SUBCOMMITTEE REPORT OF THE E-DISCOVERY SUBCOMMITTEE

Date: June 1, 2010 Chair: Lawrence H. Kolin Members: Mark Romance; Judge Richard Nielsen; Jennifer Mansfield; Kevin Johnson; Todd Demetriades; Lee Barrett; Lorence Bielby; Eric Adams; Samuel Alberto Danón; John P. Kelly; Judge Juan Ramirez, Jr.; Jennifer Mansfield; David Milian; Janet Lucente; Robyn Vines; Ralph Artigliere (emeritus); Magistrate Elizabeth Schwabedissen (emeritus). lished: Jan. 21, 2006 [as offshoot of federal rules subcommittee], proposed by former member, Judge Jennifer Bailey. Meeting dates: October 27, 2009; November 17, 2009; and December 17, 2009

I. History/Background:

This subcommittee was established in advance of groundbreaking federal rules amendments applicable to electronic discovery that became effective December 1, 2006.

The E-discovery subcommittee has monitored decisions from courts around the nation primarily concerning the application of the federal rules. These opinions demonstrate somewhat uneven application of the federal rules, depending on the jurisdiction. Over forty
District Courts have added their own local rules concerning electronically stored information or "ESI," mostly in an effort to clarify the federal rules. A pilot project by the
Seventh Circuit was established this year to get at the underlying issues that challenge conducting E-Discovery, while still recognizing the importance of having these rules.

Florida's implementation of test E-discovery rules via the state's business courts began last summer with the Thirteenth Judicial Circuit, through an administrative order shepherded by committee member, Judge Nielsen. Judges for the other Complex Business Litigation Divisions also indicated support for the implementation of rules by Administrative Order, though have been slow to follow in adopting those, which mainly concern case management. As over half of states have implemented rules, the subcommittee feels it is time to act so that rules are ready for adoption should a request come from the Supreme Court of Florida or at least by the next rule change cycle.

While it is apparent, at least anecdotally by way of state practitioners and judicial officers, that issues in active litigation involving electronic discovery have been less than initially anticipated, the internet continues to transmit more information each year (now at a staggering six terabytes per second). In an increasingly data driven-world, the need for ESI rules in litigation is very real. An informal survey conducted at a past Annual Education Program of the Florida Conference of Circuit Judges showed most of the 400 judges who responded were in favor of promulgating rules on ESI, but not many had actually encountered cases. Those judges that had E-discovery related cases, only dealt with a few. This impression was also recently confirmed at a Ninth Judicial Circuit Bench & Bar conference sponsored by the Orange County Bar Association. The subcommittee feels it is better to be prepared than to go without such rules.

We have also received periodic comments from the outside by members of the bar and judiciary in favor of passing rules. We have also been in contact on occasion with other standing rules committees to keep them abreast of our plans. Articles on our efforts were published in *The Florida Bar News* on a regular basis and encouraged feedback at a designated email address.

Our subcommittee telephone conferences are generally conducted three to four times between meetings of the full committee and we remain the largest subcommittee concerning civil rules. From our discussions, it remains evident that state court practice differs from federal court practice in Florida, so that we cannot merely adopt the new federal rules wholesale. This was made particularly evident when a unanimous straw poll of the full committee was taken in the January 2010 meeting, against any mandatory meet and confer language being incorporated into case management under Rule 1.200. This is consistent with the feeling in the country, as only a few states adopted the early disclosure or mandatory meet and confer requirements like Rule 26 to cover ESI.

However, given the broad recognition that E-discovery disputes can be reduced by early discussion of contentious issues, many states have encouraged discussions at the discretion of the court or as part of the case management conference. As such, it is the desire of the subcommittee to at least include language on the topic of ESI already found in Rule 1.201, in 1.200, as well because so few cases are actually designated as complex. This would serve as a reminder to parties and the Court and perhaps prevent problems from occurring closer to trial.

