COMMENTS
by
FLORIDA DEFENSE LAWYERS ASSOCIATION
and
LAWYERS FOR CIVIL JUSTICE
on
PROPOSED CHANGES TO
FLORIDA RULES OF CIVIL PROCEDURE
TO ADDRESS DISCOVERY OF ELECTRONICALLY STORED INFORMATION

October 13, 2011

Chief Justice Charles T. Canady
Florida Supreme Court
500 South Duval Street
Tallahassee, Florida 32399-1925

Re: **In Re: Amendments To The Florida Rules Of Civil Procedure-Electronic Discovery, CASE NO. SC11-1542.**

Dear Chief Justice Canady:

The undersigned, on behalf of the Florida Defense Lawyers Association (FDLA) and Lawyers for Civil Justice (LCJ), respectfully submit these comments on proposed amendments to the Civil Rules related to discovery of electronically stored information in the Florida courts, as proposed by the E-Discovery Subcommittee of the Florida Bar Civil Rules Committee in its January 18, 2011 Report

FDLA is an organization of over one thousand of Florida's pre-eminent attorneys whose practices are primarily devoted to representing defendants in civil litigation - from individuals and small businesses to Fortune 500 companies. FDLA is committed to improvements in the administration of justice and to increase the quantity and quality of the service and contribution which the legal profession renders to the community, state and nation.

LCJ's membership is composed of in-house counsel for major American corporations, outside defense trial counsel, and the leadership of three major defense bar organizations, the Defense Research Institute (DRI), the Federation of Defense and Corporate Counsel (FDCC), and the International Association of Defense Counsel (IADC), which collectively represent over 23,000 civil defense trial lawyers.

LCJ worked closely with the U.S. Judicial Conference Rules Committee throughout the lengthy and deliberate development of the 2006 e-discovery amendments to the Federal Rules of Civil Procedure. The Federal Amendments provided the model for recent amendments enacted by the many of the sovereign states and are now being proposed by the Rules Committee for Florida.

Given the parallel between Florida's discovery rules and those of the Federal Rules of Civil Procedure, the Federal Amendments are an important starting point, if for no other reason than as stated in the first Core Principle of the Subcommittee's Report: "Enhancing predictability by tracking language and principles used in the federal rules to the maximum extent possible so that existing precedents can be applied by courts and parties.

We strongly support the Rules Committee's practical approach to adapting the Federal Amendments to Florida's Rules. There are, however, some areas in which we respectfully suggest improvements on the Federal Amendments appropriate to Florida practice and procedure.

Accordingly we recommend:

1. RULE 1-280(D). LIMITATIONS ON DISCOVERY OF ELECTRONICALLY STORED INFORMATION.

(a) Assessment of Costs

We commend the Committee's inclusion in Rule 1-280(d) of specific reference to proportionality and assessment of costs. However, we invite consideration of a more certain and effective bright line rule similar to Texas Rule of Civil Procedure 196.4, which has been effective in reducing the costs and burdens of e-discovery by providing incentive for parties to agree on prompt production of information that is less costly to retrieve. We recommend that the final sentence of proposed Rule 1-280(d)(1) be modified to read as follows:

> "The court may specify conditions of discovery, including ordering that ~~some or all of the expenses incurred by the person from whom discovery is sought be paid by the party seeking discovery~~ the requesting party shall pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information."[1]

[1] Suggested deletions are ~~struck through~~ and additions are underscored throughout.

In assessing undue burden or cost, we suggest that the Committee Note reference not only the absolute burden and cost of preservation, retrieval and production, but also the burden and cost relative to the amount in controversy.

A rule requiring mandatory cost-shifting, such as the Texas Rule, places the cost/benefit decision where it belongs--on the party demanding the information. The requesting party must assess carefully whether all the information sought is worth the cost of obtaining it. Under current rules, the incentive is for requesting parties to make unreasonably broad demands because the cost of meeting those demands is on the producing party. See, Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, George Washington Law Review, Forthcoming, http://ssrn.com/abstract=1621944 (September 1, 2010); Martin H. Redish, *Pleading, Discovery and the Federal Rules: Exploring the Foundations of Modern Procedure*, (November 3, 2010) at 34-39, http://ssrn.com/abstract=1702406; Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L.J. 561, 596-97 (2001).

(b) Presumptive Limitations on Categories of E.S.I.

