The Electronic Discovery and Digital Evidence Committee and Computer Law and Technology Committee of the Business Law Section of The Florida Bar

Examining Where We Are Today and Looking Ahead in E-Discovery and Digital Evidence in the Face of Technology Advancements

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

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   You may call the Legal Specialization and Education Department of The Florida Bar at 850/561-5842.

   While online checking your CLER, don’t forget to check your Basic Skills Course Requirement status.
PREFACE

The course materials in this booklet were prepared for use by the registrants attending our Continuing Legal Education course during the lectures and later in their offices.

The Florida Bar is indebted to the members of the Steering Committee, the lecturers and authors for their donations of time and talent, but does not have an official view of their work products.

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The mission of the Continuing Legal Education Committee is to assist the members of The Florida Bar in their continuing legal education and to facilitate the production and delivery of quality CLE programs and publications for the benefit of Bar members in coordination with the Sections, Committees and Staff of The Florida Bar and others who participate in the CLE process.

**COURSE CLASSIFICATION**

The Steering Committee for this course has determined its content to be INTERMEDIATE.
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LECTURE PROGRAM

8:00 a.m. – 8:50 a.m.  How We Are Alike And What Sets Us Apart…A Review Of Current Law In Regard To The Federal And Florida Rules Regarding The Discovery, Authentication And Admissibility Of ESI
William Hamilton, Esq.
R. Christopher (“Chris”) Dix, Esq.

8:55 a.m. – 9:45 a.m.  Essential CyberSecurity Controls And Tales From The Dark Web
Bart Valdes, Esq.
Keith Kanouse Jr.
Daniel Whitehouse, Esq.
Lee Mangold
Serge Jorgenson

9:55 a.m. – 11:00 a.m.  A Path To Enlightenment…Federal and State Judges Preside Over a Mock Hearing on the Discovery, Authentication and Admissibility of ESI
Honorable Steven Scott Stephens
Honorable Anthony E. Porcelli
Steven W. Teppler, Esq.
David R. Hazouri, Esq.
Andy Reisman, Esq.

11:10 a.m. – noon  A View From The Bench: Federal And State Court Judges Offer Their Observations, Insight And Advice On Emerging And Problematic Issues Concerning E- Discovery and Digital Evidence.

Honorable Elizabeth Schwabedissen
Honorable Steven Scott Stephens
Honorable Anthony E. Porcelli
Honorable Karla R. Spaulding
Honorable Thomas B. Smith
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William Hamilton, Esq.
R. Christopher (“Chris”) Dix, Esq.

I. Florida Rules of Civil Procedure in Regards to ESI ..............................................................1.1

ESSENTIAL CYBERSECURITY CONTROLS AND TALES FROM THE DARK WEB
Bart Valdes, Esq.
Keith Kanouse Jr.
Daniel Whitehouse, Esq.
Lee Mangold
Serge Jorgenson

I. CyberSecurity Controls ..........................................................................................................2.1

A PATH TO ENLIGHTENMENT...FEDERAL AND STATE JUDGES PRESIDE OVER A MOCK HEARING ON THE DISCOVERY, AUTHENTICATION AND ADMISSIBILITY OF ESI
Honorable Steven Scott Stephens
Honorable Anthony E. Porcelli
Steven W. Teppler, Esq.
David R. Hazouri, Esq.
Andy Reisman, Esq.

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A VIEW FROM THE BENCH: FEDERAL AND STATE COURT JUDGES OFFER THEIR OBSERVATIONS, INSIGHT AND ADVICE ON EMERGING AND PROBLEMATIC ISSUES CONCERNING E- DISCOVERY AND DIGITAL EVIDENCE.
Honorable Elizabeth Schwabedissen
Honorable Steven Scott Stephens
Honorable Anthony E. Porcelli
Honorable Karla R. Spaulding
Honorable Thomas B. Smith

I. Emerging and Problematic Issues Concerning ESI ...............................................................4.1
CHRIS DIX is a shareholder at the Jacksonville law firm of Smith Hulsey & Busey. He is a commercial litigator and a licensed CPA in the State of Florida with experience in disputes involving contracts, sports integrity, real property, estates and trusts, fraudulent transfers, mechanics liens, bankruptcy, corporate control and business entities. Chris also advises clients regarding cybersecurity, data breaches, social media, information governance and compliance with e-discovery rules and disputes. Chris writes and speaks regularly about technology and e-discovery topics, and Chris is also the founding President of the Jacksonville Chapter of the Association of Certified E-Discovery Specialists.