In crafting these rule amendments to 1.200, 1.280, 1.350, 1.380, and proposed form 1.9XX, we carefully observed the national scene and consulted a wide variety of helpful resource materials available on this subject from independent organizations such as the Sedona Conference and National Conference of Chief Judges.

Almost all states that have adopted rules follow the federal approach in describing ESI among categories of discoverable material distinct from “documents” or “tangible things.” Though the trigger or extent of the preservation obligations, which are generally treated as part of the common law, are not covered, we propose Form 1.9XX as a preservation hold letter from which practitioners and the judiciary can at least have a level playing field from which to consider such requests, perhaps avoiding spoliation and sanctions issues that have plagued the federal courts.

II. Summary of the Issue: Whether the civil procedure rules should be more consistent with the amended federal rules as explained in detail above.

III. Factors Considered by the Subcommittee: The need for rules governing ESI in Florida state courts and promulgating language consistent with federal rule amendments and existing case law for purposes of guidance and interpretation by litigants and courts.

IV. Majority Position: Amend existing rules to accomplish object. New form proposed regarding litigation hold.

A. Rationale. The rules should be changed to recognize the existence of ESI generally consistent with the 2006 amended federal rules and case law interpreting them.

B. If the proposal varies from an existing rule or statute, state what the variance is and explain in detail why the proposal varies from any existing rule or statute, why it should be changed and what the anticipated result will be. The rules should be changed to eliminate the uncertainty over the nature of ESI and to become more modern.

C. If a minority position does not exist, explain any anticipated problems or consequences caused by the majority position and why such concerns should be disregarded. There may be an increased emphasis on electronic discovery by mere mention in the rules, but the presence of such information throughout all types of civil litigation cannot be ignored.

D. Consideration of the effect of the proposed change on other rules. We have tried to identify existing rules which to amend and do not see an effect on other civil procedure rules at this time.

E. Cite applicable case law: There are many cases in this realm nationally, but the seminal federal opinions remain:

Zubulake v. UBS Warburg LLC, 216 F.R.D. 280 (S.D.N.Y. 2003)

Pension Comm. of Univ. of Montreal Pension Plan v. Bank of Am. Secs., 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010) *(Amended Order May 28, 2010)*

In Florida, there are still only a couple of relevant decisions:

Menke v. Broward Cnty. Schl. Bd., 916 So. 2d 8 (Fla. 4th DCA 2005)

Holland v. Barfield, 35 Fla. L. Wkly. D1018b (Fla. 5th DCA 2010)

F. State the subcommittee voting result *(those in attendance)***:** Unanimous.

V. Proposed Amendments: The proposed amendments follow in *redline* version.

VI. Minority Position(s): Not applicable

A. Rationale.

B. Alternative proposed amendments in legislative format.

C. Explain any anticipated problems or consequences caused by the majority position.

VII. Time Considerations for Adopting Proposal: None; send to drafting for rule cycle.

RULE 1.200. PRETRIAL PROCEDURE

(a) Case Management Conference. At any time after responsive pleadings or motions are due, the court may order, or a party, by serving a notice, may convene, a case management conference. The matter to be considered shall be specified in the order or notice setting the conference. At such a conference the court may:
(1) schedule or reschedule the service of motions, pleadings, and other papers;
(2) set or reset the time of trials, subject to rule 1.440(c);
(3) coordinate the progress of the action if complex litigation factors are present;
(4) limit, schedule, order, or expedite discovery;
(5) consider the possibility of obtaining admissions of fact and voluntary exchange of documents and electronically stored information, stipulations regarding authenticity of documents, electronically stored information, the need for advance rulings from the court on admissibility of evidence, and preservation of electronically stored information;
(6) schedule disclosure of expert witnesses and the discovery of facts known and opinions held by such experts;
(7) schedule or hear motions in limine;
(8) pursue the possibilities of settlement;
(9) require filing of preliminary stipulations if issues can be narrowed;
(10) consider referring issues to a magistrate for findings of fact; and
(11) schedule other conferences or determine other matters that may aid in the disposition of the action.
(b) Pretrial Conference. After the action is at issue the court itself may or shall on the timely motion of any party require the parties to appear for a conference to consider and determine:
(1) the simplification of the issues;
(2) the necessity or desirability of amendments to the pleadings;
(3) the possibility of obtaining admissions of fact and of documents that will avoid unnecessary proof;
(4) the limitation of the number of expert witnesses; and
(5) any matters permitted under subdivision (a) of this rule.
(c) Notice. Reasonable notice shall be given for a case management conference, and 20 days' notice shall be given for a pretrial conference. On failure of a party to attend a conference, the court may dismiss the action, strike the pleadings, limit proof or witnesses, or take any other appropriate action. Any documents that the court requires for any conference shall be specified in the order. Orders setting pretrial conferences shall be uniform throughout the territorial jurisdiction of the court.
(d) Pretrial Order. The court shall make an order reciting the action taken at a conference and any stipulations made. The order shall control the subsequent course of the action unless modified to prevent injustice.

