SUBCOMMITTEE REPORT FORM

(E-Discovery and Federal Rules)

Rule Involved: Rule 1.380(e)

Date of Report: January 3, 2018

Chair: Rachael Loukonen

Members: Martin Alexander Ardith Bronson Miguel Chamorro Katie Dearing Vivian Fazio Leslie A. Goller

Christopher Marquardt Judge Rodolfo Ruiz Jason Stearns

Other Participants:

Judge Ralph Artigliere, Florida Business Law Section's Electronic Discovery and Digital Evidence (EDDE) Task Force

Meeting Date: December 20, 2017

In Attendance:

Rachael Loukonen, Chair Martin Alexander (by email) Ardith Bronson

Miguel Chamorro Vivian Fazio Jason Stearns

Judge Ralph Artigliere

I. Summary of Original Proposal, Report and Action Proposed:

a. **Summary of Original Proposal:** This Subcommittee was formed for the purpose of monitoring the federal electronic discovery rules and proposing, as needed, revisions to the Florida Rules on electronic discovery. In this capacity, the Subcommittee began first with determining whether Florida Rule 1.380(e) should be amended to conform to the new Federal Rule 37(e).

b. **Summary of Report:** After taking the Committee's questions under consideration and

conducting additional research, the Subcommittee recommends that the proposed Florida Rule 1.380(e) track the new Federal Rule 37(e) verbatim.

c. Action Proposed: Adopting amendments to the proposed Rule 1.380(e) to track the language of the new Federal Rule 37(e).

II. History/Background:

a. **Source of proposal:** This Subcommittee was formed shortly after the United States Supreme Court adopted the amendments to the Federal Rules of Civil

Procedure in 2015. The Subcommittee was tasked with monitoring changes to the federal electronic discovery rules and proposing, as needed, revisions to the Florida Rules on electronic discovery. In this capacity, the Subcommittee began its analysis with determining whether Florida Rule 1.380(e) should be amended to conform to the new Federal Rule 37(e). By way of background concerning the source of this proposal, the Subcommittee provides the following additional information:

The Advisory Committee on the Federal Rules of Civil Procedure provided proposed rule amendments to the U.S. Supreme Court in 2014. The proposed amendments concerned Civil Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, and 55, and abrogation of Rule 84 and the Appendix of Forms. The U.S. Supreme Court adopted the proposed rule amendments and transmitted the proposed rule amendments to Congress on April 29, 2015. Congress approved the proposed Civil Rules, which went into effect in December 2015.

Meeting Date: June 15, 2015 (Attendees: Hon. Rodolfo Ruiz, Ardith Bronson, Howard Butler, Lizzie Johnson, and Rachael Loukonen). The Subcommittee discussed Ardith Bronson's research on the relevant Florida caselaw concerning Rule 1.380(e) since its adoption in 2012. The Subcommittee discussed whether there is a need for a revision to the current Florida rule and whether the edits proposed by the federal rules committee would be the best for Florida's courts and practitioners. The committee discussed whether the proposed federal edits would limit the court's authority to sanction parties in the event that the destruction of the Electronically Stored Information (“ESI”) was not intentional as required under proposed subsection (2). The subcommittee discussed the sanctions presently available to courts for discovery violations and the desire for these same sanctions to be made available in the ESI context. The subcommittee determined that a new rule should be adopted and that the federal rule, which requires a preservation of ESI in anticipation of litigation, would be a good starting point. The subcommittee determined that the proposed federal rule should be edited (if needed) to ensure that the courts have the full range of sanctions available and to ensure that the offending party is subjected to attorneys' fees and costs.

The subcommittee discussed the fact that, if the federal rule was wholly adopted, then Florida practitioners could use federal caselaw to assist the Florida courts in determining the appropriate sanctions for a party's failure to preserve ESI. The subcommittee took a vote on adopting the proposed federal rule. The vote was 3-2, not in favor of a complete adoption of the federal rules with the majority (R. Ruiz, H. Butler, and L. Johnson) and the minority (A. Bronson and R. Loukonen) agreeing to continue the discussion given that there was unanimous agreement that Rule 1.380(e) should be amended.

b. Relevant Rules Committee history:

Meeting Date: July 28, 2015 (Attendees: Hon. Rodolfo Ruiz, Howard Butler, Lizzie Johnson, and Rachael Loukonen). After discussion, the subcommittee adopted the majority's proposed edits to Rule 1.380(e) with a few slight revisions and agreed that a committee note should be included with the revised rule.