WILLIAM HAMILTON is an electronic discovery expert. Prior to joining the faculty served as the electronic discovery partner for his national law firm. Mr. Hamilton has taught electronic discovery at the University of Florida for the past decade and is the co-author of the LexisNexis Practice Guide Florida e-Discovery and Evidence and co-author of A Student Electronic Discovery Primer: An Essential Companion for Civil Procedure Courses. Mr. Hamilton is also the General Editor of the LexisNexis Practice Guide: Florida Contract Litigation. Mr. Hamilton is also a neutral arbitrator and mediator for the World Intellectual Property Organization and the author of numerous domain name dispute decisions. Mr. Hamilton has been recognized in Chambers USA, Florida Legal Elite, Best Lawyers in America, and Florida Super Lawyers.

DAVID HAZOURI has more than twenty years of experience in the legal industry, David has practiced in a variety of environments. He began his career with national firm litigating large-scale tobacco class actions. Later, David joined a mid-sized Miami law firm where he litigated a broad range of commercial matters, including adverse proceedings in bankruptcy, construction defects, employment actions, and business torts. More recently, David was part of a nationally recognized boutique practice, where he concentrated on land use and developer-related disputes. In 2006, David established his own eDiscovery consulting firm and later worked as a Managing Director for a global legal processes outsourcing company. This unique experience enabled David to develop a deep understanding of how to conceptualize and execute a sound and efficient legal strategy with the resources and realities at hand.

SERGE JORGENSEN is Chief Technology Officer and a founding partner in the Sylint Group. He provides technical development and guidance in the areas of Computer Security, Counter Cyber-Warfare, eDiscovery, System Design and Incident Response. Mr. Jorgensen holds various patents in engineering and math-related fields. Prior to co-founding the Sylint Group, Mr. Jorgensen ran the Research and Development Department for Locast Corporation developing a HIPAA-compliant patient location- and status-tracking device. Since co-founding Sylint, Mr. Jorgensen has, among other things, directed development of DNS (Dynamic Name Server) tracking applications, provided response and
remediation guidance to multi-billion dollar international espionage and cyber-security attacks, and directed, tasked and managed multi- million dollar litigation, forensic and electronic discovery efforts.

KEITH KANOUSE is General Counsel with Therigy, LLC, a specialty pharmacy software and consulting company headquartered in Maitland, FL. Before entering law, Keith’s career was in the technology industry as a consultant with Accenture designing and implementing applications systems for Fortune 500 clients. As an attorney, Keith has leveraged his technology background as an attorney with The Tech Law Firm with a focus on transactional legal needs for the growing Central Florida tech start-up community. As Therigy is a health care business associate dealing with protected healthcare information, Keith oversees the legal HIPAA data privacy and security compliance as part of legal responsibilities. Keith has a decision and informational science undergraduate degree from University of Florida, and a cum laude graduate from Barry University School of Law. He remains active in the both the local and state legal community. He is the current chair of The Florida Bar Computer and Technology Law Committee, a member of the FL Bar Intellectual Property and EDiscovery Committee and member of the Orange County Technology Committee.