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Committee Note

2013 Amendment. Subdivision (a)(5) is amended to include language from Rule 1.201 concerning electronically stored information or "ESI."

RULE 1.280. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise and under subdivision (c) of this rule, the frequency of use of these methods is not limited, except as provided in rule 1.200 and rule 1.340.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Indemnity Agreements. A party may obtain discovery of the existence and contents of any agreement under which any person may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or to reimburse a party for payments made to satisfy the judgment. Information concerning the agreement is not admissible in evidence at trial by reason of disclosure.

(3) Electronically Stored Information. A party may obtain discovery of electronically stored information in accordance with Rules 1.280(d) and 1.380(e).

(4) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative, including that party's attorney, consultant, surety, indemnitor, insurer, or agent, only upon a showing that the party seeking discovery has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. Without the required showing a party may obtain a copy of a statement concerning the action or its subject matter previously made by that party. Upon request without the required showing a person not a party may obtain a copy of a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for an order to obtain a copy. The provisions of rule 1.380(a)(4) apply to the award of expenses incurred as a result of making the motion. For purposes of this paragraph, a statement previously made is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording or transcription of it that is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(5) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) By interrogatories a party may require any other party to identify each person whom the other

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Deleted: A person need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue 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 is not reasonably accessible because of undue burden or cost as provided under subdivision (b)(6)(d) of this rule. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, and the court may specify conditions of discovery including ordering that some or all of the expenses incurred by the person from whom the discovery is sought be paid by the party seeking the discovery. The parties should consider conferring with one another regarding the reasonable scope of the preservation of such evidence at the earliest reasonable opportunity. See Rule 1.380(e).

party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.
(ii) Any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial may be deposed in accordance with rule 1.390 without motion or order of court.

(iii) A party may obtain the following discovery regarding any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial:

1. The scope of employment in the pending case and the compensation for such service.
2. The expert's general litigation experience, including the percentage of work performed for plaintiffs and defendants.
3. The identity of other cases, within a reasonable time period, in which the expert has testified by deposition or at trial.
4. An approximation of the portion of the expert's involvement as an expert witness, which may be based on the number of hours, percentage of hours, or percentage of earned income derived from serving as an expert witness; however, the expert shall not be required to disclose his or her earnings as an expert witness or income derived from other services. An expert may be required to produce financial and business records only under the most unusual or compelling circumstances and may not be compelled to compile or produce nonexistent documents. Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and other provisions pursuant to subdivision (b)(4)(C) of this rule concerning fees and expenses as the court

may deem appropriate.
(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in rule 1.360(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.
(C) Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A) and (b)(4)(B) of this rule; and concerning discovery from an expert obtained under subdivision (b)(4)(A) of this rule the court may require, and concerning discovery obtained under subdivision (b)(4)(B) of this rule shall require, the party seeking discovery to pay the other party a fair part of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.
(D) As used in these rules an expert shall be an expert witness as defined in rule 1.390(a).
(6) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.
(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; and
(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 1.380(a)(4) apply to the award of expenses incurred in relation to the motion.
(d) Specific Limitations on Electronically Stored Information. A person need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue 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 is not reasonably accessible because of undue burden or cost as provided under subdivision (b)(6)(d) of this rule. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, and the court may specify conditions of discovery including ordering that some or all of the expenses incurred by the person from whom the discovery is sought be paid by the party seeking the discovery.
(e) Sequence and Timing of Discovery. Except as provided in subdivision (b)(4) or unless the court upon motion for the convenience of parties and witnesses and in the interest of justice orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not delay any other party's discovery.