Meeting Date: August 17, 2015 (Attendees: Hon. Rodolfo Ruiz, Ardith Bronson, Howard Butler, Lizzie Johnson, and Rachael Loukonen). The subcommittee reviewed the proposed committee note and determined that the note should not include a reference to gross negligence as opposed to intentional destruction of the electronically stored information. To do so could potentially limit a court's ability to sanction a party that has a pattern of gross negligence that rises to intentional destruction. After discussion, the subcommittee reached agreement on the language of the committee note and agreed on the final version of the proposed rule and committee note that will be presented to the Committee.

Meeting Date: December 9, 2015 (Attendees: Martin Alexander, Ardith Bronson, Howard Butler, Rachael Loukonen, and the Honorable Rodolfo Ruiz) (Excused from Subcommittee Meeting: Lizzie Johnson). The Subcommittee reviewed the comments received during the September 2015 Committee meeting. Specifically, the Subcommittee addressed the "reasonable anticipation" versus "conduct of litigation" portion of the proposed rule in light of the divergent Florida district court caselaw on when the duty to preserve ESI arises. The Subcommittee discussed the divergent caselaw that exists in Florida, as well as in the United State Circuit Courts. The subcommittee considered the public policy issues surrounding the duty to preserve, the administration of justice, and attorneys' duties to the court. After discussion, the subcommittee determined that the proposed rule could be amended to reflect the duty to preserve without using the terms “reasonable anticipation” or “conduct of litigation,” so that the rule would apply equally across jurisdictions.

Meeting Date: May 27, 2016 (Attendees: Ardith Bronson, Howard Butler, Leslie Goller, Rachael Loukonen, the Honorable Rodolfo Ruiz,b and Florida Bar Attorney Liaison Greg Zhelesnik)(Excused from Subcommittee Meeting: Lizzie Johnson). The

subcommittee discussed the comments received during the January 2016 Committee meeting, which included the following: (1) Should we keep the "safe harbor" language concerning the routine operation of electronic information systems?; and (2) Should we include other forms of sanctions in conformity with Rule 1.380(b) such as striking pleadings? On the first question, the subcommittee unanimously agreed that the new form of the rule requires judges to make several findings before sanctions are imposed, including the duty to preserve, actual loss, prejudice, and intent. These findings provide a safe harbor to litigants, as well as more detailed direction to the court. On the second question, the subcommittee discussed whether an all-inclusive list is necessary in light of the court's inherent authority. The subcommittee also discussed the sanctions listed in Rule 1.380(b), which are sanctions available to the court when a court order is disobeyed. Among other sanctions, that rule provides that the court may strike out pleadings or parts of them. After discussion, the subcommittee decided that adding a provision that expressly instructs a court that it has the authority to "strike out pleadings or parts of them" is in line with the court's inherent authority and would ensure that both subsections of Rule 1.380 (subsections (b) and (e)) conform to one another, and would otherwise serve as an express deterrent to

parties/litigants. As such, the Subcommittee agreed to add the recommended language ("strike out pleadings or parts of them") to 1.380(e)(2).

Approved in Concept: The proposed rule was submitted to the full Committee at the June 2016 meeting and was approved in concept to move to drafting.

Meeting Date: December 15, 2016 (Attendees: Martin Alexander, Ardith Bronson, Rachael Loukonen, Judge Rodolfo Ruiz). The purpose of the meeting was to discuss the following comments received from the drafting subcommittee on October 20, 2016:

(1) whether the language provided in e (2), "information's use in the litigation," should be kept or whether the simple word, "information," would suffice; and (2) whether to revise the header for subsection (e) to match the header used in the federal rule, "Failure to Preserve Electronically Stored Information." On (1), the subcommittee decided that revising the language to "information" would broaden the scope beyond the litigation at issue and that the language should remain as drafted by the subcommittee. On (2), the subcommittee determined that the header for subsection (e) should be revised to simply state "Failure to Preserve Electronically Stored Information," which is the header used in the federal rules.

The Subcommittee reported its position to the Committee at the January 26, 2017 full Committee meeting whereupon the Committee asked the Subcommittee to ensure: (1) the rule is consistent with the proposed comment; (2) subsections (1) and (2) set forth appropriate sanctions; and (3) the sanctions are consistent with Florida jurisprudence.

