IN THE CIRCUIT COURT OF THE SEVENTEENTH
JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

Administrative Order 2021-20-Gen

REGARDING DISCOVERY OF ELECTRONICALLY STORED INFORMATION IN ALL CASES AND OBLIGATIONS OF THE PARTIES TO CONFER

(a) Pursuant to Article V, section 2(d) of the Florida Constitution, and section 43.26, Florida Statutes, the chief judge of each judicial circuit is charged with the authority and the power to do everything necessary to promote the prompt and efficient administration of justice.

(b) Florida Rule of Judicial Administration 2.215(b)(3) states the chief judge "shall, considering available resources, ensure the efficient and proper administration of all courts within [this] circuit."

(c) The costs associated with the discovery of Electronically Stored Information ("ESI") in all cases have become increasingly prohibitive, and are only continuing to be an impediment to fair resolutions of disputes.

(d) To combat these growing costs, and to preserve party and judicial resources, the Seventeenth Judicial Circuit, at the request of the Chief Judge, appointed a panel of five persons to meet and confer regarding ESI discovery and to make recommendations to the Circuit regarding same as set forth in A.O. 2020-87-Gen.

(e) The appointed panel has met and conferred, and provided recommendations.

(f) In accordance with the authority vested in the Chief Judge pursuant to Article V, section 2(d) of the Florida Constitution, section 43.26, Florida Statutes, and Florida Rule of Judicial Administration 2.215, it is hereby ORDERED:

I. GUIDELINES GOVERNING ESI DISCOVERY

(1) An attorney's zealous representation of a client is *not* compromised by conducting discovery in a cooperative manner. In an adversarial proceeding, the failure of counsel or the parties to cooperate in facilitating and reasonably limiting discovery requests and responses tends to raise to litigation costs, interferes with fair resolutions, and contributes to the risk of sanctions.

(2) As contemplated in Rules 1.280 and 1.350, Florida Rules of Civil Procedure, proportionality standards must be seriously considered in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, attorney should tailor their requests with respect to substance, date ranges, file types and custodians. If a responding party objects to the requests on grounds of proportionality, the parties shall work together to resolve the imbalance between cost and benefit of the discovery before bringing the issue to the Court for resolution.

II. MEET AND CONFER OBLIGATIONS

(1) In all cases where extensive ESI discovery is anticipated, plaintiff(s) or counsel for plaintiff(s), within thirty (30) days of the first appearance of counsel for defendant(s), or within thirty (30) days of the first filing of a *pro se* defendant, shall schedule a meet and confer regarding discovery, including ESI discovery, with such meeting to occur within sixty (60) days of such service.

(2) At the meet and confer, the parties shall be prepared to discuss in detail, and will actually discuss, the following items:

(i) Custodians. Identification of the records custodians most likely to have discoverable ESI in their possession, custody control. The custodians shall be identified by name, title, connection to the instant litigation, and the type of the information under the custodian's control. In most cases, the number of custodians at issue should not exceed ten (10) per party, but the parties are expected to confer to establish the appropriate number of custodians to be disclosed based on the complexity, proportionality, and nature of the case.

(ii) Non-Custodial Data Sources. Identification of non-custodial data sources (*e.g.,* shared drives and servers) if any, likely to contain discoverable ESI. This includes discussion on the structure of each of the parties' respective computer systems and a descriptive identification of all relevant software, including the identity and number of servers, computers, and electronic devices that may contain relevant information or information that would potentially lead to the discovery of admissible evidence in the action.

(iii) Third-Party Data Sources. Identification of third-party data sources, if any, likely to contain discoverable ESI (*e.g.*, third-party mobile device providers, email providers, cloud storage, etc.), and for each such source, the extent to which a party is (or is not) able to preserve information stored in the third-party data source.

(iv) Inaccessible Data. Identification of data sources, if any, likely to contain discoverable ESI (by type, date, custodian, electronic system or other criteria sufficient to specifically identify the data source) that a party asserts is not reasonably accessible under Fla. R. Civ. P. 1.280(d). The party asserting a claim of inaccessibility of data shall be prepared to present evidence in support of their claim.

(v) Data Preservation. The existence and nature of ESI preservation policies, whether, when, and how a litigation hold was placed on ESI, the possibility of agreements regarding the extent to which ESI should be preserved, the form in which such evidence should be produced, and whether discovery of such information should be conducted in phases or limited to particular individuals, time periods, or sources.

(vi) Inadvertent Disclosures. The need for an ESI disclosure claw-back agreement beyond Fla. R. Civ. P. 1.285 which incorporates an agreement not to disqualify counsel for the use of an inadvertently disclosed document which has not been clawed back given the ethical responsibility of the producing counsel under Rule 4-4.4 to maintain client documents as confidential is recommended in most matters.

