

**MAKE IT MATTER**

*Promoting Mediator Professionalism*

26th Annual Conference  
Florida Dispute Resolution Center

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JW Marriott, Grande Lakes Orlando

# 25 ESI and E-Discovery Terms *(in 75 minutes!)* for Mediators

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*Lawyer, mediator, and arbitrator.*

*Christopher's practice involves a wide range of emerging technologies including cyber security, internet crimes, policy drafting, privacy, and social media discovery.*



# Topics



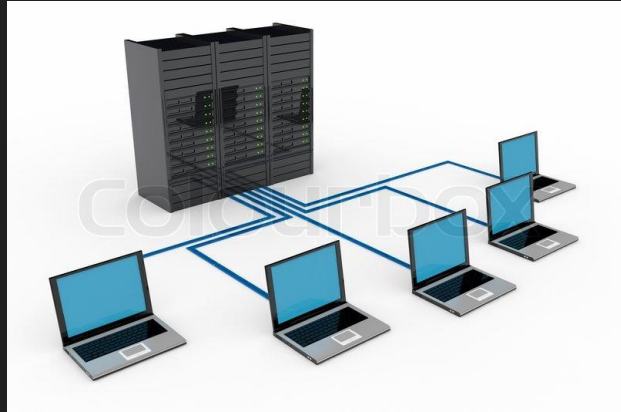
- What is ESI / e-Discovery?
- How Do You Do This?
- What Are the Rules?
- Walk Me Through the Steps
- Social Media Discovery

# Why Does a Mediator Need To Know ESI & eDiscovery?

- Probably new to you
- COST
- Sanctions
- Need for e-Discovery Mediators
- No case law on point (parties need help)

# What is ESI & e-Discovery?

## ***Electronically Stored Information (ESI) [noun]***



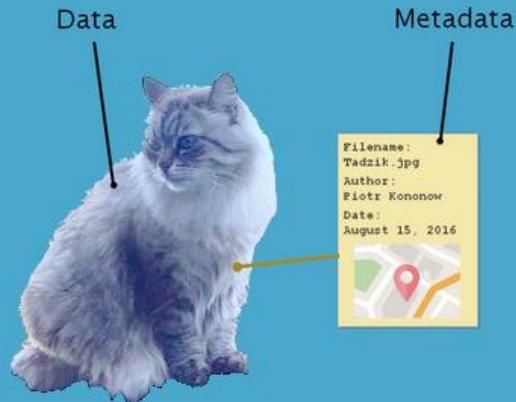
- Information created, modified, transmitted via software and hardware. “Stuff on a computer”
- *Emails, IM/Texts, Word, Photos, Excel, Video...*
- **Hard drive** – little “platter” in your PC or laptop
- **Phone** – solid state drive (SSD)
- **Server** – “serves” the “client” (your device).
- **Cloud** – server based somewhere else (vs local)



## Metadata

**[noun]**

### What is Metadata



- Data about data / “meta” (self-referential, conscious of self)
- Descriptive, structure, administrative
- **Word doc** – who created, modified, what changed?
- **Image** – GPS, device, etc
- Generally used to authenticate, time-stamp, or find people who “touched” the data
- This is why people want “native” format



## ***Native format***

***[noun]***

- file that is maintained in its original format
- Example: you created a document in WORD, but you e-mailed it as a PDF. Which is the Native format?
- Look for the step of converting to a “foreign” format
- In production, ESI is often converted to PDF or TIFF formats
- Native preserves the original metadata



