TECHNOLOGY

Presented By:

FLORIDA FAMILY LAW AMERICAN

INN OF COURT

SEPTEMBER 2022 PUPILAGE GROUP

Led by Ashley Myers

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Judicial Preferences for Zoom Hearings / IT Contacts for Clay, Duval and Nassau Counties

Zoom Hearing Rules and Tips

- This is a court proceeding and therefore an extension of the courtroom. Appropriate conduct and attire is required and expected.
- RENAME YOUR DEVICE WITH YOUR FIRST AND LAST NAME FOR ADMITTANCE.
- It is your responsibility to ensure that your audio and video connections work PRIOR to your court proceeding. PRACTICE with ZOOM before your proceeding to ensure you can be heard and seen. You must have internet access or a substantial LTE mobile data plan to ensure a quality connection.
- Depending on the device, you may need to download the Zoom app.
- For attorneys, provide parties and witnesses the Meeting link and ID for virtual appearance 72-hours in advance of the hearing.
- For pro se litigants (if you are representing yourself), provide witnesses the Meeting link and ID for virtual appearance 72-hours in advance of the hearing.
- If you are calling in to the proceeding in the same room as another person in the same proceeding, feedback and an echo will occur, making it difficult to hear you.
- Remind everyone to have their phone/computer fully charged & keep a charging cord and outlet nearby if possible.
- Keep your phone muted unless you are speaking.
- If you become aware that the hearings will be called in a particular order, please let the parties and witnesses know via text or email to reduce their waiting time.
- If you are a PARTY OR WITNESS, you must be alone and in a quiet room. Outdoor, moving vehicles and public places are not allowed.
- For ALL, background noise is disruptive to the proceedings. Please limit.
- During the proceeding, stay within the view of the camera until your case has concluded.
- If your connection in not stable, the Court has the right to terminate the proceeding and reset it for another day.

CLAY

Judge Angela M. Cox (E) Donna Gonzalez: gonzalezd@clayclerk.com
See attached.

Judge Gary L. Wilkinson (F) Kathryn Claxton: claxtonk@clayclerk.com
By Zoom: Ex Parte and Hearings less than 30 minutes.
In Person: Trials, Evidentiary Hearings, Dispositive Motions, Adoptions, DP and DV Calendar
Motion Required: Any hearing in excess of 30 minutes

DUVAL

Judge Russell Healey (FM-B) Becci Powell: bpowell@coj.net
Motions for Contempt require in person appearance – no exceptions. If one party requests in person, then the hearing will be in person. Everything else is conducted by Zoom.

Judge John I. Guy (FM-C) Jennifer Weigel: jennw@coj.net
Appearances via Zoom are permitted for any non-evidentiary hearings lasting an hour or less. Hearings scheduled for more than one hour are in-person, absent good cause to the contrary (such as an out-of-town witness or party, or expert witness). Judge Guy hosts all Zoom hearings. Exhibits must be e-mailed, or hand delivered (if greater than 25 pages) 24 hours prior to a hearing via Zoom.

Judge James E. Kallaher (FM-D) Mikaelia M. Richardson: mikaeliar@coj.net
By Zoom: non-evidentiary less than 30 minutes
Ex Parte: in person, except consent final judgments
Trials: in person unless otherwise permitted by the court

Judge Maureen T. Horkan (FM-E) Connie Pfeifer: cpfeifer@coj.net
All hearings and trials by Zoom.

Judge Suzanne Bass (FM-F) Kathy Fristrom: fristrom@coj.net
Most hearings are by Zoom. It would be very rare to have an in person hearing. Trials are in person.

Judge Lance M. Day (FM-G) Ashley White: washley@coj.net
All hearings are conducted via Zoom which is set up by the Judicial Assistant and hosted by Judge Day. Zoom is set up and hosted by Judge's office.

NASSAU

Judge Lester Bass (C) Amber Collie: acollie@coj.net
Conducts all hearings by Zoom unless requested otherwise by the parties or counsel. Judge Bass always hosts the Zoom hearings.

Judge Eric Roberson (A) Sarah Kaleel: skaleel@coj.net
All hearings are conducted via Zoom unless requested to be in person by the attorneys through email. Zoom is set up and hosted by Judge's office.

FOURTH JUDICIAL CIRCUIT TECHNOLOGY

Clay County: https://clayclerk.com/judges/courtroom-technology/

Duval County: https://www.jud4.org/Technology.aspx

Mike Smith, CTO at mikejs@coj.net
Desk: (904) 255-1083
Cell: (904) 402-1105

Vince Paruolo at Paruolo@coj.net
Desk: (904) 255-1085
Cell: (904) 237-4247

Patrick Estalilla at PEstalilla@coj.net
Desk: (904) 255-2196
Cell: (904) 312-2720

James Muse at JKMuse@coj.net
Desk: (904) 255-1084
Cell: (904) 571-7001

Nassau County: https://www.nassauclerk.com/court-rooms/?hilite=%27technology%27

Mike Smith, CTO at mikejs@coj.net
Desk: (904) 255-1083
Cell: (904) 402-1105

Vince Paruolo at Paruolo@coj.net
Desk: (904) 255-1085
Cell: (904) 237-4247

Florida Rule of General Practice and Judicial Administration 2.530

Supreme Court of Florida

No. SC21-990

IN RE: AMENDMENTS TO FLORIDA RULES OF CIVIL PROCEDURE, FLORIDA RULES OF GENERAL PRACTICE AND JUDICIAL ADMINISTRATION, FLORIDA RULES OF CRIMINAL PROCEDURE, FLORIDA PROBATE RULES, FLORIDA RULES OF TRAFFIC COURT, FLORIDA SMALL CLAIMS RULES, AND FLORIDA RULES OF APPELLATE PROCEDURE.

July 14, 2022

PER CURIAM.

This matter is before the Court for consideration of proposed amendments to the Florida Rules of Civil Procedure, the Florida Rules of General Practice and Judicial Administration, the Florida Rules of Criminal Procedure, the Florida Probate Rules, the Florida Rules of Traffic Court, the Florida Small Claims Rules, and the Florida Rules of Appellate Procedure. The proposed amendments, which we adopt with modifications, provide permanent and broader authorization for the remote conduct of certain court proceedings.[1]

1. We have jurisdiction. *See* art. V, § 2(a), Fla. Const.

Florida Family Law Rule of Procedure 12.310

Supreme Court of Florida

No. SC22-1

IN RE: AMENDMENTS TO FLORIDA RULES OF JUVENILE PROCEDURE, FLORIDA FAMILY LAW RULES OF PROCEDURE, AND FLORIDA SUPREME COURT APPROVED FAMILY LAW FORMS.

July 14, 2022

PER CURIAM.

This matter is before the Court for consideration of proposed amendments to the Florida Rules of Juvenile Procedure, the Florida Family Law Rules of Procedure, and Florida Supreme Court Approved Family Law Forms 12.980(a), (f), (n), (q), and (t). The proposed amendments, which we adopt with substantial modifications, provide permanent and broader authorization for the remote conduct of certain court proceedings in the areas of delinquency, dependency, and family law.[1]

1. We have jurisdiction. *See* art. V, § 2(a), Fla. Const.

I. BACKGROUND

Following the onset of the COVID-19 pandemic in 2020, the Court established the Workgroup on the Continuity of Court Operations and Proceedings During and After COVID-19 (Workgroup) "to develop findings and recommendations on the continuation of all court operations and proceedings statewide in a manner that protects health and safety and that addresses each [phase] of the pandemic." *In re: Workgroup on the Continuity of Court Operations and Proceedings During and After COVID-19*, Fla. Admin. Order No. AOSC20-28 (April 21, 2020). The Workgroup was also directed to "[i]dentify whether certain proceedings, due to efficiencies beneficial to stakeholders, could continue to be conducted remotely when COVID-19 no longer presents a significant risk to public health and safety," and the Workgroup was authorized to propose the necessary rule amendments. *Id.*; *see also In re: Workgroup on the Continuity of Court Operations and Proceedings During and After COVID-19*, Fla. Admin. Order No. AOSC20-110 (November 23, 2020).

The Workgroup determined that permanent, broader authorization for remote proceedings was warranted based on the

positive outcomes and efficiencies observed during the pandemic. While working to refine its proposals, however, the Workgroup identified the need for greater subject matter expertise for the proposed amendments in the areas of delinquency, dependency, and family law.[2] Therefore, the Chief Justice referred responsibility for the review, revision, and finalization of proposed amendments in these areas to the Steering Committee on Families and Children in the Court (Steering Committee). The Steering Committee was instructed to seek input from the Juvenile Court Rules Committee and the Family Law Rules Committee of The Florida Bar before filing its petition.

After the Steering Committee filed the petition at issue in this case, the Court published the proposed amendments for comment.

