IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE **CASE NO.: SC11-1542**

RESPONSE TO COMMENTS TO PROPOSED AMENDMENTS TO ADDRESS DISCOVERY OF ELECTRONICALLY STORED INFORMATION

Kevin Johnson, Chair, Civil Procedure Rules Committee, and John F. Harkness, Jr., Executive Director, The Florida Bar, file this Response to the Comments of Henry Trawick, L. Johnson Sarber, III, , Don Fountain, and Ralph Artigliere, William Hamilton, and Ralph Losey.

On August 9, 2011, The Florida Bar's Civil Procedure Rules Committee (Committee) submitted an out-of-cycle report to the Florida Supreme Court proposing rule amendments (hereinafter "proposed Rule" or "proposed Rules") to address discovery of electronically stored information (hereinafter the "Report"). The Committee proposes amendments to rules 1.200 (Pretrial Procedure); 1.201 (Complex Litigation); 1.280 (General Provisions Governing Discovery); 1.340 (Interrogatories to Parties); 1.350 (Production of Documents and Things and Entry upon Land for Inspection and Other Purposes); 1.380 (Failure to Make Discovery; Sanctions); and 1.410 (Subpoena). Thereafter, the Court directed that the Committee's proposals be published for comment. The proposals were published in the September 15, 2011, Florida Bar *News* providing a deadline of October 17, 2011, for Comments. On September 22, 2011, Henry Trawick, Esquire, filed a comment on proposed Rules 1.280(d)(2) and 1.410(c). On October 13, 2011, L. Johnson Sarber, III, Esquire, filed a comment on proposed Rules 1.280(d) and 1.380 on behalf of the Florida Defense Lawyers Association (FDLA) and the Lawyers for Civil Justice (LCJ). On October 14, 2011, Don Fountain, Esquire, filed a comment on the proposed Rules. On October 14, 2011, Ralph Artigliere, Esquire, William Hamilton, Esquire, and Ralph Losey, Esquire, filed a joint comment on the proposed rules.

In the Notice, the Court directed the Committee to file a response to any comments no later than November 7, 2011. The comments were reviewed by the Committee and this response was approved by a vote of 15-2.

Response to comment by Henry Trawick, Esquire, on proposed Rules 1.280(d)(2) and 1.410(c).

Trawick paragraph 1 regarding proposed Rule 1.280(d)(2): Mr. Trawick asserts that "the court should not consider the resources of the parties in determining whether it will order discovery." In the remaining sentences of his first paragraph, Mr. Trawick asserts select considerations in dealing with inaccessible electronically stored information (ESI), presumably in support of the assertion that the parties' resources should not be considered by the court in determining whether it will order discovery. The Committee does not agree that it follows from such statements that the parties' resources should not be a matter considered by the court along with the other factors set forth in the proposed rule. The proposed language in full context provides:

> (2) In determining any motion involving discovery of electronically stored information, the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from another source or in another manner that is more convenient, less burdensome, or less expensive; or (ii) the burden or expense of the discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

The language in the proposed rule derives from Fed. R. Civ. P. 26(b)(2)(c), including the reference to "the parties' resources" in the court's burden/benefit analysis. As expressed in the Report, "[t]he Committee believes that Rule 1.280(d)(2)'s adoption of the federal proportionality rule is critical to protecting smaller parties from being overwhelmed by excessive discovery requests from parties with greater resources. This is consistent with the core principle of keeping e-discovery issues from being unnecessarily outcome-determinative due to resource imbalances." Use of the specific language of the federal rule is important

to afford parties and courts the guidance provided by federal e-discovery cases and is consistent with Florida common law policies of proportionality and undue burden. The policy of preventing overwhelming discovery rather than the merits of the case from determining outcome is persistent in Florida as well as federal courts. In addition, state rules should, to the extent possible, remain consistent with federal rules to avoid disparity in handling cases that may be brought in either forum and to enable the use of discovery rulings of federal district court judges and magistrates for guidance when confronting discovery issues in the state courts. The Committee stands on the language of its Report for the rationale supporting these policies and the language at issue.

Accordingly, the Committee respectfully requests that the Committee's proposed amendments to Rule 1.280(d)(2) be adopted.