(vii) Timing and Cost. The scope, and estimated time for completion of ESI discovery required for the claims/counterclaims alleged, and whether any ESI issues may significantly protract the litigation, and if so, how such issues may be most efficiently mitigated, without creating prejudice towards either party.

(3) Pre-production Conference. Prior to commencement of any production of ESI by any party, a status conference should be held to memorialize the Discovery Plan (*sometimes referred to as a jointly-approved ESI Protocol*)

III. DOCUMENT COLLECTION METHODOLOGY AND SEARCH TERMS.

(1) In many cases, the use of search terms and queries, file type and date restrictions, and technology-assisted review ("TAR") will assist in reasonably locating or filtering ESI likely to contain discoverable information. Parties are encouraged, but not required, to use TAR in searching for and collecting ESI. There are a number of TAR tools available to parties, which continue to advance as technology develops. Therefore, a producing party using TAR tools must provide transparency on the process to assure receiving parties of their good faith efforts to discharge their discovery obligations. This includes, for example, discussing the use of email threading, de-duplication, the validity of the results, and margins of error.

(2) The timelines and search related numbers in this section may be sufficient in certain cases, but not in others. The parties are expected to meet and confer to establish the appropriate timing and numbers based on the complexity, proportionality and nature of the case.

(i) Search Methodology. The parties shall timely confer to attempt to reach agreement on appropriate search terms and queries, file type and date restrictions, data sources (including custodians), and other appropriate computer or technology-aided methodologies before any such effort is undertaken. The parties shall continue to cooperate in revising the appropriateness of the search methodology. In connection with any document production request, the producing party shall disclose the data sources (including custodians), search terms and queries, any file type and date restrictions, and any other methodology that it proposes to use to locate ESI likely to contain responsive and discoverable information. The producing party may also provide unique hit counts for each search query. The requesting party is entitled to, within 14 days of the producing party's disclosure, add no more than ten (10) search terms or queries to those disclosed by the producing party absent a showing of good cause or agreement of the parties.

(ii) Search Terms. If a producing party plans to use search terms to identify relevant documents, the parties are encouraged to confer on a process to test the efficacy of the search terms. The search terms shall be narrowly tailored to particular issues. Indiscriminate terms, such as the producing party's name, are inappropriate unless combined with narrowing search criteria that sufficiently reduce the risk of over-collection or over-production. A conjunctive combination of multiple words or phrases (*e.g.*, "computer" and "system") narrows the search and shall count as a single search term. A disjunctive combination of multiple words or phrases (*e.g.*, "computer" or "system") broadens the search, and thus each word or phrase shall count as a separate search term unless they are variants of the same word. Use of narrowing search criteria (*e.g.*, "and," "but not," and proximity searches (within # of words")) is encouraged to limit the production.

(iii) Post-production issues. The purpose of requiring the parties to confer on search terms prior to a party incurring the cost of a document collection and review is to reduce the likelihood of a party needing to collect additional data from a system after its initial collection, and to reduce the likelihood of a party needing to review the same data on multiple occasions. There will be instances, however, where a party's initial collection of ESI was insufficient for a complete production, which is only ascertainable to the parties after the documents are collected, reviewed, and produced. Thus, within twenty-one (21) days of the producing party notifying the receiving party that it has substantially completed the production of documents responsive to a request, the responding party may request up to five (5) additional search terms or queries if it has a good faith reason to believe, based on the document production, that potentially responsive documents were not captured.

(iv) Format of Production. Parties shall produce ESI to the requesting party with searchable text, in a format to be decided between the parties. Acceptable formats include, but are not limited to, native files, multi-page TIFFs (with a companion OCR or extracted text file), single-page TIFFs (only with load files for e-discovery software that includes metadata fields identifying natural document breaks and also includes companion OCR and/or extracted text files), and searchable PDF. Unless otherwise agreed to by the parties, files that are not easily converted to image format, such as spreadsheet, database, and drawing files, should be produced in native format. Each document image file shall be named with a unique number (i.e., Bates Number).

(v) Metadata Fields. If the requesting party seeks metadata, the following metadata fields shall be provided where reasonably ascertainable and not privileged: document type; custodian and duplicate custodians (or storage location if no custodian); author/from; recipient/to, cc and bcc; title/subject; email subject; file name; file size; file extension; original file path; date and time created, sent, modified and/or received; and hash value. The list of metadata type is intended to be flexible and may be changed by agreement of the parties, particularly in light of advances and changes in technology, vendor, and business practices.

IV. COST SHIFTING

(1) If appropriate, costs may be shifted for disproportionate ESI production requests. A party's meaningful compliance with this Administrative Order and efforts to promote efficiency and reduce costs will be considered in cost-shifting determinations.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 30th day of April, 2021

/s/ Jack Tuter
Jack Tuter, Chief Judge