THE HONORABLE ANTHONY E. PORCELLI was sworn in as United States Magistrate Judge for the Middle District of Florida in August 2009. He worked for the United States Attorney’s Office from 2000-2009 and tried over 30 federal criminal trials, involving a wide variety of complex criminal cases, sophisticated white collar frauds, violent crimes / murders, and large scale drug trafficking. Judge Porcelli is a board member of the Hillsborough County Bar Foundation, a member of The Florida Bar’s Federal Court Practice Committee, a member of the Hillsborough County Bench Bar Committee, and a board member of both the Herbert G. Goldburg/Ronald Cacciatore Criminal Inn of Court and the Ferguson-White Inn of Court. Judge Porcelli has spoken on the topic of eDiscovery for many bar organizations, taught eDiscovery at Stetson College of Law as an adjunct professor, and teaches annually on the use of electronic devices for incoming United States Magistrate Judges. Judge Porcelli received a Bachelor of Arts degree in 1993 from Stetson University; Master of Business Administration from Jacksonville University in 1995; and Juris Doctorate from Stetson University College of Law in 1998. After law school Judge Porcelli served as a law clerk from 1998-2000 for the Honorable Harvey E. Schlesinger.

ANDREW REISMAN is CEO of Elijah Ltd., a legal technology company specializing in computer forensics, eDiscovery and cybersecurity. Andrew has had primary responsibility for hundreds of investigations and has testified and lectured on numerous occasions regarding computer forensics and electronic discovery. Drawing upon his extensive computing, investigative and legal backgrounds, Andrew is uniquely qualified to bridge the communication gaps that so frequently arise between counsel, management, IT personnel and finders of fact. Computer Forensic Experience: Led computer forensic examinations relating to civil matters on behalf of clients including Fortune 500 companies and AmLaw 100 law firms relating to trade secret misappropriation, patent and trademark infringement, evidence spoliation and preservation, employment discrimination, contracts, torts and various other disputes. Led computer forensic examinations relating to criminal matters such as computer fraud and abuse, child pornography, public corruption and foreign corrupt practices. Engagements included devising investigation parameters, electronic evidence identification and collection, investigating computer activity, preparing reports and testifying regarding findings. Over ten thousand hours of computer forensic experience. E-
Discovery Experience: Led the Elijah team recognized by the Socha-Gelbmann Electronic Discovery Survey as a top-20 provider nationally in e-discovery capacity. Overseen the filtering, processing and hosting of multi-terabyte collections of data. Devised strategies for preservation and review of large collections of data. Litigation Consulting Experience: Designed and implemented data filtering and collection programs to efficiently search and collect terabytes of data for export to e-discovery platforms. Conducted interviews of corporate information technology, records management and legal personnel, reviewed existing record retention practices and provided recommendations regarding document retention and litigation hold policies. Academic Experience: Adjunct Professor of Law, IIT Chicago-Kent College of Law, 1997; Adjunct Professor, Springfield College (Benedictine University at Springfield), 1994; Education: University of Illinois College of Law, J.D., Summa Cum Laude, 1993 Class Valedictorian Editor-in-Chief, University of Illinois Law Review; Illinois State University, B.S., Magna Cum Laude, 1990 University Honors Scholar; President, Forensics Union

THE HONORABLE THOMAS B. SMITH was sworn in as United States Magistrate Judge for the Middle District of Florida on July 25, 2011 and is presently resident in the Orlando Division. Judge Smith attended the University of Florida College of Law, graduating in 1977. His past employment includes three years as an Assistant State Attorney in the Ninth Judicial Circuit of Florida before joining Maguire, Voorhis & Wells, PA where he began as an associate before becoming a shareholder. In 1998, the Maguire firm sold its practice to Holland & Knight at which time Judge Smith became a partner in the amalgamated firm. In December 2001 Governor Jeb Bush appointed Judge Smith to the Circuit Court bench which job he assumed in January, 2002. As a Circuit Court Judge he served four years in a felony division, three years in domestic relations and was sitting in the complex business litigation court when he was selected as a Magistrate Judge. Judge Smith is the immediate past Chairman of the Florida Supreme Court Committee on Standard Jury Instructions-Contract and Business Cases. He serves on the Executive Council of the Business Law Section of the Florida Bar and prior to becoming a federal judge he was a director and member of the executive committee of the American College of Business Court Judges, a director of the George C. Young First Central Florida American Inn of Court, and a director of the Central Florida Family Law Inn of Court. He also served on the Orange County Bar Association Professionalism Committee and the Orange County Bar Judicial Relations Committee.

