

IN THE SUPREME COURT OF FLORIDA

**IN RE: AMENDMENTS TO THE FLORIDA
RULES OF CIVIL PROCEDURE —
ELECTRONIC DISCOVERY**

CASE NO.:

**AMENDMENTS TO THE RULES OF
CIVIL PROCEDURE RELATED TO ELECTRONIC DISCOVERY**

Kevin D. Johnson, Chair, Civil Procedure Rules Committee, and John F. Harkness, Jr., Executive Director, The Florida Bar, file this out-of-cycle petition to amend the Florida Rules of Civil Procedure under *Fla. R. Jud. Admin.* 2.140(e). As required by *Rule* 2.140(e), the proposals have been reviewed and approved by The Florida Bar Board of Governors. The voting records of the Committee and the Board of Governors are shown on the attached Table of Contents (*see* Appendix A). The proposals have not been published for comment in *The Florida Bar News* or posted for comment on The Florida Bar’s website. The proposed amendments are attached in both the full-page (*see* Appendix B) and two-column (*see* Appendix C) formats.

Amendments to rules 1.280, 1.340, and 1.350 were approved by the Court in *In re: Implementation of Committee on Privacy and Court Records Recommendations — Amendments to the Florida Rules of Civil Procedure; the Florida Rules of Judicial Administration; the Florida Rules of Criminal Procedure; the Florida Probate Rules; the Florida Small Claims Rules; the Florida Rules of Appellate Procedure; and the Florida Family Law Rules of Procedure* (No. SC08-2443 June 30, 2011). These amendments are not effective until October 1, 2011. The new text of these amendments is shown [in brackets] in the rules being submitted.

The proposed amendments address discovery of electronically-stored information and affect seven different rules. They are the product of a multi-year effort by the Committee to study the growth of electronic discovery, the lessons to be learned from the federal rules governing electronic discovery, and the need for change in the Florida rules. The Committee has voted to make this submission on an expedited basis, rather than including these changes as part of the Committee’s next three-year cycle report in 2013.

A. History of E-Discovery Rules Consideration in Civil Procedure Rules Committee

Under former Civil Procedure Rules Committee Chair Keith Park, a standing e-discovery subcommittee was originally formed during the 2006–2007 Bar year. Its purpose was to monitor developments under the Federal Rules of Civil Procedure, which had been amended in 2006 to deal with discovery of electronically stored information, and to determine the advisability of modifying the Florida Rules of Civil Procedure to address issues involving electronically-stored information (“ESI”).¹ The subcommittee was originally chaired by Lawrence Kolin.

The subcommittee spent the next few years studying the development of federal e-discovery law and the corresponding adoption of e-discovery rules in other states. One of the initial questions considered by the subcommittee involved the feasibility of a mandatory meet-and-confer rule. In the federal system, the meet-and-confer procedures established by Federal Rule 26 (*see* Appendix D) require the parties to discuss many potential discovery issues, including questions regarding the preservation and production of ESI. The subcommittee was concerned that mandatory early conferrals might not mesh well with Florida procedures. A “straw poll” was taken of the full committee, and the idea of a mandatory meet-and-confer rule was overwhelmingly rejected.

An additional concern was the fact that Florida has relatively weak standards for the preservation of evidence. The prevailing assessment of the e-discovery specialists who assisted the Committee is that a person or business has no duty under Florida common law to preserve potentially relevant evidence, and that the duty of preservation can only be imposed by contract, statute, or a properly served discovery request. *See Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 845 (Fla. 4th DCA 2004) (finding no common-law duty of preservation and stating that “[a] duty to preserve evidence can arise by contract, by statute, or by a properly served discovery request (after a lawsuit has already been filed.)”) This standard contrasts sharply with federal common law, under which a party has a duty to preserve evidence when the party “reasonably anticipates litigation.” *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). The subcommittee was concerned about the combination of the absence of a state common-law duty to preserve evidence and the infeasibility of adopting an early meet-and-confer requirement. The subcommittee considered whether the rules could be drafted in such a way as to encourage parties to voluntarily discuss preservation issues and reach reasonable agreements either before or soon after the

¹ The phrase “electronically-stored information” is commonly shortened to “ESI” by commentators and experts in this field, so that shortened form will be used here for the sake of simplicity.

commencement of litigation. Ultimately the subcommittee concluded that it was constrained by (1) the inapplicability of the Rules of Civil Procedure to prelitigation conduct by parties, and (2) the likelihood that any such rule might exceed the scope of the Committee's jurisdiction, in that such a rule would likely amount to a change in substantive law as opposed to merely a rule of procedure.

With these considerations out of the way, the committee then moved forward with developing proposals for changes to a number of rules, that were first proposed to the full committee in early 2010. At that time, the full committee adopted the subcommittee's proposed changes to *Fla. R. Civ. P.* 1.200, but sent the remaining proposed changes back to the subcommittee for further study.

When Mr. Kolin's term on the Committee ended in the summer of 2010, incoming Chair Don Christopher appointed Kevin Johnson to chair the subcommittee. During the next several months, the subcommittee worked to solicit input on the proposed amendments from other interested Bar groups, as well as experts in the e-discovery field. The subcommittee received a great deal of valuable feedback from the Business Law Section's Computer Law Committee, with Douglas Cherry of that committee serving as liaison. The subcommittee also invited a number of attorneys and judges who closely follow e-discovery developments to provide their opinions on the proposed changes. The subcommittee received feedback from Ralph Losey (Jackson Lewis), Bill Hamilton (Quarles & Brady), Richard Martin (Akerman Senterfitt), Ralph Artigliere (retired trial court judge), Magistrate Judge Elizabeth Schwabedissen (Florida 11th Judicial Circuit), and Ron Hedges (former U.S. magistrate judge (D.N.J.) and member of the advisory board of the Sedona Conference and the Georgetown University Law Center Advanced E-Discovery Institute).

Judge Artigliere was a regular participant in the subcommittee's conference calls and provided suggestions and encouragement by email. Judge Schwabedissen also participated in conference calls and by email. Their input and that of 13th Circuit Business Court Judge Richard Nielsen (a subcommittee member) was extremely helpful in providing the subcommittee with the judiciary's perspective.

Mr. Hamilton, Mr. Losey, and Mr. Martin all speak regularly on e-discovery issues, and their participation was invaluable in helping the subcommittee

understand some of the technological considerations involved in the capture and production of ESI.²

The subcommittee then attempted to incorporate the feedback received from these sources into a revised set of proposals. These revisions were circulated among the members of the subcommittee and the interested commentators, and a vote was subsequently taken among members of the subcommittee. The vote was 7 to 0 in favor of submitting the revised proposals for review and adoption by the full committee.

The Civil Procedure Rules Committee considered the proposals at its meeting on January 21, 2011. The proposals passed on first reading, with a recommendation that they be submitted to the Florida Supreme Court for consideration on an expedited basis.

Under the Committee's procedures, the proposals were then referred to the Drafting Subcommittee. The Drafting Subcommittee reviewed the proposals and made several changes to improve the phrasing of the rules and to eliminate unnecessary or potentially confusing language. These proposals were debated at the June 22, 2011, meeting of the full committee. Some of the changes were rejected out of concern that the improvement in readability they offered was outweighed by a risk of creating confusion as to whether the Committee had intended to adopt a rule that was substantively different than its counterpart in the federal rules. The remaining adjustments were approved by the Committee, and the final proposed amendments were passed without opposition. Those amendments can be found in Appendices B and C.

B. Reasons Why Change is Needed in Existing Rules

The Committee believes that the increasing reliance of modern communication and information storage on computers, e-mail, hand-held devices, and various forms of electronic documentation requires that the Rules of Civil Procedure be updated.

The Committee observes that there has been exponential growth in the volume of ESI that is held by parties to litigation, and believes that there has likewise been significant growth in the frequency with which litigants and courts

² Additionally, the subcommittee sent a copy of its proposals to Richard Newsome, the president of the Florida Justice Association, so that Mr. Newsome could share the proposals with that organization.

have had to address issues related to the discoverability, retrieval, review, and production of ESI.

The Committee believes that the Rules need to specifically address ESI because that information differs from traditional paper documents or tangible things in a number of significant ways:

- ESI exists in greater volumes than paper documents and is more easily duplicated.
- ESI is not as persistent as paper – it is easily altered or destroyed by simple commands or by automatic system-driven processes.
- ESI often consists of dynamic, changeable information that is often specifically designed to be updated on a frequent basis.
- ESI often contains valuable metadata that is not readily visible yet may include important information about the authorship or authenticity of a document.
- ESI is heavily dependent on the system that creates it; changes in the system or environment may render such information inaccessible or obsolete.
- ESI is easily dispersed among multiple locations or storage sites and may require special care to determine which machines or sites need to be searched for discoverable information.