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Deleted: The parties should consider conferring with one another regarding the reasonable scope of the preservation of such evidence at the earliest reasonable opportunity. In deciding a motion to protect electronically stored information or to compel discovery of such information or to determine the party to bear the initial costs of the production of such information, the court should first determine whether the material sought is subject to production under subdivision (b)(1) of this rule. If the requested information is subject to production, the court should then weigh the benefits to the requesting party against the burden and expense of the discovery for the responding party. In the absence of agreement, the court should ordinarily require electronically stored information to be produced in no more than one format and should select the form of production in which the information is ordinarily maintained or in a form that is reasonably usable.

(f) Supplementing of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired.

Committee Note

2013 Amendment. Subdivision (b)(3) is added to contemplate electronically stored information or "ESI" and refers to 1.380(e) regarding preservation. Subdivision (d) is added to enable consideration of proportionality cost shifting on discovery of ESI, if appropriate. The parties should confer with one another regarding the reasonable scope of the preservation of such evidence at the earliest reasonable opportunity. In deciding a motion to protect electronically stored information or to compel discovery of such information or to determine the party to bear the initial costs of the production of such information, the court should first determine whether the material sought is subject to production under subdivision (b)(1) of this rule. If the requested information is subject to production, the court should then weigh the benefits to the requesting party against the burden and expense of the discovery for the responding party.

RULE 1.350 PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

(a) Request; Scope. Any party may request any other party (1) to produce and permit the party making the request, or someone acting in the requesting party's behalf, to inspect and copy any designated documents or electronically stored information, including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the party to whom the request is directed through detection devices into reasonably usable form, that constitute or contain matters within the scope of rule 1.280(b) and that are in the possession, custody, or control of the party to whom the request is directed; (2) to inspect and copy, test, or sample any tangible things that constitute or contain matters within the scope of rule 1.280(b) and that are in the possession, custody, or control of the party to whom the request is directed; or (3) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on it within the scope of rule 1.280(b).

(b) Procedure. Without leave of court the request may be served on the plaintiff after commencement of the action and on any other party with or after service of the process and initial pleading on that party. The request shall set forth the items to be inspected, either by individual item or category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection or performing the related acts. The party to whom the request is directed shall serve a written response within 30 days after service of the request, except that a defendant may serve a response within 45 days after service of the process and initial pleading on that defendant. The court may allow a shorter or longer time. For each item or category the response shall state that inspection and related activities will be permitted as requested unless the request is objected to, in which event the reasons for the objection shall be stated. If an objection is made to part of an item or category, the part shall be specified. When producing documents or electronically stored information, the producing party shall either produce them as they are kept in the usual course of business or shall identify them to correspond with the categories in the request. The 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 was specified in the request — the 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 that is ordinarily maintained or in a reasonably usable form or forms. The party submitting the request may move for an order under rule 1.380 concerning any objection, failure to respond to the request, or any part of it, or failure to permit the inspection as requested.

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(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

(d) Filing of Documents. Unless required by the court, a party shall not file any of the documents or things produced with the response. Documents or things may be filed when they should be considered by the court in determining a matter pending before the court.

Committee Note 2013 Amendment. Subdivision (a) is amended to include electronically stored information consistent with Rule 34, Federal Rules of Civil Procedure.