THE HONORABLE KARLA R. SPAULDING

Magistrate Judge Karla R. Spaulding was appointed United States Magistrate Judge for the United States District Court, Middle District of Florida, Orlando Division in December 1997. She received a B.A., magna cum laude, from Western Michigan University in 1975, and a J.D. from the Northwestern University School of Law in 1980. While in law school, she served as Executive Editor of the Journal of Criminal Law and Criminology. From 1983 through 1993, Judge Spaulding was an Assistant United States Attorney, serving as Chief of the Drug Trafficking Section and, later, Chief of the Appellate Division in the United States Attorney’s Office in the Middle District of Florida, and Chief of the Fraud Section in the United States Attorney’s Office in the Southern District of Texas. From 1980 to 1983, and 1994 through 1997, Judge Spaulding was a trial and appellate lawyer in private practice. She represented plaintiffs in class actions and intellectual property matters and represented defendants in civil and criminal matters.
THE HONORABLE SCOTT STEPHENS is a circuit judge in Tampa, assigned to the complex business litigation division and tobacco litigation division. He was appointed to the bench in 2005 by Governor Bush, after serving four years as Deputy Chief Judge of Compensation Claims. Before that, he was on the business school faculty at the University of Tampa. He was in private law practice in Tampa from 1988 to 1996 and in Maryland from 1985 to 1987, and worked as a research assistant in the federal court from 1982-85. Stephens graduated from University of Baltimore and George Washington Law Schools after attending the University of Maryland as an undergraduate. While in law practice he accumulated Masters Degrees in economics-related subjects from Maryland and Johns Hopkins, and a PhD in business administration from University of South Florida. More recently he completed a certificate program in advanced computer security from Stanford and is currently enrolled in the online Data Science Certificate program at Harvard. Judge Stephens serves on the Florida Supreme Court’s Judicial Management Council, Florida Courts Technology Commission, and Local Rules Advisory Committee, and on the Rules of Judicial Administration Committee of The Florida Bar. He is the author of West’s Florida Family Law, now in its fifth printing, and Chapter 2 of The Florida Bar’s Civil Trial Practice Manual. He has served as an adjunct professor at Stetson since 2011, teaching family law and Florida Constitutional Law.

THE HONORABLE ELIZABETH SCHWABEDISSEN serves as the General Magistrate for the Civil Division Eleventh Judicial Circuit Court in Miami-Dade, Florida, where she holds pretrial proceedings on a wide variety of civil matters, including but not limited to discovery disputes, e-discovery disputes, in camera review of privileged documents, and evidentiary hearings related to personal and subject matter jurisdiction, summary judgment motions, enforcement of settlement agreements, motions to vacate judgments, attorney disqualification, partition actions, and proceedings supplementary. Magistrate Schwabedissen is a frequent panel participant on e-discovery and complex discovery matters and ethics, including the 2012 Advanced Judicial College program on e-discovery. Magistrate Schwabedissen is a former partner at Adorno & Yoss, P.A., where her practice included representation of foreign corporations on matters related to jurisdiction and forum non conveniens, as well as general commercial litigation practice which included contract, commercial tort and injunction actions; corporate matters; shareholder disputes and corporate internal investigations; complex commercial arbitration; and representation of clients in commercial, banking, regulatory and tort matters. The former chair of the Florida Bar Professional Ethics Committee on which she served for many years, Judge Schwabedissen has also served on the boards of numerous non-profit charitable organizations, including United Way of Miami-Dade County, and formerly served as President of Legal Services of Greater Miami, Inc. where she served as a member of its Board for thirteen years. The recipient of several awards for pro bono legal services, Judge Schwabedissen remains an active volunteer in the community, participating as an adult literacy tutor through the Miami Dade Public Library’s Project LEAD.

