IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE — ELECTRONIC DISCOVERY

CASE NO.: 11-1542

COMMENT AS TO AMENDMENTS TO THE RULES OF CIVIL PROCEDURE RELATED TO ELECTRONIC DISCOVERY

RALPH ARTIGLIERE, WILLIAM HAMILTON, and RALPH LOSEY respectfully submit their comments relating to the Petition filed by the Florida Supreme Court Civil Procedure Rules Committee (hereafter "the Petition") as authorized by the Court pursuant to the Notice in the Florida Bar News, September 15, 2011.

The undersigned are attorneys admitted to The Florida Bar with experience in practice and in teaching principles of electronic discovery and admissibility of electronically stored information (ESI) in Florida state courts. The undersigned provided support and information to the subcommittee of the Civil Procedure Rules Committee with regard to the proposed rules that are now before the Court. We fully support the adoption of the proposed rules and commend the effort of the Civil Procedure Rules committee and The Florida Bar in both proposing rules and requesting out-of-cycle consideration by this Court, as the rules are badly needed by judges and lawyers for guidance in this burgeoning area of discovery practice.

While the rules as submitted have our unquestioned support, the undersigned wish to identify to the Court an unresolved area of particular concern that the Civil Rules subcommittee felt it was unable to address in their proposed rules because of a perceived unsettled status of Florida law. Preservation of evidence is an important and ubiquitous issue in discovery of ESI because electronic evidence is so easily lost or altered. Unlike preservation of information on paper or other tangible media, preservation of ESI often requires a party to take pro-active steps

to prevent routine deletion or alteration.[1] The Petition specifically mentions an absence of a duty under Florida common law to preserve potentially relevant evidence. By contrast, federal common law mirrors the federal rule, under which a duty to preserve is triggered by the reasonable anticipation of litigation. See the Petition at p. 2, citing *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

In certain specific cases Florida court decisions appear to limit the preservation duties in the absence of a statute, contract, or discovery request. *See Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 845 (Fla. 4th DCA 2004) (finding no common-law duty of preservation and stating that "[a] duty to preserve evidence can arise by contract, by statute, or by a properly served discovery request (after a lawsuit has already been filed.))" *See also Gayer v. Fine Line Constr. & Elec., Inc.*, 970 So.2d 424, 426 (Fla. 4th DCA 2007)(because a duty to preserve evidence does not exist at common law, the duty must originate either in a contract, a statute, or a discovery request); *Eugene J. Strasser, M.D., P.A. v. Bose Yalamanchi, M.D., P.A.*, 783 So. 2d 1087, 1093 (Fla. 4th DCA 2001)(appellants were under no statutory or contractual duty to maintain such evidence but had an affirmative responsibility to preserve documents that are the subject of a duly served discovery request).

On the other hand, the triggering of a pre-litigation duty to preserve in anticipation of litigation has arguably been acknowledged in *some* Florida state court cases *even in the absence of a contractual or statutory obligation to preserve*. *See Am. Hospitality Mgmt. Co. v. Hettiger*, 904 So. 2d 547, 549 (Fla. 4th DCA 2005); *Martino v. Wal-Mart Stores*, 835 So. 2d 1251, 1257 (Fla. 4th DCA 2003), *approved and remanded*, 908 So. 2d 342 (Fla. 2005); *Hagopian v. Publix Supermarkets, Inc.*, 788 So. 2d 1088, 1089-90 (Fla. 4th DCA 2001), *review denied*, 817 So. 2d 849 (Fla. 2002). In *Am. Hospitality Mgmt. Co. v. Hettiger, supra*, for example, a party was charged with a duty to preserve evidence where it could reasonably have foreseen the claim and in *Martino* the court noted that an adverse

[1] The game changer between ESI and types of evidence addressed in the Florida cases, like shopping carts, ladders, and exploding bottles, is the fact that organizations configure their computer systems to routinely destroy ESI and it takes affirmative action to preserve it.

inference may arise in any situation where potentially self-damaging evidence is in the possession of a party and that party either loses or destroys the evidence.

The undersigned recognize the ambivalence and reservations exercised by the courts in the various cases involving broad issues of preservation of evidence. We do not criticize the development of law in Florida, which largely occurred prior to the digital era. However, the time has come for the courts to bring clarity to this area. Justice Wells' specially concurring opinion (joined by Justice Bell) in *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342, 348-349 (Fla. 2005) calls for such clarification:

> "It appears to me that the district court in its decision in the instant case attempts to skirt Wal-Mart's lack of duty by making an erroneous distinction between a *Valcin* presumption and an "adverse inference." * * * *
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> I have carefully read the Fourth District's earlier decision in *New Hampshire Insurance Co.*, to which it cites, and I do not find a basis for the [assertion that use of an adverse inference is not based on a duty to preserve] in that case. Nor have I found any other authority for that statement. To the contrary, *New Hampshire Insurance Co.* had to do with the failure to produce an insurer's underwriting file in an instance in which the court had ordered the underwriting file to be produced. * * * * * I understand that there is a real need by those who are injured to have evidence preserved so that claims can be pursued. I recognize that the freedom to use property should be tempered by this need. However, just as tort claims have duty as a fundamental element, so must any presumptions, sanctions, or adverse inferences arising from failure to maintain or preserve property have duty as a basis. * * * * This is an exceedingly important issue which should be confronted by this Court."

The undersigned respectfully agree with Justice Wells that this important issue should be confronted by this Court. The ability of parties and counsel to comply with the law would benefit from clarification on the triggers and scope of the duty of ESI preservation. This is intimately related to the need for the court to fairly and consistently remedy spoliation.