We also commend the proposed inclusion in Rule 1-280(d) of the proportionality limitations incorporated in FRCP 26(b)(2)(C), but invite the Committee to consider proposing a Rule that identifies specific categories of electronically stored information that should not be discoverable in most cases. Such a rule might be drafted as follows:

Specific Limitations on Electronically Stored Information.

(i) A party need not provide discovery *of the following categories* of electronically stored information ~~from sources~~, *absent a showing by the receiving party of substantial need and good cause, subject to the proportionality assessment pursuant to Rule 26(b)(2)(C):*

(a) deleted, slack, fragmented, or other data only accessible by forensics;

(b) random access memory (RAM), temp files, or other ephemeral data that are difficult to preserve without disabling the operating system;

(c) on-line access data such as temporary internet files, history, cache, cookies, and the like;

(d) data in metadata fields that are frequently updated automatically, such as last-opened dates;

(e) information whose retrieval cannot be accomplished without substantial additional programming, or without transforming it into another form before search and retrieval can be achieved;

(f) backup data that are substantially duplicative of data that are more accessible elsewhere;

(g) physically damaged media;

(h) legacy data remaining from obsolete systems that is unintelligible on successor systems; or

> *(i) any other data that are not available to the producing party in the ordinary course of business and* that the party identifies as not reasonably accessible because of undue burden or cost ***and that*** on motion to compel discovery or for a protective order, if any, the party from whom discovery of such information is sought shows is not reasonably accessible because of undue burden or cost.

In sum, the categories, based in large part on the Seventh Circuit's Electronic Discovery Pilot Program, and the Sedona Conference Practice Guidelines, include: RAM, on-line access data, data in metadata fields that are frequently updated automatically, backup data, physically damaged media, legacy data, and any other data (i) that are not available to the producing party in the ordinary course of business and (ii) that the party identifies as not reasonably accessible because of undue burden or cost.

The federal rule makers already are in the process of reexamining the federal civil rules including the 2000 discovery and 2006 e-discovery amendments. See, Lawyers for Civil Justice, *White Paper, Reshaping the Rules of Civil Procedure for the 21st Century* (May 2, 2010); 2010 Litigation Conference at Duke Law School, http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/EAF7D6B2D709B78E8525770700487925/$File/E-Discovery%20Panel%2C%20Elements%20of%20a%20Preservation%20Rule.pdf?OpenElement

Since adoption of those amendments, experience dictates that specific, bright line, limitations are necessary to reduce the expanding costs and burdens of e-discovery. Because of the explosion of technology leading to the creation and retention of more and more electronic data, discovery has only become more complex. As a one court recently opined, "[w]ith the rapid and sweeping advent of electronic discovery, the litigation landscape has been radically altered in terms of *scope*, mechanism, cost and perplexity."[2]

The federal rule was drafted to recognize, and incrementally improve on, existing practice regarding inaccessible ESI.[3] Indeed, the problem may be that the amendment was too modest and too much of a compromise. It incorporated too much of the existing practice to really make a difference in reducing the costs and burdens of e-discovery. "[T]he development of electronic

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[2] *PSEG Power N.Y., Inc. v. Alberici Constructors, Inc.,* 2007 WL 2687670, at *1 (N.D.N.Y. Sept. 7, 2007) (Emphasis added.); *See also CBT Flint Partners, LLC v. Return Path, Inc.,* 2009 WL 5157961 (N.D. Ga. Dec. 30, 2009) ("The enormous burden and expense of electronic discovery are well known.")

[3] The proposed amendment is modest. The public comments and testimony confirmed that parties conducting discovery, particularly when it involves large volumes of information, first look in the places that are likely to produce responsive information. Parties sophisticated in electronic discovery first look in the reasonably accessible places that are likely to produce responsive information. On that level, stating in the rule that initial production of information that is not reasonably accessible is not required simply recognizes reality. Under proposed Rule 26(b)(2), this existing practice would continue; parties would search sources that are reasonably accessible and likely to contain responsive, relevant information, with no need for a court order. But in an improvement over the present practice, in which parties simply do not produce inaccessible electronically stored information, the amendment requires the responding party to identify the sources of information that were not searched, clarifying and focusing the issue for the requesting party. In many cases, discovery obtained from accessible sources will be sufficient to meet the needs of the case. If information from such sources does not satisfy the requesting party, the proposed rule allows that party to obtain additional discovery from sources identified as not reasonably accessible, subject to judicial supervision. *Report of the Advisory Committee on Civil Rules* 44 (May 27, 2005), *available at* http://www.uscourts.gov/rules/Reports/CV5-2005.pdf.

