

Taxing e-Discovery Costs: Amendments to the Florida Uniform Guidelines

November 25, 2013

On November 14, 2013, the Florida Supreme Court adopted amendments to the Uniform Guidelines on the Taxation of Costs that specifically allow a successful litigant to recover certain e-Discovery expenses. The amended Guidelines include a new paragraph II.C. entitled “Electronic Discovery Expenses” that contains two specific categories of taxable e-Discovery costs: **(1)** The cost of producing copies of relevant electronic media in response to a discovery request; and **(2)** The cost of converting electronically stored information to a reasonably usable format in response to a discovery request that seeks production in such format. These amendments take effect on January 1, 2014. Category (1) appears subject to a wide range of interpretations. For example, the cost of producing copies of relevant electronic media could be narrowly construed as including only the limited time and expense necessary to burn a disk or a flash drive once the media is collected, processed and ready for production. Alternatively, this category of taxable costs could be broadly interpreted to include all expenses necessary to be in a position to produce the electronic media to the requesting party, including outside vendor collection, processing, and de-duping fees and/or in-house litigation support fees. You should be prepared to make either argument depending on whether your client is the prevailing party or not. At the minimum, make sure all your client’s e-Discovery costs are sufficiently documented and maintained in the file for possible future taxation. Category (2) is more specific than (1) and reasonably should include certain outside vendor processing fees for native ESI converted into images and load files for use in database management software. Keep in mind, however, that Rule 1.350(b) of the Florida Rules of Civil Procedure encourages but does not require the requesting party to specify the format for production of ESI. If no format is specified, the producing party is obligated to produce the ESI in the form it is “ordinarily maintained or in a reasonably usable form”. If the producing party converts her client’s ESI into a reasonably usable format for production without a specific request by the other side to do so, those costs may not be taxable down the road. The better practice is to make sure to get the requesting party to agree in

advance. It is always a good idea to confer with opposing counsel about ESI format issues early in the discovery process, and now Florida litigants have one more reason to do so.

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