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2. The Workgroup's petition and proposed amendments for the permanent, broader authorization of the remote conduct of certain court proceedings are addressed in our decision in *In re Amendments to Florida Rules of Civil Procedure, Florida Rules of General Practice & Judicial Administration, Florida Rules of Criminal Procedure, Florida Probate Rules, Florida Rules of Traffic Court, Florida Small Claims Rules, & Florida Rules of Appellate Procedure*, No. SC21-990 (July 14, 2022), which is also released today.

Seven comments were received, and the Steering Committee filed a response to the comments.

Having considered the proposed amendments, the comments, and the Steering Committee's response, the Court hereby adopts, with changes, the Steering Committee's proposals as modified in response to the comments. We discuss some of the significant amendments below as well as the significant changes to the Steering Committee's proposals.

II. AMENDMENTS

New Florida Rule of Juvenile Procedure 8.001 (Communication Technology) exempts proceedings governed by the Florida Rules of Juvenile Procedure from Florida Rule of General Practice and Judicial Administration 2.530 (Communication Technology). Then, new Florida Rule of Juvenile Procedure 8.002 (Definitions) defines "Appear or Appearance" to mean "[t]he presentation of oneself before the court in person or via communication technology." And amendments to Florida Rules of Juvenile Procedure 8.100 (General Provisions for Hearings) and 8.255 (General Provisions for Hearings) provide for the remote and hybrid conduct of certain delinquency and dependency hearings. Under amended rules 8.100 and 8.255,

evidentiary proceedings must be conducted in person unless the parties agree, or the court orders for good cause shown, that the proceedings be conducted remotely or in a hybrid format. Other proceedings may be conducted remotely or in a hybrid format upon agreement of the parties or court order. And parties who participate remotely or in a hybrid format must be able to privately communicate with counsel.

The Court declines to adopt the Steering Committee's proposed amendments to Florida Rules of Juvenile Procedure 8.224 (Permanent Mailing Address) and 8.400 (Case Plan Development). However, we amend Florida Rule of Juvenile Procedure 8.225(f) (Notice and Service of Pleadings and Papers) to resemble the amendments to Florida Rule of General Practice and Judicial Administration 2.516 (Service of Pleadings and Documents) adopted in Case No. SC21-990, which require non-represented parties to participate in e-mail service unless in custody or excused after declaring a lack of an e-mail account or regular internet access.

Next, as suggested by the Alternative Dispute Resolution Committee, Florida Rule of Juvenile Procedure 8.290 (Dependency Mediation) is amended to conform to its civil and appellate

counterparts by expressly authorizing the use of communication technology in dependency mediation.

Regarding the Florida Family Law Rules of Procedure, the Court declines to adopt the Steering Committee's proposal for new rule 12.026 (Communication Technology). Since we do not adopt this proposed rule 12.026, remote family law proceedings will be governed by rule 2.530, like all other civil proceedings. This will ensure that the rules governing remote proceedings are more uniformly implemented across most case types. Moreover, the proposal for a new rule 12.026 would not have safeguarded any rights or interests unique to family law matters, and the Steering Committee's petition does not explain why a separate rule that is slightly different from rule 2.530 is needed for family law cases.

Additionally, the Court adopts modified versions of the Steering Committee's proposals for Florida Family Law Rules of Procedure 12.310 (Depositions Upon Oral Examination), 12.320(b) (Officer to Take Responses and Prepare Record), 12.410(e) (Subpoena for Taking Depositions), 12.430(d) (Juror Participation Through Audio-Video Communication Technology), 12.440(b) (Notice for Trial), and 12.740 (Family Mediation), which are modified

for greater consistency with the amendments adopted in Case No. SC21-990. Also, at the suggestion of the Family Law Section of The Florida Bar, we remove language in rule 12.740 that had unnecessarily required each party's counsel to sign a mediation agreement.

Finally, the Court amends Florida Supreme Court Approved Family Law Forms 12.980(a), (f), (n), (q), and (t) as proposed by the Steering Committee.

III. CONCLUSION

Accordingly, the Florida Rules of Juvenile Procedure and the Florida Family Law Rules of Procedure are amended as set forth in the appendix to this opinion, with new language underscored and deletions in struck-through type. The amended Florida Supreme Court Approved Family Law Forms 12.980(a), (f), (n), (q), and (t) are adopted as set forth in the appendix to this opinion, fully engrossed. The amendments to the rules and the amended forms shall become effective October 1, 2022, at 12:01 a.m. The amended forms may be accessed and downloaded from the Florida State Courts' website at https://www.flcourts.org/Resources-Services/Office-of-Family-Courts/Family-Courts/Family-Law-

Forms. By amending the forms, we express no opinion as to their correctness or applicability.

We thank the Steering Committee for its attention to this important matter. We also extend our appreciation to the commenters.

It is so ordered.

MUÑIZ, C.J., and CANADY, POLSTON, LABARGA, LAWSON, COURIEL, and GROSSHANS, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THESE AMENDMENTS.

Original Proceeding – Florida Rules of Juvenile Procedure and Florida Family Law Rules of Procedure

Judge Hope T. Bristol, Chair, Steering Committee on Families and Children, Fort Lauderdale, Florida, and Avron Bernstein, Senior Attorney, Office of the State Courts Administrator, Tallahassee, Florida,

for Petitioner

Stephanie C. Zimmerman, Chair, Juvenile Court Rules Committee, Bradenton, Florida, and Candice K. Brower, Past Chair, Juvenile Court Rules Committee, Gainesville, Florida; Michael V. Andriano, Chair, Family Law Rules Committee, Orlando, Florida, and Ashley Elizabeth Taylor, Past Chair, Family Law Rules Committee, Tampa, Florida; Philip S Wartenberg, Chair, Family Law Section of The Florida Bar, Tampa, Florida, Heather L. Apicella, Past Chair, Family Law Section of The Florida Bar, Boca Raton, Florida, Kristin R.H. Kirkner, Co-Chair, Rules and Forms Committee, Family Law Section of The Florida Bar, Tampa, Florida, and Tenesia C. Hall, Co-Chair, Rules and Forms Committee, Family Law Section of The

(a) [No Change]

(b) Pretrial Status Conference. Not less than 10 days before the adjudicatory hearing on a petition for involuntary termination of parental rights, the court shall conduct a pretrial status conference to determine the order in which each party may present witnesses or evidence, the order in which cross-examination and argument shall occur, which witnesses will be physically present and which will appear via audio-video communication technology, and any other matters that may aid in the conduct of the adjudicatory hearing.

(c) [No Change]

RULE 8.525. ADJUDICATORY HEARINGS

(a)–(c) [No Change]

(d) Presence of Parties. All parties have the right to be present at all termination hearings. A party may appear in person or, at the discretion of the court for good cause shown, by ~~an audio or audiovisual device~~communication technology. No party shall be excluded from any hearing unless so ordered by the court for disruptive behavior or as provided by law. If a parent appears for the advisory hearing and the court orders that parent to personally appear at the adjudicatory hearing for the petition for termination of parental rights, stating the date, time, and location of this hearing, then failure of that parent to personally appear at the adjudicatory hearing shall constitute consent for termination of parental rights.

(e)–(j) [No Change]

RULE 12.310. DEPOSITIONS UPON ORAL EXAMINATION

(a) [No Change]

(b) Notice; Method of Taking; Production at Deposition.

(1) A party desiring to take the deposition of any person upon oral examination must give reasonable notice in writing to every other party to the action. The notice must state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced under the subpoena must be attached to or included in the notice, and if the deposition is to be taken through the use of communication technology, the parties shall provide the subpoenaed documents no later than 5 days prior to the deposition.

(2)-(3) [No Change]

(4) Any deposition may be audiovisually recorded ~~by videotape~~ without leave of the court or stipulation of the parties, provided the deposition is taken in accordance with this subdivision.

(A) Notice. In addition to the requirements in subdivision (b)(1), a~~A~~ party intending to ~~videotape~~audiovisually record a deposition must:

(i) state ~~in the notice~~ that the deposition is to be ~~videotaped~~audiovisually recorded in the title of the notice; and

(ii) ~~must~~identify the method for audiovisually recording the deposition and, if applicable, provide ~~give~~ the name and address of the operator of the audiovisual recording equipment in the body of the notice. ~~Any subpoena served on the person to be examined must state the method or methods for recording the testimony.~~

(B) Court Reporter. ~~Videotaped~~Audiovisually recorded depositions must also be stenographically recorded by a certified court reporter, unless all parties agree otherwise. If all parties have agreed to waive the requirement of stenographic recording, then in addition to the requirements of subdivision (b)(4)(A), the notice or subpoena setting deposition shall set forth that agreement.

(C) Procedure. At the beginning of the deposition, the officer before whom it is taken must, on camera: (i) identify the style of the action, (ii) state the date, and (iii) ~~swear in~~put the witness under oath as provided in subdivision (c)(1).