Trawick paragraph 2 regarding proposed Rule 1. 410(c): Mr. Trawick asserts in his Comment that the reference to Rule 1.280(d)(2) in Rule 1.410 should be modified in some non-specified fashion or that the rule should not be changed. The Committee disagrees with these assertions and with the rationale Mr. Trawick includes in his Comment.

Relevant ESI may be requested from a party by Request to Produce under Rule 1.350 or by subpoena under Rule 1.410 on the party or subpoena on someone employed by or under the direction and control of a party. To ensure that a party responding to discovery would have an equivalent burden, whether the request is by a Rule 1.350 Request for Production or by a Rule 1.410 subpoena, it is necessary to incorporate the reference back to the limitations in Fla. R. Civ. P. 1.280(d)(2).

The Committee also disagrees with Mr. Trawick's blanket assertions that a requesting party must "always" pay the reasonable costs of production of a nonparty and that a nonparty witness "presumably has little or no interest in the outcome of the litigation." As pointed out in the Report, ESI is easily dispersed among multiple locations or storage sites, which may be, for example, on digital equipment owned by a party, on digital equipment owned by nonparties, on servers that may or may not be owned or controlled by parties, in "the cloud," or in places currently unknown that may arise as technology develops. Subpoenas under Rule

1.410 may be issued to parties, independent or innocent nonparties, and nonparties that are under the direction and control of parties. Rule 1.410 must provide the court with the flexibility to deal fairly with all of these circumstances. Granted, production of some (but certainly not all) ESI may involve expenses not normally encountered in the case of tangible documents and things. Response to a subpoena for ESI may involve, *e.g.*, search, collection, translation (in form), and privilege review costs that may create an undue burden on a responding party or nonparty. Upon application for protection under the rule, the court should consider whether discovery should be conditioned or that some or all the costs be shifted to the requesting party, especially in the case of an innocent third party. The proposed rule expressly provides that "the court may specify the conditions of the discovery including ordering that some or all of the expenses of the discovery be paid by the party seeking the discovery." However, the determination of what expenses are reasonable and who should bear them is a matter for the court to determine in its sound discretion on a case-by-case basis. For example, a court may determine that a requesting party should not be burdened by additional production costs simply because the opposing party intentionally placed its documents in the hands of a third party in a manner that requires a subpoena to get them. Furthermore, privilege review benefits the producing party and is not a typical expense to shift to the requesting party. The Committee considers proposed Rule 1.410 as drafted essential to the fair application of the rules to ESI and consistent with the remainder of the proposed Rules. Moreover, proposed Rule 1.410 provides the judge with guidance tempered by the necessary breadth of discretion to fairly address the variety of circumstances that may be encountered with discovery of ESI from parties and nonparties by subpoena.

Accordingly, the Committee respectfully requests that the Committee's proposed Rule 1.280(d)(2) and 1.410(c) be adopted.

Response to comment of L. Johnson Sarber, III, on behalf of the Florida Defense Lawyers Association and Lawyers for Civil Justice, on proposed Rules 1.280(d) and 1.380.

Note: Mr. Sarber's cover letter summarizes comments of the FDLA and LCJ attached to Mr. Sarber's letter. To the extent that there are differences in the summary and the more detailed FDLA and LCJ comments, Mr. Sarber's comments

will be addressed separately. Otherwise, the responses to the FDLA and LCJ Comments will also serve as responses to Mr. Sarber's cover letter.

Sarber paragraph a) on proposed Rule 1.280(d): In this paragraph of the Comment, Mr. Sarber requests that Rule 1.280(d) "include a provision that the court may require that the requesting party pay for some or all of the expenses incurred by the responding party in the production of the requested information." The Committee respectfully responds that the language in proposed Rule 1.280(d) does exactly what Mr. Sarber is requesting in the comment. Proposed Rule 1.280(d)(1) provides:

> (1) A person may object to discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of burden or cost. On motion to compel discovery or for a protective order, the person from whom discovery is sought must show that the information sought or the format requested is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order the discovery from such sources or in such formats if the requesting party shows good cause. *The court may specify conditions of the 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 the discovery.* (emphasis supplied)

The Committee contends that no adjustment is needed to the proposed Rule, as it already provides the discretion the court needs for the circumstances set forth in Mr. Sarber's comment.

