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2013 Legislative Update

Annual Case Law Update

Protecting Municipalities from
Liability for Recreational Activities

Florida Adopts *Daubert*

The logo for the Florida Defense Lawyers Association (FDILA) features the letters 'FDILA' in a bold, sans-serif font. A red swoosh underline is positioned beneath the 'F' and 'D'.

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A PERFECT STORM: THE NEED FOR E-DISCOVERY MEDIATION IN FLORIDA

by Robert A. Cole

A set of circumstances in Florida and around the country has elevated the need for mediation as an essential tool for the resolution of e-discovery issues in civil cases. Florida, among other states, has adopted comprehensive rules of civil procedure addressing electronically stored information (ESI), thus joining the federal courts, which have had such rules for many years. Lawyers are realizing that virtually all information is stored electronically, and that there is a burgeoning treasure trove of discoverable information contained in personal devices as well as in enterprise systems. Also, the social media explosion presents unprecedented opportunities to gather facts and investigate issues. Together, these factors are rapidly expanding the discovery landscape, and introducing issues of unprecedented depth and complexity—**fomenting a perfect storm of adversarial activity**. The result of that perfect storm: dramatically increasing demands on the courts to referee the inevitable conflicts among counsel that will arise.

To educate and certify legal and technical professionals dealing with e-discovery, Miami attorney Charles Intriago has founded the Association of Certified E-Discovery Specialists (ACEDS), a select member organization. ACEDS seeks to create

an environment for the exchange of ideas, guidance, training and the development of best practices for e-discovery.¹

Discovery Management

Almost every business, insurance company, governmental agency and court has either gone to, or is heading toward, a paperless environment. Virtually all information and documentation is stored electronically. The volume of ESI is massive and growing exponentially. Hence, e-discovery has become a necessary and ubiquitous part of the discovery process in state and federal courts. Litigators and corporate in-house counsel are being forced to become familiar with e-discovery concepts such as the litigation hold, preservation requirements, collection criteria, meta tags, and ESI format variations.

Judicial budgetary constraints (both state and federal) make it increasingly more difficult to have e-discovery disputes heard and resolved by the courts. In Florida, the courts have had to deal with the current budgetary shortfalls by establishing hiring freezes on judges and court personnel, furloughs for court employees, and limiting the court time available for the resolution of discovery disputes, as well as trials. Unfortunately, as the saying goes,

“Justice delayed is justice denied.” It is clear to litigators and their clients that a new and more efficient dispute resolution alternative is needed to assist in the management of litigation and discovery. Through the ACEDS initiative and elsewhere, e-discovery pioneers are recognizing that mediation is not just a process for getting cases settled, but can be an effective tool for addressing procedural disputes early in a case.

Mediation Agenda

The self-determination concept of settlement mediation is transferable to the case management and discovery aspects of litigation. As with a traditional mediation settlement conference, the parties can come up with their own creative, mutually agreeable plan for e-discovery. This process will help reduce discovery disputes and limit court involvement, resulting in significant cost savings to both sides.

An agenda for conducting e-discovery mediation might include the following:

- Craft an agreement as to what is reasonably accessible and in what format it will be produced;
- Discuss preservation and collection protocols, including sampling

ABOUT THE AUTHOR...



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and search techniques;

- Seek agreement on deadlines for production;
- Address the possibility of phased, targeted e-discovery;
- Strive to limit costs and discuss the allocation of extraordinary costs;
- Provide for resolution of issues concerning privileged information;
- Create a method for resolving any disputes that may arise over the mediated plan.

Ideally, this approach will dramatically reduce the time and costs associated with protracted litigation over motions for protective orders and motions to compel. These battles will inevitably arise absent a cooperative, mediated approach. E-discovery mediation is a new and emerging market for mediators. It is

also a solution to a growing problem in civil litigation. E-discovery mediation will reduce the cost of litigation, provide a workable and efficient tool for the conduct of e-discovery, and take some of the burden off a court system where, unfortunately, access is limited by funding and budget constraints. The forecast is that e-discovery mediation will help litigators, as well as their clients, weather the perfect storm.

Current Developments

Work is under way at the University of Florida, Levin College of Law, to establish and promote a program to educate lawyers and judges on e-discovery and the utilization of the ADR process as a method of discovery and case management. The University of Florida Law E-Discovery Project is a multi-disciplinary endeavor to support the civil litigation process through electronic discovery law courses, research, the development of information retrieval method

and tools, and offering electronic discovery skills training for attorneys, judges and litigation support professionals through public conferences and continuing legal education offerings. William Hamilton, Executive Director of the E-Discovery Project; Robin Davis, Director of the Institute for Dispute Resolution (IDR); George Socha, a noted E-Discovery author and consultant; and John Upchurch, of Upchurch, Watson, White & Max, are collaborating to create programs and materials to be offered jointly through the IDR and the E-Discovery Project. Access to these programs and materials will offer lawyers and judges practical tools for the neutral facilitation of E-Discovery and case management.

¹ The author's dispute resolution specialty firm, Upchurch, Watson, White & Max, is an active member of ACEDS, with the goal of providing e-discovery mediation services.

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