Proposed Amendments to the Florida Rules of Civil Procedure

Florida Bar Business Law Section
Task Force on Civil Procedure Rules

June 8, 2020

Table of Contents

I. Introduction
A. Background
B. Why Follow the Federal Courts?
C. Drafting Team
II. Rule 1.010
III. Rules 1.200 and 1.280
IV. Rules 1.350
V. Rules 1.410
VI. Proportionality

I. Introduction

A. Background

Proper use and handling of electronically stored information ("ESI") results in the achievement of effective, cost efficient, and timely justice in our court systems. Digital data storage facilitates modern personal and business communications, requiring lawyers, judges, and parties to understand and competently manage how ESI is retained, accessed, provided, and applied in legal disputes. Yet many judicial stakeholders remain behind the curve and either fail to engage, or avoid addressing the pressing need for early order, open communication, and efficiency in handling ESI litigation issues.

As technology advances, our State Bar and court system must continue their ongoing efforts to ensure the just, efficient, and economic resolution of disputes. Formalized education remains an important aspect of competency, but annual CLEs and CJEs have not maintained sufficient levels of competency in ESI amongst Bar members and the judiciary. It is incumbent that the Bar and courts continue their foresight and leadership in developing the procedural rules that bring clarity to an increasingly technical component of litigation, but also foster active engagement in what it means to handle ESI litigation issue with competence.

The Federal Rules of Civil Procedure were amended in 2006 and 2015 to address certain managed eDiscovery and ESI in civil litigation.[1] The Florida Rules of Civil Procedure were amended in 2012 to incorporate many of amended Federal Rules from 2006.[2] In 2019, the Florida Rules were amended by incorporating language on sanctions from the 2015 amendment to Federal Rule 37(e)

---

[1] Fed. R. Civ. Pro., *et seq.* (Dec. 1, 2006)(available at: https://www.uscourts.gov/sites/default/files/federal_rules/FRCP12.1.2006.pdf); Fed. R. Civ. Pro., *et seq.* (Dec. 1, 2015) (available at https://www.uscourts.gov/sites/default/files/frcp.12.1.2015_1.pdf).

[2] In re: Amendments to the Fla. Rules of Civ. Procedure 2012, SC13-224, (April 11, 2013) (available at: https://www.floridasupremecourt.org/content/download/322765/2894985/file/sc13-224.pdf).

relating to failure to preserve ESI.[3] More of the 2015 Federal Rules changes and even some of the 2006 Federal Rules relating to eDiscovery are potential sources for improvement in the current Florida Rules of Civil Procedure.

The current Federal Rules of Civil Procedure offer several advantages over the Florida Rules. The Federal Rules have a proven track record in an eDiscovery rich environment. An abundance of well-reasoned opinions guide the district courts through both difficult and routine eDiscovery disputes. This provides a preexisting body of persuasive authority if the Florida Rules of Civil Procedure are patterned on the Federal Rules. Adoption of the Federal rules would provide consistency for lawyers and parties appearing in both federal and state courts regardless of the jurisdiction. Given the variability of subject matter jurisdiction in Federal Court, the Federal Rules were crafted with flexibility in mind; flexibility that can be tailored effectively and efficiently to address the subject matter of Florida cases.

Accordingly, we considered the experiences and responses of other state courts systems as well as the ongoing projects and initiatives of our own local districts as authorized and encouraged by the Florida Supreme Court. The Business Law Section strives to support and assist the Florida Civil Rules Committee with amendments and adjustments to procedural rules relating to eDiscovery. The Section commented on and contributed to the 2012 and 2019 rules amendments. The Electronic Discovery and Digital Evidence ("EDDE") Committee of the Business Law Section has an active and experienced Civil Rules Task Force that has studied the issue and prepared recommendations for further amendments to the Florida Rules of Civil Procedure.

Our proposed amendments include an amendment to Rule 1.010 to conform to Federal Rule 1, and thereby recognize how the Florida Rules should be administered to accomplish the just, speedy, and inexpensive determination of each action and thereby balance the burden that eDiscovery may often impose with the need to accomplish efficient justice. The proposed amendments also include: (i) changes to Rule 1.280 to conform to the initial disclosures required by Federal Rule 26(a) and to develop a discovery plan early in the case; (ii) a requirement in Rule 1.200 for a Case Management Conference in most cases; (iii) changes to Rule 1.350 to conform to the 2015 Federal Rule 34 amendments addressing overbroad or nonspecific objections as a basis for respondents to withhold documents; and (iv) changes to Rule 1.410 to adhere to the 2015 amendments to Federal Rule 45.

B. Why Follow the Federal Courts?

Civil discovery in the United States is unique compared to other common law countries.[4] It was originally intended to be an open and efficient process of exchanging information unencumbered by the component of protections against self-incrimination found in criminal cases, and with limited judicial oversight. Testing truth in the crucible of adversarial proceedings was seen as an orderly and rational way to provide justice to litigants.

---

[3] In re: Amendments to the Fla. Rules of Civ. Procedure 2019, SC19-108, Corrected (December 5, 2019)(available at: https://www.floridasupremecourt.org/content/download/633876/7202458/file/sc19-108_CORRECTED.pdf).

[4] The uniqueness mostly derives from the 1938 merger of law and equity in the United States Federal Courts. By most scholarly accounts, open discovery was not generally available at law until the merger. The full history is beyond the purposes of this proposal.

This truth-seeking mission has been distorted through decades of economic and social pressures. These pressures have incentivized information-blocking behaviors amongst litigation stake holders. As parties realize strategic advantages through tactically abusive discovery practices, spiraling costs of litigation have in turn undermined orderly and equitable discovery practices.[5] Counsel, parties, and even judges lost their way, allowing the process to devolve into a game of "go fish" or worse, "hide the ball."

Since email became available for consumer use in 1995, data storage in the United States has grown at exponential levels. It is estimated that nearly 90% of all of the data produced in human history was created in the last *two years*.[6] When digital evidence became the norm in the 21st century, the primacy and proliferation of increasingly available and valuable electronic data in virtually every case forces the hand of those who propound and amend civil rules in federal and state courts to embrace change and find solutions to the inability of attorneys and judges to harness out-of-control discovery through abuse and misuse of existing rules. Now, as we modernize decades old procedural systems to account for digital record keeping, the fusion of artificial intelligence and complex digital records keeping platforms like distributed ledger systems will require further procedural innovation.

Will we remain tethered to failing systems, practices, and bad habits? Or can we modernize our discovery practices to provide efficient and flexible models that inhibit friction and decoherence in the discovery process? In 2006 and 2015, the Federal Courts made major advances in the Federal Rules by increasing judicial oversight and enforcement that makes eDiscovery more efficient, meaningful, and proportional to the needs of parties. Those changes encourage parties and courts to fashion efficient, economical, and proportioned discovery through early disclosure, meet and confer requirements, and systems that incentivize cooperation between counsel. Ardent advocacy for clients can coexist with judicial economy, so long as the rules temper the available tactical range of discovery practices. Candor and cooperation enhance trust, fosters mutually efficient discovery from opposing parties, and broadens existing avenues of communication for trial preparation, settlement discussions, and mediation. New paradigms of proportionality and cooperation realign heuristically dysfunctional processes toward equity and truth-seeking.