Accordingly, the Committee respectfully requests that the Committee's proposed Rule 1.280(d) be adopted.

Sarber paragraph b) on presumptive limitations on certain categories of electronically stored information:

Mr. Sarber asserts that by rule the Court should place presumptive limitations on certain categories of ESI that are difficult to access. The Committee believes that proposed Rule 1.280(d)(1)'s adoption of the federal good-cause standard for resolving concerns about discovery of material that is deemed "not

reasonably accessible" by a producing party will encourage the parties to discuss and attempt to avoid unduly burdensome discovery, and will also provide the court with a framework for resolving disputes about such information. The response to this comment is discussed under FDLA and LCJ comment 1(b) on presumptive limitations on categories of discoverable ESI below.

Sarber paragraph c) on adding a "willful" component to the burden for sanctions for failure to preserve ESI:

Mr. Sarber wants to add a new component to existing Rule 1.380 relating to sanctions. He asserts that a finding of willful breach of the failure to preserve and demonstrable prejudice should be required in order to levy sanctions for failure to preserve ESI. Mr. Sarber states that his proposal emphasizes culpability by requiring the court to determine that the actions [in failing to preserve evidence] were intentional. These assertions are repeated and amplified in the FDLA and FCJ comments to proposed Rule 1.380, and the Committee responds more fully below. However, the Committee responds here that Mr. Sarber's assertion would substantially alter the common law and rules of Florida relating to discovery sanctions by increasing the burden on the party requesting ESI to prove a case or defend a case. Mr. Sarber's comment fails to account for current law that action or inaction on the part of a party that possesses or controls evidence that results in the loss or destruction of the necessary, relevant evidence resulting in prejudice is subject to sanction, regardless of whether the action or inaction was intentional. Certainly the degree of culpability and degree of prejudice may impact the type of sanction levied by a trial judge for failure to preserve. However, adding a universal burden of proving intentional destruction of evidence truncates remedies available at common law, substantially lowers the bar for complying with a duty to preserve, and is fundamentally wrong. Accordingly, the Committee opposes such a rule for the reasons set forth above and the reasons set forth in response to the FDLA and FCJ comments to proposed Rule 1.380 below.

FDLA and LCJ comment (1)(a) on proposed Rule 1.280(d):

The FDLA and LCJ assert that proposed Rule 1.280(d) should include a "bright line" rule requiring the requesting party to pay the reasonable expenses of any extraordinary steps required to retrieve and produce ESI. In support of their

assertion, FDLA and LCJ cite Texas Rule of Civil Procedure 196.4 and state that the bright line rule encourages parties to assess whether information is needed before requesting it and to not make extraordinarily broad demands. They also suggest in this portion of their comment that the Committee Note also reference the concept of proportionality.

The Committee opposes the bright line rule mandating that the trial judge assess reasonable extraordinary expenses to the requesting party. The procedure employed by Texas state courts under Texas Rule 196.4 is generally similar to the procedure under proposed Rule 1.280(d) and the parallel federal rule, except that Texas *requires* the trial judge to assess "extraordinary" expenses of production to the requesting party. [1] In Texas state courts, the discretion of the judge is reduced upon a finding that extraordinary steps are required to retrieve and produce information. Texas' Rule 196.4 was adopted in 1999, seven years before the federal rules on electronic discovery were promulgated, and the federal courts and state courts adopting rules since 1999 have not followed the Texas model.[2]

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[1] Texas Rule of Civil Procedure 196.4 provides:
"**Rule 196.4 Electronic or Magnetic Data.** To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot – through reasonable efforts – retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information."

[2] The only Texas Supreme Court case to construe this statute recommended that Texas practitioners should refer to federal e-discovery practice for guidance, and laid out a detailed 8-point procedure designed to avoid conflicts over scope and costs, and obviate the need for trial court intervention. *In re Weekley Homes, L.P.*, 295 S.W. 3d 309, 321–322 (Tex. 2009).

