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IN THE SUPREME COURT OF FLORIDA

IN RE: FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.570 **CASE NO.: 17–**

OUT-OF-CYCLE REPORT OF THE FLORIDA BAR BOARD OF GOVERNORS

Michael J. Higer, President, Michelle R. Suskauer, President-Elect of The Florida Bar Board of Governors ("board"), and John F. Harkness, Jr., Executive Director of The Florida Bar, respectfully file this out-of-cycle report under Florida Rule of Judicial Administration 2.140(c) seeking adoption of proposed Florida Rule of Judicial Administration 2.570 (Parental Leave). The board approved this rule by acclamation; given the attendance, the vote is 45-0.

This proposed rule was published for comment and several comments, which are discussed below, were submitted. The proposed rule may be seen in full-page format (Appendix A) and two-column format (Appendix B).

PROPOSED RULE

After great research, the board determined that, adopting and expanding policies that promote parental leave would serve as a meaningful step towards closing the gender gap as well as encourage more male attorneys' participation in paternity leave. When fathers take leave, it increases the opportunity and ability of mothers to engage in paid work, with a positive effect on female labor force participation as well as women's wages. The stigma of the "mommy track" and diminished career opportunities faced by women who bear children is alleviated by the availability of more gender-neutral leave policies. As women take more maternity leave and require more flexible hours to care for their children, they are perceived as unable to undertake the level of commitment required to become partners or advance within their firms. To address these concerns, the board proposes a new Rule of Judicial Administration to address parental leave. The proposed rule is:

RULE 2.570. PARENTAL LEAVE

A motion for continuance based on parental leave of the lead attorney in the case must be granted if made within a reasonable time after learning the basis for the continuance unless substantial prejudice to the opposing party is shown. Three months is the presumptive length of a continuance

granted for parental leave absent good cause for a longer time. If the court denies the requested continuance, the court must state on the record the specific grounds for denial. If the motion for continuance is challenged by an opposing party proffering a basis for a claim of substantial prejudice, the attorney seeking the continuance has the burden of demonstrating the lack of substantial prejudice to the opposing party.

In tandem with this rule, the board recommends the following committee note to explain the reasoning for this proposal to judges and practitioners:

COMMITTEE NOTES

20__ Adoption. The profession is committed to parental leave and to the importance for attorneys to be able to balance work and family. This rule provides a strong presumption that a continuance for parental leave, generally not exceeding three months, will be granted when the request for relief is made within a reasonable time after the basis for continuance is reasonably discernible. However, a continuance may be denied in a case where there would be substantial prejudice to an opposing party, an emergency or time sensitive matter would be unreasonably delayed, or if many continuances have already been granted and the substantial rights of the parties may be affected.

For the court's benefit, the board would like to share the process, research, and reasoning that led to the proposed rule:

HISTORY OF PROPOSED RULE

In December 2015, a concern and proposed rule was raised by Rules of Judicial Administration Committee ("RJAC") member Craig Leen. Mr. Leen raised the concern after hearing of three instances where a continuance based on pregnancy was denied. He explained "it is important for the attorney to be able to take a reasonable period-of-time to be with family at the time of a birth or when a child needs medical care." (Appendix C, December E-mail.) The rule initially proposed by Mr. Leen would have *required* a court to automatically continue a trial if the lead counsel went on leave for pregnancy or child care concerns unless exceptional circumstances were present. The additional concern voiced by Mr. Leen is that attorneys having children should not have to suffer negative consequences for choosing to have a family: female attorney should not have to give up their careers or cases for a given period of time, and male attorneys should not suffer a stigma for choosing to spend time as a parent. Further, clients should not have to lose their attorney when that attorney has a child. Mr. Leen argued that

