**COMMENTS 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 this Task Force 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, 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. 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 Federal 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 federal rules 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 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.