## ***PST file [noun]***

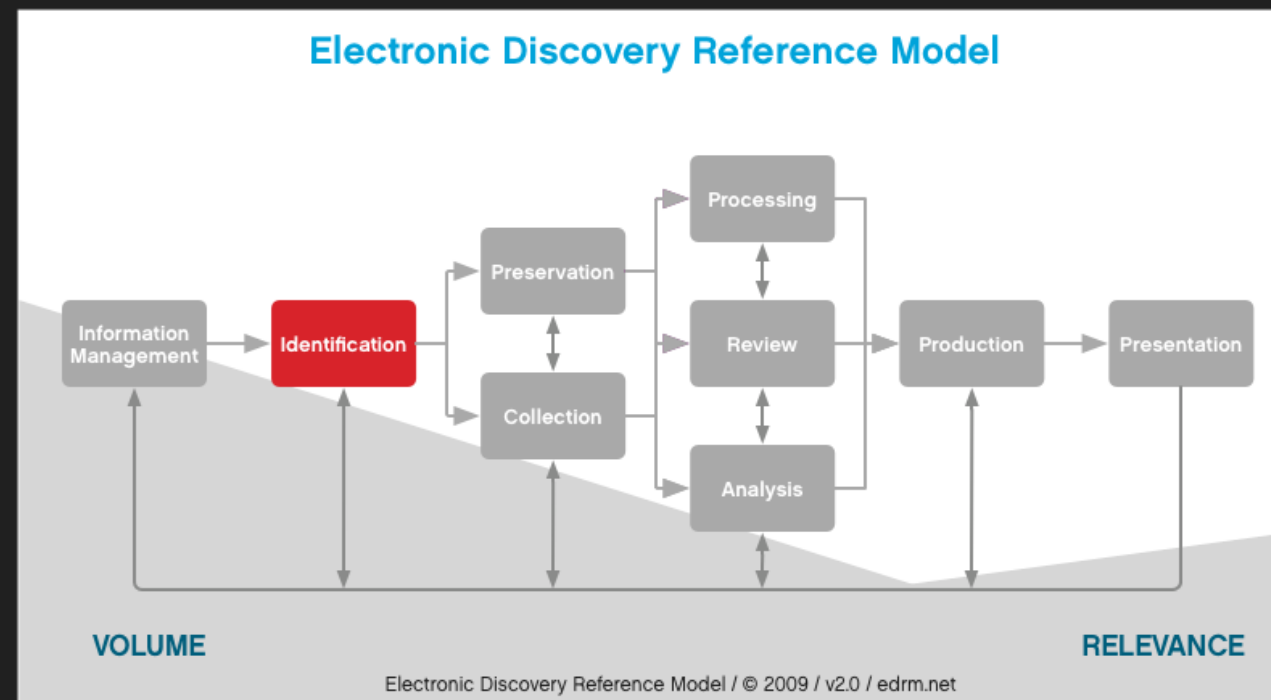
- Personal Storage Table

- This is an example of (most common) ESI
- Microsoft email and calendar files
- Export all emails / calendar events into a file
- Native format. Searchable. Has metadata

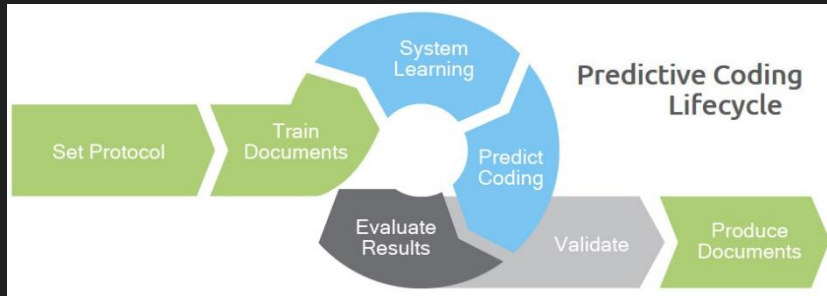


## *E-Discovery [noun]*

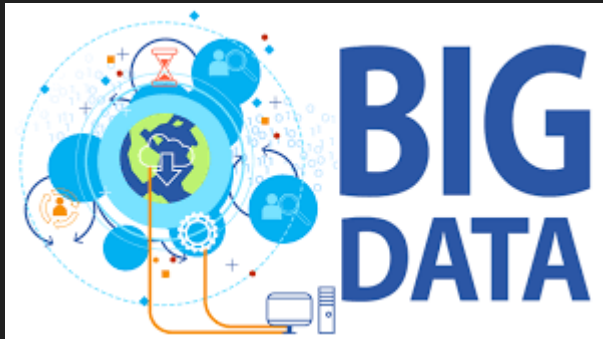
- Discovery of information in an electronic format (ESI)
- Federal Rules revised in 2006 EDRM
- Identify.
- Preserve.
- Collect.
- Review.
- Produce



# How Do We Find ESI?



- Machine-learning technology which enables the computer to “predict” how documents should be classified based upon limited human input
- “training set” – subset of documents used to train the system
- “control set” – sample of documents used to test the responsiveness of the predictive coding
- “yield” – e.g., 200,000 documents out of 1m match criteria, yield is 20%
- Saves money over “word search”





- Computer Assisted Review
- Technology Assisted Review – software used to compare and analyze documents (to find differences or similarities).
- *Looking for patterns*
- *Predictive coding is a type of CAR*
- “Discussion threading” – links related documents together, such as emails in a chronological string (helps identify who was involved and when)

# ESI & e-Discovery



## Hash

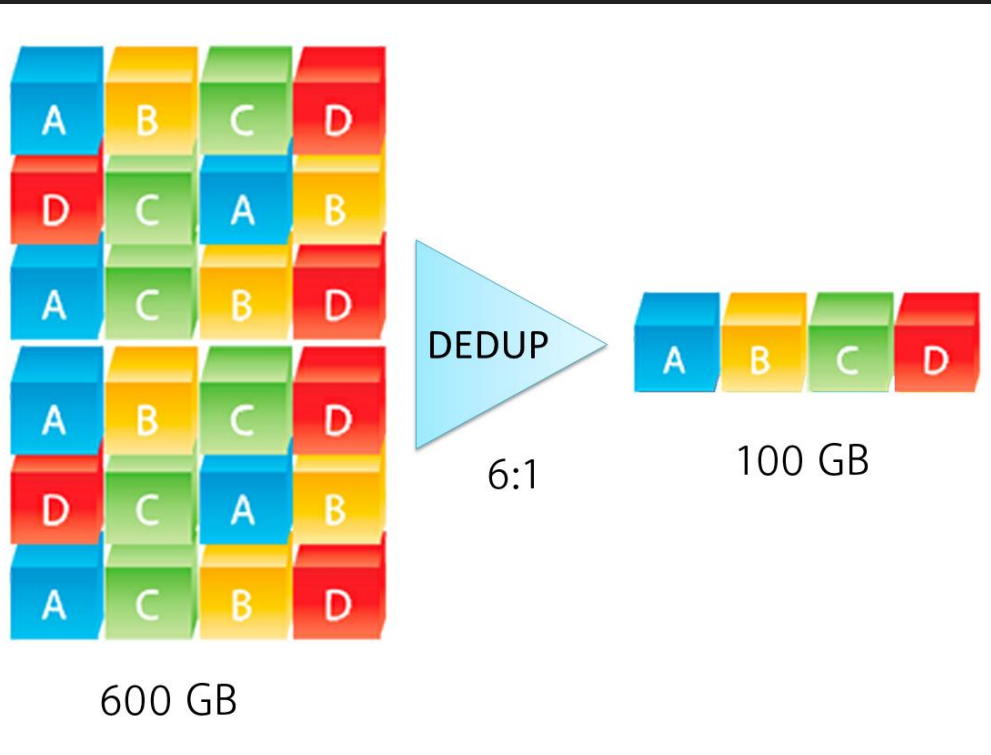


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- Algorithm creates a unique value for each document
- Digital fingerprint
- Helps authenticate AND identify duplicates
- Think “hashtag” in social media