a rule such as this would remove the stigmas parenting has received through the years. A straw vote was taken at the January 2006 RJAC meeting, in which the majority of the committee was in favor of the concept of a rule—with concerns—versus the minority vote that was in favor of the concept but disagreed a rule of court procedure was necessary. The concern voiced by the majority was that a mandatory rule would "hamstring judges." (Appendix D, Pertinent Piece of January 2016 RJAC Minutes.) A motion to table the matter and return it to the subcommittee for further review was made, seconded, and approved by the majority. Also at this meeting, it was initially suggested the Chair of the RJAC would send a letter to the Conference of Circuit Court Judges seeking input, but that suggestion was then modified and the motion was amended to require a letter be sent to all court levels expressing the concern raised. That motion passed by a vote of 29-7. The letter was sent to Chief Justice Labarga, Judge Selter of the District Court Performance and Accountability, Judge Colbath of the Florida Conference of civil Judges, Judge Aikens of the Florida Conference of County Court Judges, and the Florida Judicial Education on June 30, 2016, by then-Chair Amy Borman. Chief Justice Labarga responded stating the Court will "defer any action until such time as the Bar's recommendations are finalized." (Appendices E, Chair letter to Courts, and F, August 29, 2016 Letter from Chief Justice.)

The matter was raised for discussion again in the June 2016 RJAC meeting. Given the discussion and concerns raised in January, the subcommittee continued to redraft the rule and created a second, discretionary, version of the proposed rule. At the June meeting, the subcommittee reported the concern had also been submitted for consideration to The Florida Bar Diversity and Inclusion Committee, and the diversity committee unanimously adopted a resolution in support of the mandatory version of the rule. (Appendix E, page 14, Resolution.) Other considerations were discussed but when the matter was called for a vote, the proposed rule was not supported by the RJAC by a vote of 5-25. (Appendices E, pages 3–8, and G, June 2016 Agenda part with vote sheet.)

After this negative vote by RJAC and positive vote by the diversity committee, the concern was addressed by the Board of Governors which created the Special Committee on Parental Leave from Court Actions ("special committee") and appointed Robert Eschenfelder, a member of the RJAC, as Chair. The special committee was composed of 10 members: 5 from the Rules of Judicial Administration Committee and 5 from the Diversity and Inclusion Committee. This special committee met frequently by phone discussing the assigned research into the legal concern and impact such a rule would make. The chair researched several large states' rules to learn if a similar rule or concern was raised. Bar staff

completed the research that showed, though other states may have continuance rules, no state has a specific parental leave rule. (Appendix I, Research Table.)

At the Bar's January 2017 Winter Meeting, the special committee met in person to fine-tune the report and to vote on the proposed rule amendments. After extensive discussion, the special committee voted 5-4 to approve a new discretionary Rule 2.570 (Parental Leave), with one member absent. That absent member was later asked for his vote by the board president, and he indicated he would vote in favor of the proposed rule, which takes the final special committee vote to 6-4. The approved rule was submitted to the Board of Governors as part of the Special Committee's complete report. (Appendix H, Special Committee Report.)

The Board of Governors' unanimous vote to support the rule was made with great consideration to the research conducted and, by invitation, the many comments in both support and opposed to the proposed rule, which the board shares below.

RESEARCH CONDUCTED

Both the RJAC, to some extent, and the special committee, to a greater extent, researched Florida court and attorney members and nationwide bar resources on the question of whether a rule specifically addressing parental leave from a court procedure was necessary. (Appendix I, Table of Research.)

The special committee sought and compiled many comments from practicing Florida judges and attorneys. For the court's understanding, the special committee undertook to identify both background information and the various "pros and cons" a rule might raise in a fact-based manner. The special committee identified an initial list of questions, issues or concerns: opinion and discretion of judges, actual harm incurred, evidence and burden of proof, effect of federal law, method of enforcement, and potential harm to the client.

It was recognized that there are currently 2 rules that govern consideration of motions to continue in the civil court setting. First, Florida Rule of Civil Procedure 1.460 states:

> A motion for continuance shall be in writing unless made at trial and, except for good cause shown, shall be signed by the party requesting the continuance. The motion shall state all of the facts that the movant contends entitle the movant to a continuance. If a

> continuance is sought on the grounds of nonavailability of a witness, the motion must show when it is believed the witness will be available.

Second, Florida Rule of Judicial Administration 2.545(e) states:

> All judges shall apply a firm continuance policy. Continuances should be few, good cause should be required, and all requests should be heard and resolved by a judge. All motions for continuance shall be in writing unless made at a trial and, except for good cause shown, shall be signed by the party requesting the continuance. All motions for continuance in priority cases shall clearly identify such priority status and explain what effect the motion will have on the progress of the case.

