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August 31, 2016

VIA EMAIL

The Honorable Steven S. Stephens, Chair
Rules of Judicial Administration Committee
stephenss@fljud13.org

**Re: Appellate Court Rules Committee Comments to Proposed Amendments to Rule of
Judicial Administration 2.140(a)(6) Relating to the Rule Amendment Process**

Dear Judge Stephens,

On behalf of the Appellate Court Rules Committee ("ACRC"), I am writing to provide to you our Committee's comments to the Rules of Judicial Administration Committee's ("RJAC") proposed amendments to Rule 2.140. When the proposed amendment of Rule 2.140 was first under consideration by the RJAC, former ACRC chair Wendy Loquasto appointed an ad hoc subcommittee to review the proposed amendments on behalf of the ACRC. Based on the work of that subcommittee, the ACRC provided comments to Murray Silverstein, then the chair of the RJAC, on December 24, 2014. (See Attachment 1). Now that the RJAC has formally approved proposed amendments to Rule 2.140, the ACRC provides the following comments to the new proposal to amend Rule 2.140(a)(6).

The ACRC recognizes the RJAC's laudable goals of avoiding conflict in the rules sets and encouraging better communication between the rules committees when rules affect more than one area of practice. The ACRC is appreciative of the significant work that the RJAC has undertaken in that regard and believes many of the proposed changes to Rule 2.140 as a whole will be beneficial. The ACRC has some concerns, however, regarding the proposed amendments to Rule 2.140(a)(6). In sum and as explained below, the ACRC is concerned that as currently worded, the proposed amendments to Rule 2.140(a)(6) would add unnecessary burdens and delay to the rulemaking process; are unclear in their scope (which could further contribute to the burdens and delay); and may result in unintentionally shifting the meaningful input on a rule away from a substantive committee with members who specialize in that area of practice to the RJAC, where a majority of the members may have little or no experience using that rules set. For these reasons, the ACRC suggests alternative language to try to further the work and goals of the RJAC while addressing the ACRC's concerns.

RJAC's Historical Role as the Coordinating Committee

The RJAC was given the role of a “coordinating committee” in 1984 amendments to the Rules of Judicial Administration. The Florida Bar Re: Rules of Judicial Administration, 458 So. 2d 1110 (Fla. 1984). The Florida Supreme Court explained the scope and intent of this function:

A new rule, Rule 2.130(b)(5), has been submitted which provides for a coordinating function of all rule proposals to be assigned to the Judicial Administration Rules Committee. The intent is to identify how proposed changes in one set of rules inter-relate with existing and proposed rules in other areas. This coordinating function provides a means for determining the potential impact of rules changes on rules in other areas of the law.

458 So. 2d at 1110-11.

The 1984 version of Rule 2.130(b)(5) expressly stated that the RJAC's role as coordinating committee involved identifying conflicts and referring them to the applicable committees for resolution. The rule read as follows:

(5) The Judicial Administration Rules Committee shall also serve as a Rules Coordinating Committee. Each rules committee shall have at least one of its members appointed to the Judicial Administration Rules Committee to serve as liaison. All proposed rules changes shall be submitted to the Judicial Administration Rules Committee which shall then refer all proposed rules changes to those rules committees that might be affected by the proposed change. All proposed changes shall be submitted by June 30 of each year of the rules cycle.

(emphasis supplied).

The petition filed by the RJAC requesting the amendment to make it a “coordinating committee” likewise confirms that the intent of this role was to identify conflicts and refer those conflicts to the relevant rules committees for resolution. The stated “reason for proposed amendment” in the RJAC petition was: “This rule provides for a coordinating function to be assigned to the Judicial Administration Rules Committee. The intent is to ensure that all proposed changes are referred to a rules committee that might be affected by a proposed change in a rule on another rules committee. The committee felt this function was important to provide adequate review of the potential impact of a rules change in one area upon other rules.” RJA Proposed Amendments for cycle ending July 1, 1984, page 5.

