
- This is an example of (most common) ESI
- Microsoft email and calendar files
- Export all emails / calendar events into a file
- Native format. Searchable. Has metadata
ESI & e-Discovery

**E-Discovery [noun]**

- Discovery of information in an electronic format (ESI)
- Federal Rules revised in 2006 EDRM
- Identify.
- Preserve.
- Collect.
- Review.
- Produce
How Do We Find ESI?
Predictive Coding

- Machine-learning technology which enables the computer to “predict” how documents should be classified based upon limited human input
- “training set” – subset of documents used to train the system
- “control set” – sample of documents used to test the responsiveness of the predictive coding
- “yield” – e.g., 200,000 documents out of 1m match criteria, yield is 20%
- Saves money over “word search”
**CAR and TAR**

- **Computer Assisted Review**

- **Technology Assisted Review** – software used to compare and analyze documents (to find differences or similarities).

- **Looking for patterns**

- **Predictive coding is a type of CAR**

- “Discussion threading” – links related documents together, such as emails in a chronological string (helps identify who was involved and when)
ESI & e-Discovery

Hash

- Algorithm creates a unique value for each document
- Digital fingerprint
- Helps authenticate AND identify duplicates
- Think “hashtag” in social media
De-Duplicating

- Aka “de-duping”
- Compare documents to remove duplicates
- Reduces review time
- You use “hash” values to find/remove duplicates!
De-NIST-ing

• NIST has the National Software Reference Library – list of known computer applications

• To De-NIST means to identify unimportant computer system files and remove from your document collection

• Getting rid of junk files

• ROT – redundant, obsolete, trivial
Slack Space

- Un-used portion of a disk/drive
- ~ “Unallocated space” – where file is marked for deletion / over-writing but is not “gone” yet
- Sometimes here the word “cache”
- Examples: Criminal case (porn) and to find fraud (deleted documents)
What Are The Rules?
Florida E-Discovery Rules
Effective September 1, 2012

Case Management Rule 1.200
* Court can make advanced ruling on admissibility; facilitate agreement on scope, form, limits
* Federal rule requires “meet & confer” FL only requires meeting in complex cases

Scope and Limits Rule 1.280
ESI is discoverable but with limits similar to Fed Rule 26
ESI “not reasonably accessible” is not discoverable absent good cause
Costs can be shifted
Proportionality and Reasonableness factors

Request for Production Rule 1.350
Requesting party can specify file format

Subpoenas Rule 1.410
Respondent may object to form or not reasonably accessible
Can be ordered for good cause
Costs can be shifted
Respondent must produce in ordinary or reasonably usable form
FRCP 45 has sanction for subpoenas which are burdensome

Sanctions Rule 1.380
No sanctions, absent exceptional circumstances, for failing to produce EHI as a result of “routine, good-faith operation of an electronic information system.”
...let you know that the CIA recently located 7 additional images of OBL’s body... Had they been located previously, these records would have been responsive to your FOIA request...

...we do not believe the discovery of these additional images is relevant to the appeal pending currently before the D.C. Circuit.
ESI & e-Discovery

Proportionality

- Rule 1.280 & FRCP 26
- Reasonably accessible?
- Cost shifting
- A mediator or special master may help focus need & cost issues
Series of opinions in

Zublakē v. UBS Warburg

Prior to 2006 federal amendments
Issued by Judge Scheindlin (now retired)

7-factor test for cost shifting based upon accessibility (harder it is, more likely to get shifted to requesting party)

Case is famous because:
Scope of duty to preserve ESI
Lawyer’s duty to monitor client’s litigation hold
Knowing cost and effectiveness of recovery in advance
Shifting costs to requesting party
Spoliation
ESI & e-Discovery

Standing ESI Order

• Some judges are creating standard orders setting out how to handle e-Discovery

• ASK your parties if there is a judge- or jurisdiction-specific ESI order... just as you would ask if they are set for trial.

• Or if you can give them one.

Will Judge Sasser’s Standing ESI Order Apply to Your Case?

by Christopher B. Hopkins

Do you know what a .pst file is? Have you created a client data map? What is the difference between system and substantive metadata? Lawyers can no longer ignore or avoid e-discovery – the preservation and production of electronically stored information (ESI) – since the practice was embedded in the Florida Rules of Civil Procedure in 2012. Starting July 1, 2016, Judge Meenu Sasser of the Fifteenth Judicial Circuit has issued a Standing Order on Electronically Stored Information Discovery to both coax and compel lawyers into discussing and addressing ESI discovery. This article will re-introduce you to Florida’s e-discovery rules, provide an overview of Judge Sasser’s Standing Order, and identify resources for handling e-discovery issues in your cases.

In 2012, the Florida Rules of Civil Procedure were amended to include e-discovery. The amendments are similar but less demanding than their federal counterparts; Rule 1.200 states that a case management order “may” require lawyers to “consider” ESI admissibility and “discuss” the “possibility” of ESI agreements. Rule 1.280 more forcefully establishes ESI as a part of discovery and articulates the boundaries of what is “reasonably accessible.” Rule 1.350 explains the form of ESI production and Rule 1.380 defines sanctions for failure to preserve ESI.
**ESI & e-Discovery**

GDPR

- NOT a U.S. law but international corporations are following.
- Likely to become a standard
- Helps data protection and privacy since parties are getting rid of data
- Requires a “data protection officer”
- GDPR compliance likely means a party has better organized data
Walk Me Through the Steps
Before litigation or e-discovery, companies should have a chart where they store data.

This is an IT and legal department issue.