These characteristics of ESI raise a number of concerns that motivated the Committee's adoption of the proposed amendments, among which are the following:

- Courts and parties are confronting electronic discovery issues much more frequently. Many of the disputes that courts must address involve issues that are peculiar to e-discovery and for which there is little guidance in the present rules. For example, the present rules do not provide guidance as to how the parties should resolve disputes concerning the proper form of production for ESI. The subcommittee received feedback from several judges that the judiciary would greatly appreciate additional guidance.

- Discovery involving ESI may be expensive and technically challenging for parties who are not familiar with it. In the absence of rules-based limits on the proper scope of electronic discovery, there is a risk that the costs and burdens associated with electronic discovery issues may overwhelm the merits of the case and become an outcome-determinative factor.
- The Federal Rules of Civil Procedure have addressed electronic discovery issues for five years and have produced a growing body of precedent. Until such time as Florida adopts rules governing electronic discovery, it will be difficult for litigants or potential litigants to predict whether their conduct should be governed by those precedents or whether they should anticipate a Florida court applying a substantially different standard. As companies and government entities make significant investments in trying to build procedures and systems to comply with federal electronic-discovery requirements, providing further clarity on the requirements applicable in Florida courts will help them ensure that their procedures and systems are properly designed.

C. Core Principles Considered by Subcommittee on E-Discovery

In developing the proposed amendments, the subcommittee attempted to balance the following core principles:

1. Enhancing predictability by tracking language and principles used in the federal rules to the maximum extent possible so that existing precedents can be applied by courts and parties.
2. Recognizing that procedure in state courts is nonetheless different than practice in federal courts in significant ways, and that state rules must be adapted to the greater variety of litigation found in state court.
3. Recognizing that the resources available to litigants or courts may be different in state-court litigation than federal-court litigation.
4. Keeping discovery reasonable and cost-effective; preventing the cost and burden of electronic discovery from being outcome-determinative.

5. Encouraging early, meaningful, and reasonable cooperation and communication among parties to minimize the frequency with which disputes must be resolved by the courts.
6. Avoiding alteration of existing precedents so that changes remain procedural and not substantive.
7. Avoiding unduly favoring either requesting parties or responding parties.

D. Rationales for Key Decisions

The Civil Procedure Rules Committee identified the following rationales for the key choices that it made in the development of the proposed amendments:

1. The Committee elected not to incorporate a mandatory meet-and-confer rule due to the great variety of litigation in state court, the concern that the requirement could cause delay in otherwise routine matters that need to move forward on an expedited basis, and the likelihood that many cases will not require the parties to engage in discovery of ESI.
2. *Rule 1.201*, recently adopted by the Court, authorizes the parties to discuss ESI at a case management conference in a complex case. The Committee believes that these topics are also appropriate for discussion at a *Rule 1.200* case management conference in a non-complex case. The Committee also believed that the parties should be prompted (under both *Rule 1.200* and *Rule 1.201*) to consider discussing issues of preservation, form of production, and phasing of discovery, as these matters, if discussed early in the case, can make a significant difference in avoiding discovery disputes.
3. The Committee believes that *Rule 1.280* should contain a general statement confirming the applicability of the rules to ESI.
4. The Committee believes that *Rule 1.280(d)(1)*'s adoption of the federal good-cause standard for resolving concerns about discovery of material that is deemed "not reasonably accessible" by a producing party will encourage the parties to discuss and attempt to avoid unduly

burdensome discovery, and will also provide the court with a framework for resolving disputes about such information.

5. The Committee believes that *Rule* 1.280(d)(2)'s adoption of the federal proportionality rule is critical to protecting smaller parties from being overwhelmed by excessive discovery requests from parties with greater resources. This is consistent with the core principle of keeping e-discovery issues from being unnecessarily outcome-determinative due to resource imbalances. The Committee eliminated the second element of the federal test due to concern that this element was unnecessarily ambiguous and that any concerns at which it was aimed were adequately addressed by the first and third prongs of the test (which are found as *Rules* 1.280(d)(2)(i) and (ii) in these proposals).
6. The Committee believes that in some cases courts may find it necessary to encourage the parties to develop the record further before the court can rule on issues of good cause or proportionality. Thus, the Committee Note to *Rule* 1.280 alerts courts of the possibility of requiring parties to engage in phased or focused discovery to resolve preliminary issues when necessary to provide the court with needed information about cost, burden, or accessibility.
7. The Committee believes that *Rule* 1.340 should make clear that parties may choose to produce ESI in lieu of answering a particular interrogatory. However, a party who does so should produce such information in either a form in which it is ordinarily maintained or a form in which it is reasonable usable.
8. The Committee has adopted the federal procedure for dealing with requests for production. The Committee believes that this procedure will encourage the parties to discuss and resolve disputes about the form of discovery, and will also provide the court with a framework for resolving disputes about the format of production.
9. The Committee has adopted the safe harbor found in Fed. R. Civ. P. 37(e) regarding the routine, good-faith operation of a computer system. This is not intended to excuse knowing or reckless destruction of relevant evidence. The federal cases make clear that such spoliation does not constitute "routine, good-faith operation" of a

computer system. The Committee Note is intended to alert practitioners to this issue.

10. The Committee believes that nonparties who are subjected to subpoenas for the production of documents should enjoy roughly the same protections as parties when it comes to overbroad or unduly burdensome e-discovery. The Committee's proposals are designed to harmonize *Rule* 1.410 with *Rule* 1.280(d).

E. Rationale for Expedited Consideration

The Committee believes that the proposed amendments represent a significant improvement in the Rules of Civil Procedure. Based on feedback received from practitioners, and especially members of the judiciary, the Committee believes that there is a pressing need to incorporate these amendments into the rules as soon as possible. Florida is already five years behind the federal system in addressing e-discovery issues. If the amendments were considered as part of the Committee's regular cycle report in 2013, that gap would widen to seven years. Additionally, the Committee believes that the changes are significant enough that it will be beneficial for them to be considered separately from the other rules changes that will be part of the 2013 cycle report.

The Committee respectfully requests that the Court amend the Florida Rules of Civil Procedure as outlined in this report.

Respectfully submitted _____.

KEVIN D. JOHNSON
Chair
Civil Procedure Rules Committee
201 N. Franklin St., Ste. 1600
Tampa, FL 33602-5110
813/273-0500
FLORIDA BAR NO.: 13749

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300
850/561-5600
FLORIDA BAR NO.: 123390

APPENDIX A

TABLE OF CONTENTS

1.010.	SCOPE AND TITLE OF RULES	[NO CHANGE]
1.030.	NONVERIFICATION OF PLEADINGS	[NO CHANGE]
1.040.	ONE FORM OF ACTION	[NO CHANGE]
1.050.	WHEN ACTION COMMENCED	[NO CHANGE]
1.060.	TRANSFERS OF ACTIONS	[NO CHANGE]
1.061.	CHOICE OF FORUM	[NO CHANGE]
1.070.	PROCESS	[NO CHANGE]
1.071.	CONSTITUTIONAL CHALLENGE TO STATE STATUTE OR COUNTY OR MUNICIPAL CHARTER, ORDINANCE, OR FRANCHISE; NOTICE BY PARTY	[NO CHANGE]
1.080.	SERVICE OF PLEADINGS AND PAPERS	[NO CHANGE]
1.090.	TIME	[NO CHANGE]
1.100.	PLEADINGS AND MOTIONS	[NO CHANGE]
1.110.	GENERAL RULES OF PLEADING	[NO CHANGE]
1.120.	PLEADING SPECIAL MATTERS	[NO CHANGE]
1.130.	ATTACHING COPY OF CAUSE OF ACTION AND EXHIBITS	[NO CHANGE]
1.140.	DEFENSES	[NO CHANGE]
1.150.	SHAM PLEADINGS	[NO CHANGE]
1.160.	MOTIONS	[NO CHANGE]
1.170.	COUNTERCLAIMS AND CROSSCLAIMS	[NO CHANGE]
1.180.	THIRD-PARTY PRACTICE	[NO CHANGE]
1.190.	AMENDED AND SUPPLEMENTAL PLEADINGS	[NO CHANGE]
1.200.	PRETRIAL PROCEDURE <u>Committee vote: 29-0</u> <u>Board of Governors vote: 38-0</u>	[AMENDED]
1.201.	COMPLEX LITIGATION <u>Committee vote: 32-0</u> <u>Board of Governors vote: 38-0</u>	[AMENDED]
1.210.	PARTIES	[NO CHANGE]
1.220.	CLASS ACTIONS	[NO CHANGE]
1.221.	HOMEOWNERS' ASSOCIATIONS AND CONDOMINIUM ASSOCIATIONS	[NO CHANGE]
1.222.	MOBILE HOMEOWNERS' ASSOCIATIONS	[NO CHANGE]
1.230.	INTERVENTIONS	[NO CHANGE]
1.240.	INTERPLEADER	[NO CHANGE]