storage has introduced important new problems and substantially intensified many preexisting ones. As a result, though discovery's DNA may not have changed, the problems discovery creates have increased, and the stakes have risen substantially. To continue to employ pre-computer age discovery standards in the age of electronically stored data, then, would be the technological equivalent of driving a horse and buggy down Interstate 94."[4]

Our suggested change to the Rule specifically lists categories of ESI that a party need not provide in discovery absent a showing of substantial need and good cause. By identifying specific categories, the proposal seeks to clarify what is "not reasonably accessible," to reduce the amount of motions practice required to afford parties the protection of the rule, and to increase predictability for all parties regarding what is and is not discoverable. Despite these changes, the proposal maintains the court's discretion to apply an exception to the presumed non-discoverability upon a showing of "good cause" or "substantial need."

When it approved the 2006 e-Discovery amendments, the Advisory Committee decided to omit specific examples of inaccessible data in the rule stating that "[i]t is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information."[5] But there is now sufficient information to identify those types and sources of ESI that are burdensome and expensive to locate, retrieve and provide. One can also identify sources that are least likely to contain non-duplicative readable and relevant information. The list in the proposed rule is derived almost entirely from the principles identified in the Seventh Circuit's Electronic Discovery Pilot Program, which states "[t]he following categories of ESI generally are not discoverable in most cases."[6] The list is also consistent with examples of categories of ESI that are "not reasonably accessible" identified by the Sedona Conference.[7]

Additionally, the listing of sources that are less likely to contain non-duplicative, readable, relevant information is more consistent with one of the stated intentions of the Advisory Committee in formulating the rule than simply tying "accessibility" to "burden or cost:"

> A member stated that the real problem is not the cost of providing discovery. The current rules, he said, already address that matter. What the amendment adds is an explicit recognition that the additional costs of searching sources that are not readily accessible may be unnecessary because the information to be retrieved

[4] Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L.J. 561, 627 (2001)..

[5] Fed. R. Civ. P. 26 advisory committee's note (2006); *See* Standing Committee Meeting Minutes, June 2005 at 26, *available at* http://www.uscourts.gov/rules/Minutes/ST06-2005-min.pdf.

[6] Seventh Circuit Electronic Discovery Committee, *Seventh Circuit Electronic Discovery Pilot Program: Statement of Purpose and Preparation of Principles* 14 (2009) (Pilot Program).

[7] *Sedona Conference Commentary on Preservation, Management, and Identification of Sources of Information that are Not Reasonably Accessible,* 10 Sedona Conf. J. 281, 288 (2009).

will not make much difference. Thus, the amendment allows the relevance of information to be determined as a case proceeds.[8]

We also suggest adding "substantial need" to the standard for ordering production of one of the presumptively undiscoverable categories proposed above. As discussed above, the "good cause" standard is vague and frequently ignored. The addition of "substantial need" would clarify the burden on the requesting party by adding a standard that is better defined elsewhere in the civil rules. Specifically, a showing of "substantial need" is necessary pursuant to Fed. R. Civ. P. 26(b)(3)(A)(ii) to compel the production of information otherwise protected by the work-product doctrine.

1. RULE 1.380 -- FAILURE TO MAKE DISCOVERY; SANCTIONS

(a) Spoliation Sanctions. We also applaud the proposed inclusion in Rule 1.380 of a sanctions provision in the Florida Rules, but suggest that one based on Florida's common law spoliation standards would best serve the interests of Florida's citizens. For example, in *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So.2d 843 (Fla. 4th DCA 2004), the Fourth District Court of Appeal set forth the elements of a cause of action for spoliation under Florida law: (1)the existence of a potential civil action, (2) a legal or contractual duty to preserve evidence relevant to that cause of action, (3) destruction of that evidence, (4) significant impairment in the ability to prove up the claims in the lawsuit, (5) a causal relationship between the destruction and the inability to meet the burden of proof, and (6) damages. 877 So.2d at 844. In rejecting Plaintiff's claims that the Marine Center had violated a common law duty to preserve fire debris, the court held 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." (citations omitted). 877 So.2d at 845. The court went on to hold that Florida law did not establish a common law duty to preserve evidence when litigation is merely anticipated.