Tip: Ask your litigants if they have a data map.
Preservation Demand Letter

- Notice to (potential) opposing party to preserve necessary evidence and information.

- Typically tells the other side to stop any sort of auto-delete per the company’s deletion policy (e.g., think GDPR compliance).

- Could be a setup for spoliation claim.
Litigation (or Legal) Hold

- Notification sent by a company’s legal team (typically) to employees and other departments with instructions not to delete or destroy documents
- BEFORE there is a case
- Can be in response to a Preservation Demand or on its own
- This is an INTERNAL process
“Image” a drive vs. “image” a file

• Image (a drive): make an identical copy of a drive, including its slack and unallocated space.

• Image (a file): make a picture copy of a file, such as PDF or TIFF.

• Think “mirror image”
Example:
Warrant in Las Vegas Shooter Case

Litigants can / should learn from law enforcement how to phrase their e-discovery requests
Warrant in Las Vegas Shooter Case

ESI which the Government sought from Microsoft (email account provider)
Warrant in Las Vegas Shooter Case

Metadata which the Government sought from Microsoft (email account provider)
Social Media Discovery
Est of Antico v. Sindt Trucking, Inc.
148 So.3d 163 (Fla. 1st DCA 2014)

- Defendant sought phone and FB content
- NOT IN OPINION = FB implicated because relatives later posted, “don’t text and drive.”
- Arguably not a “social media” case but same analysis. See also Restrepo v. Carrera, 3d DCA (April 13, 2016).
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**Social Media Discovery**

**District Court of Appeal of the State of Florida**

**Fourth District**

**MARIA F. LEON NUCCI** and **HENRY LEON**, her husband, Petitioners,

v.

**TARGET CORPORATION, AMERICAN CLEANING CONTRACTING, INC., and FIRST CHOICE BUILDING MAINTENANCE, INC.**, Respondents.

No. 4D14-138

[January 7, 2015]

Petition for writ of certiorari to the Circuit Court for the Seventeenth Judicial Circuit, Broward County; John J. Murphy, III, Judge; L.T. Case No. 10-45572 (21).

John H. Pelzer of Greenspoon Marder, P.A., Fort Lauderdale, and Victor Kline of Greenspoon Marder, P.A., Orlando, for petitioners.


GROSS, J.

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**Nucci v. Target Corp.**

162 So.3d 146 (Fla. 4th DCA 2015)

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Photographs

*Nucci* distinguishes still images from other content and appears to confirm broad discovery powers. This is helpful since social media is moving *away* from written content and towards posted images (see, e.g., Instagram, Pinterest, and Snapchat).

Threshold to Get Social Media Access

Many Objections Typically Fail

Privacy

SCA

Production Method

Social Media Discovery: Bottom Line
The number of appellate decisions setting out standards for litigants pursuing discovery of information posted on social media websites is small, but growing. In this article Christopher Hopkins identifies trends in the decisional law and suggests ten steps that will improve the chances of obtaining social media discovery. The article focuses on Facebook, but the principles described here can be applied to other social and professional networking sites.

In the past year, three Florida appellate courts have articulated standards in civil cases for the discovery of content from a party’s Facebook account. Before 2014, Florida’s scant precedent for social media discovery was composed of two federal and two state trial court orders. While this budding authority of three opinions and four orders is not fully harmonized, defense practitioners will detect trends and strategies for obtaining Facebook content (e.g., posts, comments, still images, video, or other information) and, potentially, full access to a plaintiff’s Facebook account.

Rather than serving a standard set of “social media discovery” requests, the lesson from these Florida cases is that defense counsel should take discrete steps — early in the case, followed by narrow social media discovery in stages — to maximize production of the plaintiff’s Facebook content. This article provides an overview of the recent social media discovery rulings in Florida, explains the grounds to overcome frequent plaintiff objections, and describes ten steps to obtain court-approved access to the plaintiff’s Facebook content.

A primer on Facebook and other forms of social media is likely not necessary for most Florida lawyers. This article will focus exclusively on Facebook because of that site’s popularity, but the principles and steps articulated here likely will apply to other social media. We begin with a chronological discussion of the four trial court orders from 2011 through 2013 and the more recent 2014 through 2015 appellate opinions.

“Facebook Discovery” Trial Court Orders 2011–2013

There are four reported Florida trial court orders regarding Facebook discovery, decided by the Broward and Palm Beach County circuit courts and the Middle District of Florida. The two South Florida trial court orders — Besswick v. Northwest Medical Center, Inc. and Levine v. Culligan — are the most significant.

Besswick v. Northwest Medical Center, Inc.

The earliest reported authority in Florida articulating standards for the discovery of a plaintiff’s Facebook account is the November 2011 Broward County circuit court order in Besswick v. Northwest Medical Center, Inc. Besswick is also noteworthy because it was relied upon by two of the six subsequent Florida cases.

The Besswick defendant sent discovery requests asking one of the plaintiffs to identify her social media accounts and to divulge a copy of all shared content for the preceding five years. The Besswick plaintiff objected on the grounds that these requests were overbroad, burdensome, not reasonably related to the discovery of admissible evidence, and violative of privacy rights. This manner of objections, as illustrated below, appears to be the prevailing grounds that plaintiffs use to avoid production of Facebook content.

ABOUT THE AUTHOR...

Christopher B. Hopkins is a member of McDonald Hopkins LLC (West Palm Beach). He received the Trial Advocate Quarterly Award in 2012, and he serves on the TAZ editorial board since 2004. His litigation and appellate practice frequently focuses on emerging technologies. He can be reached at hopkins@mcnaldhopkins.com.