Given the driven factors of complexity of subject matter and financial stakes implied by diversity of citizenship requirements within the Federal Courts, our peers amongst the Federal bench and bar had to confront complex ESI issues earlier than most State courts. The national scope of the civil procedure rules led to earlier attention by lawyers and judges to developing rules, processes, and best practices that fit the needs of ESI cases. Judicial education on case management for electronic discovery led to amendment of rules and judicial emphasis on knowledge and compliance for lawyers who appeared in federal court. National organizations like The Sedona Conference and Federal Judicial Center evolved out of the need for education on best eDiscovery practices for judges and lawyers.

State courts, while not required to follow the federal lead, are well advised to adopt rules and case management processes that are tested and proven effective in federal court and other state jurisdictions. Of course, differences in breadth of jurisdiction, scale, and volume of cases addressed in state court should be considered in developing appropriate rules. Florida amended its civil procedure rules in 2012 to address the 2006 version of federal civil procedure rules. The 2015

---

[5] This is not to suggest that all discovery disputes or violations are intentional.

[6] *See* PC Reviews, *"90% of the Big Data We Generate is an Unstructured Mess."* https://www.pcmag.com/news/364954/90-percent-of-the-big-data-we-generate-is-an-unstructured-me

Federal Rules amendments have undergone years of testing and acceptance by federal judges and practitioners. In 2016, Florida amended the ESI discovery sanctions rule, Fla. R. Civ. P. 1.380, to conform in many respects to the 2015 federal rules counterpart. It is past time to iterate upon other important federal rules relating to eDiscovery and management of ESI in the courtroom to improve Florida's rules. The Federal courts have shown us the way.

C. The Drafting Team

The Civil Procedure Rules Task Force (the "Rules Task Force") of the Electronic Discovery and Digital Evidence Committee ("EDDE") of the Business Law Section of The Bar is tasked with developing and presenting civil rule recommendations to The Bar's Civil Procedure Rules Committee, primarily relating to discovery and eDiscovery. The Rules Task Force and its predecessors made substantial and beneficial contributions to the successful eDiscovery-related civil rule amendments in 2012 and 2019 by way of recommendations and comments to the Civil Procedure Rules Committee and to the Supreme Court. Work of The Rules Task Force is peer reviewed and approved by the EDDE and the leadership of The Business Section before submission to the Civil Procedure Rules Committee.

The Rules Task Force is comprised of lawyers, judges, and professors of law with diverse and distinguished backgrounds. The Rules Task Force includes: two former Florida circuit judges and one sitting circuit judge; three past members of the Civil Procedure Rules Committee, including a former Chair; a Florida federal magistrate judge; two judges who ran their respective circuit's Business Court; trial lawyers who currently or previously specialized in various related areas, including civil trial practice, business litigation, family law, and eDiscovery; multiple members who have taught lawyers and judges and who have written scholarly articles in the eDiscovery and Digital Evidence space; an adjunct professor of law who teaches Machine Testimony; and an eDiscovery specialist who formerly worked as a Digital Evidence vendor.

II. Rule 1.010

A. Existing State & Federal Rules

1. Florida Rules of Civil Procedure

Rule 1.010. Scope and Title of Rules

These rules apply to all actions of a civil nature and all special statutory proceedings in the circuit courts and county courts except those to which the Florida Probate Rules, the Florida Family Law Rules of Procedure, or the Small Claims Rules apply. The form, content, procedure, and time for pleading in all special statutory proceedings shall be as prescribed by the statutes governing the proceeding unless these rules specifically provide to the contrary. These rules shall be construed to secure the just, speedy, and inexpensive determination of every action. These rules shall be known as the Florida Rules of Civil Procedure and abbreviated as Fla.R.Civ.P.

2. Federal Rules of Civil Procedure

Rule 1. Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

NOTES

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 29, 2015, eff. Dec. 1, 2015.)

***

COMMITTEE NOTES—2015 AMENDMENT

Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way. Most lawyers and parties cooperate to achieve these ends. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure.

This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules.

B. Proposed Amendments and Committee Note

[Proposed] **Rule 1.010. Scope and Title of Rules**

These rules apply to all actions of a civil nature and all special statutory proceedings in the circuit courts and county courts except those to which the Florida Probate Rules, the Florida Family Law Rules of Procedure, or the Small Claims Rules apply. The form, content, procedure, and time for pleading in all special statutory proceedings shall be as prescribed by the statutes governing the proceeding unless these rules specifically provide to the contrary. These rules shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding. These rules shall be known as the Florida Rules of Civil Procedure and abbreviated as Fla.R.Civ.P.

***

[Proposed] **COMMITTEE NOTES – 2020 AMENDMENT**

Rule 1.010 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action and proceeding, so the parties share the responsibility to employ the rules in the same way throughout the process. Most lawyers and parties cooperate to achieve these ends. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure.

This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules.

C. Basis for Amendment

The 2015 Federal Rule 1 Amendment broadened the language regarding responsibility for achieving just, speedy, and inexpensive determination of every action, the need to include parties and their counsel in the mix. This Amendment recognized the fact that the process in most actions is accomplished without the need for court involvement. Lawyers and parties should take every opportunity to resolve issues without seeking hearings, and in doing carry an ongoing responsibility to avoid over-use, misuse, and abuse of procedural tools that increase cost and result in delay.

As in federal court, discovery in Florida civil cases must be proportional under Fla. R. Civ. P. 1.280, and it should not take court action to achieve economy and proportionality. By definition, the burden and expense of court involvement on the case and on the system must be reserved for issues that the parties and counsel cannot resolve on their own through appropriate drafting of and response to discovery requests, meeting and conferring on issues at the earliest possible time, and cooperation to achieve full, fair, and economical discovery for both sides. As stated in the federal Committee Note for Rule 1, "[m]ost lawyers and parties cooperate to achieve these ends." However,

Rule 1.010 should comprehensively set the tone and the baseline for application of procedural and discovery rules in order to alert all judges, lawyers, and parties of their responsibilities.

As Chief Justice Roberts noted in the *2015 Year-End Report on the Federal Judiciary*:

> The amendments may not look like a big deal at first glance, but they are. That is one reason I have chosen to highlight them in this report. For example, Rule 1 of the Federal Rules of Civil Procedure has been expanded by a mere eight words, but those are words that judges and practitioners must take to heart. Rule 1 directs that the Federal Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." **The underscored words make express the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation—an obligation given effect in the amendments that follow.** The new passage highlights the point that lawyers—though representing adverse parties—have an affirmative duty to work together, and with the court, to achieve prompt and efficient resolutions of disputes.

Id. (emphasis added).

A little less than two decades ago, recognition of the importance of economy, proportion, and cooperative effort in discovery became paramount with the onset and the rapid proliferation of digital evidence in all aspects of business, social, and governmental activities. Courts, lawyers, and rule makers seeking justice in the civil legal system realized the need for new strategies and techniques to achieve lawful discovery under existing law and policy. Rules needed change to more clearly and comprehensively address the needs of processing data created, stored, and exchanged using evolving technologies and the current culture of information. Judges and lawyers in state courts are still straining under the challenges of adjusting to digital evidence; and much can be learned from the experience of jurists, lawyers, and rule makers in federal court, where adjustments to new requirements came earlier.

Meet and confer, cooperation, and self-imposed proportionality are now standards for federal court practice. Parties in state court can reap the benefits of such practice applied as a rule rather than exception. Rule 1.010 should be amended to reflect the ongoing duties of all participants to adhere to the basic standards of justice, speed, and economy in the construction, application, and use of all succeeding rules.