Accordingly, we suggest the following amendment, although we comment in the alternative in section (b) below on the Subcommittee's FRCP 37(e) based proposal:

> **(e) Sanctions for failure to preserve information.** Absent willful destruction for the purpose of preventing the use of information in litigation, a court may not impose sanctions on a party for failing to preserve or produce relevant and material information. The determination of the applicability of this rule to sanctions must be made by the court. The party seeking sanctions bears the burden of proving the following:
>
> **(1)** a willful breach of the duty to preserve information has occurred;

[8] Standing Committee Meeting Minutes *supra* note 5.

(2) as a result of that breach, the party seeking sanctions has been denied access to specified information, documents or tangible things;

(3) the party seeking sanctions has been demonstrably prejudiced;

(4) no alternative source exists for the specified information, documents or tangible things;

(5) the specified electronically stored information, documents or tangible things would be relevant and material to the claim or defense of the party seeking sanctions;

(6) the party seeking sanctions promptly sought relief in court after it became aware or should have become aware of the breach of duty.

The way individual litigants and companies create, store and dispose of business records has changed significantly with the advent of technology. Rather than engage in extensive efforts to litigate what might be missing, courts should instead focus on what exists related to a claim or defense. And, sanctions for apparently missing evidence should be determined by intent to prevent use of the data in litigation, not by the inadvertent failure to follow some procedural step like issuing a written notice, failing to identify a key custodian, failing to identify an electronic storage location or failing to anticipate a specific request for ESI. [*See, Southeastern Mechanical Services, Inc. v. Brody,* 657 F. Supp. 2d 1293 (M.D. Fla. 2009), stating the principle that it may not be inferred that "missing" evidence was unfavorable, unless the circumstances surrounding the absence indicate bad faith: i.e., that a party tampered with the evidence.[9] 657 F. Supp. 2d at 1300.

Rather than recognize the basic challenge presented by technology some leading cases have placed a disproportionate burden on businesses by requiring preservation of *all potentially* relevant data without considering proportionality. Disputes related to preservation have focused on what was lost, rather than focusing on what still exists. *Southeastern Mechanical Services, Inc. v. Brody, supra,* is typical in this respect. There, almost the entire discussion in the opinion concerned e-mails, calendar entries and the like which were missing from two Blackberrys. Notwithstanding contentions that virtually all of the "missing" data was contained in production from other servers, the Court found that there was a short period of time for which no copies of the missing data existed, and imposed sanctions.

Cases discussing deliberate efforts to destroy documents sometimes conflate the general requirements for preservation into what is clearly a case of deliberate misconduct.[10] Instead of

[9] In that case, this is exactly what the Court found: that the individual defendants had intentionally "wiped" their BlackBerrys to avoid discovery of unfavorable data.

[10] *Southeastern Mechanical* found overwhelming evidence of just such deliberate misconduct. Many federal cases, however, demonstrate exactly the type of analysis discussed here, in which purposeful and well-meaning attempts to preserve evidence were contorted into gross negligence or even worse. *See, e.g., Pension Committee of Univ. of Montreal Pension Plan v. Bank of America Secs. LLC,* 685 F. Supp. 2d 456 (S.D.N.Y. 2010).

focusing on the intent to destroy evidence, the focus has been on whether the party had a reasonable approach and methodology to address preservation and if the apparent lack of preservation was due to negligence or an inordinate amount of prejudice. Given the complexities of modern information systems the current preservation obligations doom companies to failure. Most skilled lawyers can argue an opponent failed to properly preserve some undiscovered pocket of ESI reasons; one key custodian was missed, a network location was overlooked or a laptop of a former employee was misplaced irrespective of good faith efforts to preserve the information.

In response, well intentioned companies have fashioned detailed, time consuming and costly preservation procedures, often requiring individual employees to expend significant, resource consuming efforts to preserve data in systems that are designed to limit email mailboxes and to otherwise manage the overwhelming volume of electronic data. Other companies have created multi-million dollar computer storage systems solely to preserve data for the purposes of litigation. Instead of the law evolving with changing technology, the law is imposing costly changes on litigants that force both changes in best practices in managing information as well as forcing information management tools to conform to the singular requirements of preservation. To make matters worse the changes undertaken to meet the developing and varied preservation standards provide no certainty to litigants. No matter what efforts are taken, some piece of ESI is likely to be lost or inadvertently destroyed during preservation and discovery due to the complexity of information management (i.e. if a computer is lost or stolen). The fluid nature of digital information is the very antithesis of preservation. The current preservation—spoliation paradigm must change.