1.250.	MISJOINDER AND NONJOINDER OF PARTIES	[NO CHANGE]
1.260.	SURVIVOR; SUBSTITUTION OF PARTIES	[NO CHANGE]
1.270.	CONSOLIDATION; SEPARATE TRIALS	[NO CHANGE]
1.280.	GENERAL PROVISIONS GOVERNING DISCOVERY	[AMENDED]
	<u>Committee vote:</u> 31-0	
	<u>Board of Governors vote:</u> 38-0	
1.285.	INADVERTENT DISCLOSURE OF PRIVILEGED MATERIALS	[NO CHANGE]
1.290.	DEPOSITIONS BEFORE ACTION OR PENDING APPEAL	[NO CHANGE]
1.300.	PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN	[NO CHANGE]
1.310.	DEPOSITIONS UPON ORAL EXAMINATION	[NO CHANGE]
1.320.	DEPOSITIONS UPON WRITTEN QUESTIONS	[NO CHANGE]
1.330.	USE OF DEPOSITIONS IN COURT PROCEEDINGS	[NO CHANGE]
1.340.	INTERROGATORIES TO PARTIES	[AMENDED]
	<u>Committee vote:</u> 30-1	
	<u>Board of Governors vote:</u> 38-0	
1.350.	PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES	[AMENDED]
	<u>Committee vote:</u> 22-0	
	<u>Board of Governors vote:</u> 38-0	
1.351.	PRODUCTION OF DOCUMENTS AND THINGS WITHOUT DEPOSITION	[NO CHANGE]
1.360.	EXAMINATION OF PERSONS	[NO CHANGE]
1.370.	REQUESTS FOR ADMISSION	[NO CHANGE]
1.380.	FAILURE TO MAKE DISCOVERY; SANCTIONS	[AMENDED]
	<u>Committee vote:</u> 26-1	
	<u>Board of Governors vote:</u> 38-0	
1.390.	DEPOSITIONS OF EXPERT WITNESSES	[NO CHANGE]
1.410.	SUBPOENA	[AMENDED]
	<u>Committee vote:</u> 29-1	
	<u>Board of Governors vote:</u> 38-0	
1.420.	DISMISSAL OF ACTIONS	[NO CHANGE]
1.430.	DEMAND FOR JURY TRIAL; WAIVER	[NO CHANGE]

1.431.	TRIAL JURY	[NO CHANGE]
1.440.	SETTING ACTION FOR TRIAL	[NO CHANGE]
1.442.	PROPOSALS FOR SETTLEMENT	[NO CHANGE]
1.450.	EVIDENCE	[NO CHANGE]
1.452.	QUESTIONS BY JURORS	[NO CHANGE]
1.455.	JUROR NOTEBOOKS	[NO CHANGE]
1.460.	CONTINUANCES	[NO CHANGE]
1.470.	EXCEPTIONS UNNECESSARY; JURY INSTRUCTIONS	[NO CHANGE]
1.480.	MOTION FOR A DIRECTED VERDICT	[NO CHANGE]
1.481.	VERDICTS	[NO CHANGE]
1.490.	MAGISTRATES	[NO CHANGE]
1.500.	DEFAULTS AND FINAL JUDGMENTS THEREON	[NO CHANGE]
1.510.	SUMMARY JUDGMENT	[NO CHANGE]
1.520.	VIEW	[NO CHANGE]
1.525.	MOTIONS FOR COSTS AND ATTORNEYS' FEES	[NO CHANGE]
1.530.	MOTIONS FOR NEW TRIAL AND REHEARING; AMENDMENTS OF JUDGMENTS	[NO CHANGE]
1.540.	RELIEF FROM JUDGMENT, DECREES, OR ORDERS	[NO CHANGE]
1.550.	EXECUTIONS AND FINAL PROCESS	[NO CHANGE]
1.560.	DISCOVERY IN AID OF EXECUTION	[NO CHANGE]
1.570.	ENFORCEMENT OF FINAL JUDGMENTS	[NO CHANGE]
1.580.	WRIT OF POSSESSION	[NO CHANGE]
1.590.	PROCESS IN BEHALF OF AND AGAINST PERSONS NOT PARTIES	[NO CHANGE]
1.600.	DEPOSITS IN COURT	[NO CHANGE]
1.610.	INJUNCTIONS	[NO CHANGE]
1.620.	RECEIVERS	[NO CHANGE]
1.625.	PROCEEDINGS AGAINST SURETY ON JUDICIAL BONDS	[NO CHANGE]
1.630.	EXTRAORDINARY REMEDIES	[NO CHANGE]
1.650.	MEDICAL MALPRACTICE PRESUIT SCREENING RULE	[NO CHANGE]
1.700.	RULES COMMON TO MEDIATION AND ARBITRATION	[NO CHANGE]
1.710.	MEDIATION RULES	[NO CHANGE]

1.720.	MEDIATION PROCEDURES	[NO CHANGE]
1.730.	COMPLETION OF MEDIATION	[NO CHANGE]
1.750.	COUNTY COURT ACTIONS	[NO CHANGE]
1.800.	EXCLUSIONS FROM ARBITRATION	[NO CHANGE]
1.810.	SELECTION AND COMPENSATION OF ARBITRATORS	[NO CHANGE]
1.820.	HEARING PROCEDURES FOR NON-BINDING ARBITRATION	[NO CHANGE]
1.830.	VOLUNTARY BINDING ARBITRATION	[NO CHANGE]
1.900.	FORMS	[NO CHANGE]
1.901.	CAPTION	[NO CHANGE]
1.902.	SUMMONS	[NO CHANGE]
1.903.	CROSSCLAIM SUMMONS	[NO CHANGE]
1.904.	THIRD-PARTY SUMMONS	[NO CHANGE]
1.905.	ATTACHMENT	[NO CHANGE]
1.906.	ATTACHMENT — FORECLOSURE	[NO CHANGE]
1.907.	GARNISHMENT	[NO CHANGE]
1.908.	WRIT OF REPLEVIN	[NO CHANGE]
1.909.	DISTRESS	[NO CHANGE]
1.910.	SUBPOENA FOR TRIAL	[NO CHANGE]
1.911.	SUBPOENA DUCES TECUM FOR TRIAL	[NO CHANGE]
1.912.	SUBPOENA FOR DEPOSITION	[NO CHANGE]
1.913.	SUBPOENA DUCES TECUM FOR DEPOSITION	[NO CHANGE]
1.914.	EXECUTION	[NO CHANGE]
1.915.	WRIT OF POSSESSION	[NO CHANGE]
1.916.	REPLEVIN ORDER TO SHOW CAUSE	[NO CHANGE]
1.917.	NE EXEAT	[NO CHANGE]
1.918.	LIS PENDENS	[NO CHANGE]
1.919.	NOTICE OF ACTION; CONSTRUCTIVE SERVICE — NO PROPERTY	[NO CHANGE]
1.920.	NOTICE OF ACTION; CONSTRUCTIVE SERVICE — PROPERTY	[NO CHANGE]
1.921.	NOTICE OF PRODUCTION FROM NONPARTY	[NO CHANGE]
1.922.	SUBPOENA DUCES TECUM WITHOUT DEPOSITION	[NO CHANGE]
1.923.	EVICITION SUMMONS/RESIDENTIAL	[NO CHANGE]
1.924.	AFFIDAVIT OF DILIGENT SEARCH AND INQUIRY	[NO CHANGE]