The RJAC's role as a “coordinating committee” is currently set forth in Rule 2.140(a)(6), now the subject of the RJAC's proposed amendment. Rule 2.140(a)(6) provides:

All committees shall provide a copy of any proposed rules changes to the Rules of Judicial Administration Committee within 30 days of a committee's affirmative vote to recommend the proposed change to the supreme court. The Rules of Judicial Administration Committee shall then refer all proposed rules changes to those rules committees that might be affected by the proposed change.

Presently the RJAC acts as an intermediary to ensure that all rules committees are aware of proposed rules or amendments that may impact their rules set. The resolution of any perceived impact or conflict between rules sets is then referred to and resolved by the rules committees that would be affected by any change.

The History and Purpose of the Proposed Amendments to Rule 2.140

Based upon a review of the RJAC's agendas and minutes, amendments to Rule 2.140 arose from a desire to increase greater communication among the rules committees and to avoid conflict and redundancy between rules sets. There was a shared belief that if the rules committees communicated more frequently and before rule amendments were formally approved, then efforts at systemic changes could be better coordinated and conflicts could be potentially avoided. The ACRC generally agrees with these goals.

There were, however, vocal RJAC members who expressed concern about making consistency a priority over the best practices for each area of law. Those members explained that there may be very purposeful and good reasons why a rule would operate differently in one rule set than it does in the other rules of procedure. The ACRC generally agrees with these concerns also.

Ultimately, in its January 2015 report, the RJAC's Ad Hoc Subcommittee outlined three goals to accomplish through amendment of Rule 2.140:

- (1) describe the qualifications for membership on the RJAC and the role of rules committee liaisons;
- (2) establish an efficient and consistent procedure for ensuring that the RJAC and other rules committees are promptly apprised of proposed rules changes that could affect their rules sets; and
- (3) clarify the RJAC's role as a "rules coordinating committee" to reflect that the RJAC should determine whether proposed rule changes address a matter of common or general application and make recommendations for resolving inconsistencies, conflicts, and redundancies among the rules sets.

In that same report, the Ad Hoc Subcommittee acknowledged that complete consensus on how Rule 2.140 should be amended had not been reached. It was noted, however, that members of other rules committees expressed a shared view that amendments to Rule 2.140 should not authorize the RJAC to veto changes proposed by other rules committees, or to dictate how other rules committees address matters that those committees considered to be unique to their individual rule set.

The Proposed Amendments to Rule 2.140(a)(6)

The RJAC has now approved a proposal to amend Rule 2.140(a)(6) as follows:

(6) ~~The Rules of Judicial Administration Committee~~RJAC shall also serve as ~~the~~athe central rules coordinating committee. The RJAC's consideration of a rule proposal shall assess specifically whether the rule proposal addresses a matter of general or common application and shall include recommendations for reconciling competing or inconsistent rules, avoiding conflicts, ensuring consistency, limiting redundancy, and minimizing repetition among rules. The RJAC shall communicate regularly and promptly with other affected rules committees regarding the RJAC's considerations. The RJAC shall acknowledge promptly each rule proposal approved

formally by a rules committee and may issue a formal response to each rule proposal approved by a rule committee. Each rules committee shall have at least 1 of its members appointed to the Rules of Judicial Administration Committee to serve as liaison. All committees shall provide a copy of any proposed rules changes to the Rules of Judicial Administration Committee within 30 days of a committee's affirmative vote to recommend the proposed change to the supreme court. The Rules of Judicial Administration Committee shall then refer all proposed rules changes to those rules committees that might be affected by the proposed change within 30 days after the next regularly-scheduled meeting of the RJAC for regular-cycle submissions and within 30 days after formal approval by a rules committee for out-of-cycle submissions. Unless a deadline established by the supreme court or by the board of governors of The Florida Bar does not permit, the RJAC's response to a rule proposal shall be included and may be addressed in the submission of the rule proposal to the board of governors of The Florida Bar and to the supreme court.