The language proposed by this Committee for proposed Rule 1.280(d) provides the court with the discretion to shift expenses of production to the requesting party. The proposed language is consistent with the current federal rules and employs the concepts of undue burden, accessibility, good cause, and proportionality. As stated in the Report, the Committee believes that the proposed rules will encourage the parties to discuss and attempt to avoid unduly burdensome discovery, and will also provide the court with a framework for resolving disputes about such information. Because assessment of costs under proposed Rule 1.280(d) occurs after a motion on the issue, hearing, and determination on undue burden and accessibility, any cost shifting would not take place until the trial court orders it as a condition of production. Presumably the requesting party can "opt out" of the scope of the request before production occurs based on the court's determination on the conditions under which discovery will be ordered under proposed Rule 1.280(d). Any marginal prophylactic cost benefit of a rule providing mandatory assessment of "reasonable extraordinary costs" by presumably encouraging parties to request less ESI is outweighed by the reduced discretion accorded the trial judge, the lack of consistency with the parallel federal rule and other states following the federal model, and the injection of a new undefined term of "extraordinary costs" into the rule. The rationale for using reasonableness as a standard rather than a bright-line rule in the federal rules and in the proposed rules is to provide discretion to the court in managing discovery. Cost shifting is but one of many tools in controlling discovery costs. Improperly overbroad discovery requests can be dealt with through discovery case management tools of word searches and staged discovery and/or assessment of costs and fees upon motion for protective order. Adding the term "extraordinary costs" to the mix will further complicate the proposed rule. What is an extraordinary cost? Is it any cost greater than paper copies? A cost that is extraordinary to one party in state court may be routine to another. Is it fair to require uncompensated production from a party that expends resources in advance to better prepare itself for electronic discovery while considering the costs of the same production by an unprepared party as "extraordinary?" The Committee opposes limiting judicial discretion by mandatory cost shifting in any form. Such a rule shifts the balance of state court discovery in a one-sided fashion in favor of producing parties.

As for the request to add "the burden and cost in relation to the amount in controversy" (proportionality) to the Committee Notes to this proposed rule, the Committee responds that proportionality is already discussed in the proposed Committee Note, and there is no need to adjust the language of the Committee Note as suggested by FDLA and LCJ.

Accordingly, the Committee respectfully requests that the Committee's proposed amendments to proposed Rule 1.280(d) be adopted and that the Committee Note remain as proposed.

FDLA and LCJ Comments (1)(b) to proposed Rule 1.280(d) regarding placing presumptive limitations on categories of discoverable ESI:

FDLA and LCJ assert the need to specifically define categories of ESI that need not be produced absent a showing of "substantial need and good cause." The comment proposes a per se inaccessible status for certain categories of data. In support of its proposal, FDLA and LCJ are critical of the federal rule amendments of 2006 as being "too modest" and "too much of a compromise" to deal with the exploding cost of discovery of ESI.

While the Committee understands the need to be concerned about cost of discovery, the adjustments proposed to Rule 1.280(d) by FDLA and LCJ in this portion of their comment take us far from the current federal model by listing specific types of electronic data that merit universal protected status and will be produced not only upon "good cause" as asserted in federal rules and the rule proposed here, but also upon "substantial need." Adding a burden of substantial need and good cause to specific pre-defined categories of evidence is contrary to Florida law and the policy of liberal access to discoverable information and is ill-advised for Florida rulemaking. The Committee also opposes per se protected status for specific types of data as proposed by FDLA and FCJ. The Committee opposes injecting a standard of "substantial need" in addition to good cause in the proposed rule as suggested in the comment. FDLA and LCJ admit that the term "substantial need" implies the same protection as that afforded "work product" under the federal rules. Such a high standard for access to inaccessible ESI imposes a burden that is inconsistent with Florida's policy of open discovery. Such language is a game-changer and shifts the balance in favor of parties controlling

discoverable, relevant information in the form of ESI. Adding "substantial need" is a barrier that does not exist in federal rules for discovery of ESI and should not be incorporated here.