To a certain extent, the plain language of these rules discourages the court from granting continuances. Yet the rules complement one another to create a truly discretionary standard for the court. In fact, 1 court noted that "a ruling on a motion for continuance is treated with a relatively high degree of deference, even among other kinds of discretionary decisions." *Yaris v. Hartley*, 128 So. 3d 825, 827-28 (Fla. 4th DCA 2013) (citing *Shands Teaching Hosp. & Clinics, Inc. v. Dunn*, 977 So. 2d 594, 599 (Fla. 1st DCA 2007)). When considering the highly discretionary nature of these rulings, it is fitting that a trial court's decision will be reversed only upon a clear showing of a palpable abuse of judicial discretion. *Id*.; *see also Edwards v. Pratt*, 335 So. 2d 597, 598 (Fla. 3d DCA 1976) ("The granting or denying of a motion for continuance is within the discretion of the trial judge and a gross or flagrant abuse of this discretion must be demonstrated by the complaining party before this court will substitute its judgment for that of the trial judge.").

Although the applicable standard is discretionary in nature, there exist factors that the court should consider when ruling on a continuance motion. These factors include:

1. whether the denial of the continuance creates an injustice for the movant;

2. whether the cause of the request for continuance was unforeseeable and not the result of dilatory practices; and

3. whether the opposing party would suffer any prejudice or inconvenience as a result of a continuance.

Courts discuss these factors when reviewing the denial of a motion for continuance, but they are equally applicable to the trial court in determining whether a motion should be granted. (*Yaris*, 128 So. 3d at 828 (citing *Fleming v. Fleming*, 710 So. 2d 601, 603 (Fla. 4th DCA 1998)); *Myers v. Siegel*, 920 So. 2d 1241, 1242 (Fla. 5th DCA 2006).) It should also be noted that, when considering these factors, there is no presumption in favor of the moving party. (*Stern v. Four Freedom Nat. Medical Services, Co.*, 417 So. 2d 1085, 1086 (Fla. 3d DCA 1982).)

COMMENTS BY JUDGES

As part of its work, the special committee sought input from the judiciary. Specifically, the chief judges of each circuit and district courts of appeal were requested to circulate the proposals and seek comment from their colleagues. Several professional and personal comments were received from judges. (Appendices H, Special Committee Report, and J, Judicial Comments.)

On March 17, 2017, the Executive Committee of the Florida Conference of Circuit Judges submitted a letter conceptionally supporting a parental leave rule by an overwhelming vote. (Appendix J, page 6.) The Executive Committee of the Florida Conference of Circuit Judges then followed up with the board in April 2017 sharing a concern regarding the use of "shall" versus "may" voiced by some judges, while leaving to the rule drafters whether the rule should be mandatory or discretionary. (Appendix J, page 7.)

Across the judicial comments, there was not a unanimous consensus for or against the proposal. However, the majority of those who did respond were opposed to any mandatory rule provision. Although noting that the proposals were no doubt well intended, some questioned the need for a rule that would in essence prioritize parental leave above all other situations that might necessitate a continuance (such as calendar conflicts, or illness of counsel, parties, or essential witnesses). Also, it was noted that the parental leave proposal was aimed solely at leave requested on behalf of counsel in the case, without regard for parental leave requests on behalf of parties or witnesses. One responder commented that the rules of court are designed to provide a framework to process litigation through the courts, and should not be tinkered with in order to help advance the career goals of attorneys. (Appendix H, pages 25–26.) The best interests of the parties and witnesses should be paramount.

A number of those opposed to a parental leave rule also noted that making a provision such as this mandatory, or even discretionary, could easily be used to "game" the system. Most of those who responded expressed the belief that a request for continuance based on parental leave would, under most circumstances, be well received. Anecdotal evidence of situations where a trial judge may have unreasonably denied such a request was both insufficient to justify a rule change to some, yet to others represented proof of the need for such a change.

It was mentioned that such a rule could run counter to the attorney's oath of office which ends with "I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay anyone's cause for lucre or malice." (Florida Rules of Court, Thomson Reuters (2017).) Likewise, conflicts could very well arise in cases entitled to statutory priority, such as eminent domain proceeding, or cases involving elderly litigants. It was also mentioned that the proposed rules are antithetical to other provisions in the rules of court that suggest a firm continuance policy with few requests being granted, such as times standard for disposing of cases, and written motions signed by counsel and client (Rules 1.460, 2.250, and 2.545). (Appendix J, pages 10–11.) The prevailing theme of these comments in that justice delayed is justice denied and many negative consequences to litigants and witnesses and the courts flow from delay.