1.932.	OPEN ACCOUNT	[NO CHANGE]
1.933.	ACCOUNT STATED	[NO CHANGE]
1.934.	PROMISSORY NOTE	[NO CHANGE]
1.935.	GOODS SOLD	[NO CHANGE]
1.936.	MONEY LENT	[NO CHANGE]
1.937.	REPLEVIN	[NO CHANGE]
1.938.	FORCIBLE ENTRY AND DETENTION	[NO CHANGE]
1.939.	CONVERSION	[NO CHANGE]
1.940.	EJECTMENT	[NO CHANGE]
1.941.	SPECIFIC PERFORMANCE	[NO CHANGE]
1.942.	CHECK	[NO CHANGE]
1.944.	MORTGAGE FORECLOSURE	[NO CHANGE]
1.945.	MOTOR VEHICLE NEGLIGENCE	[NO CHANGE]
1.946.	MOTOR VEHICLE NEGLIGENCE WHEN PLAINTIFF IS UNABLE TO DETERMINE WHO IS RESPONSIBLE	[NO CHANGE]
1.947.	TENANT EVICTION	[NO CHANGE]
1.948.	THIRD-PARTY COMPLAINT. GENERAL FORM	[NO CHANGE]
1.949.	IMPLIED WARRANTY	[NO CHANGE]
1.951.	FALL-DOWN NEGLIGENCE COMPLAINT	[NO CHANGE]
1.960.	BOND. GENERAL FORM	[NO CHANGE]
1.961.	VARIOUS BOND CONDITIONS	[NO CHANGE]
1.965.	DEFENSE. STATUTE OF LIMITATIONS	[NO CHANGE]
1.966.	DEFENSE. PAYMENT	[NO CHANGE]
1.967.	DEFENSE. ACCORD AND SATISFACTION	[NO CHANGE]
1.968.	DEFENSE. FAILURE OF CONSIDERATION	[NO CHANGE]
1.969.	DEFENSE. STATUTE OF FRAUDS	[NO CHANGE]
1.970.	DEFENSE. RELEASE	[NO CHANGE]
1.971.	DEFENSE. MOTOR VEHICLE CONTRIBUTORY NEGLIGENCE	[NO CHANGE]
1.972.	DEFENSE. ASSUMPTION OF RISK	[NO CHANGE]
1.975.	NOTICE OF COMPLIANCE WHEN CONSTITUTIONAL CHALLENGE IS BROUGHT	[NO CHANGE]
1.976.	STANDARD INTERROGATORIES	[NO CHANGE]
1.977.	FACT INFORMATION SHEET	[NO CHANGE]
1.980.	DEFAULT	[NO CHANGE]
1.981.	SATISFACTION OF JUDGMENT	[NO CHANGE]
1.982.	CONTEMPT NOTICE	[NO CHANGE]

1.983.	PROSPECTIVE JUROR QUESTIONNAIRE	[NO CHANGE]
1.984.	JUROR VOIR DIRE QUESTIONNAIRE	[NO CHANGE]
1.986.	VERDICTS	[NO CHANGE]
1.988.	JUDGMENT AFTER DEFAULT	[NO CHANGE]
1.989.	ORDER OF DISMISSAL FOR LACK OF PROSECUTION	[NO CHANGE]
1.990.	FINAL JUDGMENT FOR PLAINTIFF JURY ACTION FOR DAMAGES	[NO CHANGE]
1.991.	FINAL JUDGMENT FOR DEFENDANT JURY ACTION FOR DAMAGES	[NO CHANGE]
1.993.	FINAL JUDGMENT FOR PLAINTIFF GENERAL FORM. NON-JURY	[NO CHANGE]
1.994.	FINAL JUDGMENT FOR DEFENDANT GENERAL FORM. NON-JURY.	[NO CHANGE]
1.995.	FINAL JUDGMENT OF REPLEVIN	[NO CHANGE]
1.996(a).	FINAL JUDGMENT OF FORECLOSURE	[NO CHANGE]
1.996(b).	MOTION TO CANCEL AND RESCHEDULE FORECLOSURE SALE	[NO CHANGE]
1.997.	CIVIL COVER SHEET	[NO CHANGE]
1.997.	INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET	[NO CHANGE]
1.998.	FINAL DISPOSITION FORM	[NO CHANGE]
1.998.	INSTRUCTIONS FOR ATTORNEYS COMPLETING FINAL DISPOSITION FORM	[NO CHANGE]
1.999.	ORDER DESIGNATING A CASE COMPLEX	[NO CHANGE]
APPENDIX — STANDARD INTERROGATORIES FORMS		
FORM 1.	GENERAL PERSONAL INJURY NEGLIGENCE — INTERROGATORIES TO PLAINTIFF	[NO CHANGE]
FORM 2.	GENERAL PERSONAL INJURY NEGLIGENCE — INTERROGATORIES TO DEFENDANT	[NO CHANGE]
FORM 3	MEDICAL MALPRACTICE — INTERROGATORIES TO PLAINTIFF	[NO CHANGE]
FORM 4.	MEDICAL MALPRACTICE — INTERROGATORIES TO DEFENDANT	[NO CHANGE]
FORM 5.	AUTOMOBILE NEGLIGENCE — INTERROGATORIES TO PLAINTIFF	[NO CHANGE]
FORM 6.	AUTOMOBILE NEGLIGENCE — INTERROGATORIES TO DEFENDANT	[NO CHANGE]
STATEWIDE UNIFORM GUIDELINES FOR		

TAXATION OF COSTS IN CIVIL ACTIONS [NO CHANGE]

APPENDIX B

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 shall 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 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 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;
- (58) schedule disclosure of expert witnesses and the discovery of facts known and opinions held by such experts;
- (69) schedule or hear motions in limine;
- (710) pursue the possibilities of settlement;

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

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

(4013) 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. 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.

Committee Notes

1971 Amendment. The 3 paragraphs of the rule are lettered and given subtitles. The present last paragraph is placed second as subdivision (b) because the proceeding required under it is taken before that in the present second paragraph. The time for implementation is changed from settling the issues because the language is erroneous, the purpose of the conference being to settle some and prepare for the trial of other issues. The last 2 sentences of subdivision (b) are added to require uniformity by all judges of the court and to require specification of the documentary requirements for the conference. The last sentence of subdivision (c) is deleted since it is covered by the local rule provisions of rule 1.020(d). The reference to the parties in substitution for attorneys and counsel is one of style because the rules generally impose obligations on the parties except when the attorneys are specifically intended. It should be understood that those parties represented by attorneys will have the attorneys perform for them in the usual manner.

1972 Amendment. Subdivision (a) is amended to require the motion for a pretrial by a party to be timely. This is done to avoid motions for pretrial conferences made a short time before trial and requests for a continuance of the trial as a result of the pretrial conference order. The subdivision is also amended to require the clerk to send to the judge a copy of the motion by a party for the pretrial conference.

1988 Amendment. The purpose of adding subdivision (a)(5) is to spell out clearly for the bench and bar that case management conferences may be used for scheduling the disclosure of expert witnesses and the discovery of the opinion and factual information held by those experts. Subdivision (5) is not intended to expand discovery.

1992 Amendment. Subdivision (a) is amended to allow a party to set a case management conference in the same manner as a party may set a hearing on a motion. Subdivision (c) is amended to remove the mandatory language and make the notice requirement for a case management conference the same as that for a hearing on a motion; *i.e.*, reasonable notice.

2012 Amendment. Subdivisions (a)(5) to (a)(7) are added to address issues involving electronically stored information.

Court Commentary

1984 Amendment. This is a substantial rewording of rule 1.200. Subdivision (a) is added to authorize case management conferences in an effort to give the court more control over the progress of the action. All of the matters that the court can do under the case management conference can be done at the present time under other rules or because of the court's authority otherwise. The new subdivision merely emphasizes the court's authority and arranges an orderly method for the exercise of that authority. Subdivisions (a), (b), and (c) of the existing rule are relettered accordingly. Subdivision (a) of the existing rule is also amended to delete the reference to requiring the attorneys to appear at a pretrial conference by referring to the parties for that purpose. This is consistent with the language used throughout the rules and does not contemplate a change in present procedure. Subdivisions (a)(5) and (a)(6) of the existing rule are deleted since they are now covered adequately under the new subdivision (a). Subdivisions (b) and (c) of the existing rule are amended to accommodate the 2 types of conferences that are now authorized by the rules.

RULE 1.201. COMPLEX LITIGATION

(a) Complex Litigation Defined. At any time after all defendants have been served, and an appearance has been entered in response to the complaint by each party or a default entered, any party, or the court on its own motion, may move to declare an action complex. However, any party may move to designate an action complex before all defendants have been served subject to a showing to the court why service has not been made on all defendants. The court shall convene a hearing to determine whether the action requires the use of complex litigation procedures and enter an order within 10 days of the conclusion of the hearing.

(1) A “complex action” is one that is likely to involve complicated legal or case management issues and that may require extensive judicial management to expedite the action, keep costs reasonable, or promote judicial efficiency.

(2) In deciding whether an action is complex, the court must consider whether the action is likely to involve:

(A) numerous pretrial motions raising difficult or novel legal issues or legal issues that are inextricably intertwined that will be time-consuming to resolve;

(B) management of a large number of separately represented parties;

(C) coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court;

(D) pretrial management of a large number of witnesses or a substantial amount of documentary evidence;

(E) substantial time required to complete the trial;

(F) management at trial of a large number of experts, witnesses, attorneys, or exhibits;

(G) substantial post-judgment judicial supervision; and

(H) any other analytical factors identified by the court or a party that tend to complicate comparable actions and which are likely to arise in the context of the instant action.

(3) If all of the parties, pro se or through counsel, sign and file with the clerk of the court a written stipulation to the fact that an action is complex and identifying the factors in (2)(A) through (2)(H) above that apply, the court shall enter an order designating the action as complex without a hearing.

(b) Initial Case Management Report and Conference. The court shall hold an initial case management conference within 60 days from the date of the order declaring the action complex.