Meeting Date: April 12, 2017 (Attendees: Martin Alexander, Ceci Berman, Ardith

Bronson, Kevin Cook, Vivian Fazio, Rachael Loukonen, Jason Stearns, Krys Godwin (Florida Bar Liaison), Judge Ralph Artigliere (Chair, Rules Task Force of the EDDE Subcommittee of the Business Law Section), Howard Butler (excused), and Judge Roldolfo Ruiz (excused)). After much discussion, the subcommittee members appointed a research team to consider and analyze the comments raised by the Committee at the January 26, 2017 meeting. (Minutes of this Subcommittee meeting were attached to the June 2, 2017 Subcommittee Report to the Committee.)

Meeting Date: May 25, 2017 (Research Team Meeting. In attendance: Rachael Loukonen, Jason Sterns, and Ardith Bronson (excused)). After discussion and an exchange of emails, the team came to several broad conclusions. First and foremost, we continue to believe that Florida needs a separate rule for ESI. ESI has been and should be dealt with differently by Florida courts. Second, if we are going to continue to have a separate ESI rule, then we should model this rule as closely to the federal rule as possible. This gives the courts and practitioners the ability to take advantage of federal decisions on the rule. Third, if we adopt the federal rule, based on the latest comments from the Committee, is it in line with Florida law on ESI? Lastly, regardless of whether Florida law fits squarely within the federal rule, what authority do we as the

rules committee have to propose a rule to the Florida Supreme Court, and, to the extent the federal rule may differ in some respects from Florida law, what authority does the Florida Supreme Court have to accept those differences via adoption of the rule? In sum, can the rules committee propose a rule to the Florida Supreme Court for the sake of bringing structure and/or clarity?

Meeting Date: August 10, 2017 (Attendees: Rachael Loukonen, Chair, Martin Alexander, Ardith Bronson, Katie Dearing, Vivian Fazio, Christopher Marquardt, Jason Stearns (excused; confirmed agreement with Subcommittee by email), and Mikalla Davis (Florida Bar Liaison)). The Subcommittee reviewed the findings of the Research Team and, after discussion, determined that Florida should amend Rule 1.380(e) to adopt verbatim the new Federal Rule 37(e).

Meeting Date: December 20, 2017 (Attendees: Rachael Loukonen, Chair, Martin Alexander (by email), Ardith Bronson, Miguel Chamorro, Vivian Fazio, Jason Stearns, Judge Ralph Artigliere). The Subcommittee reviewed the attached comments from the EDDE Task Force, which confirmed the Subcommittees prior findings concerning the adoption of new Federal Rule 37(e) verbatim. As well, the Subcommittee reviewed a new case out of the Northern District of Florida on Rule 37(e), Wooden v. Barringer, dated November 6, 2017. After Judge Ralph Artigliere presented the EDDE's comments, Judge Artigliere was excused from the meeting. The Subcommittee then voted to recommend to the Committee the adoption, verbatim, of the new Federal Rule 37(e).

c. **Are similar proposals under consideration by other Rules Committees or Bar Sections?** Not to the Subcommittee's knowledge. However, the Florida Bar's Business Law Section EDDE (Electronic Discovery and Digital Evidence) Task Force has been tracking the progress of this proposed rule change closely.

d. **Input sought/materials considered by Subcommittee:** Florida and federal caselaw on Florida's Rule 1.380(e), as well as the new Federal Rule 37(e), as well as articles and seminar materials and discussions with federal judges and magistrates concerning the effect of the new Federal Rule 37(e). As mentioned above, the Subcommittee also sought input from the Business Law Section's EDDE Task Force.

III. Issues Identified by the Subcommittee:

a. **Concerns about Present Rule:** The present rule is merely a safe harbor provision. It fails to take into consideration the duties that litigants have to maintain ESI. Moreover, it does not provide guidance on when and to what extent a court may impose sanctions against a litigant that fails to maintain ESI. Given that most, if not all, cases today involve the discovery of ESI, it

is important for the courts and practitioners to have a rule that provides sufficient guidance.

b. **Concerns about Proposed Changes:** The Subcommittee has concerns about adopting any version that does not track the new Federal Rule 37(e). To adopt a different version would create conflict and make it difficult for practitioners and the courts to look to federal caselaw for guidance on interpreting and understanding how the rule should be applied. The present rule, as adopted, tracks the old federal rule, giving litigants the ability to use federal caselaw to interpret and apply the present rule.