Our proposal places the emphasis on culpability - were the actions of a party intentional for the purpose of preventing the use of information in litigation. Emphasis can also be placed on analyzing the volume and type of existing evidence. For example, if most all relevant information resides in duplicate form, or is nevertheless in the possession of a litigant through other means, the loss of a laptop or deletion of duplicative information should be excused.

Even more troublesome, however, are the risks well intentioned organizations face even when following the strictest *ad hoc* rule in good faith to implement a litigation hold. If, despite best efforts an organization misses a key custodian, a single storage device or remote network location, the organization may have minimized the risk of sanctions but is not immune from them. Still other organizations may not interpret the claims or defenses as broadly as its adversary or a court especially at early litigation stages. Miscalculating the scope of preservation derides the efforts of the most careful litigants; no matter how diligent they were and no matter how much data was preserved. Additionally, the scope of the matter typically evolves over time. The determinations made at the outset of litigation should not be judged based on facts learned much later. Additionally, the determination of the scope of the matter often trails the battles over claims of spoliation.

We submit that the "willful destruction" sanctions standard we propose will minimize the "gotcha game" that has played out in too many cases over the last few years. In short, a litigant requesting information seeks wide ranging preservation pre-suit through an overly broad demand for preservation. If a recipient fails to take action in response or to preserve remotely relevant

data, ancillary litigation can ensue testing the boundaries of the scope of preservation. The proponent of such ancillary litigation "wins" if relevant data was lost or destroyed regardless of the efforts taken to preserve ESI. Currently there is no disincentive for a requester to lodge other than an overly broad request, and there is an incentive for the responder to seek to comply with such an overly broad request in an effort to avoid potential sanctions even at significant cost. A concern over lost data (feigned or real) is unlikely to result in a movant being sanctioned for waste of judicial resources. There is no downside to playing the game, but the proposed rule should minimize it.

(b) The Subcommittee's proposed sanctions rule tracks Federal Rule of Civil Procedure 37(e) and, as such, does capture a common sense approach to deal with the innocent loss of information due to the complexities of the operation of computer systems. We respectfully submit, however, that it is not adequate to deal with the increased difficulties that have arisen in this area since the adoption of 37(e) and consequently suggest the "willful destruction" rule above. In the alternative, we do think that the 37(e) approach can be improved and would recommend two revisions in the proposed Rule appropriate to Florida practice -- removal of both the introductory phrase "absent exceptional circumstances" and the reference to sanctions originating "under these rules." The former phrase adds an element of uncertainty, which invites wasteful motion practice; the latter phrase is not needed because, as a sovereign state, Florida's rulemaking power is not circumscribed by the statutory limitations on the federal rule makers.

The Federal Rules do not address the issue of sanctions under a Court's inherent authority to sanction parties for pre-litigation conduct, because the Rules of Civil Procedure apply after litigation begins and the federal Rules Enabling Act prohibits the Rules from altering substantive law. Florida does not have a similar inhibition on its power to enact rules and, therefore, can and should afford the protection of the Rule as soon as the duty to preserve evidence arises, even when that duty arises prior to commencement of the lawsuit. The purpose of the safe harbor is to protect parties from sanctions for the innocent loss of information; the protection should apply whether the loss occurs before or after commencement of the litigation

Further, what is "routine" and "in good faith" will depend on the facts of the case and the features of the computer system in question. It is important to clarify that negligent conduct is not inconsistent with "good faith." Accordingly, we reiterate our recommendation that the rule require "willful destruction'.

* * * *

We express our appreciation for the opportunity to submit these comments. The proposed amendments represent an important and necessary step in ensuring fairness, balance, and predictability in the field of electronic discovery. We hope that the Rules Committee will agree that the revisions suggested above will help resolve some ambiguities and implement the objective of the Rules to facilitate the production of relevant evidence and reduce the cost and expense of discovery in Florida's courts.

Respectfully submitted,

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