Simply, those judges who opposed a rule change felt that parental leave was 1 reason, among many, that should be given reasonable accommodation, including providing for continuances when possible so a rule change is neither necessary nor warranted. The concept of creating an increased awareness of the issue through judicial education and perhaps comments to the current rules was referenced as alternate means of addressing the issue.

A number of those who favored the rule felt that a mandatory rule would be preferable to provide for some enforcement mechanism. Others favored a discretionary rule because it would designate the matter as reasonable grounds for a continuance. Some judges felt that the presence of a rule would, in and of itself, work to positively increase awareness that there are many valid reasons for continuances and this would be a positive development.

The special committee took great care to ensure the views of as many representatives of the judicial branch as possible could be gathered and factored into the report.

COMMENTS BY ATTORNEYS

Many stories and concerns were shared by attorneys—both male and female—who had experienced what they considered to be prejudice based on their parenting roles. (Appendix K, Attorney Comments.) These are some of the received comments:

- Resolutions submitted by the Cuban American Bar Association, the Pinellas County Chapter of the Florida Association for Women Lawyers, and the Tallahassee Women Lawyers in Support of the Mandatory Version of a Parental Leave Rule

- "[Female Attorney] was denied a continuance and forced to go to trial over 200 miles away from her seven week old newborn daughter . . . , whom she was breastfeeding. She worked for a small firm, had been working on the case since its inception, and it was not possible for another attorney to step into the case with the intimate knowledge of the facts. . . . Effectively, her choice was to tell her client to get a new lawyer or to go to trial no matter the circumstances related to her health and the health of her child. This is not a choice that any attorney should have to make in the absence of substantial prejudice to the opposing party." (Jacksonville Women Lawyers Association, March 30, 2017.)

- "This rule stands to support both men and women in our profession and ties in perfectly with Florida Bar Objective V: '*Continue to Encourage and Promote Diversity and Inclusion in All Aspects of the Profession and the Justice System*.'" (Joann Grages Burnett, April 18, 2017.)

- "To be frank, when the initial debate over this rule first began I might have been convinced one way or the other as to whether a rule was necessary. But in following the debate, hearing the anecdotes of parents denied continuances, listening to comments that are dismissive of a woman's role as lead attorney for her clients, and seeing some very vigorous opposition to a rule (or even *any* rule) that leaves significant judicial discretion intact, I have become convinced a rule is needed." (Kristin Norse, April 25, 2017.)

- "As a young women (sic) in the litigation group of a large law firm who hopes to one day be a parent, I see this rule as making great strides to retain women in this profession." (Robin Nauman, April 25, 2017.)

- “I recognize ‘gamesmanship’ was brought up as a potential deterrent to getting this Rule passed, but clearly gamesmanship is always an issue for attorneys who may not consider ethics to be clear-cut. I just think the potential for harm in NOT having a rule like this in place would be more detrimental for gamesmanship and judicial economy, than if the rule were to pass.” (Adina Pollan, April 20, 2017.)

- “While the [Young Lawyers Division] board took careful consideration of the arguments against such a rule, we see the rule as groundbreaking and necessary.” (Young Lawyers Division, Mary 16, 2017.)

- “Not only common sense, but compassion and quality of life considerations <u>require</u> that a rule be in place to protect attorneys and their clients in these situations.” (Adam Portnow, May 17, 2017.)

- “With all respect to judicial discretion, this is about common decency and understanding. ... If Florida is serious about diversity and inclusion, and seeing more female trial attorneys, this is a rule which needs to be passed.” (Jesse Butler, May 5, 2017.)

- “The proposed Rule 2.570, for a minimum of a three month (sic) parental leave is a ‘coddle the attorney’ rule and suggests that trial court judges and opposite counsel are unsympathetic to a pregnancy situation as a basis for a continuance and need a new rule to dictate their decisions. ... Courts and attorneys do not exist for the benefit of judges and attorneys. ... This proposed Rule delays the resolution of the legal dispute and may cost litigants money.” (Richard Friedman, May 4, 2017.)