The Committee has had concerns about whether the federal version of the rule sets forth standards and sanctions that are consistent with Florida jurisprudence. In that regard, to the extent the standards and sanctions differ from Florida jurisprudence, the Committee has concerns as to whether it has the authority to propose an amendment that tracks the federal rule.

IV. Subcommittee Recommendation:

The Committee has already approved, in concept, an amendment to Rule 1.380(e) that adopts much of the language of the new Federal Rule 37(e) and should further amend Rule 1.380(e) to track, verbatim, the language in Federal Rule 37(e).

V. Majority Position:

a. **Summary.** The Committee has already approved, in concept, an amendment to Rule 1.380(e) that adopts much of the language of the new Federal Rule 37(e) and should further amend Rule 1.380(e) to track, verbatim, the language in Federal Rule 37(e). The new Federal Rule 37(e) is consistent with Florida jurisprudence concerning the discovery of ESI.

b. **Rationale.** The present Rule 1.380(e) was adopted verbatim from the former Federal Rule 37(e), giving the courts and litigants the ability to look to federal caselaw for guidance on the application of Rule 1.380(e). Adopting the new Federal Rule 37(e) verbatim would ensure that the courts and litigants continue to have this guidance. There are currently no Florida cases that interpret or address the present Rule 1.380(e) and the duty to preserve ESI. There are Florida cases concerning whether sanctions were appropriate, which discuss whether the litigant acted in bad faith, i.e., intentionally, to deprive the opposing part of its use. Given Florida jurisprudence and the need for direction on the preservation of ESI, the Committee should adopt the new Federal Rule 37(e) verbatim.

c. Key Points.

First and foremost, we need a separate rule concerning the presentation of ESI. ESI has been and should be dealt with differently by Florida courts.

Second, if we are going to continue to have a separate ESI rule, then we should model this rule as closely to the new federal rule as possible. This gives the courts and practitioners the ability to take advantage of federal decisions on the rule.

Third, is the new federal rule in line with Florida law on ESI preservation and sanctions for the failure to preserve ESI?

Fourth, what authority does the Committee have to propose a rule to the Florida Supreme Court to the extent the rule may differ from the jurisprudence in certain districts? In short, what authority does the Committee have to propose a rule to the Florida Supreme Court for the sake of bringing structure and/or clarity to an issue on which the district courts may differ?

With these key points in mind, the Subcommittee conducted the following research:

- What is the current state of Florida law on Rule 1.380 and the preservation of ESI? Is there caselaw that generally discusses the preservation of ESI and/or the failure to preserve ESI?

- There are no Florida state or federal cases that interpret or address specifically Rule 1.380 and the duty to preserve ESI. There is also no specific definition of what constitutes ESI as used in the Florida Rules of Civil Procedure or Florida case law.

- On the broader question of what duty exists to preserve ESI, there was very little in Florida state cases that specifically addressed the issue of ESI. There were a handful of opinions and reported cases in which the respective court analyzed whether sanctions were appropriate for alleged misconduct. *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342 (Fla. 2005); *Osmulski v. Oldsmar Fine Wine, Inc.*, 93 So. 3d 389 (Fla. 2d DCA 2012)(finding that if evidence is within the defendant's control, the defendant possesses "a duty to preserve evidence where it could reasonably have foreseen the [plaintiff's] claim); *Holland v. Barfield*, 35 So. 3d 953 (Fla. 5th DCA 2010); *Bulkmatic Transport Co.*

v. *Taylor*, 860 So. 2d 436 (Fla. 1st DCA 2003); *Lennar Corp. v. Briarwood Capital, LLC*, 2013 WL 8178375 (Fla. 11th Cir. Ct. 2013); *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.,*

Inc., 2005 WL 679071 (Fla. 15th Cir. Ct. 2005); *Floeter v. City of Orlando*, 2007 WL 486633 (M.D. Fla. 2007).

