E-DISCOVERY AMENDMENTS TO FLORIDA CIVIL RULES NOW IN EFFECT
By Doug Cherry, Shumaker, Loop & Kendrick, LLP
Chair of The Florida Bar BLS E-Discovery Committee

Effective September 1st, 2012, the Florida Rules of Civil Procedure were significantly amended to address the discovery of electronically stored information (ESI). The amendments affect seven rules of civil procedure as discussed in more detail below. The Florida Supreme Court's order is available at: http://www.floridasupremecourt.org/decisions/2012/sc11-1542.pdf. The order provides a discussion and text of the amendments, including committee notes which, although not adopted as an official part of the rules, do provide valuable insight.

A key goal of the amendments is to parallel similar provisions in the Federal Rules. This allows state courts to refer to Federal case law (which has been ever expanding since the 2006 e-discovery amendments to the Federal Civil Rules) as guidance. Despite this goal, the new Florida Rules contain subtle variances from their federal counterparts. These variances have the potential to allow the Florida rules to give more guidance, yet allow more flexibility.

- **Rule 1.200 (Pretrial Procedure).** The most significant deviation from the Federal Rules is that the 26(f) "meet and confer" provisions were not adopted. However, Rule 1.200 was amended to allow the trial court to consider various issues related to electronic discovery during a pretrial conference, including the possibility of obtaining admissions of fact, the voluntary exchange of documents and ESI, and stipulations regarding the authenticity of documents and ESI; the need for advance rulings on the admissibility of some documents or ESI; and finally, the possibility of an agreement between the parties regarding the extent to which ESI should be preserved and the form in which it should be produced. Such conference may be convened by order of the court or by a party merely serving a notice setting the conference. ***Practice pointer:*** Strongly consider setting an early case management conference to discuss e-discovery, especially if you foresee related issues in the case. This is a prudent first step in avoiding costly discovery disputes and can help set the stage for achieving discovery objectives. Judges and magistrates will be annoyed if the parties waste valuable court resources in addressing matters that should be resolved amicably between the parties. Be prepared to get into specifics with opposing counsel as to what you are seeking and any burden issues related to your production of ESI.

- **Rule 1.201 (Complex Litigation)** is amended to require parties involved in complex litigation to address the possibility of reaching an agreement addressing whether ESI should be preserved, the form in which it should be produced, and whether discovery of such information should be conducted in phases or limited to particular individuals, time periods, or sources. ***Practice pointer:*** Strive to reach an agreement. Don't engage in needless e-discovery expeditions without your client's goals in mind. Since the duty to preserve in Florida currently follows an unconventional standard in this author's opinion, it's critical to discuss preservation with opposing counsel as early as possible.

- **Rule 1.280 (General Provisions Governing Discovery)** is amended to expressly authorize discovery of ESI. On a motion to compel discovery, or a motion for a protective order, the person from whom the discovery is sought must show that the ESI sought or the format requested is not reasonably accessible because of undue burden or

cost. If this showing is made, the court may nonetheless order the discovery if the requesting party shows good cause. However, the court may specify certain conditions of discovery, including cost-shifting. The court, in addressing a motion pertaining to discovery of ESI, must limit the frequency or extent of discovery if it determines that the information sought is: (i) 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. ***Practice pointer:*** The key to supporting an objection to production of ESI is to competently understand your client's technology systems. Only then will you understand the costs and burden of the requested discovery, including search and retrieval costs and the potential for disruption of operations, against the relevance of the information and the requesting party's need for that information. For instance, if you can show that tens of thousands of files will need to be reviewed merely to find information that is duplicative of readily accessible information, then this could help your position. To determine this may require early involvement of an expert.

- **Rule 1.340 (Interrogatories to Parties) and Rule 1.350 (Production of Documents…)** are both amended to allow for the production of ESI, either as an answer to an interrogatory or in response to a specific request. 1.350 allows a request for ESI to specify the form in which the ESI is to be produced. If the responding party objects to the requested form, or if no form is specified in the request, the responding party must state in what form the ESI is being produced. If no form is specified in the request, the amended rule states that ESI shall be produced in the form in which the ESI is ordinarily maintained or in a reasonably usable form. ***Practice pointer:*** Strongly consider specifying production format in your requests, as you may need metadata. This may require an early understanding of the responding party's ESI, which counsel may voluntarily share or which may necessitate a records custodian deposition. Leaving format selection to the responding party's discretion may be problematic. ESI produced in the form as ordinarily maintained may require specialized software to review. ESI produced in a reasonably usable format may not be native format (if that is what you are after). Keep in mind you may have only one bite at the apple.

- **Rule 1.380 (Failure to Make Discovery; Sanctions)** is amended to provide that, absent exceptional circumstances, a court may not impose sanctions on a party for failing to provide electronically stored information that was lost as a result of the routine, good-faith operation of an electronic information system. ***Practice pointer:*** This "safe harbor" has seldom been followed by Federal courts. Current Florida law appears to hold that a duty to preserve arises only by statute, contract, or a request for production, rather than the stricter Federal standard of "reasonable apprehension of litigation." Florida courts will likely adopt the stricter Federal standard. Regardless, intentional destruction of evidence (pre- or post-litigation) can result in a spoliation claim. Don't take that risk. Issue a litigation hold to your client as soon as you sense litigation may arise.

- **Rule 1.410 (Subpoena)** is amended to authorize a subpoena requesting ESI. A person receiving a subpoena may object to the discovery of the ESI. The person from whom discovery is sought must show that the information or the form requested is not reasonably accessible because of undue costs or burden. If that showing is made, the court may nonetheless order the discovery if the requesting party shows good cause, consistent with the limitations provided in rule 1.280(d)(2) discussed above. The court

may also specify conditions of the discovery, including ordering that some or all the expenses be paid by the party seeking the discovery.

These rules should provide excellent direction in addressing ESI issues in Florida. However, there is still a long road ahead in Florida in creating certainty on this topic.