As presently drafted, proposed Rule 2.140(a)(6) significantly expands the role of RJAC. Currently and as shown, the RJAC identifies proposed rules that may affect another rules set and refers them to the relevant rules committees for resolution. Under the proposed rule, the RJAC would be tasked with “consideration” of all rule proposals. This implies a deliberative process much like a court deciding an issue. And the RJAC’s consideration is not limited to identifying conflicts in the rules and referring them to the affected rules committees for resolution. Instead, the RJAC is to assess if the rule “addresses a matter of general or common application” and to make its specific “recommendations for reconciling competing or inconsistent rules, avoiding conflicts, ensuring consistency, limiting redundancy, and minimizing repetition among rules.” Because of this additional step in the rulemaking process, the amendment requires that any proposal approved by a rules committee will now have to await a formal response from the RJAC at its next regularly scheduled meeting. And the RJAC’s formal response may then require further consideration by the proposing committee at *its* next regularly scheduled meeting thereafter.

The ACRC’s Three Concerns with the Proposed Amendment

The ACRC has three concerns with the proposed amendment to Rule 2.140:

- 1. The proposed amendment adds an extra step to an already cumbersome rulemaking process that will cause significant and often unnecessary delay.**

The proposed amendments to Rule 2.140(a)(6) contemplate that the RJAC may issue a formal response to each rule proposal approved by another committee within 30 days after the next regularly-scheduled meeting of the RJAC for regular-cycle submissions and within 30 days after formal approval by a rules committee for out-of-cycle submissions. The amendments also contemplate that the RJAC’s response (and if the affected committee chooses to address it, their reply to the RJAC’s response) shall be included in the submission of the rule proposal to The Florida Bar’s Board of Governors and to the Florida Supreme Court. This “response process” for every proposed rule or rule amendment adds another layer of labor and undue delay to an already thorough and lengthy rule amendment process.

The delay created by the amendments is best articulated through example. The ACRC often vets, debates, and works on referrals in its subcommittees for months before proposing amendments for the full committee’s consideration. Assuming the ACRC approves an amendment at the January Bar meeting, the RJAC’s deadline for issuing a response would be 30 days after its next regularly scheduled meeting in June—at least a six-month period of time. If the RJAC decides not to respond, the delay is only that six months. But if the RJAC issues a formal response as contemplated by the amendments, the ACRC will need time to reconvene the subcommittee that worked on the proposal and to have the subcommittee

report its recommendations to the full ACRC. Depending on how extensive the RJAC's recommendations are, the ACRC may need to discuss and vote on the appropriate action to take in response to the RJAC's response at the ACRC's next full committee meeting—September at the earliest, but possibly the next January. This could result in scenarios where proposals approved by the ACRC are not ready for submission to the Board of Governors or the Florida Supreme Court for at least six months, and possibly more than a full year, after the ACRC has approved them. In addition, if the ACRC were to ultimately disagree with the RJAC's recommendations, additional work would no doubt be required of both committees when the rule was presented to the Board of Governors or the Florida Supreme Court.

This delay will not only impact the particular proposal that is the subject of the RJAC review. Anytime the RJAC files a response that must be included in the ACRC's proposal packet, the ACRC will need to carve out time from its next meeting agenda to consider the response. As a result, the ACRC may be unable to address as many requests for amendment in the limited time provided for its meetings or in each three-year cycle.

It is respectfully suggested that this additional burden on the committees and delay in the rule process is not merited when the majority of rules amendment proposals present no conflict across the rules sets. And in the few cases in which such conflicts arise, there are existing mechanisms in place to resolve them, as discussed further below.

2. The proposed amendment does not clearly define the scope of the RJAC's proposed review, consideration, and comment.

The ACRC's concern regarding additional burdens and delay is heightened by the seemingly broad language of the proposed amendment and the difficulty in interpreting the precise scope of the RJAC's new review process.