- As to the duty to preserve evidence, in general, in *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015), the Florida Supreme Court suggested the existence of a "a duty to preserve evidence . . . when a party should reasonably foresee litigation," based on a line of case precedent including *Am. Hospitality Mgmt. Co. of Minnesota v. Hettiger*, 904 So. 2d 547, 549 (Fla. 4th DCA 2005), which states that where a defendant has evidence within its control, it can "be charged with a duty to preserve evidence where it could reasonably have foreseen the [plaintiff's] claim." However, the *League of Women Voters of Fla* opinion did not overrule differing appellate court precedent finding that there is no common law duty to preserve, *Gayer*

v. *Fine Line Constr. and Electric Inc.*, 970 So. 2d 424, 426 (Fla. 4th DCA 2007), or that a duty to preserve evidence arises only by contract, statute, or after a lawsuit has been filed and a discovery request is served. *See Royal & Sunalliance v. Lauderdale Marine Center,* 877 So. 2d 843, 845 (Fla. 4th DCA 2004*)*; *Bondu v. Gurvich*, 473 So. 2d 1307,1312 (Fla. 3d DCA 1984); *Miller v. Allstate*, 573 So. 2d 24, 27 (Fla. 3d DCA 1990); *Strasser v. Yalamanchi,* 783 So. 2d 1087, 1093– 94 (Fla. 4th DCA 2001).

- As well, the public comments from the last round of revisions that were

made to the Rules regarding ESI were reviewed. *Civil Procedure Rules Committee's Response to Comments to Proposed Amendments to Address Discovery of Electronically Stored Information,* In Re: Amendments to the Florida Rules of Civil Procedure, SC11-1542 (Fla. 2011).

- What is the current state of Florida's federal courts on the new Federal Rule 37(e)? Are there diversity cases that have considered distinctions in the duties to preserve under the Florida rule as opposed to the new federal rule? What issues have been presented (good/bad) due to the revised rule?

  - There are only a handful of cases from the 11th Circuit; however, there are blogs and articles devoted solely to the evolving caselaw on the new rules. *Amended Rule 37(e), What's New and What's Next for Spoliation?*, Judicature, Vol. 101, No. 2, pp. 46-53. The developing caselaw notes that "bad faith" (the term used in Florida jurisprudence) is embodied in the concept of

intent, i.e., it is not enough for the destruction of the ESI to be willful, there must be bad faith.

- *Brown Jordan Int'l, Inc. v. Carmicle*, 2016 WL 815827 (S.D. Fla. March 2, 2016)(discussing whether the court could apply the new rule to a pending matter and finding that it was not unjust and impractical to do so). This opinion provides a good summary of the caselaw under the old rule versus the findings that must be made under the new rule. The opinion makes clear that the inherent authority of the court remains and is always available to level the playing field.

- *In Living Color Enterprises, Inc., v. New Era Aquaculture, Ltd*., 2016 WL 1105297 (S.D. Fla. March 22, 2016), the court sitting in diversity discusses at length "bad faith" and ultimately denies the motion for sanctions.

- What authority does the Committee have to propose adoption of the new Federal Rule 37(e)? Must the Committee wait until the district courts are in agreement on ESI before proposing the rule? Or, does the Florida Supreme Court have the authority to override disparity in the district caselaw by adopting a rule that tracks the federal rule?

  - The Florida Supreme Court, in *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, (Fla. 1973), discusses the procedural versus substantive dichotomy that defines the Florida Supreme Court's procedural rule-making authority. In that opinion, the Court stated,

"We have said that 'practice' means the method of conducting litigation involving rights and corresponding defenses, or the manner in which the power to adjudicate or determine is exercised[.] It has also been said that 'practice' is the method of conducting litigation." (emphasis added and internal citations omitted). Entering sanctions or awarding remedies as a result of one party's failure to preserve evidence is the exercise of the Court's power to adjudicate the case in a particular form or manner. *See id.* ("Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion.").

- Rule 1.380(b) provides trial courts with a procedural vehicle to control the manner of litigation by providing trial courts the discretion to enter various sanctions for failing to comply with an order—ranging from fee shifting to the ultimate sanction of entry of default. Rule 1.380(d) – borrowed from the Federal Rules – permits the entry of a default judgment if a party fails to appear for deposition or respond to discovery requests, and it does not require a violation of a court order. The Florida Supreme

Court has approved of these ultimate sanctions for litigation conduct that is "willful or done in bad faith." *Wallraff v.*

T.G.I. Friday's, Inc., 490 So. 2d 50 (Fla. 1986).

