A little more than a year ago, the Florida Supreme Court made changes to the Rules of Civil Procedure in order to bring the rules into the digital era and to address some of the rapid developments in electronic discovery. A review of all of the changes is beyond the scope of this column, but the Supreme Court gave a short and clear statement of the changes on July 5, 2012.[1] The changes apply to all pending and new civil actions.

Rule 1.280 was changed to allow litigants to request discovery of actual electronically stored information (ESI), which is "data" instead of traditional written documents.[2] Given the volume and breadth of ESI created and stored in our "digital society," adding that data to discovery is daunting.

To balance the burden of allowing discovery of ESI, the Supreme Court limited such discovery. The trial court must determine whether "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from another source or in another manner that is more convenient, less burdensome, or less expensive."[3] The court must also conduct a proportionality test similar to federal litigation to determine whether "the burden and expense of discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."[4]

In a recent case in my practice, a party requested a "write block" of all of my clients' drives as "discovery" under the new rules.[5] A "write block" is a forensic copy of a drive that can be used in litigation. It captures all of the data stored on the drive, whether relevant or not. It is very invasive when sought in a business dispute between former partners.

Florida law does not require a party to permit a "write block" of its computer hard drives in discovery. The new rules highlight the need for restraint by requiring courts to balance the right to discover ESI with a consideration of the need, burden, expense, and issues at stake. Similarly, a recent case from the Fifth District holds that without proof of spoliation or "thwarting discovery," a party does not have an absolute right to obtain ESI.[6] The court noted that there was a less intrusive means of discovery and that allowing the copying of a party's computer drives "would expose confidential communications and matters extraneous to the litigation." The court found a departure from the essential requirements of law and irreparable harm in the trial court's allowing the "write block" without first balancing the factors or establishing appropriate protections.

Florida law does not require a party to permit a "write block" of its computers in discovery. ... [W]ithout proof of spoliation or "thwarting discovery," a party does not have an absolute right to obtain ESI.

[1] The Supreme Court's written opinion is styled *In re: Amendments to the Florida Rules of Civil Procedure - Electronic Discovery*, No. SC11-1542, and is available at: http://www.floridasupremecourt.org/decisions/2012/sc11-1542.pdf.

[2] Fla. R. Civ. P. 1.280(b)(3).

[3] Fla. R. Civ. P. 1.280(d)(2).

[4] *Id.*

[5] Fla. R. Civ. P. 1.280(b)(3).

[6] *Holland v. Barfield,* 35 So. 3d 953, 955-56 (Fla. 5th DCA 2010) ("The unlimited breadth of the trial court's order allows Respondent to review, without limit or time frame, all of the information on Petitioner's computer[s] … without regard to her constitutional right of privacy and the right against self incrimination or privileges… .").

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