(D) ~~Custody of Tape~~Responsibility for Recordings and Obtaining Copies. The attorney for the party, or the self-represented litigant, requesting the ~~videotaping~~audiovisual recording of the deposition must take custody of and be responsible for the safeguarding of the ~~videotape~~recording.~~, must permit the viewing of it by the opposing party, and, i~~ If requested, an attorney or self-represented litigant safeguarding a recording must provide a copy of the ~~videotape~~recording at the expense of the party requesting the copy unless the court orders otherwise. An attorney or self-represented litigant safeguarding a recording may condition providing a copy of the recording upon receipt of payment. An attorney or self-represented litigant who fails to safeguard a recording or provide a copy as set forth in this subdivision may be subject to sanctions.

(E) Cost of ~~Videotaped~~Audiovisually Recorded Depositions. The party requesting the ~~videotaping~~audiovisual recording bears the initial cost of ~~videotaping~~the recording.

(5)-(6) [No Change]

(7) A deposition may be taken by communication technology, as that term is defined in Florida Rule of General Practice and Judicial Administration 2.530, if stipulated by the parties or if ordered by the court on its own motion or ~~O~~on motion ~~the court may order that the testimony at a deposition be taken by~~

~~telephone~~of a party. A court official must determine whether good cause exists before authorizing the use of communication technology for the taking of a deposition, but a motion filed under this subdivision shall not require a hearing. The order may prescribe the manner in which the deposition will be taken. ~~A party may also arrange for a stenographic transcription at that party's own initial expense.~~In addition to the requirements of subdivision (b)(1), a party intending to take a deposition by communication technology must:

(A) state that the deposition is to be taken using communication technology in the title of the notice; and

(B) identify the specific form of communication technology to be used and provide instructions for access to the communication technology in the body of the notice.

(8) [No Change]

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections; Transcription.

(1) Examination and cross-examination of witnesses may proceed as permitted at the trial. The officer before whom the deposition is to be taken must put the witness ~~on~~under oath and must personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness, except that when a deposition is being taken by ~~telephone~~communication technology under subdivision (b)(7), the witness must be ~~sworn by a person present with the witness who is qualified to administer an oath in that location~~put under oath as provided in Florida Rule of General Practice and Judicial Administration 2.530. The testimony must be taken stenographically or recorded via audio-video communication technology~~by any other means ordered in accordance with~~ under subdivision (b)(4). ~~If requested by one of the parties, the testimony must be transcribed at the initial cost of the requesting party and prompt notice of the request must be given to all other parties.~~ All objections made at the time of the examination to the qualifications

of the officer taking the deposition, the manner of taking it, the evidence presented, or the conduct of any party, and any other objection to the proceedings must be noted by the officer during the deposition. Any objection during a deposition must be stated concisely and in a nonargumentative and nonsuggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under subdivision (d). Otherwise, evidence objected to must be taken subject to the objections. Instead of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and that party must transmit them to the officer, who must propound them to the witness and record the answers verbatim.

(2) If requested by a party, the testimony must be transcribed at the initial cost of the requesting party and prompt notice of the request must be given to all other parties. A party who intends to use an audio or audiovisual recording of testimony at a hearing or trial must have the testimony transcribed and must file a copy of the transcript with the court.

(d)-(f) [No Change]

~~**(g) Obtaining Copies.** A party or witness who does not have a copy of the deposition may obtain it from the officer taking the deposition unless the court orders otherwise. If the deposition is obtained from a person other than the officer, the reasonable cost of reproducing the copies must be paid to the person by the requesting party or witness.~~

(g~~h~~) [No Change]

Committee Notes

[No Change]

Judicial notice of information taken from

web mapping services, global satellite imaging sites or

internet mapping tools.

§90.2035, Fla. Stat.

The 2022 Florida Statutes

90.2035 Judicial notice of information taken from web mapping services, global satellite imaging sites, or Internet mapping tools.—

(1)(a) Upon request of a party, a court may take judicial notice of an image, map, location, distance, calculation, or other information taken from a widely accepted web mapping service, global satellite imaging site, or Internet mapping tool, if such image, map, location, distance, calculation, or other information indicates the date on which the information was created.

(b) A party intending to offer such information in evidence at trial or at a hearing must file notice of such intent within a reasonable time or as defined by court order. The notice must include a copy of the information and specify the Internet address or pathway where such information may be accessed and inspected.

(2)(a) A party may object to the court taking judicial notice of the image, map, location, distance, calculation, or other information taken from a widely accepted web mapping service, global satellite imaging site, or Internet mapping tool within a reasonable time or as defined by court order.

(b) In civil cases, there is a rebuttable presumption that information sought to be judicially noticed under this section should be judicially noticed. The rebuttable presumption may be overcome if the court finds by the greater weight of the evidence that the information does not fairly and accurately portray what it is being offered to prove or that it otherwise should not be admitted into evidence under the Florida Evidence Code.

(c) If the court overrules the objection, the court must take judicial notice of the information and admit the information into evidence.

(3) In criminal cases, the court must instruct the jury that the jury may or may not accept the noticed facts as conclusive.

(4) This section does not affect, expand, or limit standards for any matters that may otherwise be judicially noticed.

History.—s. 1, ch. 2022-100.

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Form Request for Judicial Notice

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.:
DIVISION:

[Case Style]

_____/

REQUEST FOR JUDICIAL NOTICE
(Florida Statutes, Section 90.2035)

[*Name of Party*], by and through *his/her* undersigned counsel, pursuant to Section 90.2035, Florida Statutes, and gives notice of the request to take judicial notice of satellite map images containing locations, distances, and other information taken from the web mapping service, *Google Earth (https://earth.google.com/web/)*, a global satellite imaging site and internet mapping tool.

The satellite map images subject to this notice and request are attached hereto and incorporated by reference as *Composite Exhibit "A,"* as required pursuant to Section 90.2035, Florida Statutes, and include the following document(s):

a) Aerial view of Terry Parker Dr., Paine Ave., Windermere Dr., and University Blvd N., Jacksonville, Florida[1]*;*

b) Street view of Paine Ave. and Windermere Dr., Jacksonville, Florida[2]*;*

c) Aerial measurement ft. (view # 1) Paine Ave.[3]*; and*

1 [cut and paste the exact hyperlink used for this information]
2 [cut and paste the exact hyperlink used for this information]
3 [cut and paste the exact hyperlink used for this information]

d) Aerial measurement mi. Paine Ave. to Windermere[4].

DATED at Jacksonville, Duval County, Florida, this _____ day of _____ 202__.

[*Signature block*]

4 [cut and paste the exact hyperlink used for this information]

Composite Exhibit "A"

CERTIFICATE OF SERVICE

[*standard certificate of service language*]

Articles

WHAT EVERY ATTORNEY NEEDS TO KNOW ABOUT ELECTRONIC TECHNOLOGY

Vol. 82, No. 9 October 2008 Pg 22 D. Patricia Wallace Featured Article

These days an attorney can get away with not knowing what a bit, byte, or gig is, but no longer can a Florida lawyer meet his or her professional obligation of competent representation without knowing the basic characteristics of electronic data. This article provides an introduction to the technology of electronic data in the context of recent court decisions and suggests some easy methods for avoiding common and often costly pitfalls related to electronic technology.

1. All data that passes across an electronic medium is stored there, if only for a short period of time.

Every time we open an electronic file, from whatever source, including the Internet, we save data to our computer. This characteristic of electronic data is one of the most profound for the nonexpert. In layman's terms, opening an electronic file such as an e-mail or a document is tantamount to opening a book. Just like we cannot see the

contents of the book without having it in our hands, we cannot read the contents of an electronic document without having the data comprising the document residing in our computer's memory, specifically, our computer's Random Access Memory (RAM). The electronic data differs from the book, however, because, unlike a book that can be reshelved, electronic data stays in our computer's memory even after we have closed the document. Electronic data also differs from the book in that we cannot readily detect most of the electronic data entering our computer's memory; we cannot see that data stays in our computer's memory; and we often cannot or do not control the flow of electronic data into our computer. For example, in order for us to see a Web page, numerous files comprising that Web page must be downloaded to our computer, including those that may be unwanted. These files or parts of them will remain on the computer in some form, likely inaccessible by the regular user.