- In light of the above, a rule governing sanctions/remedies for one party's failure to preserve ESI is procedural in nature and, therefore, permissible. The structure of the federal rule that requires a predicate finding of an "intent to deprive" another's use of ESI before entering the ultimate sanction is sufficiently akin to bad faith such that the Florida Supreme Court would likely approve of adopting Federal Rule 37(e).

d. Anticipated Impact of Change.

i. Does the proposed change necessitate a change in other Rules? None that the Subcommittee is aware of at this time. That said, given that Family Law Rule 12.380, Probate Rule 5.080(a)(12), and Small Claims Rule 7.020(b) direct litigants to Civil Rule 1.380, these Committees may choose to provide input on the proposed amendment to Rule 1.380.

ii. What is the anticipated impact of the change on practitioners? The amendment should have a favorable impact given that it will provide guidance

and clarity to the courts and the litigants. As well, it will bring consensus among the districts to the duty to preserve ESI and ensure that litigants are able to take advantage of the federal caselaw interpreting the Federal rule 37(e).

iii. Does the proposed change secure the just, speedy, and inexpensive determination of every action? Yes, because it frames the duties to preserve ESI, as well as the proofs needed in order for a court to impose sanctions for a failure to preserve ESI. Interestingly, the Criminal Rules already provide for sanctions for willful violations of discovery rules or orders.

VI. Minority Position(s): N/A.

a. Summary. N/A.

b. Rationale. N/A.

c. Key Points. N/A.

d. **Anticipated Impact of Change.**

i. **Does the proposed change necessitate a change in other Rules?** N/A.

ii. **What is the anticipated impact of the change on practitioners?** N/A.

iii. **Does the proposed change secure the just, speedy, and inexpensive determination of every action?** N/A.

VII. **Time Considerations for Adopting Proposal:** None were given to the Subcommittee.

VIII. **Text of the Proposed Amendments as Exhibits to this Report.**

a. **Vote:** Unanimous (6-0).

b. **Majority's Proposed Amendment (in Legislative Format):** See attached. Note that the Subcommittee's proposed amendments to the rule (as approved in concept by the Committee) are shown with double strikethrough and double underline for ease of reference.

c. **Minority's Proposed Amendment (in Legislative Format):** N/A.

COMMENTS OF THE EDDE COMMITTEE OF THE BUSINESS SECTION TO RULE CHANGES PROPOSED BY THE FEDERAL EDISCOVERY MONITORING SUBCOMMITTEE

The Electronic Discovery and Digital Evidence Committee (the "EDDE Committee") of the Business Law Section of The Florida Bar respectfully submits the following additional comments and suggestions to the Federal eDiscovery Monitoring Subcommittee (the "eDiscovery Subcommittee") of the Civil Procedure Rules Committee with regard to proposed amendments to Florida Rule of Civil Procedure 1.380(e). Initial comments from the EDDE Committee were submitted on April 27, 2017. Since that submission, the Civil Procedure Rules Committee and its eDiscovery Subcommittee have undertaken significant changes to the earlier proposal that was the subject of the April 27, 2017, Comments. The current rules amendment proposal is reflected in the September 25, 2017 Report of the eDiscovery Subcommittee (the "September 25 Report"). At the invitation of

the Civil Procedure Rules Committee, the EDDE Committee respectfully submits its comments on the current proposal and the September 25 Report that supports it.

The EDDE Committee has reviewed the September 25 Report and appreciates the opportunity to comment at this point in the proceedings. The September 25 Report is clear, thorough, well researched, and helpful in providing the thought process and the considerations undertaken in getting to this point in the process. The EDDE Committee commends the eDiscovery Subcommittee for its efforts to date and fully supports amendments to the Florida Rules in response to the 2015 Federal Rules Amendments to Fed. R. Civ. P. 37(e). In addition, the EDDE Committee supports the language and methodology reflected in the proposed amendments and Committee Note in the September 25 Report subject to the following comments.

The September 25 Report raises and deals with a number of significant issues that the EDDE Committee has raised previously and raise again below in these comments.