(1) At least 20 days prior to the date of the initial case management conference, attorneys for the parties as well as any parties appearing pro se shall confer and prepare a joint statement, which shall be filed with the clerk of the court no later than 14 days before the conference, outlining a discovery plan and stating:

(A) a brief factual statement of the action, which includes the claims and defenses;

(B) a brief statement on the theory of damages by any party seeking affirmative relief;

(C) the likelihood of settlement;

(D) the likelihood of appearance in the action of additional parties and identification of any nonparties to whom any of the parties will seek to allocate fault;

(E) the proposed limits on the time: (i) to join other parties and to amend the pleadings, (ii) to file and hear motions, (iii) to identify any nonparties whose identity is known, or otherwise describe as specifically as practicable any nonparties whose identity is not known, (iv) to disclose expert witnesses, and (v) to complete discovery;

(F) the names of the attorneys responsible for handling the action;

(G) the necessity for a protective order to facilitate discovery;

(H) proposals for the formulation and simplification of issues, including the elimination of frivolous claims or defenses, and the number and timing of motions for summary judgment or partial summary judgment;

(I) the possibility of obtaining admissions of fact and voluntary exchange of documents and electronically stored information, stipulations regarding authenticity of documents, electronically stored information and the need for advance rulings from the court on admissibility of evidence;

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

(~~JK~~) suggestions on the advisability and timing of referring matters to a magistrate, master, other neutral, or mediation;

(~~KL~~) a preliminary estimate of the time required for trial;

(~~LM~~) requested date or dates for conferences before trial, a final pretrial conference, and trial;

(~~MN~~) a description of pertinent documents and a list of fact witnesses the parties believe to be relevant;

(~~NO~~) number of experts and fields of expertise; and

(~~OP~~) any other information that might be helpful to the court in setting further conferences and the trial date.

(2) Lead trial counsel and a client representative shall attend the initial case management conference.

(3) Notwithstanding rule 1.440, at the initial case management conference, the court will set the trial date or dates no sooner than 6 months and no later than 24 months from the date of the conference unless good cause is shown for an earlier or later setting. The trial date or dates shall be on a docket having sufficient time within which to try the action and, when feasible, for a date or dates

certain. The trial date shall be set after consultation with counsel and in the presence of all clients or authorized client representatives. The court shall, no later than 2 months prior to the date scheduled for jury selection, arrange for a sufficient number of available jurors. Continuance of the trial of a complex action should rarely be granted and then only upon good cause shown.

(c) The Case Management Order. The case management order shall address each matter set forth under rule 1.200(a) and set the action for a pretrial conference and trial. The case management order also shall specify the following:

(1) Dates by which all parties shall name their expert witnesses and provide the expert information required by rule 1.280(b)(45). If a party has named an expert witness in a field in which any other parties have not identified experts, the other parties may name experts in that field within 30 days thereafter. No additional experts may be named unless good cause is shown.

(2) Not more than 10 days after the date set for naming experts, the parties shall meet and schedule dates for deposition of experts and all other witnesses not yet deposed. At the time of the meeting each party is responsible for having secured three confirmed dates for its expert witnesses. In the event the parties cannot agree on a discovery deposition schedule, the court, upon motion, shall set the schedule. Any party may file the completed discovery deposition schedule agreed upon or entered by the court. Once filed, the deposition dates in the schedule shall not be altered without consent of all parties or upon order of the court. Failure to comply with the discovery schedule may result in sanctions in accordance with rule 1.380.

(3) Dates by which all parties are to complete all other discovery.

(4) The court shall schedule periodic case management conferences and hearings on lengthy motions at reasonable intervals based on the particular needs of the action. The attorneys for the parties as well as any parties appearing pro se shall confer no later than 15 days prior to each case management conference or hearing. They shall notify the court at least 10 days prior to any case management conference or hearing if the parties stipulate that a case management conference or hearing time is unnecessary. Failure to timely notify the court that a case management conference or hearing time is unnecessary may result in sanctions.

(5) The case management order may include a briefing schedule setting forth a time period within which to file briefs or memoranda, responses, and reply briefs or memoranda, prior to the court considering such matters.

(6) A deadline for conducting alternative dispute resolution.

(d) Final Case Management Conference. The court shall schedule a final case management conference not less than 90 days prior to the date the case is set for trial. At least 10 days prior to the final case management conference the parties shall confer to prepare a case status report, which shall be filed with the clerk of the court either prior to or at the time of the final case management conference. The status report shall contain in separately numbered paragraphs:

(1) A list of all pending motions requiring action by the court and the date those motions are set for hearing.

(2) Any change regarding the estimated trial time.

(3) The names of the attorneys who will try the case.

(4) A list of the names and addresses of all non-expert witnesses (including impeachment and rebuttal witnesses) intended to be called at trial. However, impeachment or rebuttal witnesses not identified in the case status report may be allowed to testify if the need for their testimony could not have been reasonably foreseen at the time the case status report was prepared.

(5) A list of all exhibits intended to be offered at trial.

(6) Certification that copies of witness and exhibit lists will be filed with the clerk of the court at least 48 hours prior to the date and time of the final case management conference.

(7) A deadline for the filing of amended lists of witnesses and exhibits, which amendments shall be allowed only upon motion and for good cause shown.

(8) Any other matters which could impact the timely and effective trial of the action.

Committee Notes

2012 Amendment. Subdivision (b)(1)(J) is added to address issues involving electronically stored information.

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.

(34) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(45) 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.

(45) 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 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 (b)(45)(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)(45)(A) and (b)(45)(B) of this rule; and concerning discovery from an expert obtained under subdivision (b)(45)(A) of this rule the court may require, and concerning discovery obtained under subdivision (b)(45)(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).

(56) 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.

(de) Sequence and Timing of Discovery. Except as provided in subdivision (b)(45) 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.

(ef) 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.

[Effective 10-1-11: **(fg) 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.]

Committee Notes

1972 Amendment. The rule is derived from Federal Rule of Civil Procedure 26 as amended in 1970. Subdivisions (a), (b)(2), and (b)(3) are new. Subdivision (c) contains material from former rule 1.310(b). Subdivisions (d) and (e) are new, but the latter is similar to former rule 1.340(d). Significant changes are made in discovery from experts. The general rearrangement of the discovery rule is more logical and is the result of 35 years of experience under the federal rules.

1988 Amendment. Subdivision (b)(2) has been added to enable discovery of the existence and contents of indemnity agreements and is the result of the enactment of sections 627.7262 and 627.7264, Florida Statutes, proscribing the joinder of insurers but providing for disclosure. This rule is derived from Federal Rule of Civil Procedure 26(b)(2). Subdivisions (b)(2) and (b)(3) have been redesignated as (b)(3) and (b)(4) respectively.

The purpose of the amendment to subdivision (b)(3)(A) (renumbered (b)(4)(A)) is to allow, without leave of court, the depositions of experts who have been disclosed as expected to be used at trial. The purpose of subdivision (b)(4)(D) is to define the term “expert” as used in these rules.

1996 Amendment. The amendments to subdivision (b)(4)(A) are derived from the Supreme Court’s decision in *Elkins v. Syken*, 672 So. 2d 517 (Fla. 1996). They are intended to avoid annoyance, embarrassment, and undue expense while still permitting the adverse party to obtain relevant information regarding the potential bias or interest of the expert witness. Subdivision (b)(5) is added and is derived from Federal Rule of Civil Procedure 26(b)(5) (1993).

[Effective 10-1-11: **2011 Amendment.** Subdivision (f) is added to ensure that information obtained during discovery is not filed with the court unless there is good cause for the document to be filed, and that information obtained during discovery that includes certain private information shall not be filed with the court unless the private information is redacted as required by Florida Rule of Judicial Administration 2.425.]

2012 Amendment. Subdivisions (b)(3) and (d) are added to address discovery of electronically stored information.

The parties should consider conferring with one another at the earliest practical opportunity to discuss the reasonable scope of preservation and production of electronically stored information. These issues may also be addressed by means of a rule 1.200 or rule 1.201 case management conference.

Under the good-cause test in subdivision (d)(1), the court should balance the costs and burden of the requested discovery, including the potential for disruption of operations or corruption of the electronic devices or systems from which discovery is sought, against the relevance of the information and the requesting party’s need for that information. Under the proportionality and reasonableness factors set out in subdivision (d)(2), the court must limit the frequency or extent of discovery if it determines that the discovery sought is excessive in relation to the factors listed.

In evaluating the good cause or proportionality tests, the court may find its task complicated if the parties know little about what information the sources at issue contain, whether the information sought is relevant, or how valuable it may

be to the litigation. If appropriate, the court may direct the parties to develop the record further by engaging in focused discovery, including sampling of the sources, to learn more about what electronically stored information may be contained in those sources, what costs and burdens are involved in retrieving, reviewing, and producing the information, and how valuable the information sought may be to the litigation in light of the availability of information from other sources or methods of discovery, and in light of the parties' resources and the issues at stake in the litigation.