RULE 1.380. FAILURE TO MAKE DISCOVERY; SANCTIONS

(a) Motion for Order Compelling Discovery.
Upon reasonable notice to other parties and all persons affected, a party may apply for an order compelling discovery as follows:

(1) Appropriate Court. An application for an order to a party may be made to the court in which the action is pending or in accordance with rule 1.310(d). An application for an order to a deponent who is not a party shall be made to the circuit court where the deposition is being taken.

(2) Motion.

If a deponent fails to answer a question propounded or submitted under rule 1.310 or 1.320, or a corporation or other entity fails to make a designation under rule 1.310(b)(6) or 1.320(a), or a party fails to answer an interrogatory submitted under rule 1.340, or if a party in response to a request for inspection submitted under rule 1.350 fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, or if a party in response to a request for examination of a person submitted under rule 1.360(a) objects to the examination, fails to respond that the examination will be permitted as requested, or fails to submit to or to produce a person in that party's custody or legal control for examination, the discovering party may move for an order compelling an answer, or a designation or an order compelling inspection, or an order compelling an examination in accordance with the request. The motion must include a certification that the movant, in good faith, has conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order. If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to rule 1.280(c).

(3) Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer shall be treated as a failure to answer.

(4) Award of Expenses of Motion. If the motion is granted and after opportunity for hearing, the court shall require the party or deponent whose conduct necessitated the motion or the party or counsel advising the conduct to pay to the moving party the reasonable expenses incurred in obtaining the order that may include attorneys' fees, unless the court finds that the movant failed to certify in the motion that a good faith effort was made to obtain the discovery without court action, that the opposition to the motion was justified, or that other circumstances make an award of expenses unjust. If the motion is denied and after opportunity for hearing,

the court shall require the moving party to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion that may include attorneys' fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust. If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred as a result of making the motion among the parties and persons.

(b) Failure to Comply with Order.

(1) If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of the court.

(2) If a party or an officer, director, or managing agent of a party or a person designated under rule 1.310(b)(6) or 1.320(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or rule 1.360, the court in which the action is pending may make any of the following orders:

(A) An order that the matters regarding which the questions were asked or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence.

(C) An order striking out pleadings or parts of them or staying further proceedings until the orders obeyed, or dismissing the action or proceeding or any part of it, or rendering a judgment by default against the disobedient party.

(D) Instead of any of the foregoing orders or in addition to them, an order treating as a contempt of court the failure to obey any orders except an order to submit to an examination made pursuant to rule 1.360(a)(1)(B) or subdivision (a)(2) of this rule.
(E) When a party has failed to comply with an order under rule 1.360(a)(1)(B) requiring that party to produce another for examination, the orders listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows the inability to produce the person for examination. Instead of any of the foregoing orders or in addition to them, the court shall require the party failing to obey the order to pay the reasonable expenses caused by the failure, which may include attorneys' fees, unless the court finds that the failure was justified or that other circumstances make an award of expenses unjust.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under rule 1.370 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may file a motion for an order requiring the other party to pay the requesting party the reasonable expenses incurred in making that proof, which may include attorneys' fees. The court shall issue such an order at the time a party requesting the admissions proves the genuineness of the document or the truth of the matter, upon motion by the requesting party, unless it finds that (1) the request was held objectionable pursuant to rule 1.370(a), (2) the admission sought was of no substantial importance, or (3) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or

a person designated under rule 1.310(b)(6) or 1.320(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition after being served with a proper notice, (2) to serve answers or objections to interrogatories submitted under rule 1.340 after proper service of the interrogatories, or

(3) to serve a written response to a request for inspection submitted under rule 1.350 after proper service of the request, the court in which the action is pending may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant, in good faith, has conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. Instead of any order or in addition to it, the court shall require the party failing to act to pay the reasonable expenses caused by the failure, which may include attorneys' fees, unless the court finds that the failure was justified or that other circumstances make an award of expenses unjust. The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by rule 1.280(c).