- “Passage of the proposed rule would increase consistency and fairness across the courts of Florida, prioritize the client’s right to their choice of counsel, and be one step in the direction of creating a profession in which both parents and non-parents can thrive.” (Jacksonville Justice Association, Board of Directors, May 5, 2017.)

- “We believe that granting a continuance for the welfare of a new family is the correct decision provided there is no substantial prejudice. As this proposed rule allows judges sufficient discretion to make appropriate determinations we support it being adopted.” (Florida Chapters of the American Board of Trial Advocates, May 11, 2017.)

- “I have a friend, a single practitioner, who was set to give birth to her first child. The judge and opposing counsel were aware of her due date. Then the judge set the civil trial in her matter to occur the week after she was due to give birth. She immediately requested a continuance, stating that she was due the week before. This was the first trial set in this matter, so this was not a case of a matter being on the docket for years and years. The male judge denied the continuance and forced trial. Thus, she was forced to come to the court a week after giving birth for a trial.” (Jennifer Richardson, May 15, 2017.)

- “I am utterly dismayed that there could be opposition to proposed Rule of Judicial Administration 2.570. I have heard of more than one instance of a request for continuance based upon parental leave being denied. The proliferation of stories of such abuses of discretion discourages women from entering into or sticking with careers in litigation. ... The Bar should set the bar.” (Leanne McKnight Prendergast, May 15, 2017.)

- “[B]eing an excellent father and an excellent attorney are not mutually exclusive. Although the balancing act can be difficult, we should not have to neglect the blessings we have been given as fathers, just because opposing counsel is not willing to provide a limited continuance so we may handle our family affairs.” (Matthew Posgay, May 15, 2017.)

- “The proposed parental leave rule signals more than just a mechanism for parental leave. It is a symbol in support of gender equity, pay equity and a norm (not an exception) for workplace equality.” (Public Interest Law Section, May 15, 2017.)

- “I want to tell you about the benefits that this rule will have for male attorneys with families. Oftentimes male attorneys also would like time with their newborn children. Such requests are stigmatized by our society in general, and our profession more specifically. I remember being a young lawyer and hearing of partners in big law firms that would make fun of men requesting such leave, and of other male attorneys having to run from their wife and newborn child in the hospital to court the next day, because a judge refused to grant such lawyer a continuance.” (Angela Benjamin, May 18, 2017.)

There is a growing trend of more generous parental leave policies throughout the legal profession, however, this is not consistent across the state.

Research was conducted considering the specific effects of parental leave policy on wages and salaries, as well as the long-term effects of parental leave policies. In the special committee's overall review of the studies found on the topic, the combination of better practices and eliminating the stigma associated with taking leave will have the positive effects of encouraging more male attorneys to take parental leave, and promote female attorneys' career growth and development. Best practices to support increased access to and use of parental leave by attorneys, mothers and fathers alike, include incentivizing attorneys to take leave as well as implementing policies that are more inclusive of all parents.

The Challenges of Parental Leave for Attorneys and Modern Trends

The practice of law brings a unique set of circumstances when faced with the challenge of taking paternity leave. The attorney preparing to take leave must determine the best time to discuss the issue with partners, staff, and clients. The timing of these discussions is impacted by many factors, specifically those regarding trial strategies, discovery conferences, their deadlines, extensions and continuances. Extensions and continuances, or their lack, will often prompt earlier discussions with clients due to the uncertainty of whether a continuance will be granted.

Attorneys often must consider when to stop taking on new matters and are forced to seek substitute counsel to monitor their caseloads. Additionally, many attorneys are forced to leave firms, or simply never return, due to their lack of caseload. In a profession in which success relies heavily on client service and caseload, attorneys forced to seek substitute counsel due to paternity leave are at a disadvantage. However, modern trends in the legal profession are leaning towards offering significant parental leave policies for parents.

Leading the way of this transition are some of the largest national law firms and those included on the "50 Best" firms list. A recent *Above the La*w article titled "Which Biglaw Firm Has the Best Parental Leave Policy," revealed Orrick Herrington & Sutcliffe, a global law firm originally founded in San Francisco, offers its attorneys twenty-two weeks of paid leave for mothers and fathers. Orrick's chairman, Mitchell Zuklie, substantiates the new policy move as a means to "improve the lives of people who work at a very high level and who are very dedicated to client service." (*See* http://abovethelaw.com/2015/05/which-biglaw-firm-has-the-best-parental-leave-policy/?rf=1.)