STEVEN W. TEPPLER is a partner at the Abbott Law Group in Jacksonville, Florida, and leads the firm’s electronic discovery and technology-related litigation practice, which includes security, property and personal injury single event and mass actions arising from emerging technologies. Steven is also an adjunct professor at Nova Southeastern University Law School, where he teaches Electronic Discovery and Information Governance. He is the co-chair of the Internet of Things Committee of the American Bar Association’s Science and Technology Section, past co-chair of the eDiscovery and Digital Evidence Committee of the American Bar Association (2008- 2015), past chair and founding member of The Florida Bar’s Business Law Section’s eDiscovery and Digital Evidence Committee, which provided substantial drafting input to the 2012 electronic discovery amendments to the Florida Rules of Civil Procedure, a

**BART R. VALDES** is the Managing Partner of the Tampa office of de Beaubien, Knight, Simmons, Mantzaris & Neal, LLP. Mr. Valdes is a Board Certified Specialist in Business Litigation by The Florida Bar. He also holds an AV rating from Martindale-Hubbell and has been included in Florida Trend’s Legal Elite, Florida Super Lawyers Magazine, and Tampa’s Top Rated Lawyers by Legal Leaders Magazine. Mr. Valdes is presently the Vice-Chair of the E-Discovery and Digital Evidence Committee of the Business Law Section. Mr. Valdes has represented a variety of clients including small business owners, individuals, local governments, insurance companies, medium and large corporations, as well as nation-wide institutional clients in a wide range of matters. Mr. Valdes has litigated complex trial matters related to contract disputes, property disputes, eminent domain and condemnation actions, real estate disputes, insurance matters and general business disputes. Mr. Valdes also has extensive litigation experience in the areas of landlord and tenant disputes, bankruptcy, probate, trust and estate matters, foreclosure cases, corporate and partnership disputes, collections, construction matters, land use, zoning and code enforcement matters and local government disputes. Mr. Valdes has represented clients in high dollar, and high profile, state and federal court actions (both at trial and on appeal) as well as in administrative proceedings.

**DANIEL D. WHITEHOUSE** entered the legal profession with more than a decade of experience in the information technology (IT) industry. He has had the privilege of managing the IT infrastructures of some of the world’s largest companies while working for one of the largest international IT service providers. He holds a Bachelor of Science in Computer Science and a Master of Business Administration (MBA), both from Webster University. His unique blend of technology and business experience is an invaluable asset to the clients he represents. Mr. Whitehouse attended Stetson University College of Law and graduated Co-Valedictorian of his class in 2011. While in law school, he served as Editor in Chief of the Stetson Law Review and received two distinguished Stetson Law Review awards: The Darby Award and The Outstanding New Associate Award. He participated in Stetson Law’s Honors Program and studied interdisciplinary relationships between the law and other convergent areas. Mr. Whitehouse had the privilege of interning for The Honorable Susan C. Bucklew of the United States District Court for the Middle District of Florida. Upon graduation, Mr. Whitehouse received the Walter Mann Award for outstanding leadership, the William F. Blews Pro Bono Service Award, the Leadership Development Certificate, and was included in the Who’s Who Among Students in American Universities and Colleges listing. Mr. Whitehouse received the highest grade in numerous courses, including Electronic Discovery, Technology in Litigation, Research & Writing I, and Criminal Procedure. He delivered the Top Appellant Oral Argument in his Research & Writing II section and competed in the Phelps Dunbar First-Year Appellate Advocacy Competition. Mr. Whitehouse is a member of ACEDS and holds the organization’s CEDS credential. He has also earned a number of IT qualifications from organizations including Microsoft, CompTIA, and CIW. Mr. Whitehouse is a member of The Florida Bar, the Orange County Bar Association, and the Lake County Bar Association. He participates in numerous sections and committees within these associations and is the current chair of the OCBA Technology Committee. He is admitted to practice in all Florida state courts and the Middle
District of Florida. He currently serves on the board of directors of The South Lake Chamber of Commerce. He previously served on the Executive Committee of the Central Florida Chapter of the Stetson Law Alumni Association, The Lake County Bar Association, and The South Lake Animal League. In addition to spending time with his wife and two daughters, Mr. Whitehouse enjoys endurance training (running and triathlon), fishing, and golfing.
HOW WE ARE ALIKE AND WHAT SETS US APART... A REVIEW OF CURRENT LAW IN REGARD TO THE FEDERAL AND FLORIDA RULES REGARDING THE DISCOVERY, AUTHENTICATION AND ADMISSIBILITY OF ESI

