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.

To date, there have been no state appellate decisions interpreting the foregoing 2012 amendments. There have been a number of journal articles, forms, and circuit court orders. Judge Sasser is not the only jurist to rule on e-discovery issues but locally she is the first to issue a *standing* ESI order. Obtain the Standing Order on Judge Sasser's Fifteenth Judicial Circuit page (quick link: www.bit.ly/JudgeSasser). Former Judge Kenneth Stern, Mark Osherow, and Greg Weiss of the Bar's Circuit Civil Committee provided input on the Order.

The Standing Order applies to most business and professional liability cases and is triggered by the plaintiff's designation on the civil cover sheet. According to Judge Sasser, the purpose is to open a dialogue between parties; indeed, you will note that the Order does not require actual production. The Standing Order may be viewed as a "meet and confer" order which serves the practitioner since: (a) it puts counsel and client on notice of preservation requirements which could avoid later sanctions; (b) it requires counsel and client to discuss and understand sources of e-discovery and what may or may not be reasonably accessible; (c) it sets a tone of cooperation and communication between counsel at the beginning of the case; and (d) it may reduce confusion, expense, and motion practice later in discovery.

While the plaintiff is required to serve the Standing Order on the defendant and the parties are to schedule the "meet and confer" within 60 days, careful review of the Standing Order reveals that counsel's substantive first step is to confer with the client and obtain ESI information. By the time of the meet and confer, counsel needs to "be prepared to discuss in detail" various ESI issues. It is advisable to send the Standing Order and a summary of the e-discovery Rules to the client so they understand the necessary steps and consequences. As soon as practical, counsel should issue a litigation hold letter and comply with Rule 1.380.

In preparation for the meet and confer, counsel will need to obtain information such as: identity of ESI custodians; structure of the client's system and email accounts which may contain relevant information or information which would potentially lead to discovery of admissible evidence; the existence and nature of ESI policies; and identification of all relevant software. Typically, it is not difficult to ascertain the ESI custodian(s) however it can be surprisingly time-consuming to develop an accurate "data map" of where ESI may exist (do not overlook phones, backups, cloud, IM, and social media accounts). While most companies use suites like Microsoft Office, be aware of database, time-keeping, and industry-specific software. Look for landmarks such as when the client may have gone through a major software change or hardware upgrade which makes legacy data harder to access. Again, this is reconnaissance at this stage and not production.

The "meet and confer" should occur by phone or in person since it requires counsel to "actually discuss… in detail" the ESI issues above as well as the need for an ESI clawback agreement; scope, cost, and estimated time for ESI discovery; and whether ESI issues may significantly protract litigation.

If the parties successfully complete the meet and confer, they simply file a "short," joint Notice of Compliance within 15 days. If something is not completed, the plaintiff shall notice a Rule 1.200 case management conference.

A number of ESI resources exist including the 2016 Florida Handbook on Civil Discovery Practice, the Florida Bar Business Section's draft Stipulation Establishing Electronic Discovery Protocol, and several Florida Bar Journal articles (links, and some further discussion about these resources, on www.hopkins.law).

If ESI discovery issues are cumbersome to the point of distracting counsel from the prosecution or defense of the case – or if counsel is simply unequipped – consider hiring separate counsel to handle the discrete ESI issues so that primary counsel can focus on the case. Likewise, the parties may hire an experienced ESI lawyer to serve as an e-discovery special master. Another option is to hire an e-discovery mediator to efficiently bring parties together to create an ESI exchange protocol without the risk of adverse orders or sanctions.

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