

### **ITEM 9.11 | PRODUCTION OF ESI PURSUANT TO SUBPOENA**

Production of electronically stored information pursuant to subpoena potentially raises the now familiar issues of form of production, undue burden, and who pays the cost of production. Fortunately, effective September 1, 2012, the civil procedure rules specifically address these issues and provide a pathway for counsel and judges to negotiate these issues.

The issue of form of production in response to a subpoena is much the same as the issues implicated in a Fla. R. Civ. P. 1.350 request for production, and amended Rule 1.410 addresses the issues in similar fashion. It makes abundant sense for the party issuing the subpoena to specify the preferred form of production. However, if a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.<sup>96</sup>

Persons responding to a subpoena may object to discovery of ESI from sources that are not reasonably accessible because of undue costs or burden.<sup>97</sup> On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought or the form requested is not reasonably accessible because of undue costs or burden. Once that showing is made, the court may order that the discovery not be had or may nonetheless order discovery limited to such sources or in such forms if the requesting party shows good cause, considering the limitations set out in Fla. R. Civ. P. 1.280(d)(2). The court may specify conditions of the discovery, including ordering that some or all of the expenses of the discovery be paid by the party seeking the discovery.<sup>98</sup> Failure of the court or a party to make provision for cost of production from non-parties to produce subpoenaed documents is a departure from the essential requirements of the law and may be remedied by certiorari review.<sup>99</sup> The court will undoubtedly take into account whether the subpoena is directed to a party or a person or organization controlled by or closely identified with a party, or to a person or entity totally unrelated to and disinterested in the case. Subpoenas to non-parties have become a major issue in discovery of ESI because an enormous amount of ESI is sent, stored, shared, or created on systems owned or controlled by third parties, including internet accessible sites.



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### Footnotes

<sup>96</sup> Fla. R. Civ. P. 1.410(c).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *First Call Ventures, LLC v. Nationwide Relocation Servs.*, 127 So. 3d 691 (Fla. 4th DCA 2013).