III. Rules 1.200 and 1.280

A. Existing State & Federal Rules

1. Florida Rules of Civil Procedure

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 must 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 documents;

(2) set or reset the time of trials, subject to rule 1.440(c);

(3) coordinate the progress of the action if the complex litigation

factors contained in rule 1.201(a)(2)(A)–(a)(2)(H) 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, and stipulations regarding authenticity of documents and electronically stored information;

(6) consider the need for advance rulings from the court on the admissibility of documents and electronically stored information;

(7) discuss as to electronically stored information, the possibility of agreements from the parties regarding the extent to which such evidence should be preserved, the form in which such evidence should be produced, and whether discovery of such information should be conducted in phases or limited to particular individuals, time periods, or sources;

(8) schedule disclosure of expert witnesses and the discovery of facts known and opinions held by such experts;

(9) schedule or hear motions in limine;

(10) pursue the possibilities of settlement;

(11) require filing of preliminary stipulations if issues can be

narrowed;

(12) consider referring issues to a magistrate for findings of fact; and

(13) 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;

(5) the potential use of juror notebooks; and

(6) any matters permitted under subdivision (a) of this rule.

(c) Notice. Reasonable notice must be given for a case management conference, and 20 days' notice must 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 must be specified in the order. Orders setting pretrial conferences must be uniform throughout the territorial jurisdiction of the court.

(d) Pretrial Order. The court must make an order reciting the action taken at a conference and any stipulations made. The order controls the subsequent course of the action unless modified to prevent injustice.

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 rules 1.200, 1.340, and 1.370.

(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 these rules.

*(4) Trial Preparation: Materials***.** Subject to the provisions of subdivision (b)(5) 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 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 un-usual 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)(5)(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)(5)(A) and (b)(5)(B) of this rule; and concerning discovery from an expert obtained under subdivision (b)(5)(A) of this rule the court may require, and concerning discovery obtained under subdivision (b)(5)(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) Limitations on Discovery of Electronically Stored Information.

(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.

(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.

(e) Sequence and Timing of Discovery. Except as provided in subdivision (b)(5) 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.

(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.

(g) Court Filing of Documents and Discovery. Information obtained during discovery shall not be filed with the court until such time as it is filed for good cause. The requirement of good cause is satisfied only where the filing of the information is allowed or required by another applicable rule of procedure or by court order. All filings of discovery documents shall comply with Florida Rule of Judicial Administration 2.425. The court shall have authority to impose sanctions for violation of this rule.

2. Federal Rules of Civil Procedure (Excerpted)

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) Scheduling.

(1) ***Scheduling Order.*** Except in categories of actions exempted by local rule, the district judge -- or a magistrate judge when authorized by local rule -- must issue a scheduling order:

(A) after receiving the parties' report under rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference.

(2) ***Time to Issue.*** The judge must issue the scheduling order as soon as practicable, but unless the judge finds good cause for delay, the judge must issue it within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.

(3) ***Contents of the Order.***

(A) ***Required Contents.*** The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) ***Permitted Contents.*** The scheduling order may:

(i) modify the timing of disclosures under rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure, discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;

(vi) set dates for pretrial conferences and for trial; and

(vii) include other appropriate matters.

(4) ***Modifying a Schedule.*** A schedule may be modified only for good cause and with the judge's consent.

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(f) Conference of Parties; Planning for Discovery.

(1) ***Conference Timing.*** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable -- and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) ***Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including -- if the parties agree on a procedure to assert these claims after

production -- whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) ***Expedited Schedule.*** If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written reprot and permit them to report orally on their discovery plan at the Rule 16(b) conference.

B. Proposed Amendments and Committee Note

[Proposed] **Rule 1.200 - Pretrial Procedure**

(a) Case Management Conference. An initial Case Management Conference will be scheduled in all contested cases to be held within 150 days from the date of filing the initial complaint. The parties may set a Case Management Conference by agreement or by written request, or the court may set the same *sua sponte*. The initial Case Management Conference may be waived or canceled upon submission of a Stipulated Case Management Plan within the 150-day period, which stipulation must be signed by all the parties and approved by the court. Forms for stipulated submission shall be available on the court's website and shall be uniform throughout the territorial jurisdiction of the court. A Stipulated Case Management Plan shall integrate any discovery plan as formulated pursuant to rule 1.280(g). Absent submission and court approval of a Stipulated Case Management Plan, the court shall enter a Case Management Plan pursuant to the proceedings had in the initial Case Management Conference. During the initial and any subsequent Case Management Conference, and taking into consideration any discovery plans submitted pursuant to rule 1.280(g), the court may:

(1) schedule or reschedule deadlines for 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 the complex litigation factors contained in rule1.201(a)(2)(A)-(a)(2)(H) are present;

(4) limit, schedule, order, or expedite matters of discovery;

(5) consider the possibility of obtaining admissions of fact and additional voluntary exchange of documents and electronically stored information, and stipulations regarding authenticity of documents and electronically stored information;

(6) consider the need for advance rulings from the court on the admissibility of documents and electronically stored information;

(7) discuss as to electronically stored information, the possibility of agreements from the parties regarding the extent to which such evidence should be preserved, the form in which such evidence should be produced, and whether discovery of such information should be conducted in phases or limited to particular individuals, time periods, or sources;

(8) schedule disclosure of expert witnesses and the discovery of facts known and opinions held by such experts;

(9) schedule or hear motions *in limine*;

(10) pursue the possibilities of settlement;

(11) require filing of preliminary stipulations if issues can be narrowed;

(12) consider referring issues to a magistrate for findings of fact; and

(13) 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;

(5) the potential use of juror notebooks; and

(6) 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 along with all matters that may be considered. 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.

[Proposed] Rule 1.280. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) *Initial Disclosure.*

(A) *In General.* Except as exempted by rule 1.280(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects, and where known, the substance, of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category, custodian, location, storage format, and estimated quantity—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under rule 1.350 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under rule 1.350, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a state statute;

(iii) a petition for *habeas corpus* or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) a proceeding ancillary to a proceeding in another court;

(vii) an action to enforce an arbitration award;

(viii) forfeitures and eminent domain cases;

(ix) actions to enforce out-of-state judgments; and

(x) probate cases.

(C) *Time for Initial Disclosures—In General*. Unless a different time is set by written stipulation or court order, a party seeking affirmative relief must serve its initial disclosure of information under subdivision (a)(1)(A) of this rule no later than 30 days after the filing of the first responsive pleading to the complaint, counterclaim, crossclaim or third-party complaint that sets forth the party's claim for affirmative relief. Unless the parties agree in writing or the court orders otherwise, a party filing a responsive pleading must serve its initial disclosure of information under subdivision (a)(1)(A) of this rule no later than 30 days after filing its responsive pleading.

(D) *Basis for Initial Disclosure; Unacceptable Excuses*. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(b) 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 (d) of this rule, the frequency of use of these methods is not limited, except as provided in rules 1.200, 1.340, and 1.370.

(c) 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 these rules.

(4) *Trial Preparation: Materials*. Subject to the provisions of subdivision (c)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (c)(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 (c)(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 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 (c)(5)(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 (c)(5)(A) and (c)(5)(B) of this rule; and concerning discovery from an expert obtained under subdivision (c)(5)(A) of this rule the court may require, and concerning discovery obtained under subdivision (c)(5)(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.

(d) 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.

(e) Limitations on Discovery of Electronically Stored Information.

(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.

(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.

