

Direct Dial: (561) 899-2103
E-Mail: dfountain@clarkfountain.com

October 14, 2011

Clerk of the Court
Florida Supreme Court
500 South Duval Street
Tallahassee FL 32399-1927

Re: Amendments to the Florida Rules of Civil Procedure – Electronic Discovery
Case No. SC11-1542

I am very pleased that the Committee has taken on the tremendous task of beginning to address electronic discovery in the Florida state courts. With the pace at which our society has and is becoming more and more electronically organized, by the time the new rules have made their way through the five district courts of appeal it is likely that virtually every civil case will involve some type of electronic discovery.

Indeed as lawyers, businesses, the medical field and the courts continue to pursue a “paperless” existence, and more and more data ends up in Clouds it is likely that electronic discovery will become The Discovery.

I mention this and write, solely for the purpose of underscoring the tremendous need not only for rule changes but also for some specific guidance for the trial courts and litigants with regard to the various types of electronic discovery that the trial Court’s will allow and will order produced, and the procedures by which it will actually occur in day to day practice.

I feel very strongly that the proposed rules should be accompanied by a form Order or footnotes providing detailed guidance of the actual in-practice method by which electronic discovery will be conducted.

My fear is that without some specific guidance there will be tremendous diversity in the rulings that Trial Court’s will make regarding the actual nuts and bolts of seeking and obtaining electronic discovery and as a result of widely divergent Orders there will be a

tremendous amount of Appellate court effort and decisions to burden our already budget strapped Court System.

There is hardly a seminar offering that does not have at least one topic devoted to electronic discovery. The new rage in discovery is requesting all Face Book, emails, and other online activities. I have seen seminars on how and when to get rid of your electronic data so that it is not exposed to discovery.

Many states and the Federal Court System have been dealing with this exact issue for some time. I have enclosed a proposed e-discovery model order for patent cases that is the product of Chief Judge, Randall R. Rader, from the U.S. Court Appeals for the Federal Circuit, Eastern District, Texas, Judicial Conference.

Electronic discovery involves many issues including; 1] Confidentiality/Protective Orders, of which Florida still has virtually no guidance or format, 2] Will documents be produced in electronic format/searchable format, 3] Record Retention/Destruction Policies, 4] Scope, depth and thoroughness of the search, 5] Cost, 6] Depositions of those doing the searching.

In actual practice the nature and extent of electronic discovery materials actually received is largely the product of who does the looking, where they look, how hard they look, and what search methods they use to actually look for responsive documents. There are many instances I am familiar with where identical requests in nearly identical cases pending in different states against the same defendant at the same time result in dramatically different electronic discovery responses.

As a result, I am familiar with cases where Courts have actually ordered that the search process be videotaped, wherein a Corporate Representative or the party whom is being asked to produce electronic discovery designates a person to conduct the search while opposing counsel and their experts are able to be present and look over the shoulder of the person conducting the search while the entire process, including the screen of the search computer is videotaped.

Other Courts have required production of the actual "screen shots" of each search term entered with the results of each search displayed in a separate screen shot, to verify that the production actually matches the search results.

Discovery has always been subject to "search motivation" by the searcher, but because electronic discovery searches are computer based the incentive not to look or find is reduced or eliminated.

The inherent difficulty in electronic discovery is the reliability of the results. A person who is not familiar with the required search protocol or the database being searched can easily find nothing or very little whereas a person familiar with the database and its search criteria can uncover a tremendous amount of responsive materials.

Recognizing this limitation has led some courts to simply order the production of entire databases, and then permitting the requesting party to sift or “mine” the data.

The trouble of course comes in attempting to craft guidelines that would even begin to cover the myriad of different systems, and issues in existence recognizing that electronic discovery will soon become as much as part of the routine divorce case as it currently is in a patent case.

Having been involved in the attempt to obtain and compel electronic discovery, the first thing that the requesting party needs to be advised of is what electronic data systems, programs, etc... are in place, what documents are kept in the electronic systems, and the retention/destruction policies in existence. Defendants often object that the very systems that they use are trade secret, confidential, competitively sensitive etc...

I don't claim to have the answer, but would propose that the Committee consider a form Order or specific actual “man in the field” guidelines that make it clear that the types of systems in existence during the relevant periods of discovery, the types of documents kept in these systems, and the document retention/destruction policy is something that should be voluntarily disclosed and provided without objection. These form guidelines should also provide that electronic should be produced electronically and in the same form that it is kept with no search functions disabled, and that the identities persons conducting the searches and the specific search criteria utilized should be produced as well.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via U.S. Mail to committee chair, Kevin David Johnson, Thomason, Sizemore, Gonzalez & Hearing, P.A., 201 No. Franklin Street, Suite 1600, Tampa, FL 33602-5110, this 14th day of October, 2011.

/s/

Don Fountain, Esq. for
CLARK, FOUNTAIN, LA VISTA, PRATHER,
KEEN & LITTKY-RUBIN, LLP
1919 N. Flagler Drive, 2nd Floor
West Palm Beach, FL 33407
PH: (561) 899-2100
Fax: (561) 832-3580
Email: dfountain@clarkfountain.com
sbates@clarkfountain.com
Florida Bar No. 774030