Litigators must understand this characteristic of electronic data so that they can find information to support their client's claims or defenses. A recent decision from the Central District of California shows the value of being familiar with the staying power or stickiness of electronic data. In *Columbia Pictures Indus. v. Bunnell*, No. CV 06-1093FMCJCX, 2007 WL 2080419 (S.D. Cal. May 29, 2007), the plaintiff, Columbia Pictures, alleged that the defendant had pirated its copyrighted works.[1] The defendant allegedly sold copies of copyrighted works over the Internet, using a vendor's server located in the Netherlands to process orders.[2] To prosecute its case, Columbia Pictures wanted to find out how many copyrighted works were sold illegally and who made the illegal purchases. During discovery, its attorneys requested the IP addresses of users of the defendants' Web site, the users' requests for files (that is, the films purchased), and the dates and times of such requests.[3] The defendants contended that this information was not within their possession because it was routed to the RAM of their Dutch vendor.[4] According to the defendants, the information routed to their vendor's RAM was not "in any medium from which the data [could] be retrieved or examined, or fixed in any tangible form such as a hard drive."[5] This response may have been acceptable in the world of paper discovery, but Columbia Pictures' attorneys knew that any information that went across a server had to stay there if only for a short period of time. The attorneys confirmed through discovery that a customer's order remained in RAM for about six hours on the server in the Netherlands.[6] Columbia Pictures convinced the

court that such information was in the custody and control of the defendants.[7] The court ordered the defendants to cause their vendors' automatic overwriting process to cease so that the requested information would be preserved during the course of litigation.[8] It cannot be emphasized enough: All data that crosses over an electronic medium is stored there. The attorneys for Columbia Pictures used this knowledge as part of their litigation strategy. Conversely, defending attorneys need to anticipate requests such as those made by Columbia Pictures, work with their clients to develop a strategy before receiving such requests, and lay the groundwork for convincing the court of the appropriateness of their client's position and actions.

2. Deletion does not mean destruction.

now, most attorneys know the basic rule that deletion of an electronic document does not eradicate it, but few contemplate all the dangers and opportunities arising from this characteristic of electronic data. "Deletion" of electronic files simply means that the space occupied by those files is now available to store other files. Techies commonly use the analogy that deletion of files is like removing a library's card catalog: The books are still in the library, but without another card catalog, the library patron cannot find them. In the electronic storage system, until new files occupy the old spaces, that data survives even if it is locatable only through the application of forensic software.

Attorneys must incorporate an understanding of this technology into every aspect of handling their clients' and their own electronic media. It is not enough just to be cautious about the fates of files, electronic media, and discarded computers. Attorneys must think how they can use this sticky property of electronic data to their client's advantage. For example, attorneys may want to consider whether to retain a computer forensics expert to recover "deleted" files. A fictional adaptation of circumstances in recent Florida litigation illustrates this point: An attorney representing a husband in divorce was surprised to learn after months of talking with his client that the wife had used the computer that now belonged to the husband. The husband assumed the wife's use was not important because she had copied all her files to CDs and then deleted the files from the husband's hard drive. The attorney knew better and engaged the services of a

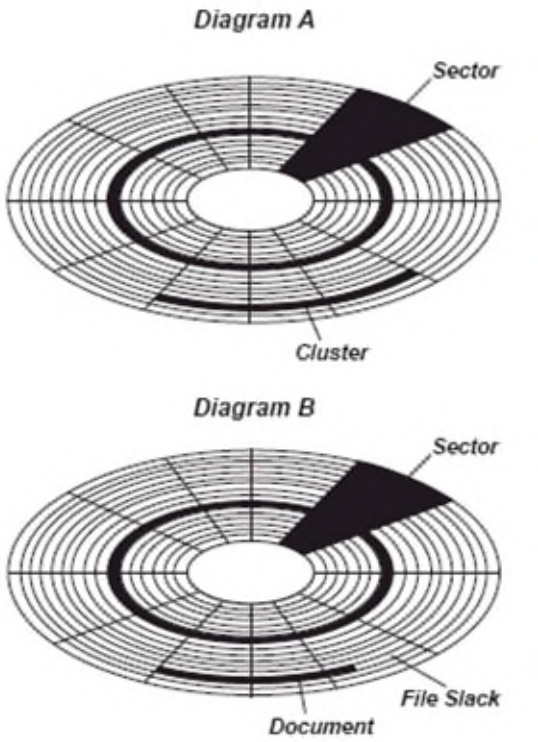
certified computer examiner. The husband was astonished by what the computer examiner was able to restore. So was the wife.

Understanding this basic characteristic of electronic data also applies defensively by helping attorneys avoid disclosure of confidential information. Without application of this knowledge, attorneys risk inadvertently producing materials and destroying the protection of attorney-client privilege not only with respect to the produced documents but also with respect to the entire subject matter of the documents inadvertently produced.[9] Courts are not always sympathetic to the plight of the lawyer who accidently turns over confidential documents to opposing counsel. In *Amersham Biosciences Corp. v. Perkinelmer, Inc.*, No. 03-4901(JLL), 2007 WL 329290 (D.N.J. Jan. 31, 2007), for example, the plaintiff's counsel carefully reviewed Lotus Notes e-mails saved on a DVD, segregated into a separate file those e-mails deemed "privileged," and deleted the file of privileged documents before submitting the DVD to the firm's vendor with instructions to prepare the documents in a readable format for production to opposing counsel. The vendor converted the files from Lotus Notes to single page image files.[10] Unknown to counsel, however, his vendor's software captured the "deleted" files and also converted them into single page images.[11] Without examining the processed DVD copy, counsel produced it to the opposing party.[12] Months later, producing counsel saw his error and asked for the return of the inadvertently produced privileged documents.[13] The parties took the issue to the magistrate judge who found the inadvertently produced Lotus Notes documents were privileged and ordered their return on the ground that plaintiffs knew or should have known that the information retrieved from this metadata was privileged and had not been intended to be disclosed.[14] The district court, however, disagreed. The court concluded that the producing party's counsel should have detected his error, and, therefore, the production of the documents waived the privilege.[15]

3. The typical hard drive of a computer is comprised of several disks, each of which contains fixed-size spaces for storing electronic data.

At first blush, this fact may strike the attorney as overly techie, but it is a simple concept that, if understood, can save much heartache. In simple terms, electronic file structure is like that of a metal file drawer where each file folder and each file drawer are of fixed

sizes that do not expand or contract with the addition or deletion of material.[16] To apply the comparison to electronic data, two further conditions must be imposed: All of the folders and drawers are always full, and nothing can be removed from the file folders or drawers unless something else is stuck in its place. Electronic data storage media are comprised of clusters (the file drawers), which are, in turn, comprised of sectors (the file folders). Diagram A illustrates the basic storage structure of one side of a single disk of a hard drive.[17] When we save a file (for example, a Microsoft Word document) to a hard drive, the data of that file fills in cluster after cluster, writing over data that had been "deleted," until all the data of the file is stored. Any space left over in the last sector remains as "file slack." File slack remains filled with the "deleted" data.[18] Diagram B illustrates this storage structure and file slack.



The FBI and other law enforcement agencies here and abroad have examined electronic media's file slack and located incriminating evidence such as downloads from the Internet or e-mails.[19] Examination of file slack will play an increasingly important role in civil litigation as attorneys become more aware of the possible uses of computer forensics as a discovery tool. Although the process of recovering data from slack and unallocated space (the space on a hard drive not occupied by a partition; it is not

formatted) is labor intensive and expensive, recovering this data may be essential to prosecuting certain kinds of cases, and attorneys must understand the basics of this technology or associate with someone who does in order to provide competent representation.[20] No longer should a sentence such as “A bit-stream mirror image copy of the media item(s) will be captured and will include all file slack and unallocated space” sound foreign to attorneys. That is not techno-language; it is part of a magistrate judge’s discovery order.[21] In some instances, companies are conducting their own internal computer forensics examinations when theft of proprietary information is a concern.[22] Attorneys need to know when this type of investigation is appropriate, and they need to be able to advise their clients of possible repercussions of such investigations. Such investigations may be discoverable. In *Lockheed Martin Corp. v. L-3 Communications Corp.*, No. 6:05-cv-1580-Orl-31KRS, 2007 WL 2209250 (M.D. Fla. July 29, 2007), the magistrate judge concluded that documents recovered through computer forensics examination are “facts” and are, therefore, “not protected by the attorney-client privilege.”[23]

Understanding the structure of clusters and slack, attorneys can better protect themselves and their clients from inadvertent disclosure of confidential information. From a strategic perspective, a rudimentary understanding of electronic file structure may help attorneys discover opportunities to obtain relevant evidence they otherwise would have missed.

4. Information on work stations is not necessarily stored on network servers.

Ignoring this fact may result in sanctions for not adequately searching for responsive documents, especially where a request for production asks for all versions and variations of a single document. It is not uncommon, for example, for an employee to prepare a memorandum on his or her work station, save it to the server, revise the document, and save the revised version over the original version on the server. Depending on the network set-up, the original document may be inaccessible from the server, but it may remain on the employee’s work station, thus, leading to a client’s having two or more versions of the same responsive document. This problem is exacerbated as versions of documents are e-mailed and opened on different work stations.