By

William Hamilton
R. Christopher (“Chris”) Dix
In 2012, the Florida Rules of Civil Procedure were amended to specifically address the discovery of ESI. At the time, the Florida Rules were patterned after the corresponding Federal Rules of Civil Procedure. In 2015 and 2017, several of the Federal Rules that concern the discovery of ESI were amended, thereby creating a gap between the Florida and Federal Rules. This session describes the primary differences between the Federal and Florida Rules with respect to the discovery, authentication and admissibility of ESI, discusses recent, notable federal and Florida court decisions on this topic, and provides an overview of where we stand in the cycle of possible further amendments to the Florida Rules in light of the recent amendments to the Federal Rules.
ESSENTIAL CYBERSECURITY CONTROLS AND TALES FROM THE DARK WEB

By

Bart Valdes
Daniel Whitehouse
Lee Mangold
Serge Jorgenson
CyberSecurity controls involve more than just hardware (firewalls) and software (system patches). They also include, but are not limited to, User Access Management, Security & Privacy Training Programs, Logging Monitoring, Disaster Recovery Planning, Human Resources Controls, and System Inventory. The Session will highlight the policies, procedures, and controls your firm and your clients’ businesses should have in place to ensure proper CyberSecurity. With a better understanding of CyberSecurity controls, an attorney can look to identify any gaps and subsequent remediation efforts to address. Without properly understanding and addressing CyberSecurity, an organization can face increased legal liability exposure from individual and class action torts, contractual breach, regulatory actions, both general (FTC, State AG) and industry specific (HIPAA – HealthCare, PCI – Financial). Accompanying technology attorneys on the panel will be CyberSecurity professionals who are experienced with CyberSecurity policies, procedures, and controls.
A PATH TO
ENLIGHTENMENT...FEDERAL AND
STATE JUDGES PRESIDE OVER A
MOCK HEARING ON THE
DISCOVERY, AUTHENTICATION
AND ADMISSIBILITY OF ESI

By

Honorable Steven Scott Stephens
Honorable Anthony E. Porcelli
Steven W. Teppler
David R. Hazouri
Andy Reisman
One of the best ways to learn how to do something is to observe the practice of others who are skilled in the art. In this session, two practicing lawyers with extensive experience and expertise in litigating issues concerning the discovery, authentication and admissibility of ESI square off with one another in a mock hearing. The lawyers will be accompanied by a jointly-selected, neutral expert witness who will assist the court in understanding and deciding the issues. One federal and one state judge will preside over the hearing. They will render their respective rulings and discuss the basis of their rulings under the applicable federal or state rules.
A VIEW FROM THE BENCH: FEDERAL AND STATE COURT JUDGES OFFER THEIR OBSERVATIONS, INSIGHTS AND ADVICE ON EMERGING AND PROBLEMATIC ISSUES CONCERNING E-DISCOVERY AND DIGITAL EVIDENCE

By
Bart R. Valdes
Honorable Steven Scott Stephens
Honorable Anthony E. Porcelli
Honorable Karla R. Spaulding
Honorable Thomas B. Smith
Honorable Elizabeth Schwabedissen
The pace of technological advancement is accelerating. As a result, the law is constantly confronted with new and challenging issues concerning the discovery of ESI, and its authentication and admissibility. Some examples of this entail social media evidence, evidence generated by wearable technologies and other Internet of Things devices, and potentially relevant evidence generated, stored and maintained by third-parties. During this session, a panel of esteemed state and federal judges will discuss the emerging and problematic issues they are encountering in their respective courtrooms regarding ESI, explain how they are dealing with these issues, and offer advice to attorneys on how best to address such issues with the Court.