## De-Duplicating



- Aka “de-duping”
- Compare documents to remove duplicates
- Reduces review time
- *You use “hash” values to find/remove duplicates!*



## *De-NIST-ing*

- NIST has the National Software Reference Library – list of known computer applications
- To De-NIST means to identify unimportant computer system files and remove from your document collection
- *Getting rid of junk files*
- *ROT – redundant, obsolete, trivial*





## Slack Space

- Un-used portion of a disk/drive
- ~ “*Unallocated space*” – where file is marked for deletion / over-writing but is not “gone” yet
- *Sometimes hear the word “cache”*
- Examples: Criminal case (porn) and to find fraud (deleted documents)



# What Are The Rules?

# Florida E-Discovery Rules

Effective September 1, 2012



## Case Management Rule 1.200

- \* Court can make advanced ruling on admissibility; facilitate agreement on scope, form, limits
- \* Federal rule requires “meet & confer” FL only requires meeting in complex cases

## Scope and Limits Rule 1.280

ESI is discoverable but with limits similar to Fed Rule 26

ESI “not reasonably accessible” is not discoverable absent good cause

Costs can be shifted

Proportionality and Reasonableness factors

## Request for Production Rule 1.350

Requesting party can specify file format

## Subpoenas Rule 1.410

Respondent may object to form or not reasonably accessible

Can be ordered for good cause

Costs can be shifted

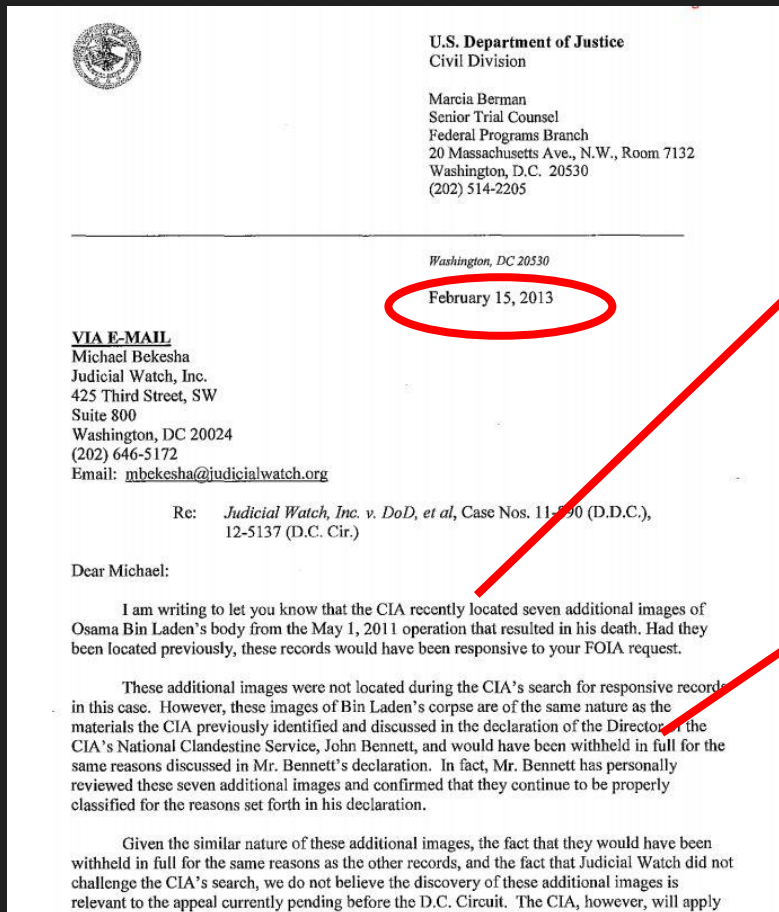
Respondent must produce in ordinary or reasonably usable form

FRCP 45 has sanction for subpoenas which are burdensome

## Sanctions Rule 1.380

No sanctions, absent exceptional circumstances, for failing to produce EHI as a result of “routine, good-faith operation of an electronic information system.”