Failure to understand or to heed this network basic can lead to sanctions, as it did in the trademark infringement case, *Cache la Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614 (D. Colo. 2007). In what appeared to be honorable efforts to preserve relevant material, Land O'Lakes' counsel, within days of filing of the suit, imposed a litigation hold and instructed employees to search for responsive materials, including paper documents, e-mails, and compact disks.[24] Counsel expanded its inquiry as discovery proceeded and included additional employees in the discovery process.[25] Despite these good faith efforts, counsel made a costly mistake in assuming that data stored on employees' hard drives was saved on Land O'Lakes' numerous servers. Because of this mistaken assumption, both in-house and outside counsel allowed Land O'Lakes to continue with its standard operating procedure of wiping clean the hard drives of the work stations of departed employees.[26] The magistrate judge, finding that Land O'Lakes' counsel had failed to monitor adequately the discovery process by not stopping Land O'Lakes' standard procedures for dealing with the computers of departing employees, held that counsel had "interfered with the judicial process." The judge imposed a $5,000 fine and ordered Land O'Lakes to pay the court reporter fees and transcript costs of the plaintiff's deposition of Land O'Lakes' in-house counsel.[27]

The *Cache la Poudre* order does not mean that clients must shut down all standard operating procedures when litigation appears imminent. Consistent with the holding in *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004), the order emphasizes that clients and counsel must take reasonable steps to preserve data and monitor compliance with a litigation hold. Sometimes a lockdown on hard drives may be expensive and disruptive. A good alternative is to hire a certified computer examiner to make mirror copies of all hard drives that may contain relevant information and to maintain a chain of custody record. This procedure provides a forensically sound copy of the relevant electronic media, which the computer examiner should keep in a safe, and the clients may continue to use their computers without fear of deleting or changing relevant information. If the client chooses this option, it *must* use a computer examiner working with appropriate software: Having employees or worse, attorneys, duplicate the files without the appropriate software actually changes the data on the hard drive, risks spoliation of evidence and consequential sanctions, and often requires the person who made the copies to serve as a witness.

5. Clients' information may be stored on the servers of third parties.

This basic is not so much technological as it is common sense, but as we have seen with the Columbia Pictures case, the nature of electronic data requires attorneys to cast a wider net to identify possible sources of relevant materials and to do so as soon as it appears that litigation is imminent. The first step for quickly identifying sources of relevant material, as almost every electronic discovery how-to pamphlet or book will advise, is to examine a data map of the client's information systems. An accurate and complete data map and inventory shows where information comes into the client's systems, where it is processed, where it leaves the client, where information is stored, where it is backed up, how client employees communicate within the organization, and how all the client's systems interact. A good inventory should show all laptops, home computers, and other devices for storing electronic data that are used for any company purpose, whether within the bricks and mortar of the client's operations, on the road, or in employees' homes. Often omitted from either the data map or the inventory, however, are identifications of vendors, attorneys, or other service providers who may have relevant data — perhaps the only remnants of that data. As happened in *Columbia Pictures*, a court may order a party to see that its vendor retains electronic information, even information as transient as that downloaded to RAM for the sole purpose of fulfilling purchase orders.

Attorneys who have continuing relationships with corporate clients should discuss data maps with them before litigation appears evident. Attorneys, however, should be aware that this is an extremely sensitive topic. The many companies that find themselves without a day's rest from litigation should be careful not to expose themselves in continuing litigation by admitting that their current procedures for handling electronic data are not sufficient. To avoid or mitigate this problem, companies may be able to show that their current procedures were reasonable given the circumstances at the time they were developed and that they proceeded with the improvements because of better technology and development of case law that clarified their responsibilities. Attorneys with continuing relationships with corporate clients need to work with them to ensure that the data maps and inventories are constantly updated and that the procedures for storing and deleting data comports with the changing law surrounding e-discovery.

Electronic discovery is a (if not THE) major litigation problem for most companies.[28] Of all the reasons to learn something of electronic technology, this may be the most important. Electronic discovery is posing a huge and expensive problem to corporations.[29] Granted, most large enterprises have sophisticated IT departments and deep legal departments, but often there is a vast gap between the "geeks" and in-house counsel. A good outside attorney will serve as a translator between these two departments; the client and the court; and the client and its opponent. To be an effective translator, the outside attorney needs to understand the rudiments of electronic data creation, transmission, and storage, and he or she needs to be able to examine a client's data map and computer system inventory and understand it quickly. Litigators' intelligence when it comes to systems and electronic data is absolutely crucial in the context of federal litigation, where one must serve initial disclosures within at most three months of service and be prepared to tell opposing counsel within that time period what his or her client is willing and able to produce and in what format.

6. The history of clients' hardware, including hard drives may be critical.

Often we assume that clients' hardware was never used before the client obtained it, but that is not always the case, especially in our current world of numerous small start-ups where equipment changes hands in a relatively short period of time. An attorney who does not know the history of his or her client's work stations and servers may risk missing out on identifying relevant evidence. For example, in *Phoenix Four, Inc. v. Strategic Resources Corp.,* No. 05 Civ. 4837(HB) 2006 WL 1409413 (S.D.N.Y. May 23, 2006), the court held that outside counsel had failed to meet its discovery obligations because they did not identify and produce responsive information that was stored on a portion of their clients' server that had been partitioned from what employees could access from their work stations. The defendant, Strategic Resources Corp. (SRC), had provided various services for the plaintiff, Phoenix Four.[30] After the business relationship between the parties ended, SRC wound down, but its principle, Paul Schack, opened a new company, and there he installed a server and several work stations from SRC.[31] Once litigation started, Schack told outside counsel the new company did not have any responsive documents other than what it had already provided Phoenix Four during the course of their relationship.[32] Counsel relied on this representation and did not investigate what happened to the SRC computers once that business wound

down.[33] The court did not view this omission as an innocent oversight and found that counsel "failed in its obligation to locate and timely produce the evidence stored in the server that the SRC defendants took with them from [their previous office]."[34] The court held that it was not enough that counsel *asked* its client for "all electronic and hard copy *documents*. "[35] The court advised that counsel was obliged "to search for *sources* of information," and, in this instance, because counsel did not investigate the server of Schack's new company, counsel failed to meet their obligations.[36] Between the data map and a short history of hardware (and in some cases whole systems), the attorney has, in fairly short order, an enormous head start in preparing a list of all places where relevant information may be found. Examining and understanding the data map and history also gives the attorney the enormous advantage of understanding better what the client does, how the client does it, where the client started, and where the client is going. Armed with this information, the attorney can more effectively and efficiently help his or her client through discovery in case after case.

7. Client assurances will not insulate attorneys from sanctions.

As discussed in connection with the *Land O'Lakes* and *Phoenix Four* decisions, courts are not allowing attorneys to rely on the assurances of their clients to excuse passive approaches to discovery. In an unsettling decision from the Southern District of California, one judge contemplated reporting to the state bar attorneys who purported to rely on client assurances. In a patent enforcement action, *Qualcomm Inc. v. Broadcom Corp.*, No. 3:05cv1958-B (BLM) (S.D. Cal. Aug. 6, 2007), Doc. No. 593 at 32, the district court concluded the patents were unenforceable in part because it found that "by clear and convincing evidence. . . Qualcomm['s] counsel participated in an organized program of litigation misconduct and concealment throughout discovery, trial, and post-trial before new counsel took over lead role in the case on April 27, 2007." After the district court ruled on the unenforceability of the patents, Magistrate Judge Barbara L. Major considered Broadcom's motion for sanctions for discovery violations. Judge Major ordered to appear before her "all attorneys who signed discovery responses, signed pleadings and pre-trial motions, and/or appeared on behalf of Qualcomm," to show cause why sanctions should not be imposed against them.[37] Among the sanctions the

magistrate judge stated she would consider imposing on the attorneys were "monetary sanctions, continuing legal education, referral to the California State Bar for appropriate investigation and possible sanctions, and counsel's formal disclosure of this court's findings to all current clients and any courts in which counsel is admitted or has litigation currently pending."[38]

How had Qualcomm's attorneys violated the discovery orders? For one, they claimed they had not been able to find over 200,000 pages of relevant e-mails and other documents even though they were able to identify other company records. They also claimed that Qualcomm had "'kept [them] in the dark'" about these and other documents. Neither the district court nor the magistrate judge accepted these assertions. On October 29, 2007, Magistrate Judge Major recommended sanctions against Qualcomm and its attorneys.[39] On December 11, 2007, the district court adopted Judge Major's recommendation that Broadcom be awarded $8,568,633.24 in attorneys' fees, additional litigation costs, and expert fees as well as pre- and post-judgment interest.[40] On March 5, 2008, however, the district court vacated the sanctions order as to the attorneys, but not as to Qualcomm.[41] Qualcomm's appeal is pending before the U.S. Court of Appeals for the federal circuit.

8. Rule 26(f) may set a trap for the unwary.

As discussed in *Amersham* and *Qualcomm*, attorneys' ignorance of electronic discovery has led to inadvertent disclosure of client confidential information and inadvertent (or perhaps purposeful) failure to disclose responsive documents. Even with an understanding of electronic technology, however, attorneys risk disclosing confidential information because of the sheer volume of data to be reviewed and the fact electronic data is often hidden.

