

## The New Florida Electronic Discovery Rules Compared to Their Federal Counterparts

### What Happened?

Seven of the Florida Rules of Civil Procedure have been amended to address Electronically Stored Information (“ESI”). The amendments are generally patterned on the 2006 amendments to the Federal Rules of Civil Procedure, but they are not identical in all respects to the federal rules.

### What Rules Were Amended?

The amendments affect the following rules:

- 1.200 (case management conference).
- 1.201 (initial case management report and conference in “complex litigation”).
- 1.280 (limitations on discovery).
- 1.340 (option to produce business records to answer interrogatories).
- 1.350 (production of documents).
- 1.380 (discovery sanctions).
- 1.410 (subpoena for documents).

### When Do They Take Effect?

The rules do not contain a “grandfather” provision exempting litigation already pending. The Court’s opinion adopting the amendments simply states, “[t]hese amendments shall become effective September 1, 2012, at 12:02 a.m.”

### Differences Between New Florida Rules and Federal Rules

The attached chart generally summarizes the differences between the new *Florida* rules and the existing *federal* rules governing ESI. The tables do not summarize how the new Florida rules differ from the *prior* Florida rules. The latter appears in track changes in the July 5, 2012, Florida Supreme Court’s decision adopting the amendments. A copy of the Court’s decision is available at <http://www.floridasupremecourt.org/decisions/2012/sc11-1542.pdf>.

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For more information, please contact:

**Robert W. Pass**  
[rpass@carltonfields.com](mailto:rpass@carltonfields.com)  
[www.carltonfields.com/rpass](http://www.carltonfields.com/rpass)  
850.513.3608





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Federal Rule of Civil Procedure	2012 Florida Rule of Civil Procedure	General Topic Addressed	Notable Textual Differences
26(a)(1)(A)(ii), 26(f) 16(b)(1)	No counterpart 1.200 and 1.201 1.200 and 1.201	Initial disclosure of certain types of ESI  Meeting of counsel for discovery plan  Scheduling/case management orders  General overview (see additional discussion below)	A substantial difference between the federal and Florida rules lies in the automatic “disclosure” of ESI, and the obligation of counsel to have initial “meet and confers” on ESI.  With minor exceptions, the federal rules <i>require</i> an initial meeting of counsel to discuss ESI (Rule 26(f)) and <i>require</i> the disclosure of certain ESI without waiting for a discovery request. (Rule 26(a)(1)(A)(ii)).  The Florida rules require such an initial meeting of counsel <i>only</i> in “complex actions” (Rule 1.201) and <i>do not</i> mandate initial disclosures of ESI without a discovery request.  The federal rules also mandate that the court issue a “scheduling order” (Rule 16(b)(1)), which may address ESI, while the Florida rules require a case management order, which may address ESI, only in “complex actions” (Rule 1.201) or where the court or a party elects to convene a case management conference.
16(a) + (b)	1.200(a)(5), (6), (7)	Case management conference before the court – ESI topics for discussion	Rule 1.200 covers case management conferences held before Florida state courts. It now specifically encourages discussion of several ESI topics.  Neither Rule 16 nor Rule 1.200 require that the court automatically convene a case management conference (a “pretrial conference” under Rule 16(a), of which there can be multiple such conferences), absent a party request.  However, a case management conference is mandatory in Florida where the action is designated as a “complex action” or “complex litigation.” (See discussion of Rule 1.201 below.)  The Florida rule is more specific than the federal rule in identifying ESI topics that may be addressed if a case management conference is held. Topics specifically mentioned in the Rule 1.200 include authenticity, preservation, format of production, advance rulings on ESI admissibility, phased discovery, and whether discovery should be limited to particular individuals, time periods or sources.
16(a) + (b)	1.201(b)(1)(I), (J)	Case management conference for a “complex action” – ESI topics for discussion	The Florida complex litigation rule requires a case management conference in cases designated as a “complex action” or “complex litigation.” The Federal Rules of Civil Procedure do not have such a requirement. (Note that the Manual For Complex Litigation, when applied to an action, effectively makes such conferences mandatory.)  Rule 1.201 is more specific in identifying ESI topics to be addressed.  Prior to the 2012 amendments Rule 1.200(b)(1)(I) already included certain specific ESI topics (those are now required in Rule 1.200(a)(5) and (6) for discussion at a case management conference.)  The 2012 ESI amendments to Rule 1.201 added a specific requirement for discussion of preservation, format of production, phased discovery, and whether discovery should be limited to particular individuals, time periods or sources.