Court Commentary

2000 Amendment. *Allstate Insurance Co. v. Boecher*, 733 So. 2d 993, 999 (Fla. 1999), clarifies that subdivision (b)(4)(A)(iii) is not intended “to place a blanket bar on discovery from parties about information they have in their possession about an expert, including the party’s financial relationship with the expert.”

RULE 1.340. INTERROGATORIES TO PARTIES

(a) Procedure for Use. Without leave of court, any party may serve upon any other party written interrogatories to be answered (1) by the party to whom the interrogatories are directed, or (2) if that party is a public or private corporation or partnership or association or governmental agency, by any officer or agent, who shall furnish the information available to that party. Interrogatories 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 upon that party. The interrogatories shall not exceed 30, including all subparts, unless the court permits a larger number on motion and notice and for good cause. If the supreme court has approved a form of interrogatories for the type of action, the initial interrogatories on a subject included therein shall be from the form approved by the court. A party may serve fewer than all of the approved interrogatories within a form. Other interrogatories may be added to the approved forms without leave of court, so long as the total of approved and additional interrogatories does not exceed 30. Each interrogatory shall be answered separately and fully in writing under oath unless it is objected to, in which event the grounds for objection shall be stated and signed by the attorney making it. The party to whom the interrogatories are directed shall serve the answers and any objections within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the process and initial pleading upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under rule 1.380(a) on any objection to or other failure to answer an interrogatory.

(b) Scope; Use at Trial. Interrogatories may relate to any matters that can be inquired into under rule 1.280(b), and the answers may be used to the extent permitted by the rules of evidence except as otherwise provided in this subdivision. An interrogatory otherwise proper is not objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or calls for a conclusion or asks for information not within the personal knowledge of the party. A party shall respond to such an interrogatory by giving the information the party has and the source on which the information is based. Such a qualified answer may not be used as direct evidence for or impeachment against the party giving the answer unless the court finds it otherwise admissible under the rules of evidence. If a party introduces an answer to an interrogatory, any other party may require that party to introduce any other interrogatory and answer that in fairness ought to be considered with it.

(c) **Option to Produce Records.** When the answer to an interrogatory may be derived or ascertained from the records (including electronically stored information) of the party to whom the interrogatory is directed or from an examination, audit, or inspection of the records or from a compilation, abstract, or summary based on the records and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party to whom it is directed, an answer to the interrogatory specifying the records from which the answer may be derived or ascertained and offering to give the party serving the interrogatory a reasonable opportunity to examine, audit, or inspect the records and to make copies, compilations, abstracts, or summaries is a sufficient answer. An answer shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party interrogated, the records from which the answer may be derived or ascertained, or shall identify a person or persons representing the interrogated party who will be available to assist the interrogating party in locating and identifying the records at the time they are produced. If the records to be produced consist of electronically stored information, the records shall be produced in a form or forms in which they are ordinarily maintained or in a reasonably usable form or forms.

(d) **Effect on Co-Party.** Answers made by a party shall not be binding on a co-party.

(e) **Service and Filing.** Interrogatories shall be arranged so that a blank space is provided after each separately numbered interrogatory. The space shall be reasonably sufficient to enable the answering party to insert the answer within the space. If sufficient space is not provided, the answering party may attach additional papers with answers and refer to them in the space provided in the interrogatories. The interrogatories shall be served on the party to whom the interrogatories are directed and copies shall be served on all other parties. A certificate of service of the interrogatories shall be filed, giving the date of service and the name of the party to whom they were directed. The answers to the interrogatories shall be served upon the party originally propounding the interrogatories and a copy shall be served on all other parties by the answering party. The original or any copy of the answers to interrogatories may be filed [Effective 10-1-11: in compliance with Florida Rule of Judicial Administration 2.425 and rule 1.280(fg)] by any party when the court should consider the answers to interrogatories in determining any matter pending before the court. The court may order a copy of the answers to interrogatories filed at any time when the court determines that examination of the answers to interrogatories is necessary to determine any matter pending before the court.

Committee Notes

1972 Amendment. Subdivisions (a), (b), and (c) are derived from Federal Rule of Civil Procedure 33 as amended in 1970. Changes from the existing rule expand the time for answering, permit interrogatories to be served with the initial pleading or at any time thereafter, and eliminate the requirement of a hearing on objections. If objections are made, the interrogating party has the responsibility of setting a hearing if that party wants an answer. If the interrogatories are not sufficiently important, the interrogating party may let the matter drop. Subdivision (b) covers the same matter as the present rule 1.340(b) except those parts that have been transferred to rule 1.280. It also eliminates the confusion between facts and opinions or contentions by requiring that all be given. Subdivision (c) gives the interrogated party an option to produce business records from which the interrogating party can derive the answers to questions. Subdivision (d) is former subdivision (c) without change. Former subdivision (d) is repealed because it is covered in rule 1.280(e). Subdivision (e) is derived from the New Jersey rules and is intended to place both the interrogatories and the answers to them in a convenient place in the court file so that they can be referred to with less confusion. The requirement for filing a copy before the answers are received is necessary in the event of a dispute concerning what was done or the appropriate times involved.

1988 Amendment. The word “initial” in the 1984 amendment to subdivision (a) resulted in some confusion, so it has been deleted. Also the total number of interrogatories which may be propounded without leave of court is enlarged to 30 from 25. Form interrogatories which have been approved by the supreme court must be used; and those so used, with their subparts, are included in the total number permitted. The amendments are not intended to change any other requirement of the rule.

[Effective 10-1-11: **2011 Amendment.** A reference to Florida Rule of Judicial Administration 2.425 and rule 1.280(f) is added to require persons filing discovery materials with the court that good cause exists prior to filing discovery materials and that certain specific personal information is redacted.]

2012 Amendment. Subdivision (c) is amended to provide for the production of electronically stored information in answer to interrogatories and to set out a procedure for determining the form in which to produce electronically stored information.

Court Commentary

1984 Amendment. Subdivision (a) is amended by adding the reference to approved forms of interrogatories. The intent is to eliminate the burden of unnecessary interrogatories.

Subdivision (c) is amended to add the requirement of detail in identifying records when they are produced as an alternative to answering the interrogatory or to designate the persons who will locate the records.

Subdivision (e) is changed to eliminate the requirement of serving an original and a copy of the interrogatories and of the answers in light of the 1981 amendment that no longer permits filing except in special circumstances.

Subdivision (f) is deleted since the Medical Liability Mediation Proceedings have been eliminated.

RULE 1.350. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

(a) **Request; Scope.** Any party may request any other party (1) to produce and permit the party making the request, or someone acting in the requesting party's behalf, to inspect and copy any designated documents, including electronically stored information, writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the party to whom the request is directed through detection devices into reasonably usable form, that constitute or contain matters within the scope of rule 1.280(b) and that are in the possession, custody, or control of the party to whom the request is directed; (2) to inspect and copy, test, or sample any tangible things that constitute or contain matters within the scope of rule 1.280(b) and that are in the possession, custody, or control of the party to whom the request is directed; or (3) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on it within the scope of rule 1.280(b).

(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. A request for electronically stored information may specify the form or forms in which electronically stored information is to be produced. If the responding party objects to a requested form, or if no form is specified in the request, the responding party

must state the form or forms it intends to use. If a request for electronically stored information does not specify the form of production, the producing party must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. 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.

(c) **Persons Not Parties.** This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

(d) **Filing of Documents.** Unless required by the court, a party shall not file any of the documents or things produced with the response. Documents or things may be filed [Effective 10-1-11: in compliance with Florida Rule of Judicial Administration 2.425 and rule 1.280(fg)] when they should be considered by the court in determining a matter pending before the court.

Committee Notes

1972 Amendment. Derived from Federal Rule of Civil Procedure 34 as amended in 1970. The new rule eliminates the good cause requirement of the former rule, changes the time for making the request and responding to it, and changes the procedure for the response. If no objection to the discovery is made, inspection is had without a court order. While the good cause requirement has been eliminated, the change is not intended to overrule cases limiting discovery under this rule to the scope of ordinary discovery, nor is it intended to overrule cases limiting unreasonable requests such as those reviewed in *Van Devere v. Holmes*, 156 So. 2d 899 (Fla. 3d DCA 1963); *IBM v. Elder*, 187 So. 2d 82 (Fla. 3d DCA 1966); and *Miami v. Florida Public Service Commission*, 226 So. 2d 217 (Fla. 1969). It is intended that the court review each objection and weigh the need for discovery and the likely results of it against the right of privacy of the party or witness or custodian.

1980 Amendment. Subdivision (b) is amended to require production of documents as they are kept in the usual course of business or in accordance with the categories in the request.

[Effective 10-1-11: **2011 Amendment.** A reference to Florida Rule of Judicial Administration 2.425 and rule 1.280(f) is added to require persons filing

discovery materials to make sure that good cause exists prior to filing discovery materials and that certain specific personal information is redacted.]