Motivate Male Attorneys to Use Parental Leave

Studies show workplace culture and gender stereotypes prevent men from seeking to take more extended paternity leave. The recent published research shows the following:

- Highly educated professional fathers who have more access to parental leave than most U.S. workers took less than the full amount of paid leave available. In that survey, fathers cited workplace pressures as a factor in the length of leave they took. (*See DOL Policy Brief, Paternity Leave: Why Parental Leave for Fathers Is So Important for Working* Families, https://www.dol.gov/asp/policy-development/paternityBrief.pdf.)

- In a 2014 survey of highly paid professional U.S. fathers, only about 5% took no paternity leave and over 80% took two weeks of leave or less. (Brad Harrington, *The New Dad: Take Your Leave*. Boston College Center for Work and Family (2014).)

- A 2012 Department of Labor survey found that 70% of men taking leave for parental reasons took 10 days or less. (Jacob Alex Klerman, et al. 2012. *Family and Medical Leave in 2012: Technical Report*. (Prepared for U.S. Department of Labor.))

- Similarly, paternity leaves in the U.S. are short and two-thirds of fathers take less than two weeks of leave. Even when men have access to leave, they might cut their leave short to avoid being perceived as less dedicated. (Nepomnyaschy, L., & Waldfogel, J. *Paternity leave and fathers' involvement with their young children: Evidence from the American ECLS_B. Community, Work & Family*, 10(4), 427, 433–437 (Cambridge: Abt Associates, 2007).)

- Forty-eight percent of men working full-time reported job demands interfered with family life sometimes or often. (*DOL Policy Brief, Paternity Leave: Why Parental Leave for Fathers Is So Important for Working Families retrieved at* https://www.dol.gov/asp/policy-development/paternityBrief.pdf.)

New efforts to motivate fathers' use of parental leave are accelerating a cultural change and breaking down the stereotypes within the professional realm. Workers face tension in balancing their roles as professionals and parents, especially when there are adverse consequences to prioritizing family over work or

work over family. Empowering more fathers with the opportunity to take leave means they can achieve their professional goals and be supportive fathers. Access to parental leave and implementation of policies in support of taking leave without consequences will ultimately result in fathers' increased use of it.

ADDITIONAL CONSIDERATIONS

Right to Counsel

In order to meet the "realities of our adversary system of justice," additional factors may be considered when ruling on a motion for continuance due to the mental or physical condition of counsel. (*Myers v. Siegel*, 920 So. 2d 1241, 1243 (Fla. 5th DCA 2006).) These factors include:

1. the length of the requested continuance;

2. whether the counsel who becomes unavailable for trial has associates adequately prepared to try the case;

3. whether other continuances have been requested and granted;

4. the inconvenience to all involved in the trial; and

5. any other unique circumstances.

Id. *Myers* further explained that, "[c]onsideration of these factors allows the courts to balance the protection of the client's right to counsel of his or her choice with the general interest in the prompt and efficient administration of justice, which includes an opposing party's right to prompt resolution of the issues involved in the proceedings." *Id.* The court notes that in civil proceedings the right to counsel is not absolute, "judicial protection of that right ensures continued public confidence in our system of justice." *Id.*

Absence of a Witness

In addition to the requirements of Florida Rule of Civil Procedure 1.460, a party seeking a motion for continuance due to the absence of a witness must show:

1. prior due diligence to obtain the witness's presence;

2. that substantially favorable testimony would have been forthcoming;

3. that the witness was available and willing to testify; and

4. that the denial of the continuance would cause material prejudice.

(*Fisher v. Perez*, 947 So. 2d 648, 650 (Fla. 3d DCA 2007) (quoting *Geraldis v. State*, 674 So 2d 96, 99 (Fla. 1996)).)

Affidavits and other Requirements

The plain language of the rules regarding motions for continuance does not require a sworn statement nor any documentation that provides substance to the motion. (*Myers*, 120 So. 2d at 1244.) Nonetheless, the Authors' Comment–1967 to Florida Rule of Civil Procedure 1.460 notes that many courts may require continuance motions to be supported by affidavits or documentation as a matter of practice. Once again, this reaffirms the discretionary nature of these rules, as the rules permit each court to determine its own requirements for submitting a motion for continuance.