## Even the CIA Makes Mistakes

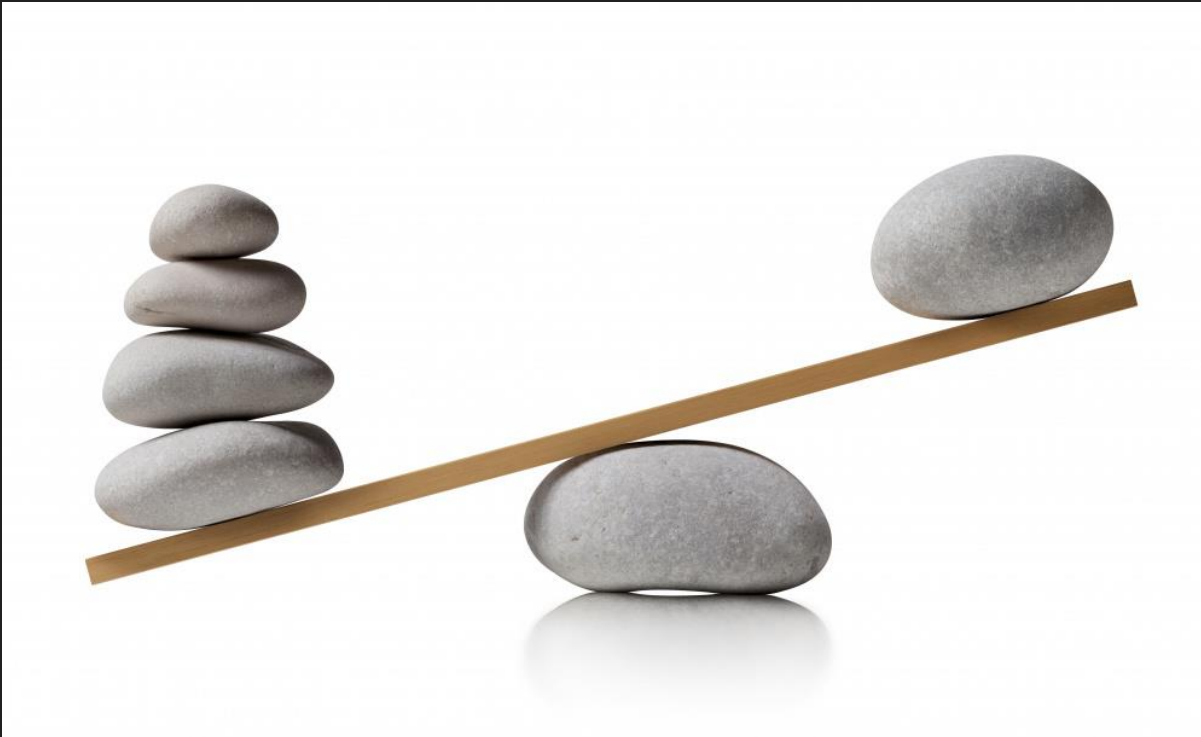


*...let you know that the CIA recently located 7 additional images of OBL's body... Had they been located previously, these records would have been responsive to your FOIA request...*

*...we do not believe the discovery of these additional images is relevant to the appeal pending currently before the D.C. Circuit.*

## *Proportionality*

- Rule 1.280 & FRCP 26
- Reasonably accessible?
- Cost shifting
- *A mediator or special master may help focus need & cost issues*





# ESI & e-Discovery



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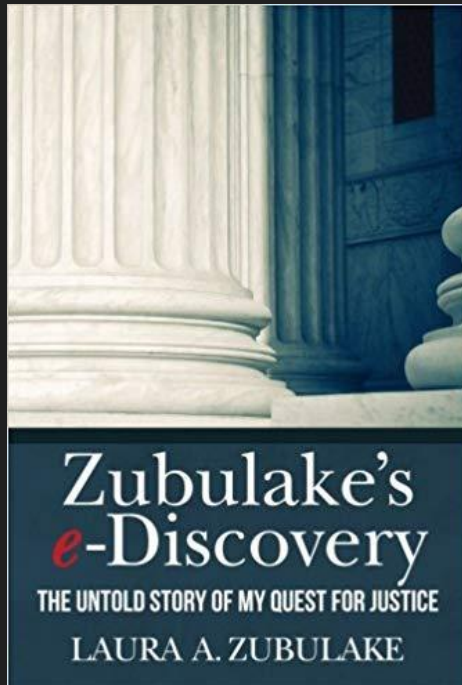
## Series of opinions in *Zublake v. UBS Warburg*

Prior to 2006 federal amendments  
Issued by Judge Scheindlin (now retired)

*7-factor test for cost shifting based upon  
accessibility (harder it is, more likely to  
get shifted to requesting party)*

## Case is famous because:

- Scope of duty to preserve ESI
- Lawyer's duty to monitor client's litigation hold
- Knowing cost and effectiveness of recovery in advance
- Shifting costs to requesting party
- Spoliation



## Technology Corner



### 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.

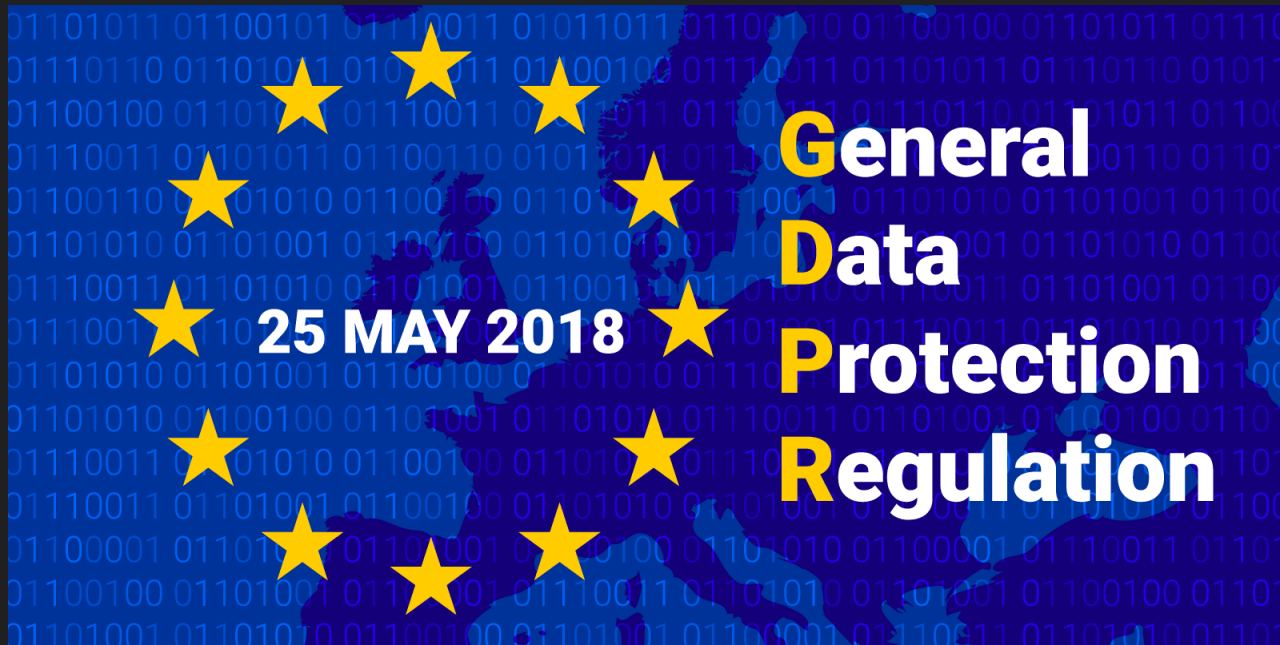
the client and obtain ESI info and confer, counsel needs to various ESI issues. It is advisable and a summary of the e-discovery understand the necessary steps practical, counsel should issue with Rule 1.380.