The FDLA and FJC comment contends that "experience dictates that specific, bright-line, limitations are necessary to reduce expanding costs and burdens of e-discovery." Following that assertion, the comment expresses opinions and commentary concerning burgeoning discovery costs and increased complexity in e-discovery at the federal court level. The Committee is cognizant of the federal experience, the experience of other states, and the experience in Florida with e-discovery. The Committee's Report reflects our view of the scope of the problem and the rationale for the rules proposed to deal with the issue, which are substantially based on the federal rules of e-discovery. While controlling costs is a concern, there is no evidence that the state of e-discovery in Florida state courts requires a substantial deviation from the federal model, let alone a rule that would significantly limit the discretion of the judge on the issue of scope of discovery and increase the burden of access or substantially limit access to potentially significant evidence. The Committee's proposed rule was developed with input from Florida circuit judges and lawyers practicing in the area of e-discovery. The current e-discovery subcommittee is chaired by a circuit judge responsible for the commercial division of his circuit and experienced in state court ESI issues. The Committee has no empirical or anecdotal evidence of a need in Florida state court for the additional burdens requested by FDLA and FCJ or that such a bright line rule would make any difference in discovery conduct of parties. To the contrary, Florida's rules must serve all Florida civil cases, the range of which dictates the exercise of caution in establishing burdens in the request for discoverable information.

In advancing their position on categories of data that should be declared by rule as per se inaccessible, the FDLA and FCJ comment cites The Sedona Conference® Commentary on Preservation, Management, and Identification of Sources of Information that are Not Reasonably Accessible.[3] This particular Sedona Commentary relates to guidelines for preservation of data as opposed to

[3] FDLC and FJA Comment at p. 5. The full text of the Sedona Commentary is located at http://www.thesedonaconference.org/dltForm?did=NRA.pdf.

protection from discoverability of data as intended by proposed Rule 1.280(d). Nonetheless, the Commentary specifically provides:

> The central dilemma of preservation planning in the absence of the opportunity to discuss discovery requests or reach prior agreement among the parties is predicting exactly which sources of information may actually be discoverable in a given case. *No bright-lines exist.*[FN omitted] The primary duty is to make reasonable assessments in good faith. (emphasis supplied)

The Commentary then goes on to provide a detailed framework for case-by case assessment of what may be considered "not reasonably accessible," following the federal balancing test. No publication of The Sedona Conference® has ever advocated or advanced a rule that establishes bright-line designations for specific categories of ESI such that they are rendered per se inaccessible.

The Committee opposes presumptive protection for certain categories of protected ESI by listing them in the rule, for the same reasons such specific rules were rejected by the Federal Rules Advisory Committee when proposing their ESI rules. The FDLA and FCJ suggest in their comment that the federal rulemakers are in the process of considering amendments to the federal rules, but the Committee is familiar with the current federal court rules activity, and there is no evidence that the federal rules will be amended in the manner suggested in the FDLA and FCJ comment. To the contrary, while there have been proposals by certain groups advocating protected status for certain types of data on inaccessibility, such efforts have been rejected because the rules need to remain flexible enough to deal with changing technology and a significant variety of circumstances.

It is remarkable that the FDLA and FCJ comment suggests that experience since 2006 supports adjustment to the rule by designating specific data that "should not be discoverable in most cases." In fact, since 2006, technology and forensics have advanced such that specific categories listed in the comment for protected status have actually become more accessible over time, which presumably is why they are requested more frequently in federal court discovery. Granted, time will tell whether the federal rules are ultimately amended to adjust to costs of retrieving specific types of inaccessible data. The Committee does not expect that federal

rules will be amended to adopt per se categories of inaccessible data given the current status of federal rules efforts. The Committee will continue to monitor the federal rules experience and amendments, if any, to federal rules that may be useful in Florida state court. However, the fact that federal rules may change should not hinder or delay consideration of the rules proposed for Florida. The experience in Florida state courts has not suggested an overwhelming need to get ahead of the federal courts by designating specific categories of presumptively inaccessible data. Furthermore, advances in technology and forensics may well continue to make data that is considered inaccessible today more easily and less expensively accessed in the future. It is hazardous to develop electronic discovery rules anchored to specific technology or defined categories, as technology changes every day. The rules should meet the needs of Florida state court litigants and judges such that rules and terminology will not become outmoded or out of step with changing times. Perhaps most importantly, the Committee does not want to impinge on the discretion of the trial judge by micromanaging discoverable categories of ESI in rulemaking. Certain ESI may or may not be reasonably accessible, a determination that can and should be determined on a case by case basis.

Accordingly, the Committee respectfully requests that the Committee's proposed Rule 1.280(d) be adopted.