Following Fed. R. Civ. P. 37(e) ("Rule 37(e)") essentially verbatim has the advantages cited in the report of consistency with federal rules, bringing into consideration a significant body of federal case law that fills the void in Florida of precedent because circuit judges do not frequently generate published opinions on discovery and sanctions rulings and few of these cases go up on appeal. We find this to be a laudable goal, consistent with Florida's 2012 Civil Procedure Rule amendments on eDiscovery. While there may be a need or reason to vary from Rule 37(e) language in a given circumstance, whenever possible the rules should be consistent. If not, there should be a valid reason behind the variance so those working under and applying the rules will know when federal precedent may be authoritative and usable by the court. That being said, a spirited argument may be made that the federal judges' response to Rule 37(e) has been neither uniform nor universal. Members of the EDDE are not unanimous in support of adopting the federal rule at this point. Some argue that we should await further clarification of

the law. The EDDE Committee supplied to you copies of federal cases and commentary on the Rule 37(e) cases that have come down since the 2015 federal amendments took effect. The countervailing view is that the cases, while not uniform, are not the result of, nor do they reflect or uncover, a fundamental or discernable flaw in the text or intent of Rule 37(e). It appears from the September 25 Report that the eDiscovery Subcommittee considered the "diversity" in federal precedent and reached the same conclusion as the EDDE Committee.

One of the disadvantages of adopting the federal language is that Florida law of sanctions for failure to preserve is not identical to federal law. Rule 1.380(e), like Rule 37(e) is intended to create an exclusive remedy in Florida for failure to preserve ESI. The Report approached this issue head on and submits authority for adopting a new exclusive remedy. The EDDE does not question that authority, but we have not researched the issue. We confine our further comments to the practical application of the new rule, if adopted.

If adopted, Rule 1.380 would presumably be applied in the case of failure to preserve ESI in a manner consistent with the Rule 37(e) analysis as stated by Magistrate Judge Jones in Wooden v. Barringer, F. 3d , 1:16-CV-00378-WTH-GRJ (N. D. Fla. Nov. 6, 2017):

Rule 37(e) requires the Court to conduct the following step-by-step analysis. See Ala. Aircraft Indus., Inc. v. Boeing Co., 319 F.R.D. 730, 740-46 (N.D. Ala. 2017); Living Color Enters., Inc. v. New Era Aquaculture, Ltd., No. 14-cv-62216-MARRA/MATTHEWMAN, 2016 U.S. Dist. LEXIS 39113 , 2016 WL 1105297 , at *4-6 (S.D. Fla. Mar. 22, 2016); Ronald

J. Hedges et al., Managing Discovery of Electronic Information 44-45 (3d ed. 2017). First, was there was a duty to preserve the data in issue. Id. If so, were reasonable steps taken to avoid the loss of the data. Id. If not, can the lost data can be restored or replaced through additional discovery. Id. If not, was the other party prejudiced by the loss of the data. Id. If so, the Court may impose "measures no greater than necessary to cure the prejudice." Fed. R. Civ. P. 37(e)(1) . But, if data was lost "with the intent to deprive another [*5] party of the information's use in the litigation," the court may "presume that the lost information was unfavorable to the party," "instruct the jury that it may or must presume the information was unfavorable to the party," or "dismiss the action or enter a default judgement." Fed. R. Civ. P. 37(e)(2) .

Nothing in this analysis appears to be inconsistent with the policies and processes of current Florida law with regard to discovery violations of failure to preserve evidence, which supports the positions taken in the September 25 Report.

It is the considered view of the EDDE that the case of League of Women Voters of Fla. v. Detzner, 172 So. 3d 363 (Fla. 2015), determined the trigger for preservation to be reasonable anticipation of litigation in addition to the traditional Florida triggers of statute, contract, and

discovery request. While the report correctly notes that the Florida Supreme Court did not expressly overrule all district court cases reaching an inconsistent result, there is no question that the Court cited and quoted from Am. Hospitality Mgmt. Co. of Minnesota v. Hettiger, 904 So. 2d 547, 549 (Fla. 4th DCA 2005), which states that where a defendant has evidence within its control, it can be charged with a duty to preserve evidence where it could reasonably have foreseen the plaintiff’s claim. The EDDE Committee would leave to future cases any further development in this area, but it is not reasonable for Florida lawyers and judges to assume that the Supreme Court’s decision leaves older DCA opinions inconsistent with Hettiger and Detzner in force and effect anywhere in Florida.