The Federal Civil Rules Committee recognized this problem, and the 2006 amendments to the Federal Rules of Civil Procedure tried to provide two mechanisms to help attorneys and clients avoid being penalized for inadvertent disclosure of confidential information: the so-called "clawback" and "sneak peek" agreements. These mechanisms, however, do not provide a panacea, and a brief analysis of the clawback provision shows attorneys cannot rely on them to solve problems stemming from attorneys' ignorance of technology.

Rule 26(b)(5) allows a party who has produced material it believes is subject to privilege to "notify any party that received the information of the claim [of privilege] and the basis for it." Once so notified, the receiving party "must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved." The comments to this 2006 amendment state: "Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production." Rule 26(f)(4) requires parties to consider these issues during the initial conference, and the notes recognize that a number of parties enter the now familiar "clawback agreements," which provide "that production without intent to waive privilege or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances."

Clawback agreements sound like a good idea, but like so many good ideas, such agreements pose problems. First, the parties in litigation must keep in mind that clawback agreements are procedural arrangements, a child of the federal rules. Privilege issues are evidentiary and are governed by rules promulgated by Congress. A clawback arrangement alone does not protect privilege. Second, clawback arrangements are limited to the parties who entered them, and it is questionable whether they can be enforced against third parties.[42] Third, as with any waiver of privilege situation, once a document is produced, the privilege may be waived not only as to that document, but also as to all documents or communications of the same subject matter, even where privilege had been asserted.[43] Proposed Federal Rule of Evidence 502[44] attempts to resolve these problems by providing that inadvertent disclosure where the holder of the privilege took reasonable steps to prevent disclosure and where the holder of the privilege took reasonable steps to rectify the error will, as a matter of law, not act as a waiver. Unless and until this legislation is enacted, production of privileged documents is risky. Neither attorneys nor clients should enter clawback agreements (or sneak peek agreements) lightly, and how clients approach privilege issues including such arrangements should be carefully considered and ultimately incorporated into company-wide litigation preparedness plans.

Conclusion

Electronic discovery is slowly catching on in Florida, and savvy attorneys are learning to

use it to their clients' advantage. Within a few years, there will be no escaping electronic discovery as litigators, rulemakers, and courts address the hard fact that the vast majority of contemporary information is created, manipulated, transmitted, or stored as electronic data. Attorneys do not need to be able to convert decimals into hexadecimals or understand hash values (yet), but we must have a basic knowledge of how data is stored on electronic media so that we can ask questions that will identify all sources of relevant information, develop viable discovery plans, and protect our clients.

[1] For the most part, this article discusses unpublished decisions of U.S. district courts in a number of jurisdictions. Few appellate courts have had an opportunity to review electronic technology decisions because these decisions are largely confined to discovery issues, which seldom reach appeal. The paucity of appellate opinions and even published trial court orders from Florida courts does not mean that litigators can await such decisions, the promulgation of state rules governing electronic discovery, or reported state court decisions. Florida's discovery rules are broad enough to include inspection of an opponent's computer system. *See Strasser v. Yalamanchi*, 669 So. 2d 1142 (Fla. 4th D.C.A. 1996). The infamous jury verdict of $1.4 billion against Morgan Stanley in *Coleman Holdings, Inc. v. Morgan Stanley & Co.*, No. 679071, 2005 WL 679071 (Fla. 15th Cir. Ct. Mar. 1, 2005), resulted in part from the court's giving the jury an adverse inference instruction in light of Morgan Stanley's failure to preserve e-mails after it knew that litigation was imminent. The Fourth District Court of Appeal reversed the award on grounds unrelated to the alleged spoliation issue. *See Morgan Stanley & Co. v. Coleman (Parent) Holdings Inc.*, 955 So. 2d 1124 (Fla. 4th D.C.A. 2007).

[2] *See Columbia Pictures Indus. v. Bunnell*, No. CV 06-1093FMCJCX, 2007 WL 2080419 (C.D. Cal. May 29, 2007).

[3] *See id.* at *1.

[4] *See id.* at *5.

[5] *Id.*

[6] *See id.* at *3

[7] *See id.*

[8] *See id.*

[9] *See, e.g., Martin Marietta*, 856 F.2d 619, 621-23 (4th Cir. 1988) ("any disclosure of a confidential communication outside a privileged relationship will waive the privilege as to all information related to the same subject matter").

[10] *Amersham Biosciences Corp. v. Perkinelmer, Inc.*, No. 03-4901(JLL), 2007 WL 329290, at *1 (D.N.J. Jan. 31, 2007).

[11] *See id.*

[12] *See id.*

[13] *See id.*

[14] *See id.* at *2.

[15] *See id.* at *5-6.

[16] *See, e.g.,* Craig Ball*, Can Your Old Files — Don't Be So Sure Your Deleted Files Are Gone*, L. Tech. News 18 (Jan. 2004), *available at* **www.americanbusinessmedia.com/images/abm/pdfs/events/neal_library/Law%20Technology%20News%201.pdf**.

[17] Most hard drives now are designed so that the amount of space on an interior sector is the same as on an exterior sector, but this diagram depicts the structure of older hard drive platters. The concepts of sectors, clusters, and slack are, however, the same. Technology, especially with respect to storage devices, is advancing rapidly. For this reason, it behooves attorneys to retain the services of a computer forensics examiner as soon as practicable.

[18] Clusters may contain data other than "deleted" data. Electronic media, even when new, contain data. Data downloaded from the Internet, even inadvertently, may end up stored indefinitely in the "slack" or unallocated space.

[19] *See, e.g.,* Deborah Radcliffe, *Handling Crime in the 21st Century*, CNN.com (Dec. 15, 1998), **www.cnn.com/TECH/computing/9812/15/cybersleuth.idg/**; John Ashcroft, *Forensic Examination of Digital Evidence: A Guide for Law Enforcement*, U.S. Dep't of Justice, Office of Justice Programs, Inst. of Justice (Apr. 2004); Gov't's Opposition to Standby Counsel's Reply to the Government's Response to Court's Order Computer and E-Mail Evidence, *United States v. Zacariah Moussaoui*, No. 01-CR-455-A (E.D. Va. Dec. 30, 2002).

[20] Rule of Professional Conduct 4-1.1, requires that lawyers "provide competent representation," which "requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." One of the comments to this rule states: "Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge."

[21] *See XPEL Technologies Corp. v. Amer. Filter Film Distributors*, No. SA-08-CV-0175 XR, 2008 WL 744837 (W.D. Tex. Mar. 17, 2008). Under the terms of the order, the plaintiff's computer forensics expert was allowed to make mirror images of the defendants' computers and other electronic storage devices.

[22] *See, e.g., Lockheed Martin Corp. v. L-3 Communications Corp.*, No. 6:05-cv-1580-Orl-31KRS, 2007 WL 2209250 (M.D. Fla. July 29, 2007) (evaluating the burdensomeness of recovering information from the unallocated space on former employees' hard drives).

[23] *Id.* at *6. The magistrate judge ordered Lockheed Martin to produce documents recovered from the unallocated space of hard drives. *See id.* at *11.

[24] *See Cache la Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 624 (D. Colo. 2007).

[25] *See id*.

[26] Wiping clean the hard drives of departing employees is an effort to accommodate the fact that information remains on work station hard drives even if each employee consciously saved data only to the server. Discarding or passing along work station hard drives without writing over the data numerous times, that is, "wiping" the hard drives, risks disclosure of confidential information.

[27] *Cache la Poudre*, 244 F.R.D. at 636.

[28] For a discussion of why electronic discovery is such a problem for most companies, *see Top Ten Reasons e-Discovery is a Major Headache for Most Companies and Lawyers*, http://ralphlosey.wordpress.com/2007/06/07/top-ten-reasons-e-discovery-is-a-major-headache-for-most-companies-and-lawyers/.

[29] *See, e.g., Hopson v. Mayor and City Council of Baltimore*, 232 F.R.D. 228, 239 (D. Md. 2005) ("'The cost of responding to a discovery request can be in the millions of dollars if several years' worth of archived e-mail and files must be located, restored, sorted through and cleansed to remove non-relevant confidential material.'") (quoting Linda Volonino, *Electronic Evidence and Computer Forensics*, 12 Comm. of the Ass'n for Info. Sys. 14 (Oct. 2003), *available at* http://cais.isworld.org/articles/12-27/article.pdf)).

[30] *See Phoenix Four, Inc. v. Strategic Resources Corp.*, No. 05 Civ. 4837(HB) 2006 WL 1409413 (S.D.N.Y. May 23, 2006).

[31] *See id.*

[32] *See id.*

[33] *See id.*

[34] *Id.* at *5.

[35] *Id.* at *6-7 (emphasis added).