In preparation for the meet and obtain information such as: identify of the client's system and email relevant information or information lead to discovery of admissible nature of ESI policies; and identify Typically, it is not difficult to however it can be surprisingly accurate “data map” of where phones, backups, cloud, IM, most companies use suites like database, time-keeping, and identify for landmarks such as when a major software change or hardware data harder to access. Again, and not production.

The “meet and confer” step since it requires counsel to “

## Standing ESI Order

- Some judges are creating standard orders setting out how to handle e-Discovery
- ASK your parties if there is a judge- or jurisdiction-specific ESI order... *just as you would ask if they are set for trial.*
- *Or if you can give them one.*



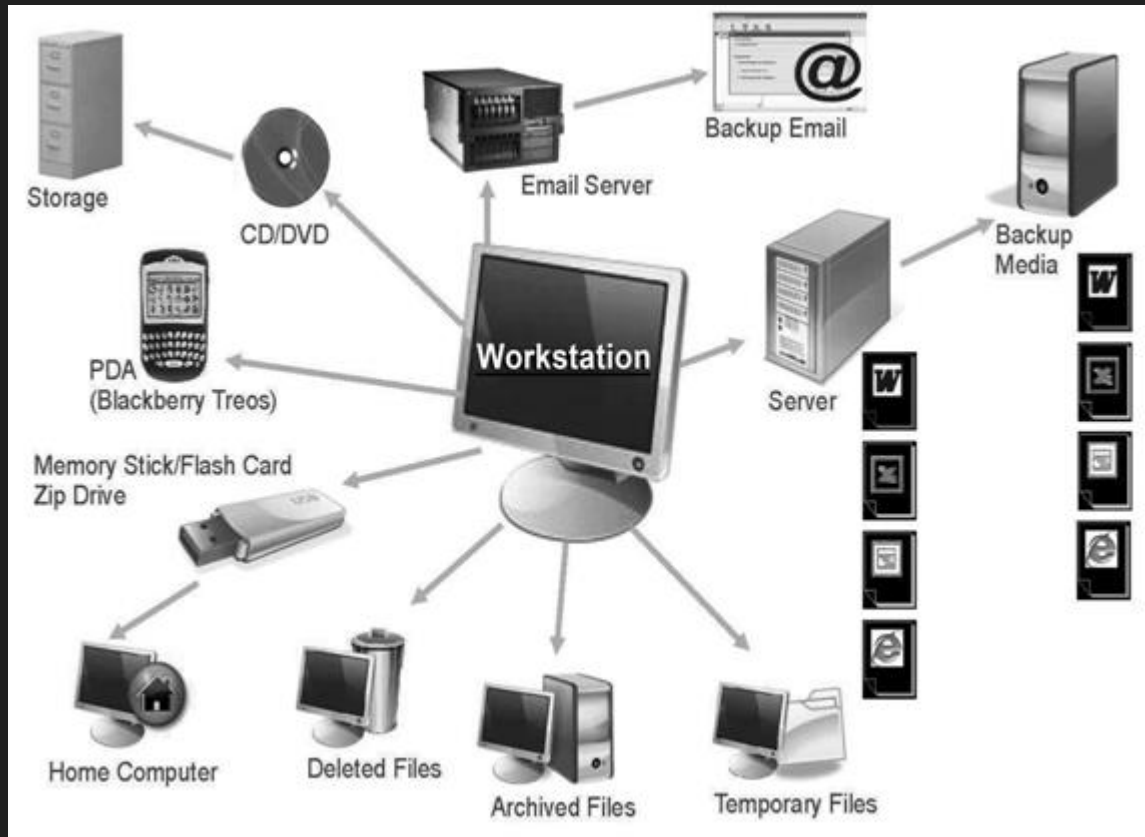
## ***GDPR***

- NOT a U.S. law but international corporations are following.
- Likely to become a standard
- Helps data protection and privacy since parties are getting rid of data
- Requires a “data protection officer”
- GDPR compliance likely means a party has better organized data