Deleted: **(e) Electronically Stored Information; Sanctions for Failure to Preserve** ¶
(1) If a party moves for sanctions based on the alleged failure of a party to preserve electronically stored information for production as evidence, the motion must include a description of the efforts made by the movant to confer in good faith with the responding party to reach an agreement regarding the proper scope and method for preservation of that evidence. In determining whether to award sanctions based on a party's failure to preserve electronic evidence, the Court should consider: ¶
(A) whether the moving party failed to confer with the non-moving party in good faith to seek agreement on a reasonable scope and method of preservation of the evidence; ¶
(B) whether the non-moving party failed to respond in good faith to the moving party's attempt to confer regarding preservation; ¶
(C) whether other circumstances establish good cause to award or deny sanctions despite the failure of the movant to confer in good faith or the failure of the ¶
¶
non-moving party to respond in good faith. ¶
(2) 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. ¶
Committee Note ¶
2013 Amendment. The increasing volume of electronic documents and the ease with which those electronically stored information documents or other electronic evidence can be created, changed, or destroyed creates heightened risks that discoverable evidence may be lost due to the failure of a party to comply with its common-law duty to preserve evidence within its control. This problem is complicated by the fact that the duty to preserve will often attach long before a party is served with the discovery requests that seek such evidence. ¶
Subdivision (e)(1) is designed to address this problem by encouraging the parties to engage in good-faith discussions between counsel at an early juncture in the dispute to discuss the proper scope and method for preservation of electronic evidence, while recognizing that even good-faith conferral may not always be enough to guarantee the preservation of relevant electronic evidence. In some cases this may require pre-discovery and even pre-litigation discussions between counsel regarding the extent to which electronic evidence should be preserved. ¶
The rule is not intended to preempt the common law precedents governing ... [1]

RULE 1.410 SUBPOENA

(a) Subpoena Generally. Subpoenas for testimony before the court, subpoenas for production of tangible evidence, and subpoenas for taking depositions may be issued by the clerk of court or by any attorney of record in an action.

(b) Subpoena for Testimony Before the Court.

(1) Every subpoena for testimony before the court shall be issued by an attorney of record in an action or by the clerk under the seal of the court and shall state the name of the court and the title of the action and shall command each person to whom it is directed to attend and give testimony at a time and place specified in it.

(2) On oral request of an attorney or party and without praecipe, the clerk shall issue a subpoena for testimony before the court or a subpoena for the production of documentary evidence before the court or a subpoena for the production of documentary evidence before the court signed and sealed but otherwise in blank, both as to the title of the action and the name of the person to whom it is directed, and the subpoena shall be filled in before service by the attorney or party.

(c) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, electronically stored information, or tangible things designated therein, but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive, or

(2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, electronically stored information or tangible things. A party seeking a production of evidence at trial which would be subject to a subpoena may compel such production by serving a notice to produce such evidence on an adverse party as provided in rule 1.080 (b). Such notice shall have the same effect and be subject to the same limitations as a subpoena served on the party.

Deleted: A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources or otherwise specify conditions, if the requesting party shows good cause.

(d) Service. A subpoena may be served by any person authorized by law to serve process or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made as provided by law. Proof of such service shall be made by affidavit of the person making service if not served by an officer authorized by law to do so.

(e) Subpoena for Taking Depositions.

(1) Filing a notice to take a deposition as provided in rule 1.310(b) or 1.320(a) with a certificate of service on it showing service on all parties to the action constitutes an authorization for the issuance of subpoenas for the persons named or described in the notice by the clerk of the court in which the action is pending or by an attorney of record in the action. The subpoena may command the person to whom it is directed to produce designated books, papers, documents, or tangible things that constitute or contain evidence relating to any of the matters within the scope of the examination permitted by rule 1.280(b), but in that event the subpoena will be subject to the provisions of rule 1.280(c) and subdivision (c) of this rule. Within 10 days after its service, or on or before the time specified in the subpoena for compliance if the time is less than 10 days after service, the person to whom the subpoena is directed may serve written objection to inspection or copying of any of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy

the materials except pursuant to an order of the court from which the subpoena was issued. If objection has been made, the party serving the subpoena may move for an order at any time before or during the taking of the deposition upon notice to the deponent.