FDLA and LCJ Comments 1 (a) on Rule 1.380:

FDLA and LCJ applaud the proposed amendments to Rule 1.380 in their comment, but suggest a narrowing of spoliation sanctions based on *Royal Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843 (Fla. 4th DCA 2004). However, the view expressed as Florida common law spoliation sanctions fails to acknowledge the full scope and content of Florida spoliation and preservation cases. Further, the proposed language advanced in this paragraph of the FDLA and FCJ comment is not supported by any cited case from Florida. The proposed language imposes a burden for sanctions that requires a "willful breach" of a duty to preserve followed by five additional specific elements, thereby setting forth a collective burden for sanctions that is not recognized in Florida or federal law.

First, adding a "willful" component only serves the interests of producing parties and is inconsistent with the fabric of Florida law of spoliation and preservation. In Florida, as in federal court, the negligent failure to preserve evidence is subject to sanction. Likewise, in federal and Florida courts, a range of sanctions is available depending on *culpability* and *prejudice*. If the prejudice is extreme enough, such as a case that cannot proceed due to lack of evidence that was lost or destroyed while in the possession or control of the producing party, then applying the burden of willfulness is not required in Florida or federal courts. If the contention by FDLA and FCJ is accepted and incorporated into Rule 1.380, the law of preservation and spoliation will have been altered such that the acceptable conduct for protection of relevant information would be lowered to negligent but not willful conduct. This is a quantum leap away from the protection afforded Florida litigants in their effort to present their case or defense in Florida (and federal) courts.

The remaining five elements that the FDLA and FCJ comment proposes to add to Rule 1.380 likewise create a burden that is not cognizable by Florida law (or federal law for that matter). To advance a presumed need for this alteration of Florida common law and rules, FDLA and FCJ assert the "disproportionate burden on businesses by requiring preservation of all *potentially relevant* data without considering proportionality." (emphasis in original Comment). The Committee respectfully disagrees that this Court should shift a burden to the requesting party that is not recognized in Florida law because of this perceived problem. First, there are no Florida state court cases or empirical evidence cited in the comment that support the contention that the current Florida rules and common law (or federal rules for that matter) have created a disproportionate burden of preservation. Second, proportionality is a policy recognized in Florida and expressed in the Committee's proposed rules as to scope of discovery. The Committee does not feel that establishing a new rule carving out a special burden for sanctions as proposed by FDLA and LCJ resolves the issue in a fair and balanced fashion. To do so would abolish by rule common-law rights.

The Committee notes that preservation is an area that may require further study pending further development of Florida law. The *Royal Sunalliance* case cited in the FDLA and FCJ Comment is only one of several cases that provide conflicting common-law guidance on triggers and scope of preservation. The issue

was mentioned in the Report and addressed in a Comment y Artigliere, Hamilton, and Losey discussed below. This issue was extensively discussed and researched by the subcommittee assigned to draft the rules and was expressly addressed by the Committee in approving the proposed rules for submission to The Bar and the Court. The Committee respectfully submits that Florida law currently provides insufficient guidance to go beyond the proposed rules. If preservation is to be addressed by rule, it must be done in a fashion that balances the need for preservation of relevant information necessary for litigants tempered by reasonableness and proportionality. The additional burdens proposed by FDLA and FCJ are by no means consistent with Florida law and policy and should not be incorporated in the rules.

Accordingly, the Committee respectfully requests that the Committee's proposed Rule 1.380 be adopted without addition of the proposals submitted by FDLA and FCJ.

FDLA and LCJ Comments 1 (b) on proposed Rule 1.380(e):

In the alternative to their proposal above, FDLA and LCJ propose adjustments to proposed Rule 1.380(e) by adding a "willful" requirement as discussed above and by removing the phrases "absent exceptional circumstances" and "under these rules." The Committee opposition to adding a willful component is covered above. This portion of the response discusses the Committee's opposition to removal of the phrases "absent exceptional circumstances" and "under these rules," which the Committee considers essential to the rule.