(f) Sequence and Timing of Discovery. A party may not seek discovery from any source before that party has served its initial disclosure statement as required by subdivision (a)(1)(A) of this rule, except in a proceeding exempted from initial disclosure under subdivision (a)(1)(B) of this rule, or when authorized by these rules, by stipulation, or by court order. Thereafter, except as provided in subdivision (c)(5) 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.

(g) 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. However, a party has an ongoing duty to promptly update or amend its initial disclosures whenever new, supplemental or additional information or materials falling under the categories set forth in subdivision (a)(1)(A) of this rule are discovered, revealed or obtained.

(h) Conference of the Parties; Planning for Discovery.

(1) Conference Timing. Except in a proceeding exempted from initial disclosure under subdivision (a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable, and in any event, at least 14 days before the initial Case Management Conference is to be held or a Stipulated Case Management Plan is submitted under rule 1.200(a).

(2) Conference Content; Parties' Responsibilities. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by subdivision (a)(1)(A) of this rule if not already made; discuss any issues about preserving

discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 7 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) Discovery Plan. A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under rule 1.280(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to, or focused on, particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under subdivision (c) of this rule or under rule 1.200(a) and/or (b).

(4) Expedited Schedule. If necessary to comply with its expedited schedule for rule 1.200(a) conferences, a court may by local rule: (A) require the parties' conference to occur less than 14 days before the Case Management Conference is held or a Case Management Plan is due under rule 1.200(a); and (B) require the written report outlining the discovery plan to be filed less than 7 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the rule 1.200(a) conference.

***(i)* Court Filing of Documents and Discovery.** Information obtained during discovery shall not be filed with the court until such time as it is filed for good cause. The requirement of good cause is satisfied only where the filing of the information is allowed or required by another applicable rule of procedure or by court order. All filings of discovery documents shall comply with Florida Rule of Judicial Administration 2.425. The court shall have the authority to impose sanctions for violation of this rule.

[PROPOSED] COMMITTEE NOTES – 2020 AMENDMENT

Subdivision (a) The duty of a party to make initial, voluntary disclosures of certain basic information "needed in most cases to prepare for trial or make an informed decision about settlement" was first imposed under Rule 26(a) of the Federal Rules of Civil Procedure by 1993 amendment. "A major purpose of the revision [was] to accelerate the exchange of basic information about the case and to eliminate the paperwork involved in requesting such information . . . ." 1993 Committee Notes. With the advent and proliferation of digital

information, the need for voluntary disclosure has taken on an even more significant purpose in advancing broader adoption of competent ESI management in modern litigation.

Proposed Rule 1.280(a)(1)(A) sets forth the general direction for initial voluntary disclosures while at the same time incorporating the express category of cases exempted in **1.280(a)(1)(B)**. **Subdivision (a)(1)(A)** also reserves to the parties' and court's ability to modify or opt-out of the initial voluntary disclosure requirement under appropriate circumstances or with respect to identified categories of cases. The categories of voluntary disclosures in **(i)-(iv)** closely follow those of federal Rule 26 except for modifications in **(i)** and **(ii)**. The modification to the latter acknowledge the substantial value these additional components of disclosure have with respect to meaningful early informational assessment, especially with respect to issues related to ESI.

Proposed subsection (a)(1)(B)(i)-(x) sets forth a list of categorical actions and proceedings which may be generally considered inappropriate or ill-suited to initial disclosure requirements. The categories have been taken from those set forth the federal Rule counterpart, along with a few additions taken from other state jurisdictions already requiring federal Rule 26-type initial disclosures. See, e.g., Minn. R. Civ. P. 26.01(a)(2); Alaska Civil Rule 16(g) with respect to **(a)(1)(B)(viii)** and **(ix).** In **subsection (a)(1)(C),** the timing of initial disclosures, unless ordered or stipulated to otherwise, is 30 days from the party's initial pleading regardless of how joined to the action. Subsection (a)(1)(E) of the federal Rule is retained without change in proposed subsection **(a)(1)(D)** as the committee believes it is important to reinforce the obligation to perform sufficient due diligence at or near case initiation.

Subdivision (f) Proposed subsection **(f)** adds the first sentence to the existing version to establish that a party may not commence discovery from any source unless or until it has first filed its voluntary disclosures under **(a)(1)(A)**. This amendment adopts the concept set forth in federal Rule 26(d)(1) that the initial burden of participating in cooperative disclosure and conferral must be satisfied prior to engaging in other discovery, but ties the timing to the party's **(a)(1)(A)** disclosures rather than an federal Rule 26(f) conference.

Subdivision (g) Proposed subsection **(g)** adds a second sentence that requires a party to update or amend its **(a)(1)(A)** initial voluntary disclosures in the event that the party obtains new or additional responsive information that it would have been obligated to disclose under **(a)(1)(A)** originally, or if it determines that the original disclosure was inaccurate or incomplete when made. This proposed requirement adopts the obligation in federal Rule 26(e) to supplement Rule 26(a) initial disclosures, but, consistent with current subsection (f), does not extend that obligation to any other discovery responses. The supplementation requirement will help to promote better initial compliance with early stage disclosures and will ensure that this core case information does not become stale or that an initial misconception is not deceptively perpetuated.

Subdivision (h) Proposed subsection **(h)** tracks federal Rule 26(f) in establishing an early case assessment conference between the parties to generate a well-considered case management plan, including planning for discovery. Subsection (g) is designed to operate in coordination with existing Rule 1.200 (as also revised by these proposed amendments), similar to the function of federal Rule 16. The proposed subsection requires the parties to confer at least 14 days before the initial Case Management Conference or submission of the Stipulated Case Management Plan as required under proposed amended Rule 1.200(a). This pre-case management plan conference helps promote a more informed and meaningful

result at the subsequent initial Case Management Conference with the court and/or the quality of the stipulated plan submitted in lieu of a conference. Subsection (g) does not apply to matters exempted under **(a)(1)(B)** and may be dispensed with or modified by individual or standing order of the court. However, the obligations may not be altered by stipulation of the parties.

Proposed subsection (h)(2) adopts the applicable language of federal Rule 26(f)(2) setting forth the parties' independent responsibilities at the initial planning conference, including the formulation and submission of a discovery plan. Importantly, **subdivision (h)(2)** also requires the parties to discuss any issues concerning the preservation of discoverable information.

Proposed subsection (h)(3) adopts the applicable language of federal Rule 26(f)(3) in prescribing the mandatory contents of the written discovery plan the parties are to generate pursuant to subsections **(h)(1)** and **(2)**. The six categories of content identified in **(A)** through **(F)** represent arguably the most important set of variables to begin considering at the earliest possible stage of litigation in order to maximize the benefit of effective case management.

Proposed subsection (h)(4) adopts federal Rule 26(f)(4)'s provisions for the court to shorten the timeframe for the parties to convene and report on the **(g)(1)** initial conference according to the dictates of expedited matters referenced in Rule 1.200 as proposed for amendment.

C. Basis for Amendment

A purely adversarial discovery system encourages litigators to avoid proactive disclosure and cooperation in favor of the tactically defensive responses to propounded discovery from opposing counsel that exploit the requesting party's lack of knowledge of responding party systems or documents. Both sides are then consigned to excess steps and delay in the name of maintaining opacity in the name of zealous client representation. Zealous advocacy should include seeking and achieving economy, efficiency, and reasonable transparency which enhances credibility with opposing parties and the court.

