DRAFT: TASK FORCE PROPOSED COMMENTS TO 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 its 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).

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. The EDDE Committee appreciates the opportunity to comment at this point in the proceedings.

We understand the interest in taking the amendment process a step at a time and that current effort to amend Rule 1.380(e) will be followed by proposals to amend other Florida discovery rules consistent with the Federal Rules. When that happens, the EDDE Committee will have suggestions on rules that may be considered for amendment, and we hope that we will be permitted to submit those suggestions to the Civil Procedure Rules Committee vis-à-vis the eDiscovery Subcommittee as we are doing here.

The eDiscovery Subcommittee has done excellent work so far on Rule 1.380(e), but we have some comments and suggestions:

1. It is apparent that the proposed amendment to Rule 1.380(e) was occasioned by the 2015 amendments to Federal Rule 37(e). Yet the proposed Florida Rule varies considerably from the Federal Rule. This raises the question of whether the Florida Rule is intentionally different in scope and intent from its federal counterpart. One suggested solution is to more closely track the Federal Rule to take advantage of developing case law interpreting and applying Rule 37(e). If the intention is to have a Florida rule similar to the Federal Rule, then clarification would be minimal. However, if the intention is to have a rule tailored for Florida that is deliberately different from Rule 37(e), then a more robust Committee Note is suggested to explain where Florida Rule 1.380(e) is intended to be similar, and where it is intended to differ from, Federal Rule 37(e), along with some explanation why the differences were adopted.

2. Both the 2015 Federal Rule and the proposed Florida Rule supplant existing "safe harbor" language for loss occurring in the "routine, good faith operation of an electronic information system." Our understanding is that the safe harbor concept was so narrow it was rarely invoked, and routine system operation would appear to be subsumed by the more general and flexible language concerning the "failure to take reasonable steps to preserve," which appears in both the Federal Rule and the proposed amendment to the Florida Rule. In other words, destruction resulting from routine operation is usually reasonable if the operation that caused destruction truly is routine. The comment to the Federal Rule addresses the elimination of the existing Rule 37(e) by saying "This limited rule has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information." The comment to the proposed Florida Rule does not provide a reason for supplanting the rule. This is another unclear area that may be handled either by more closely adopting the federal language or by incorporating clarity through more comprehensive Committee Notes or both.

2. Rule 37(e) has an extensive Committee Note explaining the purpose, reach, and effect of the rule. The EDDE Committee posits that Florida Rule 1.380(e) would benefit from having a similar lengthy

note. The failure to include an extensive Committee Note with the proposed amendment to Rule 1.380(e) may lead to misunderstanding and misapplication of the rule. For example:

a. The Committee Notes for Federal Rule 37(e) state that "The court should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than others who have considerable experience in litigation." Is this also intended in Rule 1.380(e)? Is sophistication an appropriate consideration under what is reasonable under the circumstances? Can it be a mitigating factor in sanctions? Can it be a factor that eliminates sanctions?

b. Florida's proposed Committee Note says: "The remedy should fit the wrong, and the severe measures authorized by subdivision (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." Will the Florida Rule (or the Committee Notes) also refer to some sort of sliding scale of culpability for spoliation based on the sophistication of the parties?

3. The amended Federal Rule applies only to electronically stored information, which was also the focus of the 2006 version of Federal Rule 37(e). Does Florida Rule 1.380(e) relate *exclusively* to ESI?

a. If so, is this rule the exclusive remedy for dealing with spoliation of ESI under Florida law, or does a court still have inherent authority to address sanctions outside of this rule?

b. Can there be two different remedies if the same email is lost in paper form and also lost in electronic form?

c. Is the independent tort of spoliation preserved?

We suggest that clarity on these points should be provided in the Committee Notes.

4. The proposed Committee Notes regarding "duty to preserve" are troubling: "Subdivision (e) recognizes that 'reasonable steps' to preserve suffice; it does not call for perfection. **This rule is not intended to create a duty. The point at which a party has a duty to preserve may vary by jurisdiction.**" By contrast, the Federal Rule comments on duty to preserve are lengthier and clear: "Many court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when information is lost before a duty to preserve arises." (e.s.). Does the Florida Committee Note intend to strike a difference between "this rule does not create a new duty" and "this rule does not create a duty?"

The language that duty to preserve varies from jurisdiction to jurisdiction is troubling. While Florida law was a bit muddled before last year, the case of *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 390-94 (Fla. 2015), clarified that reasonable anticipation of litigation triggers the duty to preserve.

5. As a general comment, we would like to better understand whether the proposed rule is intended to standardize sanctions or curative measures on parties who fail to preserve electronically stored information in Florida. Is the proposed amendment to the Florida Rule intended to limit the court's discretion, and, if so, will there be a distinction between intentional destruction and negligent failure to preserve? (The available sanctions under section (e)(2) of the proposed amendment to Florida

Rule 1380(e)—which are to be applied only upon a finding of intent to deprive—are not significantly greater than those available under section (e)(1) of the proposed amendment—which do not require a finding of intent. On this point, the EDDE Committee is of the view that severe prejudice due to the failure of a party to preserve warrants an equally severe sanction, even in the absence of intent.) We recognize that Florida law of remedies and sanctions for failing to preserve and for spoliation are broad-based in the sense that the court has inherent authority, common law authority, and rule-based authority and direction for remedies and sanctions. Elimination of prejudice and punishment for bad behavior play into the range of options for the judge. In the federal realm, the 2015 amendment to Rule 37(e) was intended to supplant then-existing remedies and sanctions in the case of failure to preserve ESI, in part due to variance in treatment in different circuits. The intent of Florida Rule 1.380(e) is less clear at this point.

Thank you again for the opportunity to comment. The EDDE Committee is ready and willing to discuss any of these points with you and to provide clarification or other assistance in this extremely worthwhile endeavor that the rules committee has undertaken.