For example, the new amendments contemplate the RJAC will review every other committee's rule proposals to determine whether the proposals address a "matter of general or common application." Yet the RJAC has provided no definition or guidance regarding what constitutes a "matter of general or common application." Indeed, members of the RJAC Ad Hoc Subcommittee acknowledged their struggle to articulate what would constitute a "rule of general application." And former Chair Loquasto's prior comments to the RJAC on an earlier draft of Rule 2.140 also explained that no consensus had been reached as to what those potential rules of general application might cover.

In the absence of a clear definition of a "matter of general or common application," whether or not a proposed rule falls into this category will generally be left to the discretion of the reviewer, i.e., the assigned RJAC member. While one RJAC member may limit the definition to a rule that has equal application across *all* rules sets, another RJAC member may consider a rule that impacts two or more rules sets to be a matter of common application that should be applied elsewhere. Moreover, the question may beg a result-driven analysis: If a rule passed by the RJAC will apply to all proceedings, then such a rule is or will be a "matter of general or common application," regardless of its impact on differing areas of practice. In the absence of a definition or further guidance, what constitutes a matter of general or common application could be infinite—and would seem to be determined largely by the eye of the beholder.

In truth, there is and has been legitimate debate about what is or should be considered a "matter of general or common application." The RJAC's Ad Hoc Subcommittee's January 2015 report suggested that "several rules of common or general application are easily identified, such as computation of time,

service and filing of pleadings, motion, notices, etc., attorney appearances, attorney signature, basic discovery devices, court testimony, and motions for rehearing.” While there certainly may be “rules of common or general application” crafted on these subjects, the potential impact of such rules could be very different across the different areas of practice. Discovery is different in criminal and civil proceedings, and does not occur at all in appellate proceedings, for example. And limited appearances may work one way in trial courts but differently in appellate courts.

A similar concern is presented over what may be considered “competing or inconsistent” rules, as compared to rules that actually create a conflict. Where two rules are diametrically opposed, a conflict will be easy to identify. But the RJAC’s materials provide no guidance as to what may constitute a “competing or inconsistent rule” that would merit RJAC intervention under new Rule 2.140.

Recently, RJAC’s liaison subcommittee’s “coordinating” activity has gone beyond merely looking for conflicts between rules sets. As reflected in recent RJAC Liaison Subcommittee reports and RJAC minutes, some RJAC members have begun to comment on language or procedural choices in rules proposed by the other substantive rules committees, even where no conflict exists. Such recent actions suggest the RJAC may identify rules to be “competing or inconsistent” more frequently than the RJAC contemplated when it determined the RJAC should prepare formal, written responses to all such rules.

Because terms like “matter of general or common application” and “competing and inconsistent” remain undefined and unclear, it is impossible to determine how many potential rule proposals will be subject to delay as a result of the RJAC preparing a written response with recommendations of further action. However, it is reasonable to conclude that the broader these concepts are interpreted to be, the more responses the RJAC may draft and the more proposals will be delayed.

3. The proposed rule risks shifting the meaningful input on rules away from the substantive rules committees that are made up of practitioners who specialize in the use of those rules to a committee with a majority of members without specialized experience in the rules at issue.

Currently, the primary responsibility for both crafting rules of procedure in discrete practice areas and reconciling any perceived conflicts in the rules lies with the respective substantive rules committees. In turn, those committees are made up of “attorneys and judges with extensive experience and training in the area of practice of the committee calling for regular, frequent use of the rules.” Rule 2.140(a)(4). And under current Rule 2.140(a)(6), the RJAC acts effectively as an intermediary to ensure that all rules committees are aware of rules that may impact their committee’s rules or pose a potential conflict. That process then promotes having the affected committees work together when necessary to propose rules that are consistent and in keeping with their respective areas of practice.

To date, the RJAC has not been tasked with formally commenting on the work of the substantive committees, much less required to propose recommendations as to how those substantive rules should be crafted. That the RJAC will now directly advise the other committees, the Board of Governors, and the Florida Supreme Court regarding how proposals should be reconciled or rewritten is a significant departure from its current coordinating function.