We understand why the subcommittee felt it could not propose a rule in this area in the absence of common law guidance from the courts. However, we simply point out that there is a compelling need to settle the law in this area.

Preservation of evidence – and possible rulemaking on the topic – is an important topic today because of the potential costs and burdens involved in over-preservation in the absence of guidelines. The following information is respectfully submitted to the Court and the Civil Rules Committee because it became available after the Committee process resulting in the proposed rules in the Petition. The Federal Civil Rules Advisory Committee recently conducted a Mini-Conference in which comments were solicited on three alternative approaches to dealing with the pre-litigation preservation issue. Subsequent to the Mini-Conference, the Committee posted all of the relevant materials furnished on the US Courts website.[2] This included the alternative rule proposals being considered.[3]

The Subcommittee sought input on a proposed Rule 26.1 (in "Category 1" or "Category 2" formats),[4] which would require persons who "reasonably expect" to be a party to an action to preserve "discoverable" information once aware of certain facts or circumstances. The Category 1 version would list the trigger events *and* also specify types of information which could be "presumptively excluded from the duty," absent agreement or court order; limit the retroactive reach of the duty and limit the numbers of custodians whose information must be included. The Category 2 version would only list alternative trigger facts or circumstances. Both versions would excuse a party that complied with Rule 26.1 from sanctions in identical sanction provisions. Courts would be authorized to "employ" any sanction listed in Rule 37(b) and to inform a jury of a failure to preserve information. Alternative provisions could limit sanctions depending upon degree of culpability involved.

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[2] Dallas Conference Materials (Sept. 9, 2011), collectively found at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011.aspx

[3] Subcommittee Preservation/Sanctions Issues (hereinafter "ISSUES MEMO"), copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Materials/Preservation-Sanction%20Issues.pdf.

[4] ISSUES MEMO, 3-18 ("Category 1") and 18-21 ("Category 2").

The Subcommittee also proposed a new Rule 37(g)("Category 3")[5] which would authorize Rule 37(b) sanctions whenever a party does not "reasonably preserve," listing factors for courts to consider in deciding if that had occurred, such as anticipation of litigation, reasonableness of efforts to preserve, use of a litigation hold and the scope of the preservation efforts, as well as the "sophistication" of the party, proportionality concerns and whether the party sought timely guidance from courts. This "standalone" rule would incorporate something akin to existing Rule 37(e), barring sanctions in the absence of "willful" or "bad faith" failure to preserve which causes substantial prejudice in the litigation.[6] A perceived advantage of a Category 3 version would be to avoid issues in regard to authority to engage in pre-litigation rulemaking.

We are not in a position to predict whether any of these options will be adopted, given that the federal committees have not publicly reported a conclusion on whether rule amendments would be a productive way of dealing with preservation/sanctions concerns, much less what amendment proposals would be useful. Nonetheless, there is no reason why Florida could not consider these issues its own path forward, especially in regard to pre-litigation duties. Connecticut recently acted in regard to this topic by adopting a higher culpability standard for its "safe harbor" provision, which was broadened to include all forms of discoverable information and eliminating the limitation to rule-based sanctions.[7]

The competing interests are important and not without debate. The disadvantages of an unlimited pre-litigation preservation duty are compounded by the difficulty of anticipating the scope of preservation required. Currently, the only sources of guidance in Florida are the subjective principles of proportionality and undue burden. Justice Wells correctly raised questions of the fairness, practicality, or constitutionality of such a rule and others might question the

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[5] *Id*., 22-25 ("Category 3")
[6] *Id*., 23 (Rule 37(g)(2)).
[7] *See* Sec. 13-14 CONNECTICUT PRACTICE BOOK (2011)(eff. Jan. 2012)(copy at http://www.jud.ct.gov/Publications/PracticeBook/PB_070511.pdf, page 108PB) [barring sanctions for failure to provide information, including ESI, lost due to routine, good faith operations of systems or processes "in the absence of a showing of intentional actions designed to avoid known preservation obligations"]).

jurisdictional authority to impose a general obligation to preserve before suit is filed. *Martino, supra* at 348-349. The arguments pro and con must be considered so that the law of preservation in Florida fairly and effectively accommodates ESI, which is fast becoming the dominant source of evidence in litigation.

Conclusion

The eDiscovery rules proposed in the Petition are well-done and needed. We support their adoption. However, some work remains in clarifying Florida law on the issue of preservation of electronically stored information in anticipation of litigation. Regardless of the Court's preference for the scope of detail in Florida preservation law going forward, we respectfully direct your attention to the issue and the immediate need for guidance by rule or case law to the extent the court can clarify whether preservation in Florida is truly limited to cases in which a contract, statute, or discovery request requires it in the current information environment where important, relevant information is stored electronically and subject to loss without prompt intervention. Clarification of this issue affects economics of discovery, fairness in the application of sanctions for failure to preserve, and the ability to achieve the truth by promoting the availability of evidence.

The undersigned have not requested oral argument but are willing to have a representative appear if the Court sets oral argument and has questions for the undersigned.

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I certify that a copy hereof has been furnished by mail and by email to Kevin David Johnson, Thompson Sizemore Gonzalez & Hearing P.A., 201 N Franklin Street, Suite 1600, Tampa, Florida 33602-5110 this ____ day of October 2011.

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Certificate of Compliance

I certify that the foregoing Comment complies with the font requirements of the Florida Rules of Appellate Procedure.

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Ralph Artigliere