(2) A person may be required to attend an examination only in the county wherein the person resides or is employed or transacts business in person or at such other convenient place as may be fixed by an order of court.

(f) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued.

(g) Depositions Before Commissioners Appointed in This State by Courts of Other States; Subpoena Powers; etc. When any person authorized by the laws of Florida to administer oaths is appointed by a court of record of any other state, jurisdiction, or government as commissioner to take the testimony of any named witness within this state, that witness may be compelled to attend and testify before that commissioner by witness subpoena issued by the clerk of any circuit court at the instance of that commissioner or by other process or proceedings in the same manner as if that commissioner had been appointed by a court of this state; provided that no document or paper writing shall be compulsorily annexed as an exhibit to such deposition or otherwise permanently removed from the possession of the witness producing it, but in lieu thereof a photostatic copy may be annexed to and transmitted with such executed commission to the court of issuance.

(h) Subpoena of Minor. Any minor subpoenaed for testimony shall have the right to be accompanied by a parent or guardian at all times during the taking of testimony notwithstanding the invocation of the rule of sequestration of section 90.616, Florida Statues, except upon a showing that the presence of a parent or guardian is likely to have a material, negative impact on the credibility or accuracy of the minor's testimony, or that the interests of the parent or guardian are in actual or potential conflict with the interests of the minor.

Committee Note

2013 Amendment. Subdivision (c) is amended to include electronically stored information consistent with Rule 45, Federal Rules of Civil Procedure.

FORM 1.9XX ELECTRONIC EVIDENCE PRESERVATION LETTER

(ADDRESS OF RECIPIENT)

Re: (Name of represented individual)

Please be advised that we represent (client) in a dispute against (opposing party) . The dispute involves (describe the dispute with sufficient detail to allow receiving party to search documents) .

It is our belief that you or your company ("You") may have electronically stored information ("ESI") relevant to this dispute. This letter is a demand that you preserve this ESI since the dispute will likely result [or has already resulted] in litigation involving electronic evidence.

ESI can physically be found in many different computer data storage devices such as computers, servers, CDs, DVDs, thumb drives, flash drives, external hard drives, cell phones (Blackberry, iPhone, Palm, Windows Mobile etc. . .), instant messaging devices, printers, fax machines and other media. ESI can be found in a variety of formats including emails, text messages, word processing documents, spreadsheets, digital, photographs, web browser histories, computer data in general, or other digital data.

When we use the term "preserve," we mean that You do not delete, erase, or alter such information. In addition, it means that You do not permit relevant ESI to be erased. For example, often computer data backup tapes or other media are used to backup ESI on a server or hard-drive. These tapes are often reused and written over after a certain period of time. If these tapes contain relevant ESI, You should pull them from any such backup rotation so that they are not overwritten or discarded. Additionally, email programs may delete emails after a certain period of time. If the result of this is that potentially relevant emails could be destroyed, this feature should be disengaged. You may also maintain relevant ESI such as an email account at some remote location (i.e. through a web based provider). Even though the computer data is not physically stored at your location, if You have access to it or control over it, You should search these locations for relevant ESI and preserve it. Thus, to preserve ESI, it is important that You understand how and where You store ESI.

Where to Search

If You employ individuals who may have relevant ESI, these employees should be provided with a copy of this letter and asked to search all of their computer storage data storage devices to which they have access for relevant ESI. You should oversee these searches.

In addition to overseeing the searches conducted by your employees or agents, You should review any other computer data storage devices (i.e. corporate servers, computers, etc. . .) where relevant ESI could be stored.

Specific Guidance

Because you may have a better idea than we do as to what kind of relevant ESI you possess (and where it is located), we have provided you with the foregoing description of the nature of the dispute. To facilitate your search however, we believe that the ESI created from [DATE] to [DATE] would be potentially relevant.

We also believe that the following people may have relevant ESI or know where such ESI is located:

[Identify relevant persons - also identify computer data storage devices of which you know about that might contain ESI such as a blackberry, laptop, etc. . .]