2012 Amendment. Subdivision (a) is amended to address the production of electronically stored information. Subdivision (b) is amended to set out a procedure for determining the form to be used in producing electronically stored information.

RULE 1.380. FAILURE TO MAKE DISCOVERY; SANCTIONS

(a) Motion for Order Compelling Discovery. Upon reasonable notice to other parties and all persons affected, a party may apply for an order compelling discovery as follows:

(1) Appropriate Court. An application for an order to a party may be made to the court in which the action is pending or in accordance with rule 1.310(d). An application for an order to a deponent who is not a party shall be made to the circuit court where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under rule 1.310 or 1.320, or a corporation or other entity fails to make a designation under rule 1.310(b)(6) or 1.320(a), or a party fails to answer an interrogatory submitted under rule 1.340, or if a party in response to a request for inspection submitted under rule 1.350 fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, or if a party in response to a request for examination of a person submitted under rule 1.360(a) objects to the examination, fails to respond that the examination will be permitted as requested, or fails to submit to or to produce a person in that party's custody or legal control for examination, the discovering party may move for an order compelling an answer, or a designation or an order compelling inspection, or an order compelling an examination in accordance with the request. The motion must include a certification that the movant, in good faith, has conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order. If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to rule 1.280(c).

(3) Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer shall be treated as a failure to answer.

(4) Award of Expenses of Motion. If the motion is granted and after opportunity for hearing, the court shall require the party or deponent whose conduct necessitated the motion or the party or counsel advising the conduct to pay to the moving party the reasonable expenses incurred in obtaining the order that may include attorneys' fees, unless the court finds that the movant failed to certify in the motion that a good faith effort was made to obtain the discovery without

court action, that the opposition to the motion was justified, or that other circumstances make an award of expenses unjust. If the motion is denied and after opportunity for hearing, the court shall require the moving party to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion that may include attorneys' fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust. If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred as a result of making the motion among the parties and persons.

(b) Failure to Comply with Order.

(1) If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of the court.

(2) If a party or an officer, director, or managing agent of a party or a person designated under rule 1.310(b)(6) or 1.320(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or rule 1.360, the court in which the action is pending may make any of the following orders:

(A) An order that the matters regarding which the questions were asked or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence.

(C) An order striking out pleadings or parts of them or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part of it, or rendering a judgment by default against the disobedient party.

(D) Instead of any of the foregoing orders or in addition to them, an order treating as a contempt of court the failure to obey any orders except an order to submit to an examination made pursuant to rule 1.360(a)(1)(B) or subdivision (a)(2) of this rule.

(E) When a party has failed to comply with an order under rule 1.360(a)(1)(B) requiring that party to produce another for examination, the orders listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows the inability to produce the person for examination.

Instead of any of the foregoing orders or in addition to them, the court shall require the party failing to obey the order to pay the reasonable expenses caused by the failure, which may include attorneys' fees, unless the court finds that the failure was justified or that other circumstances make an award of expenses unjust.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under rule 1.370 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may file a motion for an order requiring the other party to pay the requesting party the reasonable expenses incurred in making that proof, which may include attorneys' fees. The court shall issue such an order at the time a party requesting the admissions proves the genuineness of the document or the truth of the matter, upon motion by the requesting party, unless it finds that (1) the request was held objectionable pursuant to rule 1.370(a), (2) the admission sought was of no substantial importance, or (3) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under rule 1.310(b)(6) or 1.320(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition after being served with a proper notice, (2) to serve answers or objections to interrogatories submitted under rule 1.340 after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under rule 1.350 after proper service of the request, the court in which the action is pending may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant, in good faith, has conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. Instead of any order or in addition to it, the court shall require the party failing to act to pay the reasonable expenses caused by the failure, which may include attorneys' fees, unless the court finds that the failure was justified or that other circumstances make an award of expenses unjust. The

failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by rule 1.280(c).

(e) 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.

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.

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 shall be issued by an attorney of record in an action or by the clerk under the seal of the court and shall state the name of the court and the title of the action and shall 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 shall issue a subpoena for testimony before the court or a subpoena for the production of documentary evidence 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 shall 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, papers, documents (including electronically stored information), or tangible things designated therein, but the court, upon 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 upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, 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 a 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(b). 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 upon a person named therein shall be made as provided by law. Proof of such service shall 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 may command the person to whom it is directed to produce designated books, papers, 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 upon 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 upon 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 or paper writing 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 shall have 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 upon 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.

Committee Notes

1972 Amendment. Subdivisions (a) and (d) are amended to show the intent of the rule that subpoenas for deposition may not be issued in blank by the clerk, but only for trial. The reason for the distinction is valid. A subpoena for appearance before the court is not subject to abuse because the court can correct any attempt to abuse the use of blank subpoenas. Since a judge is not present at a deposition, additional protection for the parties and the deponent is required and subpoenas should not be issued in blank. Subdivision (d) is also modified to conform with the revised federal rule on subpoenas for depositions to permit an objection by the deponent to the production of material required by a subpoena to be produced.

1980 Amendment. Subdivision (c) is revised to conform with section 48.031, Florida Statutes (1979).

1996 Amendment. This rule is amended to allow an attorney (as referred to in Fla. R. Jud. Admin. 2.060(a)B(b)), as an officer of the court, and the clerk to issue subpoenas in the name of the court. This amendment is not intended to change any other requirement or precedent for the issuance or use of subpoenas. For example, a notice of taking the deposition must be filed and served before a subpoena for deposition may be issued.

2012 Amendment. Subdivision (c) is amended to address the production of electronically stored information pursuant to a subpoena. The procedures for dealing with disputes concerning the accessibility of the information sought or the form for its production are intended to correspond to those set out in Rule 1.280(d).

APPENDIX C

Proposed rule

Reasons for change

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 shall 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 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 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;

Amended to provided for pretrial consideration of electronic discovery issues.

(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;

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

(69) schedule or hear motions in limine;

(710) pursue the possibilities of settlement;

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

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

(1013) schedule other conferences or determine other matters that may aid in the disposition of the action.

(b) [No change]

(c) [No change]

(d) [No change]

Committee Notes

1971 Amendment. [No change]

1972 Amendment. [No change]

1988 Amendment. [No change]

1992 Amendment. [No change]

2012 Amendment. Subdivisions (a)(5) to (a)(7) are added to address issues involving electronically stored information.

Court Commentary

[No change]

Proposed rule

Reasons for change

RULE 1.201. COMPLEX LITIGATION

(a) [No change]

(b) Initial Case Management Report and Conference. The court shall hold an initial case management conference within 60 days from the date of the order declaring the action complex.

(1) At least 20 days prior to the date of the initial case management conference, attorneys for the parties as well as any parties appearing pro se shall confer and prepare a joint statement, which shall be filed with the clerk of the court no later than 14 days before the conference, outlining a discovery plan and stating:

(A) a brief factual statement of the action, which includes the claims and defenses;

(B) a brief statement on the theory of damages by any party seeking affirmative relief;

(C) the likelihood of settlement;

(D) the likelihood of appearance in the action of additional parties and identification of any nonparties to whom any of the parties will seek to allocate fault;

(E) the proposed limits on the time:
(i) to join other parties and to amend the pleadings, (ii) to file and hear motions, (iii) to identify any nonparties whose identity

is known, or otherwise describe as specifically as practicable any nonparties whose identity is not known, (iv) to disclose expert witnesses, and (v) to complete discovery;

(F) the names of the attorneys responsible for handling the action;

(G) the necessity for a protective order to facilitate discovery;

(H) proposals for the formulation and simplification of issues, including the elimination of frivolous claims or defenses, and the number and timing of motions for summary judgment or partial summary judgment;

(I) the possibility of obtaining admissions of fact and voluntary exchange of documents and electronically stored information, stipulations regarding authenticity of documents, electronically stored information and the need for advance rulings from the court on admissibility of evidence;

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

(~~J~~K) suggestions on the advisability and timing of referring matters to a magistrate, master, other neutral, or mediation;

Amended to provide for consideration of electronic discovery issues at the initial pretrial conference in a complex case.

(~~K~~L) a preliminary estimate of the time required for trial;

(~~L~~M) requested date or dates for conferences before trial, a final pretrial conference, and trial;

(~~M~~N) a description of pertinent documents and a list of fact witnesses the parties believe to be relevant;

(~~N~~O) number of experts and fields of expertise; and

(~~O~~P) any other information that might be helpful to the court in setting further conferences and the trial date.

(2)–(3) [No change]

(c) [No change]

(d) [No change]

Committee Notes

2012 Amendment. Subdivision (b)(1)(J) is added to address issues involving electronically stored information.

Proposed rule

Reasons for change

RULE 1.280. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) [No change]

(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.