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16(a) + (b) (pretrial conference and scheduling order)	1.201(b)(1)(I), (J)	Case management conference for "complex litigation"	<p>Rules 1.200 and 1.201 now specify the same ESI topics for discussion. (See the list of topics set out in the discussion of Rule 1.200 above.) The key difference between Rule 1.200 and Rule 1.201 is that the complex litigation rule requires such a conference, while the non-complex litigation rule requires it only on court order.</p> <p>A court order establishing an action as "complex" is required before the complex litigation rule applies. Rule 1.201(a)(1).</p> <p>Florida's three "complex litigation business courts" (Miami, Tampa, Orlando) have more specific definitions of what cases fall within their purview and often involve additional, specific procedures for ESI. (A case can be designated as "complex" in any court, not just the three "business courts.")</p>
26(f)(3)(C)	1.201(b)(1)(I), (J) (for complex litigation); 1.200(a)(5), (6), (7) (cases generally).	Initial conference of counsel	<p>The Florida complex litigation rule, Rule 1.201, requires a meeting of counsel to discuss ESI issues (among other things), specifically including those topics listed above. Such a conference is not required by the Florida rules other than for complex litigation. As a practical matter, however, something similar to a Rule 26(f)(3)(C) conference should occur in all cases involving ESI, regardless of whether they constitute "complex litigation," when a case management conference before the court is scheduled. (See discussion of Rule 1.200, above.)</p>
26(a)(1)(A)(ii)	None.	Initial Disclosures	<p>The Florida rules do not incorporate the Federal rule's automatic disclosure requirement for ESI (or other materials). However, both Rules 1.200(a)(5) and 1.201(b)(1)(I), (J) now require discussion of a "voluntary exchange" of ESI at a case management conference before the court (and at an initial meeting of counsel under Rule 1.201).</p>
26(b)(2)(B), 26(b)(2)(C)	1.280(b)(3), (d)	Limitations on ESI discovery when "inaccessible" due to undue burden or cost; "proportionality" principles	<p>Florida now explicitly authorizes (but does not require) cost shifting as a condition of discovery of ESI not reasonably accessible because of undue burden or cost. The federal rule does not do so explicitly, but permits the court to specify "conditions" for discovery, which has been held to include cost shifting.</p> <p>The Florida rule also expressly includes the format of production of ESI as a potential basis for objecting to discovery as imposing undue burden or cost. The federal rule does not expressly do so.</p> <p>The Florida rule adopts the federal "proportionality" principles to limit ESI (and other) discovery.</p> <p>The Florida Rules Committee Notes (not adopted by the Court as "official") also suggest that the parties and court consider "focused discovery, including sampling of the sources [of ESI]," in ruling on whether to permit discovery of ESI claimed to be "inaccessible due to undue burden or cost."</p>



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33(d)	1.340(c)	Option to produce designated ESI to answer interrogatories	The Florida rule expressly requires ESI produced under this rule to be produced in a format in which is ordinarily maintained or in reasonably useable format. Rule 33(d) does not expressly so provide, although Rule 34(b)(2)(E) requires production in such a form generally, if the request does not specify a particular form of production.
34(b)	1.350(b)	Procedure for designating format for production of ESI and specifying that it must be produced, unless agreed, in form in which ordinarily maintained or reasonably useable form and that a party need not produce ESI in more than one format (absent court order or stipulation).	The Florida rule does not contain the specific statement that appears in Rule 34(b) that a party need not produce the same ESI in more than one form.
37(e)	1.380(e)	"Limited safe harbor" prohibiting sanctions "under these rules" for ESI lost "as a result of the routine, good-faith operation of an electronic information system."	<p>There are no differences between the text of the federal rule and the Florida rule.</p> <p>The Rules Committee Note to Rule 1.380 generally tracks part of the Committee Notes to the 2006 amendments that created Federal Rule 37(f) (now 37(e)) in pointing out that a party may not "exploit" the routine operation of an information system to thwart discovery obligations. In other words, the Rules Committee Notes indicate that the Florida rule, like the Federal rule, may not be read to provide a complete override of preservation obligations that otherwise exist under applicable substantive law.</p> <p>Unlike the Federal rule and the Federal Advisory Committee Notes to Rule 37(e), the Florida Rules Committee Notes expressly include "requests to preserve such information" (e.g., a "preservation demand letter") as a consideration in determining whether a party acted in good faith in allowing a computer system's routine operation to destroy ESI.</p>
45(c), (d)(1)	1.410(c)	Third party rights when subpoenaed to produce ESI that is inaccessible due to burden or cost.	The Florida rule does not include language similar to Rule 45(c) (1) imposing an affirmative obligation on attorney not to serve a subpoena that imposes under burden or expense and requiring judicial sanctions and award of attorneys' fees for a violation.