# Walk Me Through the Steps

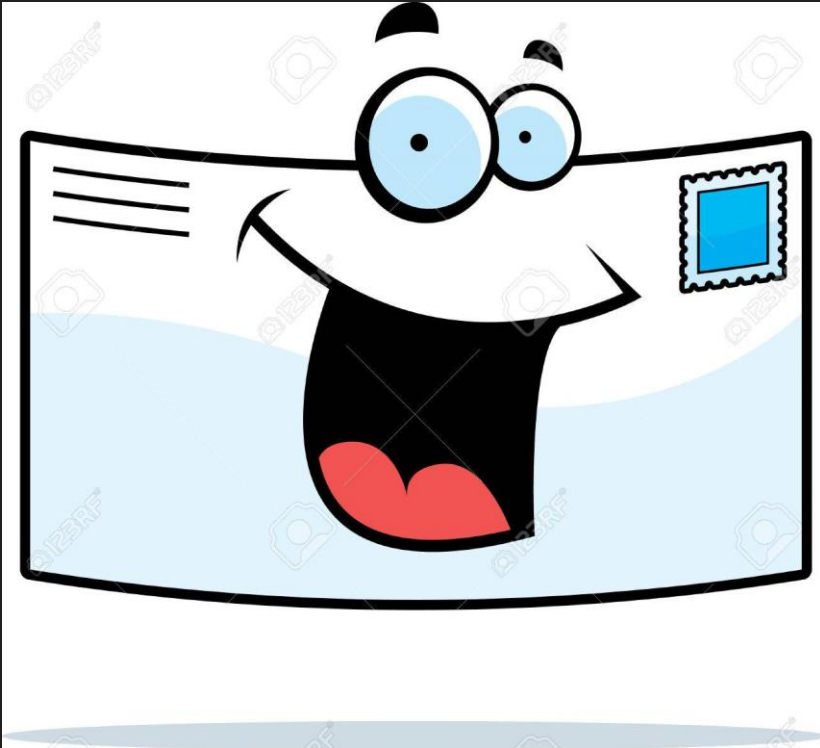
## Data Map



- BEFORE litigation or e-discovery, companies should have a chart where they store data
- This is an IT and LEGAL department issue
- *TIP: ask your litigants if they have a data map.*

## ***Preservation Demand Letter***

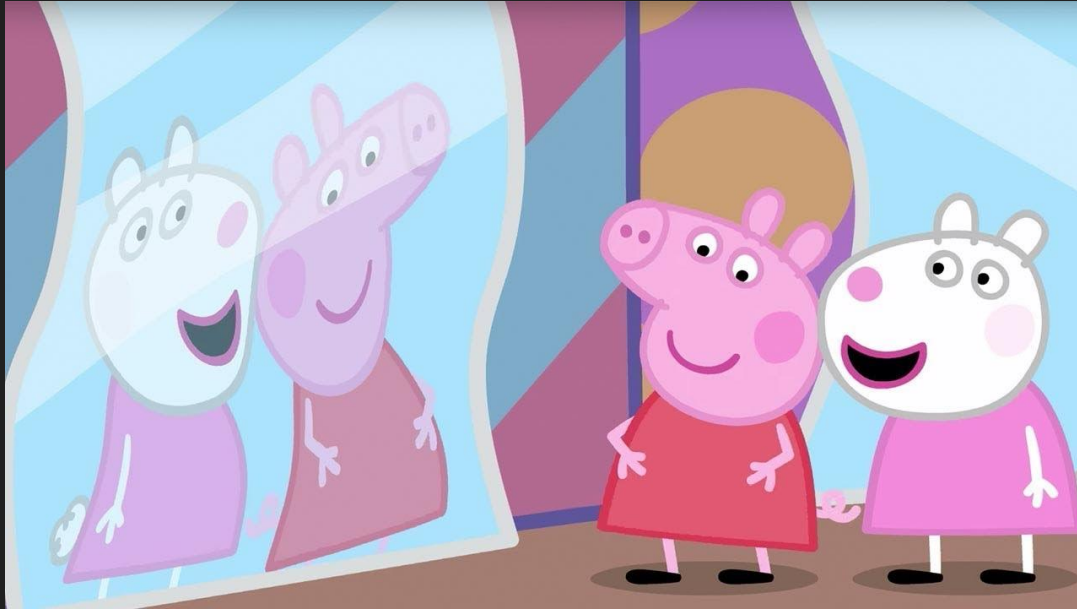
- Notice to (potential) opposing party to preserve necessary evidence and information.
- Typically tells the other side to stop any sort of auto-delete per the company's deletion policy (e.g., think GDPR compliance).
- Could be a setup for spoliation claim.



## *Litigation (or Legal) Hold*

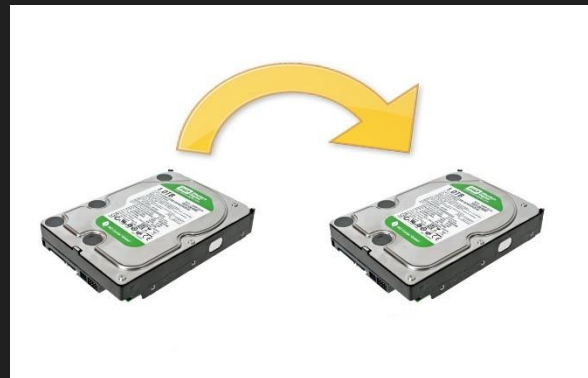


- Notification sent by a company's legal team (typically) to employees and other departments with instructions not to delete or destroy documents
- BEFORE there is a case
- Can be in response to a Preservation Demand or on its own
- This is an INTERNAL process



## ***“Image” a drive vs. “image” a file***

- Image (a drive): make an identical copy of a drive, including its slack and unallocated space.
- Image (a file): make a picture copy of a file, such as PDF or TIFF.
- ***Think “mirror image”***



# Example: Warrant in Las Vegas Shooter Case

Litigants can / should learn from law enforcement how to phrase their e-discovery requests

**ATTACHMENT "A1"**

**ONLINE ACCOUNT TO BE SEARCHED**

1. This warrant applies to information associated with the Microsoft email account centralpark1@live.com (the "Target Accounts") from their inception to present, which is stored at premises owned, maintained, controlled, or operated by Microsoft Corporation, headquartered at 1 Microsoft Way, Redmond, Washington, 98052.