Amended to specifically permit discovery of electronically stored information.

(34) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(45) 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.

(45) 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 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 (b)(45)(C) of this rule concerning fees and expenses as the court may deem appropriate.

Corrects cross-reference

(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)(45)(A) and (b)(45)(B) of this rule; and concerning discovery from an expert obtained under subdivision (b)(45)(A) of this rule the court may require, and

Corrects cross-references

concerning discovery obtained under subdivision (b)(45)(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).

(56) 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) [No change]

(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

Amended to provide limitations on discovery of electronically stored information, including provisions for objection to the discovery and determinations to be made by the court.

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.

(de) Sequence and Timing of Discovery. Except as provided in subdivision (b)(45) 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.

(ef) 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.

[[Effective 10-1-11] **(fg)** [No change in text]

Corrects cross-reference

Committee Notes

1972 Amendment. [No change]

1988 Amendment. [No change]

1996 Amendment. [No change]

[Effective 10-1-11: **2011 Amendment.** [No change in text.]]

2012 Amendment. Subdivisions (b)(3) and (d) are added to address discovery of electronically stored information.

The parties should consider conferring with one another at the earliest practical opportunity to discuss the reasonable scope of preservation and production of electronically stored information. These issues may also be addressed by means of a rule 1.200 or rule 1.201 case management conference.

Under the good-cause test in subdivision (d)(1), the court should balance the costs and burden of the requested discovery, including the potential for disruption of operations or corruption of the electronic devices or systems from which discovery is sought, against the relevance of the information and the requesting party's need for that information. Under the proportionality and reasonableness factors set out in subdivision (d)(2), the court must limit the frequency or extent of discovery if it determines that the discovery sought is excessive in relation to the factors listed.

In evaluating the good cause or proportionality tests, the court may find its task complicated if the parties know little

about what information the sources at issue contain, whether the information sought is relevant, or how valuable it may be to the litigation. If appropriate, the court may direct the parties to develop the record further by engaging in focused discovery, including sampling of the sources, to learn more about what electronically stored information may be contained in those sources, what costs and burdens are involved in retrieving, reviewing, and producing the information, and how valuable the information sought may be to the litigation in light of the availability of information from other sources or methods of discovery, and in light of the parties' resources and the issues at stake in the litigation.

Court Commentary

[No change]

Proposed rule

Reasons for change

RULE 1.340. INTERROGATORIES TO PARTIES

(a) [No change]

(b) [No change]

(c) **Option to Produce Records.** When the answer to an interrogatory may be derived or ascertained from the records (including electronically stored information) of the party to whom the interrogatory is directed or from an examination, audit, or inspection of the records or from a compilation, abstract, or summary based on the records and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party to whom it is directed, an answer to the interrogatory specifying the records from which the answer may be derived or ascertained and offering to give the party serving the interrogatory a reasonable opportunity to examine, audit, or inspect the records and to make copies, compilations, abstracts, or summaries is a sufficient answer. An answer shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party interrogated, the records from which the answer may be derived or ascertained, or shall identify a person or persons representing the interrogated party who will be available to assist the interrogating party in locating and identifying the records at the time they are produced. If the records to be produced consist of electronically stored information, the records shall be produced in a form or forms in which they are ordinarily maintained or in a reasonably usable form or forms.

Amended to recognize that answers to interrogatories may be found in electronically store information

Amended to require that production of electronically stored information be in the form the records are ordinarily maintained or in a form in which they can be used.

(d) [No change]

(e) [No change]

Committee Notes

1972 Amendment. [No change]

1988 Amendment. [No change]

[Effective 10-1-11: **2011 Amendment.** [No change in text.]]

2012 Amendment. Subdivision (c) is amended to provide for the production of electronically stored information in answer to interrogatories and to set out a procedure for determining the form in which to produce electronically stored information.

Court Commentary

[No change]

Proposed rule

Reasons for change

RULE 1.350. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

(a) **Request; Scope.** Any party may request any other party (1) to produce and permit the party making the request, or someone acting in the requesting party's behalf, to inspect and copy any designated documents, including electronically stored information, writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the party to whom the request is directed through detection devices into reasonably usable form, that constitute or contain matters within the scope of rule 1.280(b) and that are in the possession, custody, or control of the party to whom the request is directed; (2) to inspect and copy, test, or sample any tangible things that constitute or contain matters within the scope of rule 1.280(b) and that are in the possession, custody, or control of the party to whom the request is directed; or (3) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on it within the scope of rule 1.280(b).

(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

Amended to include electronically stored information in the list of items that may be produced

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. A request for electronically stored information may specify the form or forms in which electronically stored information is to be produced. If the responding party objects to a requested form, or if no form is specified in the request, the responding party must state the form or forms it intends to use. If a request for electronically stored information does not specify the form of production, the producing party must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. 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.

(c) [No change]

(d) [No change]

Amended to provide procedures for request of the form of electronically stored information, procedures for objection to the form requested, and procedures when no form is specified.

Committee Notes

1972 Amendment. [No change]

1980 Amendment. [No change]

[Effective 10-1-11: **2011 Amendment.** [No change in text]]

2012 Amendment. Subdivision (a) is amended to address the production of electronically stored information. Subdivision (b) is amended to set out a procedure for determining the form to be used in producing electronically stored information.

Proposed rule

Reasons for change

**RULE 1.380. FAILURE TO MAKE DISCOVERY;
SANCTIONS**

(a) [No change]

(b) [No change]

(c) [No change]

(d) [No change]

(e) 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.

Amended to provide that the court may not impose sanctions for failure to provide electronically stored information that has been lost because of the good-faith, routine operation of the system, absent exceptional circumstances.

Committee Notes

1972 Amendment. [No change]

2003 Amendment. [No change]

2005 Amendment. [No change]

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.

Proposed rule

Reasons for change

RULE 1.410. SUBPOENA

(a) [No change]

(b) [No change]

(c) **For Production of Documentary Evidence.** A subpoena may also command the person to whom it is directed to produce the books, papers, documents (including electronically stored information), or tangible things designated therein, but the court, upon 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 upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, 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

Includes electronically stored information in the category of documents to be produced.

Provides for objection to production of electronically stored information because the information is not reasonably accessible due to undue costs or burden. Permits the court to order production for good cause shown and to specify conditions for the discovery.

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 a 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(b). Such notice shall have the same effect and be subject to the same limitations as a subpoena served on the party.

(d) [No change]

(e) [No change]

(f) [No change]

(g) [No change]

(h) [No change]

Committee Notes

1972 Amendment. [No change]

1980 Amendment. [No change]

1996 Amendment. [No change]

2012 Amendment. Subdivision (c) is amended to address the production of electronically stored information pursuant to a subpoena. The procedures for dealing with disputes concerning the accessibility of the information sought or the form for its production are intended to correspond to those set out in rule 1.280(d).

APPENDIX D

Federal Rules of Civil Procedure Rule 26

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) *Initial Disclosure.*

(A) *In General.* Except as exempted by Rule 26(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 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 and location--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 34 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 34, 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 federal 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) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) *Time for Initial Disclosures--In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) *Time for Initial Disclosures--For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) *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.

(2) *Disclosure of Expert Testimony.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

- (ii) the facts or data considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
- (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

- (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
- (ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

- (i) at least 90 days before the date set for trial or for the case to be ready for trial; or
- (ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

(3) *Pretrial Disclosures.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

- (i) the name and, if not previously provided, the address and telephone number of each witness--separately identifying those the party expects to present and

those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence--separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made--except for one under Federal Rule of Evidence 402 or 403--is waived unless excused by the court for good cause.

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) Scope in General. 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--including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

(2) Limitations on Frequency and Extent.

(A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought 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.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed 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.

(3) *Trial Preparation: Materials.*

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral

statement.

(4) Trial Preparation: Experts.

(A) Deposition of an Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party 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 to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending--or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) **Ordering Discovery.** If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) **Awarding Expenses.** Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) **Timing.** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) **Sequence.** Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) **In General.** A party who has made a disclosure under Rule 26(a)--or who has responded to an interrogatory, request for production, or request for admission--must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) **Expert Witness.** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information

must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the 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 or discovery 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;

(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 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 report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name--or by the party personally, if unrepresented--and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) Failure to Sign. Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) Sanction for Improper Certification. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 30, 1970, effective July 1, 1970; April 29, 1980, effective August 1, 1980; April 28, 1983, effective August 1, 1983; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 17, 2000, effective

December 1, 2000; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; April 28, 2010, effective December 1, 2010.)

I certify that these rules were read against *West's Rules of Court – State (2011)*. I also certify that this document was prepared in accordance with the font requirements of *Fla. R. App. P. 9.210(a)(2)*.

Ellen H. Sloyer
Rules Committee Liaison
The Florida Bar
651 E. Jefferson St.
Tallahassee, FL 32399
850/561-5709