Discussion of Florida Law

The applicable rules and case law provide that a truly discretionary standard is applied to motions for continuance. Although the cases identify various factors that the court may consider when ruling on such a motion, the court is free to adopt its own requirements for continuance motions. It is only on a clear showing of palpable abuse that a court's decision on a motion for continuance is overturned. Accordingly, the current state of the law clearly illustrates that a judge is competent enough to use discretion to determine whether granting a continuance is warranted based on the specific facts of each individual case.

Federal Court Rules

The special committee found none of the 94 federal district courts has a local rule specifically addressing continuances based on parental leave. Many, although not all, federal district courts have local rules regarding continuances. Those rules generally impose a "good cause" standard, and sometimes include a requirement that the moving party have been informed of the request for continuance and have agreed to it. *See, e.g.*, M.D. Fla. Local Rule 3.09. Some federal district court local rules require that a motion for continuance be filed as soon as counsel learns of the reason the continuance is needed. *See, e.g.*, D.R.I. Local Rule Civ. 39.02. Additionally, some district courts require that a motion for continuance be accompanied by an affidavit setting forth the facts on which the request is based. *See, e.g.*, N.D.N.Y. Local Rule Crim. Pro. 45.1. A few district courts require that a

request for continuance based on the illness of a party or witness be supported by a medical certificate. *See* D. Mass. Local Rule 40.3(c); M.D. Pa. Local Rule 83.10.3.

Impacts on Parties—Other Counsel

In considering the efficacy of a possible rule granting a continuance based on parental leave, the special committee examined questions such as the effect, if any, on a party's litigation position potentially caused by such a continuance; whether or not the client of a lawyer requesting such a continuance should be heard by the court in its consideration of whether to grant the continuance; whether or not there are financial impacts on the party (or parties) on the non-requesting side and how, if at all, those impacts should be considered; whether any consideration should be given to anyone who is not a party to the court action, but who may be impacted by such a rule; and whether or not The Florida Bar or the State of Florida could be legally liable to a party harmed by the effect of a continuance mandated or granted under any such rule.

Currently, in Florida, a continuance motion proponent carries the burden of proof to show "good cause," while there is no explicit requirement of any party opposing the motion to show any prejudice at all. However, several appellate cases enumerate additional factors for consideration by the court which relate to any adverse impact on the opposing party. Among these are whether the opposing party would suffer any prejudice or inconvenience as a result of a continuance and the inconvenience to all involved in the trial.

In addressing the first issue, it must be first recognized that a continuance granted under any circumstances has the *potential* to harm the litigation position of any party involved—including the party requesting the continuance. However, the litigation position of a party opposing a continuance is likely the most vulnerable to harm. An unexpected delay for any party in the trial of a case could, among numerous other consequences, render lay or expert witnesses unavailable (or more expensive); impact limitation periods and related litigation pending in other jurisdictions; heighten the potential for assertions that evidence has been spoliated; add to legal fees for the parties as attorneys would necessarily be required for representation for a longer period of time; and add daily to a financial injury that may not be compensable retroactively. Clearly, continuances in the criminal context will ultimately impact the accused, who may remain incarcerated longer, as well as the public, which deserves the justice resulting only from disposition of the case.

Not surprisingly, most potential impacts enumerated in this non-exhaustive list are linked to financial effects on the parties. It is therefore clear that any continuance of a matter will likely have some financial effect on one or more of the parties. However, if the current law in Florida is to control, it is reasonable to assume these financial effects will be considered and weighed within the present rubric of "prejudice or inconvenience as a result of a continuance" (*Fleming*, 710 So.2d at 603) and the "inconvenience to all involved in the trial" (*Myers*, 920 So. 2d at 1243).

Though the recommendation of a rule dedicated to the family needs of trial counsel may appear against the fundamental rule that an attorney's client—the actual litigant, or party to a case—it is the party whose interests are being served above others through legal process and consistent legal representation. Thus, any client opposition to a lawyer's motion to continue a matter may justifiably defeat such a request. An attorney seeking a continuance over a client's objection would be obliged to notify the court of their client's objection.