Proposed Rule 1.380(e) is the so-called "safe harbor" provision derived directly from federal Rule 37(e), which conditionally protects data that is destroyed through routine, good-faith operation of an information system. This protects, for example, the routine destruction of records after the lapse of a period of time for the purposes of efficiency and clearing computer memory. The proposed rule is:

> **(e) Electronically Stored Information; Sanctions for Failure to Preserve.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

The words "absent exceptional circumstances" are found in Federal Rule 37(e).[4] The Comment states without any support or rationale that the phrase adds "uncertainty" and "invites wasteful motion practice." In response, the Committee asserts that the phrase was intentionally placed in federal Rule 37(e) for valid reason and should remain in the proposed Rule 1.380(e). The purpose for inclusion of the phrase in the federal rules was to accommodate a case in which a judge finds from the evidence that lack of evidence destroyed in routine good faith operation of an electronic information system results in extreme prejudice such that the case cannot proceed.[5] The Committee finds this a compelling reason for judicial discretion over the safe harbor and sees no reason to vary from the federal rules. In short, the Committee supports the element of discretion granted to the trial court to determine whether the safe harbor applies in a given case to avert extreme prejudice.

The rationale for removing the words "under these rules" provided in the Comment likewise does not create a compelling argument to deviate from the

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[4] The proposed rule 1.380(e) is identical to Federal Rule 37(e).

[5] The official explanation of the phrase "in exceptional circumstances" that appears in what is now Fed. R. Civ. P. 37(e) can be found in the Communication of the Chief Justice, The Supreme Court of the United States, Transmitting Amendments to the Federal Rules of Civil Procedure , 234 F.R.D. 219 (2006), which includes the report of the Judicial Conference of the United States. Regarding what was then proposed Rule 37(f), the report explains,

> The change to a good-faith standard is accompanied by addition of a provision that permits sanctions for loss of information in good-faith routine operation in "exceptional circumstances." This provision recognizes that in some circumstances a court should provide remedies to protect an entirely innocent party requesting discovery against serious prejudice arising from the loss of potentially important information.

Id. at 375.

federal rule. From a practical standpoint, sanctions administered other than through the rules of procedure either through common law or the court's inherent authority, carry with them the burden of bad-faith destruction or loss of evidence. Therefore, removing the words "under these rules" would not substantially change the application of the safe harbor, as good-faith business activity is not sanctionable under Florida common law and the inherent authority of the court. As for the rationale provided by FDLA and FJC, the Committee accepts and acknowledges that the phrase was inserted in the federal rule based on the constraints of the Rules Enabling Act. However, the limitations of the phrase "under these rules" in the context of a state court rule serve the laudable purpose of recognizing and not impinging on common law and the inherent authority of the court to sanction. Accordingly, the Committee opposes removal of the words "in these rules" from proposed Rule 1.380(e).

The Committee respectfully requests that the Committee's proposed Rule 1.380(e) be adopted.

Response to comment by Don Fountain, Esquire, on all proposed Rules:

Mr. Fountain requests that the Court consider adding a form order[6] to the Florida Rules of Civil Procedure or specific guidelines to the proposed rules, which might provide "detailed guidance of the actual in-practice method by which electronic discovery will be conducted." The Committee disagrees with this request. The Committee crafted the proposed rules with some purposeful breadth for a couple of reasons. First, while litigants have engaged in some form of electronic discovery for decades, the proposed rules regarding the subject are new. The Committee is disinclined to provide specific guidelines, which may have the unintended effect of limiting, or unnecessarily increasing, the scope of discovery, or a form order, which may inhibit the trial court's discretion in fashioning appropriate discovery orders in each particular case. Second, the Committee is opposed to identifying with more specificity the electronic data subject to

[6] Mr. Fountain attaches a Model Order Limiting E-Discovery in Patent Cases, which is itself an attachment to an article authored by a panel of federal judges and others regarding the need for a model order. The article suggests that the Model Order operate as a guide to federal judges in fashioning their own discovery orders, but does not advocate its inclusion in any rules of civil procedure.

discovery, given the pace with which technology is advancing. Providing specific guidelines linked to existing technology carries the risk of making the proposed Rules obsolete in a short time.

Mr. Fountain specifically requests a form order or guidelines, which:

> [m]ake it clear that the types of systems in existence during the relevant periods of discovery, the types of documents kept in those systems, and the document retention/destruction policy is something that should be voluntarily disclosed and provided without objection.