We believe that the following servers/files/directories may have relevant ESI:

[Identify servers/files/directories]

We believe that ESI containing the following keywords would be potentially relevant:

[List keywords]

Special Instructions

[Insert special instructions. For example, if metadata is a component of the request, a forensic examiner may need to be retained]

Cooperation

Upon receipt of this letter, we would ask that you contact our office so that we may be able to provide assistance. If cost or burdensomeness is an issue, we may be able to provide additional guidance to reduce the impact of this demand. In addition, although this request presumes that you will search for relevant ESI, the key component of this letter is that all such information be preserved. If you are able to preserve all relevant ESI without extensive searching, this may be sufficient. It is requested, however, that You contact our office so that we may review the ESI preservation strategies with You.

Committee Note

2013 Amendment. This form was created to address the issue of presuit spoliation by providing detailed information to the recipient regarding litigation hold requests and encouraging discussion on scope and reasonableness of preservation duties before filing of an action.

(e) Electronically Stored Information; Sanctions for Failure to Preserve

(1) If a party moves for sanctions based on the alleged failure of a party to preserve electronically stored information for production as evidence, the motion must include a description of the efforts made by the movant to confer in good faith with the responding party to reach an agreement regarding the proper scope and method for preservation of that evidence. In determining whether to award sanctions based on a party's failure to preserve electronic evidence, the Court should consider:

(A) whether the moving party failed to confer with the non-moving party in good faith to seek agreement on a reasonable scope and method of preservation of the evidence;

(B) whether the non-moving party failed to respond in good faith to the moving party's attempt to confer regarding preservation;

(C) whether other circumstances establish good cause to award or deny sanctions despite the failure of the movant to confer in good faith or the failure of the

non-moving party to respond in good faith.

(2) 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.

Committee Note

2013 Amendment. The increasing volume of electronic documents and the ease with which those electronically stored information documents or other electronic evidence can be created, changed, or destroyed creates heightened risks that discoverable evidence may be lost due to the failure of a party to comply with its common-law duty to preserve evidence within its control. This problem is complicated by the fact that the duty to preserve will often attach long before a party is served with the discovery requests that seek such evidence.

Subdivision (e)(1) is designed to address this problem by encouraging the parties to engage in good-faith discussions between counsel at an early juncture in the dispute to discuss the proper scope and method for preservation of electronic evidence, while recognizing that even good-faith conferral may not always be enough to guarantee the preservation of relevant electronic evidence. In some cases this may require pre-discovery and even pre-litigation discussions between counsel regarding the extent to which electronic evidence should be preserved.

The rule is not intended to preempt the common law precedents governing claims for spoliation; on the contrary, Section (e)(1)(C) permits the court to apply common-law precedents regarding spoliation of evidence to resolve a motion for sanctions. The rule is intended to supplement the common law by adding a procedural requirement that the parties state in any motion for sanctions based on a failure to preserve electronic evidence what efforts they have made to confer in good faith and to reach agreement regarding the proper scope and method for preserving the electronic evidence in question.

The court should consider the listed factors before granting or denying sanctions for failure to preserve electronic evidence. Whether a party has sought to confer in good faith is intended to include an analysis of whether the party's actions were reasonably timely in light of the circumstances. Thus, the party seeking preservation should not unreasonably delay in seeking a good-faith conference, nor should the party who controls the evidence unreasonably delay its response to the request to confer. Nevertheless, there may be situations where, due to the volatility of the evidence in question or other complicating factors, even an attempt by the movant to confer at the earliest possible opportunity would not have been timely enough to preclude the loss of relevant evidence. In such situations, the court should rely on applicable common-law precedents to determine whether sanctions should be awarded against the non-movant.

Subdivision (e)(2) is added to make clear that a party should not be sanctioned for the loss of electronic evidence due to the good-faith operation of an electronic information system; the language mirrors that of Federal Rule of Civil Procedure 37(e).