[36] *Id.* at *14 (emphasis added).

[37] *Qualcomm Inc. v. Broadcom Corp.*, No. 3:05cv1958-B (BLM) (S.D. Cal. Aug. 6, 2007) Doc. No. 593, at 3.

[38] *Id.* at 2-3.

[39] *See Qualcomm Inc. v. Broadcom Corp.*, No. 3:05cv1958-B (BLM) (S.D. Cal. Oct. 29, 2007) Doc. No. 715).

[40] *See Qualcomm Inc. v. Broadcom Corp.*, No. 3:05cv1958-B (BLM) 2007 WL 43451017 (S.D. Cal. Dec. 11, 2007).

[41] *See Qualcomm Inc. v. Broadcom Corp.*, No. 3:05cv1958-B (BLM) 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

[42] *See, e.g., Hopson*, 232 F.R.D. at 235. (stating that even if nonwaiver agreements are enforceable as to the parties entering them, "it is questionable whether they are effective against third-parties") (citing *Westinghouse Elec. Corp. v. Rep. of the Philippines*, 951 F.2d 1414, 1426-27 (3d Cir. 1991) (agreement between litigant and DOJ that documents produced in response to investigation would not waive privilege does not preserve privilege against different entity in unrelated civil proceeding); *Bowne v. AmBase Corp.*, 150 F.R.D. 465, 478-79 (S.D.N.Y. 1993) (nonwaiver agreement between producing party in one case not applicable to third party in another civil case)).

[43] *See, e.g., Martin Marietta*, 856 F.2d 619, 621-23 (4th Cir. 1988).

[44] S. 2450, 110th Cong. (2007) ("A bill to amend the Federal Rules of Evidence to address the waiver of the attorney-client privilege and the work product doctrine," was introduced to the Senate Committee on the Judiciary on December 11, 2007).

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Amendments to Florida's Rules Permanently Authorize Remote Court Proceedings—What Attorneys Need to Know

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By Esther E. Galicia

Remote court proceedings are here to stay! Based on the success of remotely-conducted proceedings since the inception of the COVID-19 pandemic, the Florida Supreme Court has amended Florida's various procedural rules, effective Oct. 1, to provide "permanent and broader authorization for the remote conduct of certain court proceedings." *In re: Amendments to the Florida Rules of Civil Procedure,* No. SC21-990, 2022 WL 2721129, at *1 (Fla. July 14, 2022). (Baker Act hearings are excluded from the general authorization.)

At the center of the Supreme Court's amendments is the general authorization for court proceedings through "communication technology" set forth in substantially rewritten Florida Rule of General Practice and Judicial Administration 2.530 (renamed "communication technology"). Communication technology is defined as "audio communication technology or audio-video communication technology. The term "audio communication technology" refers to "electronic devices, systems, applications or platforms that permit all participants to hear and speak to all other participants in real time." "Audio-video communication technology" encompasses "electronic devices, systems, applications, or platforms that permit all participants to hear, see, and speak to all other participants in real time." These three terms and their definitions are incorporated in the Supreme Court's various amendments.

Below are bullet-point summaries of the communication technology and related amendments that pertain to the Florida Rules of Civil Procedure, Florida Rules of General Practice and Judicial Administration, and Florida Rules of Appellate Procedure. (The Supreme Court also amended the Florida Rules of Criminal Procedure, Florida Probate Rules, Florida Rules of Traffic Court and Florida Small Claims Rules.)

Rules of Civil Procedure

- Rule 1.310(b)(4): Requires notice of taking deposition to specifically state in title the intent to audio-visually record the deposition. The method of audiovisual recording and the recording equipment must also be identified.
- Rule 1.310(b)(7): Permits depositions to be taken by communication technology if stipulated by the parties, if ordered by the court on its own motion, or on motion of a party. Requires that notice of deposition state in the title that it will be taken using communication technology. The notice must also specify the form of technology to be used and provide access instructions.
- Rule 1.310(c): Deponents must be put under oath as provided in Rule 2.530(b)(2)(B). Party that will use an audio or audiovisual recording of testimony at a hearing or trial must have the testimony transcribed and must file a copy of the transcript with the court.

- Rule 1.410(e): A subpoena for taking deposition must state that the deposition will be audio-visually recorded or taken using communication technology. The subpoena must also identify the method of recording or specific form of communication technology to be used, as well as the name and address of the equipment operator (if applicable). Additionally, the subpoena should provide instructions to access the communication technology.
- Rule 1.430(d): Authorizes prospective jurors to participate in voir dire or empaneled jurors to participate in the jury trial through audio-video communication technology, if stipulated by the parties in writing and authorized by the court. Written stipulations and written motions requesting authorization must be filed within 60 days after service of a demand for jury trial or within any court-ordered time period.
- Rule 1.440(b): A notice for trial must indicate if the court has authorized the participation of prospective jurors or empaneled jurors through audio-video communication technology.
- Rule 1.700(a): Authorizes an order of referral or written stipulation for mediation or arbitration to provide that the proceeding will be conducted through the use of communication technology. If the order of referral is silent, the mediation or arbitration must be conducted in person, unless the parties stipulate or the court thereafter orders that the proceeding be conducted by communication technology or by a combination of communication technology and in-person participation.
- Rule 1.730(c): The enforceability of an agreement reached during mediation may not be challenged on the ground that the parties participated through the use of communication technology if that use was authorized under Rule 1.700(a).
- Rule 1.830(a)(2): The hearing procedures for voluntary binding arbitration may include the use of communication technology.

Rules of General Practice and Judicial Administration

- Rule 2.451(c): Subject to the presiding judge's approval, prospective jurors may participate in voir dire and empaneled jurors may participate in a trial through audio-video communication technology as authorized by another rule of procedure.
- Rule 2.515(b): A pro se litigant must provide his/her primary e-mail address and secondary e-mail addresses, if any.
- Rule 2.516(b)(1)(D): Clerk of court must excuse a pro se litigant from the requirements of email service if the party is in custody or upon the party's declaration, under penalties of perjury, that he/she does not have an e-mail account or does not have regular access to the Internet.
- Rule 2.530(a)(1-3): Provides above-quoted definitions of various forms of "communication technology."
- Rule 2.530(b): A court official may authorize the use of communication technology upon a party's written motion or at the court official's discretion. Written objections by a party may be filed within 10 days or a period directed by the court official. Objections are waived if not timely raised, unless good cause is established.
- Rule 2.530(b)(1): The court official must grant a motion to use communication technology for non-evidentiary proceedings scheduled for no more than 30 minutes absent good cause to deny it.

- Rule 2.530(b)(2)(A-C): A party's motion for use of communication technology to present testimony must set forth good cause and specify whether each party consents to the form requested. Oaths may be administered through audio-video communication technology by a person not physically present with the witness. Only audio-video communication technology is authorized for the testimony of a person whose mental capacity or competency is at issue.
- Rule 2.530(c): Confers a judge with discretion to allow prospective jurors to participate through communication technology in a court proceeding to determine whether the prospective jurors will be disqualified, be excused, or have their jury duty postponed. Also permits prospective jurors to participate in voir dire and empaneled jurors to participate in a trial through audio-video communication technology when authorized by another rule of procedure.

Rules of Appellate Procedure

- Rule 9.320(e)(1-4): A party may request to participate in oral argument via the use of communication technology and must state the reason for that request. The court has discretion to grant or deny the request. Additionally, the court may sua sponte order the parties to participate in oral argument through the use of communication technology. An oral argument in which communication technology is used for participation must be recorded and made publicly available through a live broadcast and by posting the recording to the court's website as soon as practicable after the proceeding.
- Rule 9.700(b): Mediation on appeal may conducted in person, through the use of communication technology, or by a combination thereof. A party's motion for referral to mediation must indicate that the movant consulted with opposing counsel or unrepresented party, and state what is the position of opposing counsel or the unrepresented party with respect to the use of communication technology. If the order of referral is silent, the mediation must be conducted in person, unless the parties stipulate or the court thereafter orders that the proceeding be conducted by communication technology or by a combination of communication technology and in-person participation.
- Rule 9.740(c): The enforceability of an agreement reached during mediation may not be challenged on the ground that the parties participated via communication technology if such technology was authorized under Rule 9.700(b).

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WHAT IS THE BIGGEST TECHNOLOGY-RELATED ISSUE FACING LAWYERS TODAY?

Vol. 90, No. 1 January 2016 Pg. 42 David Whelan Featured Article

iStock.com/eternalcreative

The biggest technology challenge for Florida lawyers is education. Lawyers feel poorly prepared to use technology, with only 40 percent feeling prepared on leaving law school.[1] A t the same time, most lawyers consider new and advanced technology to have an impact on their ability to practice law successfully.[2] T he collision of this lack of preparedness and technology's impact may influence its adoption. In Florida, adoption of practice management systems is low, with large numbers of lawyers failing to use case management (77 percent) or document management (85 percent) systems.[3]

This dynamic is under additional pressure with the commentary to Model Rule of Professional Conduct 1.1, suggesting that lawyers be aware of changing practice technology.[4] T his guidance means that, no matter how much or little technology lawyers use, they need to keep a weather eye on the landscape.

