

4. An opinion from the U.S. District Court for the Middle District of Florida requiring the plaintiff to return electronic devices to his employer so that the employer could preserve the ESI on them for purposes of litigation.

In *Wegman v. United States Specialty Sports Association, Inc.*, No. 23-cv-1637-RBD-RMN, 2023 WL 8599972 (M.D. Fla. Dec. 12, 2023), U.S. Magistrate Judge Robert M. Norway addressed a motion regarding the ownership and return of several electronic devices containing information relevant to the litigation in the context of the parties' respective obligations to preserve evidence on the devices.

Plaintiff, who was on administrative leave from his position as Defendant's chief executive officer, had retained several electronic devices containing evidence relevant to the litigation when he was placed on leave. Defendant sought an order requiring Plaintiff to return and refrain from copying those devices.

Magistrate Judge Norway first noted a report from Defendant's counsel that he had sought to confer with counsel for Plaintiff about this dispute several times without success. *Id.* at *1 n.1. Magistrate Judge Norway reminded the parties that they were required to promptly respond to requests for a meet-and-confer conference from opposing parties and that "a response that occurs more than two business days after a request is not 'prompt.'" He noted that he would impose sanctions in the future against counsel who do not respond promptly to requests for a conference.

Turning to the merits of the dispute, Magistrate Judge Norway first addressed the issue of ownership. Citing to Defendant's employee handbook stating that all technology provided by Defendant, "including computer systems, communication networks, Association related work records and other information stored electronically," was the property of Defendant and not its employees, Magistrate Judge Norway noted that Plaintiff had conceded the devices were Defendant's property. For this and other reasons, Magistrate Judge Norway had previously denied a motion filed by Plaintiff seeking a court order authorizing him to create forensic copies of the devices before returning them to Defendant.

Magistrate Judge Norway next explained that under Federal Rule of Civil Procedure 37(e), all persons who anticipate or are parties to litigation have a duty to locate, retain, and preserve potentially relevant evidence, including ESI. Both parties acknowledged that they had an obligation to preserve evidence contained on the devices, and Defendant stated that it intended to make forensic copies of the devices once they were returned so it could comply with its preservation obligations. Magistrate Judge Norway found that Plaintiff's retention of the devices prevented the organization from fulfilling its duty to preserve evidence, thereby prejudicing the Defendant.

Magistrate Judge Norway found that Defendant was also prejudiced by Plaintiff's failure to return the devices because the devices contained evidence "that the organization needs to determine what [Plaintiff] knows, when he learned about it, what he did about it, and who was involved." Citing to the Sedona Conference Commentary on Legal Holds, among other sources, Magistrate Judge Norway explained that "[o]rganizations know what their employees know," and their knowledge is imputed to an organization in the context of the duty to preserve evidence. Because Plaintiff was

once Defendant's chief executive officer but was now on administrative leave, Magistrate Judge Norway found that the devices contained evidence of his knowledge.

Magistrate Judge Norway ultimately found that Plaintiff's failure to return Defendant's devices "frustrates the organization's collection efforts, stymies its investigation into the events that form the basis of Plaintiffs' claims, and thwarts the preparation of the organization's defenses." *Id.* at *2. Accordingly, Magistrate Judge Norway ordered Plaintiff to return all electronic devices provided to him by Defendant and further ordered that Plaintiff "not access, copy, or otherwise tamper with any [ESI] contained on the devices." Finally, Magistrate Judge Norway awarded Defendant reasonable expenses and ordered the parties to confer regarding the expenses that Defendant "necessarily incurred prosecuting the motion."