The proposed amendments to Rule 1.200 are made in conjunction with the Rules Task Force's proposed amendments to Rule 1.280 and are critical to achieving the overarching goal of adopting and adapting the updated federal rules' approach to greater party and attorney responsibility for adequate participation in proper and timely disclosures and better judicial leverage in managing the same and holding parties and their counsel accountable. Requiring an initial Case Management Conference as the default procedure subject to an opt-out that still calls for submission of a thoughtful report creates a record of the parties' positions on important litigation matters already informed by compliance with obligations to investigate and make initial disclosures under Rule 1.280 and to meet and confer for purposes of discovery planning also under Rule 1.280. This record, in turn, provides the trial court with both a better understanding upon which to approve or modify the resulting Case Management Plan and the grounds upon which to hold the parties and their counsel responsible for the consequences of failing to discharge their respective duties in actively managing the case themselves. The trial court, and to some degree, the parties, remain able to customize the scope and intensity of this procedure in keeping with the nature, value and/or complexity of the matter at hand. Some of the structure and/or attributes of the amendments proposed come from

existing procedural programs being successfully deployed in various jurisdictions throughout Florida, including the Twentieth Judicial Circuit Court.

The 1993 Federal Rules Amendments were seen as a remedy to added expense and delay from escalating counterproductive tactics surrounding purely adversarial discovery. was expanding the trial judge's role as case manager to an untenable degree, further burdening the system on the whole. The adoption of an early-stage voluntary disclosure mechanism in Rule 26(a) was recognized as a prudent and effective method for addressing this need for discovery reform without undermining the essential adversarial nature of the federal discovery framework. It was also recognized that, as a welcomed byproduct, litigants and their counsel would be compelled to conduct better and more thorough pre-filing investigations in order to comply with their obligations under Rule 11. *See, e.g., Schwarzer*, p. 72. Importantly, this amendment was seen as addressing what was still thought of as a predominantly analogue discovery issue with no mention whatsoever being made of electronically stored information ("ESI"). The first amendment to the Rules specifically addressing ESI discovery issues would not be implemented for another thirteen years in 2006.

For twenty-seven years, Florida has resisted adopting Rule 26(a)'s voluntary disclosure requirement for all civil litigation, although mandatory disclosure has been a significant feature of the Florida Family Law Rules of Procedure since 1996. *See* Fla. Fam. L.R.P. Rule 12.285. The same inefficient and sometimes abusive discovery conduct motivating the 1993 federal rules amendment continues to hamper our civil litigation proceedings to an unacceptable degree. Resistance to early-stage voluntary disclosure has been largely, and to some extent, accurately, predicated on the disparity in complexity and economic stakes typical of federal court matters. Now, with the advent and proliferation of computerized data technology and the resulting impacts on all civil litigation, this resistance is no longer justifiable. Where a purely adversarial discovery system operating in the world of analogue information generated a tolerable level of inefficient and costly discovery conduct, the present exponential growth of ESI has rendered this same conduct not only more inefficient and costly, but well beyond the average lawyer's ability to competently manage in pursuing or facing an initial case strategy of blind man's bluff. Judges, who must rely upon the initiative, competence, and candor of the lawyers to timely develop and present discovery issues, are at an even greater disadvantage to discern an appropriate pathway towards resolution, especially where these issues are presented for the first time midway through the case.

Given the specialized and ever evolving technical knowledge required to identify and handle the data on the typical personal injury plaintiff's smart phone or social media account, let alone the legacy data of a foreign-based business unit purchased by a corporate client operating a global logistics enterprise, the members of this committee are convinced that it is well past the time for adopting initial, voluntary disclosure requirements for a majority of state court litigation matters in kind with Rule 26(a). For years, legal scholars, practitioners, experienced judges and ESI industry leaders have universally acknowledged that early case assessment and party conferral are the key to a fair, competent and efficient discovery process in today's post-analogue world. *See, The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 Sedona Conf. J. 1 (2018), pp. 71-86; Ball, Craig, *Ten Things That Trouble Judges About E-Discovery*, www.craigball.com/TenTroublesEDD.pdf (2015); 2019 *Florida Handbook on Civil Discovery Practice*, https://www.floridatls.org/wp-

content/uploads/2019/04/ADA-2019-Florida-Handbook-on-Civil-Discovery-Practice.pdf (2019), pp. 10-54.

Subdivision (h) Proposed subsection **(h)** attempts to mirror federal Rule 26(f) in establishing an early case assessment conference between the parties to generate a well-considered case management plan, including planning for discovery. With the exception of Florida's limited number of complex business courts, few other trial court have the means for establishing a specific set of guidelines that create particularized early case assessment and disclosure requirements for the parties to follow commensurate with the value and nature of each case. While current Rule 1.200 does provide trial courts with the ability to convene such early conferencing and issue standing orders on case management, it appears that very few courts have felt comfortable enough to venture into the deeper end of these waters on an individual basis. This reluctance is understandable given the judiciary's general lack of practical experience with, and knowledge of, ESI technical protocols and eDiscovery industry capabilities as well as the concern for interdicting upon the statewide rules of procedure, which always prevail over local rule when in conflict. The committee believes the time has come to resolve this situation at the statewide level by not only adopting initial, voluntary disclosure requirements that move basic, but important, case investigation and disclosure of the core issues to the very front, but by also returning the lion's share of case management responsibilities to the parties in a manner that empowers the judge to enforce accountability based upon the quality of each party's competence, candor and compliance.

To the extent that there are concerns that the foregoing amendments will add unnecessary and otherwise avoidable expense and/or delay to the large number of routine matters throughout the state that do not involve complex ESI discovery issues or do not justify investment in significant discovery practice owing to low case value, such concerns are simply unjustified. The foregoing amendments allow for a flexible and sensible application adaptable to the needs and character of every case profile not previously exempted by definition, court order or party stipulation. Where there is truly little to discuss, anticipate, plan or report, there will be little, if any, burden sustained in complying. Competent lawyering in this area of procedural law will almost always unmask improper efforts by overly aggressive or opportunistic opponents who attempt to leverage costly or time-consuming mountains out of molehills. However, the increased technical complexity of even the most routine discovery spawned by expanding mobile connectivity, arithmetically progressive computing speeds, and the exploding commercial value of data that begets data dictates that lawyers must adapt to these circumstances now. Lawyers must be made to uphold their critical role as officers of the court in this area, competently informing and advising the court in the course of advocating for their clients rather than using the pretense of advocacy as means for avoiding change. The committee believes that these amendments are critical to fostering these much-needed changes.

IV. Rule 1.350

A. Existing State & Federal Rules

1. Florida Rules of Civil Procedure

Rule 1.350(b) Production of Documents and Things and Entry Upon Land For Inspection and Other Purposes

* * * * *

(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, 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 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.

2. Federal Rules of Civil Procedure

Rule 34(b) Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land for Inspection and Other Purposes

(b) Procedure.

(1) *Contents of the Request.* The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(2) *Responses and Objections.*

(A) * * * * *

(B) Responding to Each Item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) Objections. An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

COMMITTEE NOTES – 2006 AMENDMENT

Subdivision (a). As originally adopted, Rule 34 focused on discovery of "documents" and "things." In 1970, Rule 34(a) was amended to include discovery of data compilations, anticipating that the use of computerized information would increase. Since then, the growth in electronically stored information and in the variety of systems for creating and storing such information has been dramatic. Lawyers and judges interpreted the term "documents" to include electronically stored information because it was obviously improper to allow a party to evade discovery obligations on the basis that the label had not kept pace with changes in information technology. But it has become increasingly difficult to say that all forms of electronically stored information, many dynamic in nature, fit within the traditional concept of a "document." Electronically stored information may exist in dynamic databases and other forms far different from fixed expression on paper. Rule 34(a) is amended to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents. The change clarifies that Rule 34 applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined. At the same time, a Rule 34 request for production of "documents" should be understood to encompass, and the response should include, electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and "documents."