The Committee does not feel it prudent to require mandatory disclosures with respect to electronically stored information. The civil rules do not otherwise require mandatory disclosure of any other discoverable information, and doing so might present an unnecessary added expense to litigation. When necessary, a party may use interrogatories to ascertain the nature of another party's systems, the types of documents stored there, and the parties' document retention/destruction policy. The Committee has made room for voluntary agreement regarding e-discovery at a case management conference. *See* Proposed Rule 1.200(a)(5) and (a)(7). The proposed rules would also require that the matter be addressed in the initial case management report in complex litigation. *See* Proposed Rule 1.201(b)(1)(J).

Finally, Mr. Fountain requests that the proposed rules include guidelines, which "provide that electronic [sic] should be produced electronically and in the same form that it is kept with no search functions disabled, and that the identities of persons conducting the searches and the specific search criteria utilized should be produced as well." A portion of Mr. Fountain's concern is addressed in the proposed Rule 1.350(b), which provides that:

> A request for electronically stored information may specify the form or forms in which electronically stored information is to be produced. If the responding party objects to a requested form — or if no form is specified in the request — the responding party must state the form or forms it intends to use. If a request for electronically stored information does not specify the form of production, the producing party must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

With respect to identifying the person conducting the searches and the specific search criteria, the party seeking this information may ascertain such information through an appropriate interrogatory.

Response to Comment by Ralph Artigliere, William Hamilton, and Ralph Losey on all proposed Rules and preservation of ESI:

Messieurs Artigliere, Hamilton, and Losey comment initially that they support adoption of all the proposed rules. They then comment at length concerning the need to address preservation of ESI in anticipation of litigation. They recognize that the Committee determined that it could not propose rules on this subject since Florida law is not settled. Nevertheless, they suggest that there is an urgent need to settle the law in this area.

As noted above, the Committee believes that preservation is an area that may require further study pending further development of Florida law. Although federal courts recognize when the obligation to preserve ESI arises, Florida has no clearly established pre-litigation standard. Federal case law provides that the duty to preserve arises when a party has notice that the evidence is relevant to litigation or a party should have known that it may be relevant to future litigation. *Zubulake v. UBS Warburg LLC,* 220 F.R.D. 212 (S.D.N.Y. 2003).

In contrast, Florida courts have yet to definitively address the triggers for and the scope of preservation. Some Florida courts, finding no common law duty, have not imposed a duty of pre-suit preservation absent a contractual or statutory obligation. *See Gayer v. Fine Line Construction & Electric, Inc.*, 970 So. 2d 424 (Fla. 4th DCA 2007); *Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843 (Fla. 4th DCA 2004).

This issue was specifically addressed by the Committee in approving the proposed rules for submission to The Bar and the Court. Because Florida law provides insufficient guidance, and because the Committee was concerned about the ability of any procedural rule to reach and control pre-litigation conduct, no rule change was proposed.

Accordingly, the Committee respectfully requests that the Committee's proposed amendments to the Rules be adopted in their present form, but agrees

with the commenters' suggestion that there is a need for either the courts or the legislature to clarify the duties of parties to preserve ESI in anticipation of litigation.

CONCLUSION

The Committee respectfully requests that the Committee's proposed amendments to rules 1.200; 1.201; 1.280; 1.340; 1.350; 1.380; and 1.410 be adopted as submitted in the Report.

Respectfully submitted _____.

KEVIN D. JOHNSON
Chair
Civil Procedure Rules Committee
201 n. Franklin St., Ste. 1600
Tampa, FL 33602-5110
813/273-0500
FLORIDA BAR NO.: 13749

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300
850/561-5600
FLORIDA BAR NO.: 123390

Certificate of Service

I certify that a copy of this response was served by U.S. Mail on _____ to:

Henry P. Trawick, Jr.
P. O. Box 4009
Sarasota, FL 34230

Ralph Artigliere
573 Ridge Road
Blue Ridge, GA 30512

William Hamilton
101 E. Kennedy Blvd.
Tampa, FL 33602

Ralph C. Losey
390 N. Orange Ave.
Orlando, FL 32801

L. Johnson Sarber III
Marks Gray, P.A.
P. O. Box 447
Jacksonville, FL 32201

Don Fountain
1919 N. Flagler Drive, 2nd Floor
West Palm Beach, FL 33407

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