To the extent the proposed amendments to Rule 2.140(a)(6) contemplate that the RJAC will review all rules and recommend changes to already-approved amendments by other substantive committees, the amendments tend to undermine the rationale for having members with specialized knowledge on each rules committee. By way of example, the ACRC’s members with extensive experience in appellate practice and procedure should be in the best position to determine what rules of

procedure should apply in appellate proceedings and the likely impact of proposed rule changes on appellate practice—whether or not non-appellate practitioners might view a proposed rule as one of “common application.” But rather than let the ACRC resolve that issue, the proposed amendments to Rule 2.140(a)(6) would permit RJAC members with potentially little or no appellate court experience to review ACRC proposals and make alternative recommendations to the Board of Governors or the Florida Supreme Court.

And while the substantive rules committees are provided representation on the RJAC, their limited representation would not carry the day over the larger group of diverse practitioners. As a result, if the RJAC is to truly shift from a coordinating committee to a reviewing committee with formal substantive input on the text of rules, perhaps the makeup of the committee should be changed or other protections put in place to ensure the expertise of the substantive committee members is not easily overridden by other RJAC members who have little or no experience with those rules or subject matters.

The Purposes Behind The Amendments Can Be Served By Already-Existing Mechanisms

As noted, the ACRC supports the RJAC’s laudable goals to increase greater communication among the various rules committees and to avoid conflict and redundancy between rules sets. To that end, the existing rules and procedures rightfully allow the RJAC the opportunity to participate in the other rules committee’s amendment process.

Rule 2.140(a)(6) requires a rules committee to “provide a copy of any proposed rule changes” to the RJAC within 30 days of the rules committee’s vote affirming the proposal. The RJAC then refers those proposals to any “rules committees that might be affected by the proposed change.” It is now common for members of the RJAC to contact the referring committee if they perceive a problem in the proposed rule or rule amendment. Rule 2.140(a)(5) also requires committees to “keep minutes of their activities” and furnish those minutes to the Supreme Court Clerk, the Board of Governors, and proponents of a proposal. These mechanisms keep the RJAC apprised of and involved in other committees’ rule proposals.

The schedule for rules proposals outlined by Rule 2.140(b) also gives RJAC the opportunity to comment on all rule proposals. As set forth therein, all proposed rule changes are published and “[a]ny person desiring to comment upon proposed rule changes” can submit written comments to the relevant committee. The relevant committee must then consider all comments received and report any changes that follow—or the reasons no changes were made—to the Board of Governors.

Furthermore, once the proposed amendment is filed with the Florida Supreme Court, the RJAC has another opportunity to comment. Under Rule 2.140(b)(4)(D) and (b)(4)(G), a rules committee must report to the Florida Supreme Court the actions taken in response to comments the committee received before the proposal was filed. And under Rule 2.140(b)(6), the RJAC could submit comments directly to the Florida Supreme Court after the proposed amendment is filed. The chair of the proposing rules committee must thereafter respond to all such comments. These existing mechanisms provide the RJAC ample opportunity to comment on any proposals it receives.

Aside from the mechanisms already in place in the Rules of Judicial Administration, the individual rules committees may have their own procedures in place to further ensure proposals are available for public view and comment. For example, the ACRC posts a chart of its active referrals on its webpage. Pursuant to the ACRC’s Internal Operating Procedure V.c., upcoming meeting agendas and minutes are posted to the ACRC’s website. Consistent with the amendment process set forth in the Rules

of Judicial Administration, the ACRC's procedures require relevant subcommittees to review any comments made to proposals and prepare written responses thereto (IOP V.i.). And the ACRC is well known for working with other rules committees on matters that affect more than one rules set. See, e.g., In Re Amendments to The Florida Rules Of Criminal Procedure, 167 So.3d 395 (Fla. 2015) (criminal submission joined by ACRC to jointly address conflict between rules regarding rendition).