Education is difficult to acquire when it comes to technology, though. The legal profession used to have a multitude of publications — such as *Law Office Computing* —

dedicated solely to technology and how lawyers use it. No longer. The survivors, often bar association publications, cover a broader swath now.

Just like legal research, there are two useful approaches: random and focused. A random approach is similar to reading a magazine. You will find information that is inapplicable to your practice mixed in with the useful. There are a variety of podcasts that you can download to an app on your phone or tablet. For example, The Florida Bar Podcast can be located on Legal Talk Network.[5] Y ou can listen to podcasts at your leisure and store away the information until you need it.

Develop the habit of checking in. Download a podcast, but know that you can skip it if the first minute or so doesn't grab you. Similarly, you can follow some of the many blogs dealing with law practice technology — skim the headlines, as you do with a newspaper. A few examples are Lawyerist's tech posts and Bob Ambrogi's LawSites.[6] T echnoLawyer's BlawgWorld, a free email subscription, sends you posts they have found each week.[7] A newsfeed app, such as Feedly or Flipboard, and an email app can bring those post to your tablet or phone as well. The random approach will help you slowly acclimatize to new terms of art — two factor, hybrid cloud, ransomware — even if you do not have any particular need to know them at the time. It is similar to CLE in that way.

The focused approach is more like legal research: Do it when you have a specific need, such as when you closed a document without saving it and want to know if you can retrieve it. You can always Google a focused question, using plain language, such as "How do I recover a Word document?" (Hopefully your question is not one, such as "What is this bitcoin I have to use to ransom my encrypted client files?") Just as other lawyers are the number one resource when you have a legal question, informed colleagues can be your best starting point. Most Florida lawyers have internal or external technology support. Use them. You can do this proactively, perhaps by asking them about something you have read or heard.

Do not be reluctant to Google a topic. There's a wealth of free, reliable information on the Internet to help you understand your options. Most technology in a law practice is not legal-specific. There are huge communities of other professionals using the same software in the same way, so there is a high probability that someone else has had the

same problem. Perhaps there is a comparison of other programs with the one you use. You can find some of these for legal software at the ABA.[8] W ikipedia has a surprising number of extensive comparison charts and lists of types of products.[9] T here are even sites like AlternativeTo that will show you software choices that are similar to ones you use.[10] T hese resources aren't comprehensive — as there may not be such a thing, but you are trying to become educated, not omniscient. The more human and information resources you use, the more informed you will be.

The biggest technology challenge to the Florida law practice is not the technology itself. It is understanding what is available and how to use it within your unique practice. Once you tackle technology, your ability to manage its impact on your ability to practice successfully will improve.

[1] The Florida Bar, *Vision 2016 Survey on Legal Education and Bar Admission* at 7.

[2] The Florida Bar, *2014 Economics and the Law Office Management Survey* at 32 (only 16 percent see technology having no impact).

[3] *Id*. at 48-49.

[4] ABA Model Rule 1.1 Comment at ¶8, **http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.html**.

[5] The Florida Bar has a broad podcast. *See* Legal Talk Network, Law Technology Now, **http://legaltalknetwork.com/podcasts/law-technology-now/** (for legal technology); The Digital Edge, **http://legaltalknetwork.com/podcasts/digital-edge/** ; The Law Society of Upper Canada, **http://www.lsuc.on.ca/technology-practice-tips-podcasts**.

[6] Example of related blogs include Lawyerist, **https://lawyerist.com/topic/tech/** ; LawSites, **http://www.lawsitesblog.com/.**

[7] The TechnoLawyer Community, BlawgWorld, **http://www.technolawyer.com/blawgworld.asp.**

[8] ABA, Tech Overviews and Charts, **http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis.html.**

[9] *See* Wikipedia, Category: Software Comparisons, **https://en.wikipedia.org/wiki/Category:Software_comparisons.**

[10] Amicus Attorney, Alternatives, **http://alternativeto.net/software/amicus-attorney/.**

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Whelan, David, "What is the Biggest Technology-Related Issue Facing Lawyers Today?" *The Florida Bar Journal,* Vol. 90, No.1; January 2016; https://www.floridabar.org/the-florida-bar-journal/?vol=90&num=1

COMMITTEE ON TECHNOLOGY FOCUSES ON CYBER SECURITY

Oct 26, 2021 By Jim Ash Senior Editor Top Stories

Beau Blumberg

Gone are the days when cybercriminals focused exclusively on state secrets and corporate espionage, warns Committee on Technology Chair Beau Blumberg.

Ransomware attacks, like the REvil assault on a New York law firm that released gigabytes of Lady Gaga client data, pose an “existential threat” to the legal profession, Blumberg said.

“No lawyer likes to think they are a target,” he said. “But unfortunately, because of the nature of what we do, we’re all targets.”

Bar leaders listed cybersecurity as a top concern in a recent survey, so the Technology Committee will dedicate the next year to developing, updating and promoting CLE, podcasts, short articles, and white papers on the topic, Blumberg said.

“We’ll have a variety of content,” he said. “Not everybody wants to sit down for an hour video, and even a half-hour video on passwords might bore somebody to death.”

Studies suggest that firms are increasingly at risk.

An October ABA report found that 20% of law firms reported a data security breach and 36% reported malware infections.

The 2020 ABA Legal Technology Survey Report showed that only 43% of respondents used file encryption, less than 40% use multi-factor authentication, intrusion detection or email encryption.

The committee will focus on such topics as encryption, multi-factor authentication, VPNs, cloud storage, ransomware, cyber insurance, phishing, and social engineering, Blumberg said.

Content will be released throughout the year, Blumberg said.

“We’re doing a rolling production,” he said.

The committee won’t be working from scratch, Blumberg said.

“Fortunately, there’s already a lot of content out there,” he said. “One of the jobs that we’re doing is not necessarily going to be creating more content, but to make it more accessible, and digestible for Bar members as a whole.”

The content will be tailored to the needs of different-sized firms, Blumberg said.

“Not every solution is right for every law firm,” he said. “I work at a small firm, and there’s no way we could ever afford a multi-million-dollar tech budget, as much as we would like to.”

At an October 13 meeting, the committee discussed various projects, including a review of the LegalFuel website and the development of a marketing campaign for the site and cybersecurity material.

Vice Chair Anessa Allen Santos, who heads the Subcommittee on Current and Emerging Technologies, is working on content regarding law firms accepting cryptocurrency, Blumberg said.

“One of the biggest concerns is that it gets to you, and doesn’t go out in the ether,” he said.

An Ad Hoc Subcommittee on New Member Benefit Proposals will be evaluating tech-related proposals that the Member Benefits Committee has forwarded for review.

A Subcommittee on Programming will oversee the day-long Annual Technology Symposium that coincides with The Florida Bar Annual Convention in June in Orlando, Blumberg said.

A theme has not been identified, Blumberg said.

“Doing the entire symposium on cybersecurity would probably be a little too much,” he said. “But there will definitely be programs on cybersecurity. People want it and people need it.”

Ash, Jim, “Committee on Technology Focuses on Cyber Security.” *The Florida Bar News* October 26, 2021; https://www.floridabar.org/the-florida-bar-news/committee-on-technology-focuses-on-cyber-security/

Florida Bar Technology Credits Requirement

THE FLORIDA BAR REQUIRES THAT EACH ATTORNEY EARN THREE TECHNOLOGY CREDITS FOR EACH REPORTING PERIOD

The Rules Regulating the Florida Bar - Rule: 6-10.3 (b) provides in relevant part:

“Each member must complete a minimum of 33 credit hours of approved continuing legal education activity every 3 years. At least 5 of the 33 credit hours must be in approved legal ethics, professionalism, bias elimination, substance abuse, or mental illness awareness programs, with at least 1 of the 5 hours in an approved professionalism program, and at least 3 of the 33 credit hours must be in approved technology programs.”

Several rule additions, deletions, and/or changes address the use of technology in the courtroom. Look for the changes, which become effective October 1, 2022, and pay special attention to Florida Rule of General Practice and Judicial Administration 2.530. Please also note any related Forms changes.

Florida Rule of General Practice and Judicial Administration 2.530

Florida Family Law Rule of Procedure 12.310

Florida Family Law Rule of Procedure 12.320

Florida Family Law Rule of Procedure 12.407

Florida Family Law Rule of Procedure 12.410

Florida Family Law Rule of Procedure 12.430

Florida Family Law Rule of Procedure 12.440

Florida Family Law Rule of Procedure 12.451 (scheduled for deletion)

Florida Family Law Rule of Procedure 12.740