## *Warrant in Las Vegas Shooter Case*

**ESI**  
which the  
Government  
sought from  
Microsoft  
(email account  
provider)

- a. The contents of all emails associated with the account, including copies of emails sent to and from the account, draft emails, the source and destination addresses associated with each email, the date and time at which each email was sent, and the size and length of each email;
- b. All records or other information regarding the identification of the account, to include full name, physical address, telephone numbers and other identifiers, records of session times and durations, the date on which the account was created, the length of service, the types of service utilized, the IP address used to register the account, log-in IP addresses associated with session times and dates, account status, alternative email addresses provided during registration, methods of connecting, log files, and means and source of payment (including any credit or bank account number);
- c. All records or other information stored in the Online Accounts, including address books, contact and buddy lists, calendar data, pictures, applications, documents, and other files;
- d. All records pertaining to communications between Service Provider and any person regarding the account, including contacts with support services and records of actions taken.
- e. All third-party application data and content associated with the Target Account through any Android operating system and/or any Microsoft-related facility.

## ***Warrant in Las Vegas Shooter Case***

**Metadata**  
which the  
Government  
sought from  
Microsoft  
(email account  
provider)

- a. The contents of all emails associated with the account, including copies of emails sent to and from the account, draft emails, the source and destination addresses associated with each email, the date and time at which each email was sent, and the size and length of each email;
- b. All records or other information regarding the identification of the account, to include full name, physical address, telephone numbers and other identifiers, records of session times and durations, the date on which the account was created, the length of service, the types of service utilized, the IP address used to register the account, log-in IP addresses associated with session times and dates, account status, alternative email addresses provided during registration, methods of connecting, log files, and means and source of payment (including any credit or bank account number);
- c. All records or other information stored in the Online Accounts, including address books, contact and buddy lists, calendar data, pictures, applications, documents, and other files;
- d. All records pertaining to communications between Service Provider and any person regarding the account, including contacts with support services and records of actions taken.
- e. All third-party application data and content associated with the Target Account through any Android operating system and/or any Microsoft-related facility.



# Social Media Discovery

148 So.3d 163

District Court of Appeal of Florida,  
First District.

**Tammy Lee ANTICO**, Personal

Representative of the Estate of Tabitha  
Frances Guyton **Antico**, Deceased, Petitioner,  
v.

**SINDT TRUCKING, INC.**, and

James Paul Williams, Respondents.

No. 1D14-277. | Oct. 13, 2014.

## Synopsis

**Background:** Estate of driver, who was killed in vehicular collision with **truck**, brought wrongful death action against **trucking** company, which operated **truck**. Company moved for an order from the trial court permitting an expert to inspect data from driver's cellphone on day of the accident. The trial court granted motion. Driver's estate filed petition for writ of certiorari.

**[Holding:]** The District Court of Appeal, **Osterhaus**, J., held that trial court did not err by allowing company's expert to retrieve data from driver's cellphone under limited and controlled conditions.

## *Est of Antico v. Sindt Trucking, Inc.* 148 So.3d 163 (Fla. 1<sup>st</sup> DCA 2014)

- Defendant sought phone and FB content
- NOT IN OPINION = FB implicated because relatives later posted, “don’t text and drive.”
- Arguably not a “social media” case but same analysis. See also *Restrepo v. Carrera*, 3d DCA (April 13, 2016).

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT

**MARIA F. LEON NUCCI** and **HENRY LEON**, her husband,  
Petitioners,

v.

**TARGET CORPORATION, AMERICAN CLEANING CONTRACTING,  
INC., and FIRST CHOICE BUILDING MAINTENANCE, INC.,**  
Respondents.

No. 4D14-138

[January 7, 2015]

Petition for writ of certiorari to the Circuit Court for the Seventeenth  
Judicial Circuit, Broward County; John J. Murphy, III, Judge; L.T. Case  
No. 10-45572 (21).

John H. Pelzer of Greenspoon Marder, P.A., Fort Lauderdale, and Victor  
Kline of Greenspoon Marder, P.A., Orlando, for petitioners.

Nicolette N. John and Thomas W. Paradise of Vernis & Bowling of  
Broward, P.A., Hollywood, for respondent, Target Corporation.

GROSS, J.

## *Nucci v. Target Corp.* 162 So.3d 146 (Fla. 4th DCA 2015)

- Photos only
- “there is no better portrayal of what an individual’s life was like than through those photographs which the individual has chosen to share through social media” (really?)
- “...all content on a Facebook page does not necessarily have the inherent value of a user’s photo collection” (Hogwood v HCA Holdings)

# Social Media Discovery: Bottom Line

P

## Photographs

*Nucci* distinguishes still images from other content and appears to confirm broad discovery powers. This is helpful since social media is moving away from written content and towards posted images (see, e.g, Instagram, Pinterest, and SnapChat).

T

## Threshold to Get Social Media Access

O

## Many Objections Typically Fail

Privacy

SCA

Production Method

The number of appellate decisions setting out standards for litigants pursuing discovery of information posted on social media websites is small, but growing. In this article Christopher Hopkins identifies trends in the decisional law and suggests ten steps that will improve the chances of obtaining social media discovery. The article focuses on Facebook, but the principles described here can be applied to other social and professional networking sites.

## TEN STEPS TO OBTAIN FACEBOOK DISCOVERY IN FLORIDA

By Christopher B. Hopkins

In the past year, three Florida appellate courts have articulated standards in civil cases for the discovery of content from a party's Facebook account. Before 2014, Florida's scant precedent for social media discovery was composed of two federal and two state trial court orders. While this budding authority of three opinions and four orders is not fully harmonized, defense practitioners will detect trends and strategies for obtaining Facebook content (e.g., posts, comments, still images, video, or other information) and, potentially, full access to a plaintiff's Facebook account.