In addition, the structure of the RJAC, which includes members from the other substantive rules committees, already promotes the goal of encouraging greater communication before rule amendments are formally approved. In recent years, the RJAC has successfully navigated communications with and among the various rules committees to gain consensus where consensus could be had without a negative impact on any specific rules set. And to further that effort, the RJAC's proposed amendment to Rule 2.140(a)(5) will also increase pre-approval communications by requiring the committees to furnish their agendas and minutes to other committees.

Given the concerns expressed above and the existing procedures in place to identify and resolve conflicts in the rules—procedures that are consistent with the premise that those practitioners most experienced in a rule set should be the arbiters of the best proposed rules for that area of practice—the ACRC believes that the proposed amendments to Rule 2.140(a)(6) are unnecessary and unwieldy and should be reconsidered.

ACRC's Alternative Proposal

ACRC agrees that all of the rules committees can benefit from greater communication and coordination. Therefore, ACRC proposes that Rule 2.140(a)(6) be amended as follows:

RULE 2.140. AMENDING RULES OF COURT

(a) **Amendments Generally.** The following procedure shall be followed for consideration of rule amendments generally other than those adopted under subdivisions (d), (e), (f), and (g):

(1)–(5) [No change to the proposed amendments]

(6) The Rules of Judicial Administration Committee shall also serve as the central rules coordinating committee. ~~Each rules committee shall have at least 1 of its members appointed to the Rules of Judicial Administration Committee to serve as liaison. All committees shall provide a copy of any proposed rules changes to the Rules of Judicial Administration Committee within 30 days of a committee's affirmative vote to recommend the proposed change to the supreme court. The Rules of Judicial Administration Committee shall then refer all proposed rules changes to those rules committees that might be affected by the proposed change. The Rules of Judicial Administration Committee's consideration of the rule proposal shall assess specifically whether the rule proposal addresses a matter of general or common application and shall include recommendations for reconciling competing or inconsistent rules, avoiding conflicts, ensuring consistency, limiting redundancy, and minimizing repetition among rules. The Rules of Judicial Administration Committee shall communicate regularly and promptly with other affected rules committees regarding the Rules of Judicial Administration Committee's considerations. The Rules of Judicial Administration Committee shall consider whether any proposed rule conflicts with another rule of procedure, and may make informal recommendations to the affected committee(s) for ensuring consistency, limiting redundancy, and minimizing repetition among rules. The Rules of Judicial Administration Committee shall acknowledge promptly each rule proposal approved formally by a rules committee and refer all proposed rules changes to those rules committees~~

~~that might be affected by the proposed change. The Rules of Judicial Administration Committee may issue a formal response to each rule proposal approved by a rules committee within 30 days after the next regularly scheduled meeting of the Rules of Judicial Administration Committee for regular cycle submissions and within 30 days after formal approval by a rules committee for out of cycle submissions. Unless a deadline established by the supreme court or by the board of governors does not permit, the Rules of Judicial Administration Committee's response to a rule proposal shall be included and may be addressed in the submission of the rule proposal to the board of governors and to the supreme court.~~

(7) [No change to the proposed amendments]

(b)-(h) [No change to the proposed amendments]

When RJAC serves its intended function as the “coordinating committee” by identifying conflicts and referring them to the relevant committees, as it has increasingly done in recent years, the process works.

The above proposed changes thus contemplate the RJAC will continue to serve in that role and that the originating committee—the one with the specialized knowledge of the rule’s impact—should continue to be tasked with addressing any potential conflict. And under the RJAC’s proposed changes to Rule 2.140(a)(5), any other committee that may be affected by proposed rules will have received the proposed changes. If necessary, two or more affected committees can work together to resolve identified areas of conflict or potential conflict. In the opinion of the ACRC, this proposal can strike a proper balance between the goals of the RJAC and the concerns of substantive rules committees.

If you have any questions regarding these comments, please feel free to contact me.

Sincerely,



Kristin Norse
Chair, Appellate Court Rules Committee

cc (by email):

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