Discoverable information often exists in both paper and electronic form, and the same or similar information might exist in both. The items listed in Rule 34(a) show different ways in which information may be recorded or stored. Images, for example, might be hard-copy documents or electronically stored information. The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. Rule 34(a)(1) is expansive and includes any type of information that is stored electronically. A common example often sought in discovery is electronic communications, such as e-mail. The rule covers—either as documents or as electronically stored information—information "stored in any medium," to encompass future developments in computer technology. Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.

References elsewhere in the rules to "electronically stored information" should be understood to invoke this expansive approach. A companion change is made to Rule 33(d), making it explicit that parties choosing to respond to an interrogatory by permitting access to responsive records may do so by providing access to electronically stored information. More generally, the term used in Rule 34(a)(1) appears in a number of other amendments, such as those to Rules 26(a)(1), 26(b)(2), 26(b)(5)(B), 26(f), 34(b), 37(f), and 45. In each of these rules, electronically stored information has the same broad meaning it has under Rule 34(a)(1). References to "documents" appear in discovery rules that are not amended, including Rules 30(f), 36(a), and 37(c)(2). These references should be interpreted to include electronically stored information as circumstances warrant.

The term "electronically stored information" is broad, but whether material that falls within this term should be produced, and in what form, are separate questions that must be addressed under Rules 26(b), 26(c), and 34(b).

The Rule 34(a) requirement that, if necessary, a party producing electronically stored information translate it into reasonably usable form does not address the issue of translating from one human language to another. *See In re Puerto Rico Elect. Power Auth.*, 687 F.2d 501, 504–510 (1st Cir. 1989).

Rule 34(a)(1) is also amended to make clear that parties may request an opportunity to test or sample materials sought under the rule in addition to inspecting and copying them. That opportunity may be important for both electronically stored information and hard-copy materials. The current rule is not clear that such testing or sampling is authorized; the amendment expressly permits it. As with any other form of discovery, issues of burden and intrusiveness raised by requests to test or sample can be addressed under Rules 26(b)(2) and 26(c). Inspection or testing of certain types of electronically stored information or of a responding party's electronic information system may raise issues of confidentiality or privacy. The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

Rule 34(a)(1) is further amended to make clear that tangible things must—like documents and land sought to be examined—be designated in the request.

Subdivision (b). Rule 34(b) provides that a party must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the discovery request. The production of electronically stored information should be subject to comparable requirements to protect against deliberate or inadvertent production in ways that raise unnecessary obstacles for the requesting party. Rule 34(b) is amended to ensure similar protection for electronically stored information.

The amendment to Rule 34(b) permits the requesting party to designate the form or forms in which it wants electronically stored information produced. The form of production is more important to the exchange of electronically stored information than of hard-copy materials, although a party might specify hard copy as the requested form. Specification of the desired form or forms may facilitate the orderly, efficient, and cost-effective discovery of electronically stored information. The rule recognizes that different forms of production may be appropriate for different types of electronically stored information. Using current technology, for example, a party might be called upon to produce word processing documents, e-mail messages, electronic spreadsheets, different image or sound files, and material from databases. Requiring that such diverse types of electronically stored information all be produced in the same form could prove impossible, and even if possible could increase the cost and burdens of producing and using the information. The rule therefore provides that the requesting party may ask for different forms of production for different types of electronically stored information.

The rule does not require that the requesting party choose a form or forms of production. The requesting party may not have a preference. In some cases, the requesting party may not know what form the producing party uses to maintain its electronically stored

information, although Rule 26(f)(3) is amended to call for discussion of the form of production in the parties' prediscovery conference.

The responding party also is involved in determining the form of production. In the written response to the production request that Rule 34 requires, the responding party must state the form it intends to use for producing electronically stored information if the requesting party does not specify a form or if the responding party objects to a form that the requesting party specifies. Stating the intended form before the production occurs may permit the parties to identify and seek to resolve disputes before the expense and work of the production occurs. A party that responds to a discovery request by simply producing electronically stored information in a form of its choice, without identifying that form in advance of the production in the response required by Rule 34(b), runs a risk that the requesting party can show that the produced form is not reasonably usable and that it is entitled to production of some or all of the information in an additional form. Additional time might be required to permit a responding party to assess the appropriate form or forms of production.

If the requesting party is not satisfied with the form stated by the responding party, or if the responding party has objected to the form specified by the requesting party, the parties must meet and confer under Rule 37(a)(2)(B) in an effort to resolve the matter before the requesting party can file a motion to compel. If they cannot agree and the court resolves the dispute, the court is not limited to the forms initially chosen by the requesting party, stated by the responding party, or specified in this rule for situations in which there is no court order or party agreement.

If the form of production is not specified by party agreement or court order, the responding party must produce electronically stored information either in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. Rule 34(a) requires that, if necessary, a responding party "translate" information it produces into a "reasonably usable" form. Under some circumstances, the responding party may need to provide some reasonable amount of technical support, information on application software, or other reasonable assistance to enable the requesting party to use the information. The rule does not require a party to produce electronically stored information in the form it [sic] which it is ordinarily maintained, as long as it is produced in a reasonably usable form. But the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.

Some electronically stored information may be ordinarily maintained in a form that is not reasonably usable by any party. One example is "legacy" data that can be used only by superseded systems. The questions whether a producing party should be required to convert such information to a more usable form, or should be required to produce it at all, should be addressed under Rule 26(b)(2)(B).

Whether or not the requesting party specified the form of production, Rule 34(b) provides that the same electronically stored information ordinarily be produced in only one form.

B. Proposed Amendments and Committee Note

***[Proposed]* Rule 1.350(b) Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes**

* * * * *

(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 grounds and reasons for the objection shall be stated with specificity. If an objection is made to part of an item or category, the part shall be specified. An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest. When producing documents, 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 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.

***[Proposed]* Committee Notes – 2020 Amendment**

Rule 1.350(b) is updated to address the responsibilities of parties in connection with objections to document production, including specificity of those objections and whether any materials are being withheld. Under the existing rule, specificity is not required when objecting, nor is the obligation to identify if portions of responses are being withheld. The revised rule protects against boilerplate discovery responses and objections.

C. Basis for Amendment

Rule 1.350(b) is amended to conform to similar language in Rule 34(b)(2)(B) and 34(b)(2)(C) of the Federal Rules of Civil Procedure. The 2015 Amended to Rule 34(b)(2)(B) included an explanation as follows: "Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with specificity. This provision adopts the language of Rule 33(b)(4), eliminating any doubt that less specific objections might be suitable under Rule 34. The specificity of the objection ties to the new provision in Rule 34(b)(2)(C) directing that an objection must state whether any responsive materials are being withheld on the basis of that objection. An objection may state that a request is overbroad, but if the objection recognizes that some part of the request is appropriate the objection should state

the scope that is not overbroad. Examples would be a statement that the responding party will limit the search to documents or electronically stored information created within a given period of time prior to the events in suit, or to specified sources. When there is such an objection, the statement of what has been withheld can properly identify as matters “withheld” anything beyond the scope of the search specified in the objection.” The existing Rule 1.350 did not include these express protections and clarifications for objections.

