



Lawrence H. Kolin

E-discovery Rules Approved by The Florida Bar

This summer, The Florida Bar Civil Procedure Rules Committee finally approved draft rule amendments of its longstanding e-discovery subcommittee. The Florida Bar Board of Governors recently gave its unanimous blessing to the Expedited Submission of Proposed Amendments to Address Discovery of Electronically Stored Information. These new rules are likely to be submitted to the Supreme Court of Florida off-cycle and soon published for comment.

Following Congress's 2006 amendments to the Federal Rules of Civil Procedure, which coincided with increasing reliance in modern communication on email, documents, and electronic information residing in computers, storage devices, handhelds, and smartphones, it was decided that the Florida Rules of Civil Procedure also needed to be updated. Likewise, exponential growth in the volume of electronically stored information (ESI) in the possession of parties to litigation, and the significant growth in the frequency with which litigants and courts have since had to address issues related to the discoverability, retrieval, review, and production of ESI, also brought about these changes, with which all practitioners should now become familiar.

After studying the rules enacted in just over half of the fifty states with the intention of facilitating the development of proposed changes to Florida's Rules, the subcommittee adopted core principles that provided predictability by tracking language used in the federal rules so that existing precedents might be applied. The core principles were developed with recognition that the culture in state courts, with their greater variety of litigation, is different from the culture in federal practice. Additionally, issues involving information technology are no longer limited to complex or commercial litigation; they are increasingly evident in the full range of civil cases that routinely involve electronic evidence.

Resources available to litigants also are often different in state court cases than in federal litigation. As such, keeping discovery reasonable and cost-effective, and preventing the cost and burden of electronic discovery from being outcome determinative rather than based on the merits (or at least from being unduly favorable to either requesting or responding parties), was considered.

It should be noted that while encouraging early, meaningful, and reasonable cooperation and communication among parties in a desire to min-

imize the frequency with which disputes must be resolved by the courts, the mandatory "meet and confer" of the federal system seemed impracticable to the full standing committee, which overwhelmingly voted against imposing such requirements in the state rules.

Changes are entirely incorporated into existing rules and specifically include amendments to address ESI within Rules 1.200, 1.201, 1.280, 1.340, 1.350, 1.380 and 1.410 of the Florida Rules of Civil Procedure.

For example, case management in Rule 1.200, as well as Rule 1.201 involving complex litigation, will now include the ability to address topics such as: considering the voluntary exchange of ESI and stipulations for authenticity; considering the need for advance rulings from the court on admissibility; and discussing the possibility of agreements (whether by parties or by referral to a special magistrate, master, or other neutral for mediation) on preservation of evidence, 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.

Other changes include limitations on discovering ESI under Rule 1.280, such as objecting to discovery from sources not reasonably accessible because of burden or cost. On a 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. However, the court, upon finding good cause, may require and 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.

In determining any motion involving discovery of ESI contemplated by Rule 1.280, the court must limit the frequency or extent of discovery if it determines: (1) 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 (2) 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.

State practitioners will be glad to know that Rule