Presently, the existing rules on continuances do not address whether the interests of other case participants (or their attorneys or clients) to a court action should be considered when ruling on motions for continuances. It stands to reason that any overriding concerns brought to the court by such a non-party to the litigation as to parental leave continuance motions would be weighed by the court under the same current standard of "inconvenience to all involved in the trial. (*Id.*)

Neither The Florida Bar nor the State of Florida are likely to be exposed to any new theory of liability if a rule addressing continuances based on parental leave were adopted so long as the officers of either were acting within the scope of their official duties when enacting such a rule. (*Mueller v. The Florida Bar*, 390 So. 2d 449 (Fla. 4th DCA 1980); *see also League of Women Voters of Florida v. Florida House of Representatives*, 132 So. 3d 135 (Fla. 2013).)

Increase Productivity and Reduce Turnover

Research also shows that leave increases the likelihood that workers will return to work after childbirth; improves employee morale; has no or positive effects on workplace productivity; reduces costs to employers through improved employee retention; and improves family incomes.

Leave may contribute to increased productivity by reducing turnover, increasing the length of time workers stay at firms or in the labor market. This helps workers accumulate increased human capital, which enhances their

productivity at work. A study of Organization for Economic Cooperation and Development ("OECD") countries shows that family leave, especially when paid, can have a positive impact on productivity. Every 1-week increase in available family leave is associated with an increase in aggregate labor productivity and multifactor productivity. *See* Institute for Women's Policy Research ("IWPR") *Paid Parental Leave in the United States*. http://www.iwpr.org/publications/pubs/paid-parental-leave-in-the-united-states-what-the-data-tell-us-about-access-usage-and-economic-and-health-benefits.

Economic Implications—Gender Equity in Workplace

Research shows women are more likely to return to the work force in a *part-time* position than men are after the birth of a child. *See Paternity Leave Stimulus*, TIME (Dec. 22, 2014) http://time.com/3642763/paternity-leave-stimulus/). As a result, men's incomes increase, while women remain at lower income or outside the formal labor market. Paternity leave reduces this disparity by allowing men to participate in leave, breaking the trend and shifting traditional gender expectations.

Studies show that when men share childcare responsibilities through policies like parental leave, women's participation in the paid labor force increases. At least 1 study, cited by the U.S. Government Accountability Office (2007), finds that paid leave for fathers help to foster gender equity, both in the workplace and in the home. It shortens leaves for mothers, increasing their job tenure and potentially their wage growth. Further, a study in Sweden found that woman's income increases 7 percent for each month that her partner takes leave. *See* Noland, *Is Gender Diversity Profitable? Evidence from a Global Survey*. https://piie.com/publications/working-papers/gender-diversity-profitable-evidence-global-survey.

Additionally, the Organization for Economic Co-operation and Development ("OECD") predicts that, if women in the U.S. worked at the same rates men did, U.S. gross domestic product ("GDP") could grow 9 percent. On average, across OECD countries, if women's participation in the workplace were to converge with men's rates by 2030, the GDP would increase by 12% overall. The McKinsey Global Institute (2015) estimates that a scenario in which women achieved complete gender parity with men could increase global output by more than one-quarter.

Missed Promotions & Opportunity

"The Vizier Insights: Gender Equity" report suggests that there are a number of steps that can make meaningful progress toward closing the manager divide and reducing the gender pay gap. (Appendix L.) Among the recommendations in the report:

1. Support meaningful paid parental leave that is equal for both men and women.

2. Ensure that it is socially acceptable for both men and women to take time off to care for their children and that it is socially acceptable for both mothers and fathers to make use of flexible working time arrangements to care for children.

3. Support programs that increase the availability of quality, affordable child care for all parents.

It is generally recognized that employers with strong parental leave policies benefit through greater employee loyalty and productivity, more successful recruitment efforts, increased employee retention, and enhanced client satisfaction through continuity.

The board and special committee would like to express their appreciation to all the judges and attorneys who shared their opinions and their experiences, which aided greatly in the understanding of and need for this proposed rule.

WHEREFORE, the board requests that Florida Rule of Judicial Administration 2.570 (Parental Leave) be adopted for the reasons detailed above.

Respectfully submitted on August 31, 2017.

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CERTIFICATE OF COMPLIANCE

I certify that this rule is not currently published in Thomson Reuters' *Florida Rules of Court—State* (2017 Edition).

I certify that this report was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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