The 2015 Amendment Committee Notes on the Federal Rules included the following explanation: “Rule 34(b)(2)(C) is amended to provide that an objection to a Rule 34 request must state whether anything is being withheld on the basis of the objection. This amendment should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections. The producing party does not need to provide a detailed description or log of all documents withheld but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection. An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been ‘withheld’.” The existing Rule 1.350 did not include these express protections and clarifications for objections.

The amendment seeks to harmonizes the procedure for objections with that of the Federal Rules.

V. Rule 1.410

A. Existing State & Federal Rules

1. Florida Rules of Civil Procedure

Rule 1.410. Subpoena

* * * * *

(b) Subpoena for Testimony before the Court.

(1) Every subpoena for testimony before the court must be issued by an attorney of record in an action or by the clerk under the seal of the court and must state the name of the court and the title of the action and must 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 must issue a subpoena for testimony 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 must 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, documents, (including electronically stored information), or tangible things designated therein, but the court, on 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 on the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, documents, or

tangible things. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. A person responding to a subpoena may object to discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue costs or burden. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought or the form requested is not reasonably accessible because of undue costs or burden. If that showing is made, the court may nonetheless order discovery from such sources or in such forms if the requesting party shows good cause, considering the limitations set out in rule 1.280(d)(2). The court may specify conditions of the discovery, including ordering that some or all of the expenses of the discovery be paid by the party seeking the discovery. A party seeking 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. Such notice shall have the same effect and be subject to the same limitations as a subpoena served on the party.

2. Federal Rules of Civil Procedure

Rule 45. Subpoena

* * * * *

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection.*

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding 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 responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

COMMITTEE NOTES ON RULE – 2006 AMENDMENT

Rule 45 is amended to conform the provisions for subpoenas to changes in other discovery rules, largely related to discovery of electronically stored information. Rule 34 is amended to provide in greater detail for the production of electronically stored information. Rule 45(a)(1)(C) is amended to recognize that electronically stored information, as defined in Rule 34(a), can also be sought by subpoena. Like Rule 34(b), Rule 45(a)(1) is amended to provide that the subpoena can designate a form or forms for production of electronic data. Rule 45(c)(2) is amended, like Rule 34(b), to authorize the person served with a subpoena to object to the requested form or forms. In addition, as under Rule 34(b), Rule 45(d)(1)(B) is amended to provide that if the subpoena does not specify the form or forms for electronically stored information, the person served with the subpoena must produce electronically stored information in a form or forms in which it is usually maintained or in a form or forms that are reasonably usable. Rule 45(d)(1)(C) is added to provide that the person producing electronically stored information should not have to produce the same information in more than one form unless so ordered by the court for good cause.

As with discovery of electronically stored information from parties, complying with a subpoena for such information may impose burdens on the responding person. Rule 45(c) provides protection against undue impositions on nonparties. For example, Rule 45(c)(1) directs that a party serving a subpoena "shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena," and Rule 45(c)(2)(B) permits the person served with the subpoena to object to it and directs that an order requiring compliance "shall protect a person who is neither a party nor a party's officer from significant expense resulting from" compliance. Rule 45(d)(1)(D) is added to provide that the responding person need not provide discovery of electronically stored information from sources the party identifies as not reasonably accessible, unless the court orders such discovery for good cause, considering the limitations of Rule 26(b)(2)(C), on terms that protect a nonparty against significant expense. A parallel provision is added to Rule 26(b)(2).

Rule 45(a)(1)(B) is also amended, as is Rule 34(a), to provide that a subpoena is available to permit testing and sampling as well as inspection and copying. As in Rule 34, this change recognizes that on occasion the opportunity to perform testing or sampling may be important, both for documents and for electronically stored information. Because testing or sampling may present particular issues of burden or intrusion for the person served with the subpoena, however, the protective provisions of Rule 45(c) should be enforced with vigilance when such demands are made. Inspection or testing of certain types of electronically stored information or of a person's electronic information system may raise issues of confidentiality or privacy. The addition of sampling and testing to Rule 45(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a person's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

Rule 45(d)(2) is amended, as is Rule 26(b)(5), to add a procedure for assertion of privilege or of protection as trial-preparation materials after production. The receiving party may submit the information to the court for resolution of the privilege claim, as under Rule 26(b)(5)(B).

Other minor amendments are made to conform the rule to the changes described above.

---

2. Proposed Amendments and Committee Note

[Proposed] **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 must be issued by an attorney of record in an action or by the clerk under the seal of the court and must state the name of the court and the title of the action and must 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 must issue a subpoena for testimony 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 must 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, documents, (including electronically stored information), or tangible things designated therein, but the court, on motion made ~~promptly~~ within 30 days 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, requires disclosing a trade secret or other confidential research, development, or commercial information or requires disclosing an unretained expert's opinion on or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party, or (2) condition denial of the motion on the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, documents, or tangible things. Upon any motion, the serving party may seek an order compelling compliance with the requested production or inspection, which compliance may only be as directed in the order, and which order should protect a person who is neither a party nor a party's officer from significant expense resulting from compliance. A party or attorney responsible for issuing and serving a subpoena should take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court should enforce this duty and may impose an appropriate sanction -- which may include lost earnings and reasonable attorneys' fees – on a party or attorney who fails to comply. When producing documents, a person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to respond to the categories in the demand. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. The person responding need not produce the same electronically stored information in more than one form. A person commanded to produce documents or tangible things or to permit inspection in response to a subpoena may object to producing or permitting inspection of electronically stored information in the form or forms requested. A person responding to a subpoena may object to discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue costs or burden. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought ~~or the form requested~~ is not reasonably accessible because of undue ~~costs or~~ burden or expense. If that showing is made, the court may nonetheless order discovery from such sources or in such forms if the requesting party shows good cause, considering the limitations set out in rule 1.280(d)(2). The court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party: (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and (ii) ensures that the subpoenaed person will be reasonably compensated. The court may specify conditions of the discovery, including ordering that some or all of the expenses of the discovery be paid by the party seeking the discovery. A party seeking 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. Such notice shall have the same effect and be subject to the same limitations as a subpoena served on the party.

(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 on a person named within must be made as provided by law. Proof of such service must be made by affidavit of the person making service except as applicable under rule 1.351(c) for the production of documents and things by a nonparty without deposition, 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 must state the method for recording the testimony. The subpoena may command the person to whom it is directed to produce designated books, 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 on 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 on 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 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 has 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 Statutes, except on 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.

***[PROPOSED]* COMMITTEE NOTES—2020 AMENDMENT**

Rule 1.410(c) is updated to address the responsibilities of parties seeking and the burdens on persons responding to requests for electronically stored information. The revisions are to avoid the burdens of a subpoena, including for electronically stored information, on a responding person. Rule 1.410(c) is amended to state that the court may quash or modify a subpoena that requires disclosing trade secrets or confidential information or an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party. The update to the Rule provides protection for subpoena requests seeking electronically stored information. Under the existing rule, the responding person need not provide discovery of electronically stored information from sources that responding person identifies as not reasonably accessible, unless the court orders such discovery for good cause. Rule 1.410(c) is amended to allow a person responding to a subpoena to object to the form of discovery of electronically stored evidence. The revised rule protects against undue burden on nonparties. Rule 1.410(c) is also amended to place an affirmative duty upon a party or attorney issuing a subpoena to avoid imposing an undue burden or expense upon a person subject to the subpoena, and enforcing that duty through an appropriate sanction. Rule 1.410(c) is also amended to provide the form for production of documents.