Rather than serving a standard set of "social media discovery" requests, the lesson from these Florida cases is that defense counsel should take discrete steps — early in the case, followed by narrow social media discovery in stages — to maximize production of the plaintiff's Facebook content. This article provides an overview of the recent social media discovery rulings in Florida; explains the grounds to overcome frequent plaintiff objections; and describes ten steps to obtain court-approved access to the plaintiff's Facebook content.

A primer on Facebook and other forms of social media is likely not necessary for most Florida lawyers.<sup>1</sup> This article will focus exclusively on Facebook because of that site's popularity, but the principles and steps articulated here likely will apply to other social media. We begin with a chronological discussion of the four trial court orders from 2011 through 2013 and the more recent 2014 through 2015 appellate opinions.

### "Facebook Discovery" Trial Court Orders 2011–2013

There are four reported Florida trial court orders regarding Facebook discovery, decided by the Broward and Palm Beach County circuit courts and the Middle District of Florida. The two South Florida trial court orders — *Beswick v. Northwest Medical Center, Inc.* and *Levine v. Culligan* — are the most significant.

*Beswick v. Northwest Medical Center, Inc.*<sup>2</sup>

The earliest reported authority in Florida articulating standards for the discovery of a plaintiff's Facebook account is the November 2011 Broward County circuit court order in *Beswick v. Northwest Medical Center, Inc.* *Beswick* is also noteworthy because it was relied upon by two of the six subsequent Florida cases.<sup>3</sup>

The *Beswick* defendant sent discovery requests asking one of the plaintiffs to identify her social media accounts and to divulge a copy of all shared content for the preceding five years.<sup>4</sup> The *Beswick* plaintiff objected on the grounds that these requests were overbroad, burdensome, not reasonably related to the discovery of admissible evidence, and violative of privacy rights.<sup>5</sup> This mantra of objections, as illustrated below, appears to be the prevailing grounds that plaintiffs use to avoid production of Facebook content.

### ABOUT THE AUTHOR...



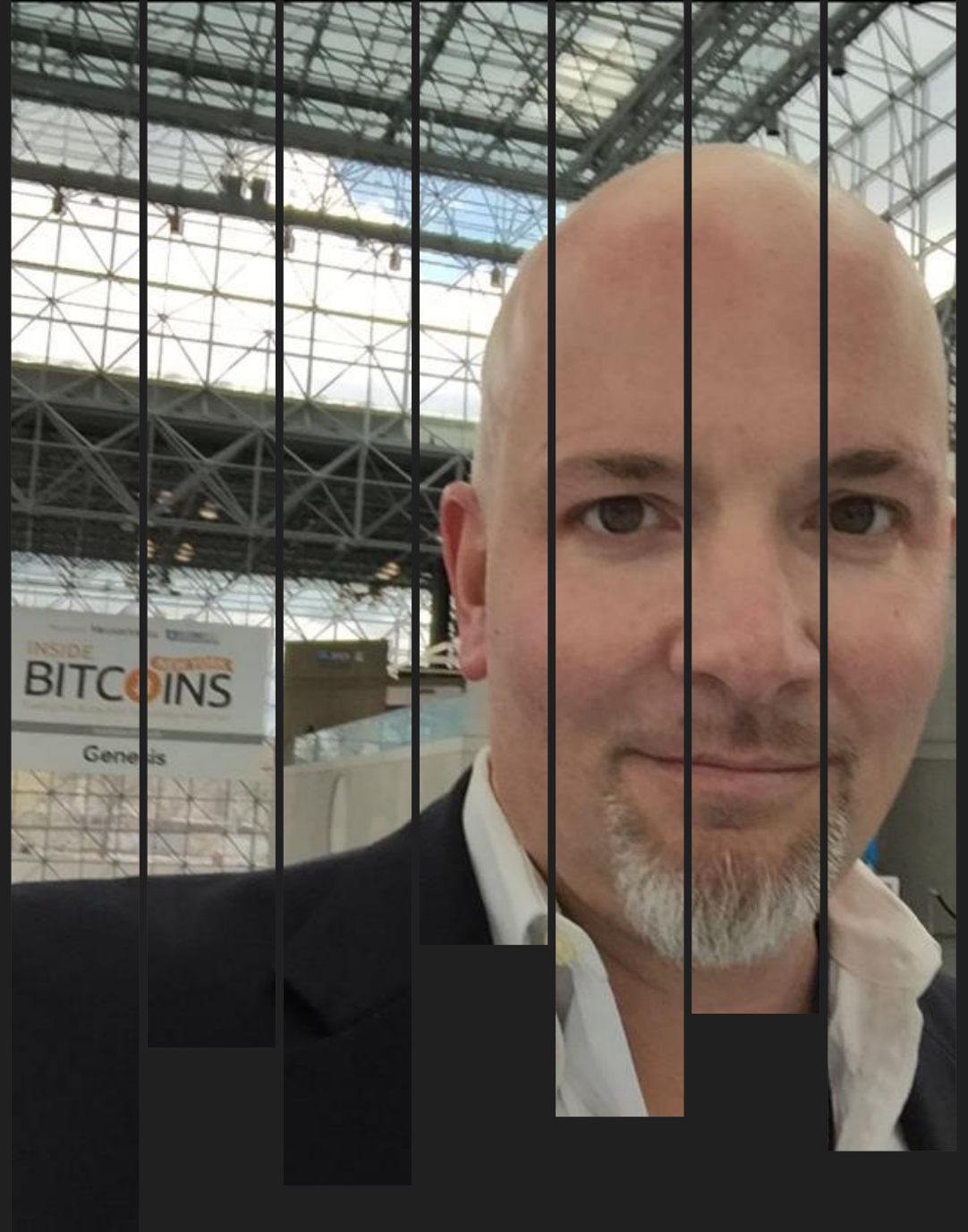
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