These comments have the full support and approval of the EDDE Committee, as there was no opposition to the content of these comments in the EDDE. The EDDE Committee will seek the approval of the leadership of the Business Section of the Florida Bar to submit these comments to the Civil Procedure Rules Committee as official comments of the Business Section at the January, 2018 meeting of the section. Results of that request

will be forwarded when received by the EDDE Committee. The EDDE Committee stands ready and able to further comment on the process and proposed substance of Rule 1.380(e). If any clarification or further comment is needed, please let us know.

Respectfully Submitted, Bart Valdez

EDDE Committee Chair and

Co-Chair of the Civil Rules Amendment Task Force

Ralph Artigliere

Co-Chair of the Civil Rules Amendment Task Force

MAJORITY PROPOSAL FOR RULE 1.380(e)*

***Double strikethrough and double underline indicate amendments to the rule as approved in concept.**

RULE 1.380.

FAILURE TO MAKE DISCOVERY; SANCTIONS

. . .

(e) Failure to Preserve Electronically Stored Information; Sanctions for Failure to Preserve. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system If electronically stored information that should have been preserved in the anticipation or conduct of litigation , upon finding a party had a duty to preserve electronically stored information, the court determines that the electronically stored information is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from the loss of the information, may order measures among (2)(A)-(D) below commensurate with, but no greater than necessary, to cure the prejudice based on the totality of the circumstances; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may order measures among (A)-(E) below commensurate with, but no greater than necessary, to cure the prejudice based on the totality of the circumstances:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party;

(C) award reasonable attorneys' fees and expenses as justice requires;

(D) strike out pleadings or parts of them; or

(E) dismiss the action or enter a default judgment.

Committee Notes

1972 Amendment. Derived from Federal Rule of Civil Procedure 37 as amended in 1970. Subdivision (a)(3) is new and makes it clear that an evasive or incomplete answer is a failure to answer under the rule. Other clarifying changes have been made within the general scope of the rule to ensure that complete coverage of all discovery failures is afforded.

2003 Amendment. Subdivision (c) is amended to require a court to make a ruling on a request for reimbursement at the time of the hearing on the requesting party's motion for entitlement to such relief. The court may, in its discretion, defer ruling on the amount of the costs or fees in order to hold an evidentiary hearing whenever convenient to the court and counsel.

2005 Amendment. Following the example of Federal Rule of Civil Procedure 37 as amended in 1993, language is included in subdivision (a)(2) that requires litigants to seek to resolve discovery disputes by informal means before filing a motion with the court. This requirement is based on successful experience with the federal rule as well as similar local rules of state trial courts. Subdivision (a)(4) is revised to provide that a party should not be awarded its expenses for filing a motion that might have been avoided by conferring with opposing counsel. Subdivision(d) is revised to require that, where a party failed to file any response to a rule 1.340 interrogatory or a rule 1.350 request, the discovering party should attempt to obtain such responses before filing a motion for sanctions.

2012 Amendment. Subdivision (e) is added to make clear that a party should not be sanctioned for the loss of electronic evidence due to the good-faith operation of an

electronic information system; the language mirrors that of Federal Rule of Civil Procedure 37(e).

Nevertheless, the good-faith requirement contained in subdivision (e) should prevent a party from exploiting the routine operation of an information system to thwart discovery obligations by allowing that operation to destroy information that party is required to preserve or produce. In determining good faith, the court may consider any steps taken by the party to comply with court orders, party agreements, or requests to preserve such information.

2013 Amendment. This rule was amended to add “substantially” before “justified” in subdivisions (a)(4), (b)(2), and (d), to make the rule internally consistent and to make it more consistent with Federal Rule of Civil Procedure 37, from which it was derived.

2017 Amendment. Subdivision (e) of this rule was amended to make it consistent with Federal Rule of Civil Procedure 37(e).Subdivision (e) recognizes that "reasonable steps" to preserve suffice; it does not call for perfection. The routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information. Under subdivision (e)(1), an evaluation of prejudice from the loss of the information necessarily includes an evaluation of the information's importance in the litigation. Subdivision (e)(2) provides that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Under subdivision (e)(2), while the court is not required to find prejudice to the party deprived of the information, the court should exercise caution in using the measure specified in (e)(2). The remedy should fit the wrong, and the severe measures authorized by subsection (e)(2) should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.