C. Basis for Amendment

Rule 1.410 is amended to adhere to changes in Rule 45 of the Federal Rules of Civil Procedure. Rule 1.410(c) is amended to conform to protection of confidential information and non-party expert consultants. Rule 45(c)(3)(B)(i) incorporated protection from the 1991 Amendment to Rule 45 by allowing explicit protection for unnecessary or harmful disclosures of trade secrets and other confidential information. Rule 45(c)(3)(B)(ii) addressed the protection in the 1991 Amendment to Rule 45 by providing appropriate protection for the intellectual property of the non-party witness. The existing Rule 1.410 did not include express protection for trade secrets and confidential research, development, or other confidential information. Instead, a person served with a subpoena has to rely on a protective order pursuant to Rule 1.280(c)(7) to protect such a trade secret or other confidential research, development, or commercial information. Rule 1.410(c) is now modified to state that the court may quash or modify a subpoena that requires disclosing trade secrets or confidential information or an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

Rule 1.410(c) is amended to allow a person responding to a subpoena to object to the form of discovery of electronically stored evidence. The existing Rule allowed an objection on the basis of sources that were not reasonably accessible, but did not expressly allow an objection on the basis of form. Instead, existing subsection (c) allowed a person from whom discovery is sought to raise the form of the electronically stored information requested only on a motion to compel discovery or to quash. This places persons responding to subpoenas at a disadvantage because an objection to

production prevents the production absent a court order pursuant to Rule 1.410(e)(1), whereas having to file a motion to quash to object to the form of production of electronically stored information requires a court order to prevent the production. Existing subsection (c) also required the party responding to a subpoena to show that the form is not reasonably accessible because of undue burden or costs. Tethering an objection to the form of electronically stored evidence to both a reasonable accessibility standard and an undue burden standard places a heavy burden upon a third party responding to the subpoena. It is also ill fitting to use the standard of whether electronically stored information is "reasonably accessible" to measure an objection to the form in which electronically stored information is being produced. The "reasonably accessible" standard looks to whether the data can be accessed without undue burden or cost, whereas an objection about the form of the data concerns how electronic data is produced where it is already available.

The amendment conforms Rule 1.410(c) with Federal Rule 45(d)(2)(B), which allowed on objection "to producing electronically stored information in the form or forms requested" and does not tie that to a motion to compel discovery or to quash or to the reasonable accessibility standard. Federal Rule 45 bifurcates these two issues. In Federal Rule 45(e)(1)(D), 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. Separately, Federal Rule 45(d)(2)(B) allows a person responding to a subpoena to object to producing electronically stored evidence in the form or forms requested, without requiring the subpoenaed party to meet the reasonable accessibility or undue burden or cost standards.

Similarly, the amendment harmonizes the procedure for objections to the form of electronically stored information with Rule 1.410 with Rule 1.350. In Rule 1.350(b), the producing party may object to a requested form of electronically stored information, and the requesting party is permitted to move for an order concerning the objection or the failure to permit inspection as requested. In that instance, the producing party did not need to establish that the electronically stored information was not reasonably accessible nor did the producing party need to prove undue cost or burden. Existing Rule 1.410(c), in contrast, placed a higher burden on a third party responding to a subpoena that objects to the form of production of electronic evidence than a party to a case.

One of the central points of the Task Force's role has been to attempt to reduce the burden imposed by electronic discovery. The existing Rule contains no provision that deters attorneys from issuing overbroad and burdensome subpoenas calling for the production of extensive electronically stored information. To that end, the Task Force is proposing amendments that motivate the persons and attorneys that issue subpoenas to carefully tailor their discovery requests in accordance with the concepts of proportionality. Rule 1.410(c) is amended to conform to Federal Rule 45(d)(1) which places an affirmative duty upon a party or attorney issuing a subpoena to avoid imposing an undue burden or expense upon a person subject to the subpoena, and enforcing that duty through an appropriate sanction. An affirmative duty is particularly important in the case of electronic discovery sought from a person that is not a party to an action.

Rule 1.410(c) is also amended to provide the form for production of documents. Federal Rule 45(e)(1)(A) states that a person responding to a subpoena must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand. Existing Rule 1.410(c) follows Federal Rule 45(e)(1)(B) by permitting a person responding to a subpoena for electronically stored information to produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. However, the existing Rule does not

state how non-electronic documents are to be produced in response to a subpoena. Federal Rule 45(e)(1)(A) does contain that specification and the existing Rule is now amended to provide for a form of production.

VI. Proportionality

One issue that the Civil Procedure Rules Task Force of the EDDE considered was whether to amend Florida's existing rules in light of hightened emphasis on proportionality in federal courts following the 2015 FRCP amendments. Proportionality in civil discovery has existed in Florida common law[7] and was prominently made a matter of scope of electronic discovery in the 2012 rule amendments.[8] The issue is whether the current treatment in Florida rules adequately addresses the issue of proportionality in a manner consistent with the current federal rules.

There are differences between Florida and federal law on scope of discovery. Under federal civil rules and law, parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case considering the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Fed. R. Civ. P. 26(b)(1). Under Florida rules, any party may obtain discovery regarding any matter, not privileged, that is *relevant to the subject matter* involved in the pending action. Fla. R. Civ. P. 1.280(b)(1).

However, Fla. R. Civ. P. 1.280 further refines scope of discovery in the ensuing paragraphs, including limitations on the scope of electronic discovery.[9] In addressing a motion pertaining to discovery of ESI pursuant to Fla. R. Civ. P. 1.280(d)(1), the court 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, 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* (Proportionality). Thus since 2012, proportionality has been part of the scope of discovery analysis under the amended rules.[10]

It is true that proportionality became more prominently enforced in federal courts under the 2015 federal rules amendments. The 2015 amendments moved the proportionality analysis to one of scope of discovery under Rule 26. In lieu of the "reasonably calculated to lead to the discovery of admissible evidence" phrasing, the amendments created a proportionality standard for the discovery process. Amended Rule 26(b)(1) reads in part:

> Unless otherwise limited by court order, the scope of discovery is as follows: parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information,

---

[7] Chrysler Corp. v. Miller, 450 So. 2d 330 (Fla. 4th DCA 1984)(undue burden case in which the appellate court quashed a discovery order in which the value of the damages in the case was considerably less than the cost of compliance by the defendant with the discovery order).

[8] Fla. R. Civ. P. 1.280(d)(2).

[9] Fla. R. Civ. P. 1.280(d)(1), (2).

[10] *See* Fla. R. Civ. P. 1.280(d)(2).

> the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefits.

Further, proportionality was addressed in the Advisory Committee notes, which point out that the revision "restores the proportionality factors [previously found in Rule 26(b)(2)(C)(iii)] to their original place in defining the scope of discovery." However, the revised language "does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations."[11] But the amended rule language "reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management."[12]

The emphasis on proportionality in discovery of ESI in the 2012 Florida amended rules preceded the federal rules change elevating proportionality to a scope of discovery standard. Proportionality standards in Florida rules should adequately reflect the post-2015 proportionality standards in federal rules. The Rules Task Force reviewing the rules determined that the Florida rules already encompass what the federal courts intended in their 2015 proportionality amendments and advisory notes. The proportionality language existing in Fla. R. Civ. 1.280(d) is quite similar to the federal rule, it is a matter of scope of discovery of ESI, and it is mandatory; all of which is consistent with the current federal rule. Thus, no rule changes are proposed on proportionality at this time.

---

[11] Fed. R. Civ. P. 26 advisory committee's note to 2015 amendment.
[12] *Id.*