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THE FLORIDA BAR SPECIAL COMMITTEE ON PARENTAL LEAVE IN COURT ACTIONS

COMMITTEE ANALYSIS AND ACTION REPORT

TO: Bill Schifino, Florida Bar President and the Florida Bar Board of Governors

FROM: Robert Eschenfelder—Committee Chair

DATE: January 27th 2017

TOPIC: Final Report and Recommendation of the Committee

Please be advised that pursuant to the referral given to this committee by you on September 16th 2016, the committee submits this report for such further action as you and the Governors should desire.

The membership of this committee is as follows:

Robert Eschenfelder (chair)
Hon. Josephine Gagliardi
Craig Leen
Marynelle Hardee
Andres Oliveros
Miriam Ramos
Hon. Manuel Menendez
Chasity O'Steen
Stanford Solomon
Katherine Yanes

To ensure it was able to accommodate the Bar President's charge to this committee to have a final report adopted by the Bar's January 2017 meeting, the committee met a total of 10 times prior to its final January 27, 2017 live meeting to adopt the report.

Historical Background on the Referral:

The Florida Bar's committee structure includes a variety of committees, one of which is the Diversity and Inclusion Committee (hereinafter Diversity Committee). One item that Committee identified as worthy of resolution via a change in the Rules of Judicial Administration was a lack of sensitivity among some of the State's trial judges to the occasional need for attorneys involved in litigation matters to seek continuances of proceedings in light of "parental leave" type events in their lives.

Inasmuch as changes to certain portions of the Rules of Judicial Administration are to first be referred to the Bar's standing Rules of Judicial Administration Committee (RJA), the Chair of the Diversity Committee (who also sits on the RJA as Diversity's liaison) presented the concept to the full RJA at its January 22nd 2016 meeting, and request that the RJA take on the matter and approve a rule on parental leave in court proceedings. After much discussion, a substantial majority of the RJA voted not to pursue such a rule.

On March 22nd 2016, the Diversity and Inclusion Committee, after its own substantial research and discussion, adopted a formal resolution recommending the adoption of a new Rule of Judicial Procedure addressing the Diversity Committee's belief that the State's trial judges were not giving sufficient import to motions from counsel for continuances associated with counsel's child birth schedule or associated parental needs.

Since this action triggered a more formal referral to the RJA, it was presented to the RJA at its June 17th 2016 meeting. The RJA engaged in additional debate concerning the topic, but again voted to reject the request to draft or recommend a rule addressing family leave in court proceedings.

When the Florida Bar President learned of the disagreement between the two committees, he recommended to the Board of Governors that a special committee be created to analyze the topic for the Bar, and draft compromise rule language if possible to address the concerns of both Diversity and the RJA. To ensure diverse and balanced views would be represented, the President's appointments to the membership of this special committee drew from members of both the Diversity and RJA committees. The committee was given its referral on September 19th 2016.

Work Plan:

In response to the referral, the committee first set about challenging itself to identify both the background factual information the Governors might want to know in order to feel adequately educated about the topic, and also to identify and analyze the various "pros and cons" proponents and opponents to a rule might raise, with an eye toward addressing them in a dispassionate, reasoned and fact-based manner.

The special committee, after its own reflection and doing informal surveys of other Bar and judiciary members, identified the following initial list of questions, issues or concerns:

- What do the judges think about this?
- What evidence is there that lawyers have suffered due to the exercise of judicial discretion (specific accounts are requested)?
- At motion hearings on a family leave rule, who bears the burden of proof?
- For motions for family leave, what is the evidentiary burden?
- Will the Code and Rules of Evidence apply to motions for family leave?
- What do other states do as to judicial leave for family issues?

- If a family leave rule speaks only to the state of expectancy, is the Equal Protection Clause implicated?
- What does the federal court system do as to this topic?
- How does this proposal alter a judge's discretion and what impact to the judiciary would removing discretion have on the judiciary?
- To build support for this idea, should we not have some individual stories to tell?
- How will we enforce this with the judges, who do lawyers complain to if a judge fails to grant a continuance for a parental leave reason?
- What happens if a party's litigation position is harmed by delay?
- Should the client of the requesting lawyer have a say in granting the request?
- Are there monetary impacts upon the party or lawyers on the non-requesting side, and how if at all should those impacts be considered?
- What, if any consideration should be given to third parties (and clients) who may be impacted by a judicial family leave rule?
- Has this issue ever been the subject of litigation?
- Could the Bar or State face liability from a party harmed by the effect of rule-required continuance?
- What are the policies regarding leave for family issues currently being used by law firms and governmental agencies?
- What does the FMLA provide for as to employers covered by that law?
- How is attorney compensation influenced by the availability of firm-provided family leave from court proceedings and other firm duties?
- Is there a correlation between career advancement and the availability of judicial leave, and are there gender distinctions as between female and male lawyers with access or no access to such leave?

The committee discussed these various points, and concluded that some were "variations on a theme" and thus combined some into more general discussion points. The committee's analysis of these points follows.

Committee Analysis:

CURRENT CONTINUANCE STANDARD UNDER FLORIDA LAW

In this section of the committee report, we first discuss the standard for granting motions for continuances in Florida. Next, we explore the various factors that courts should generally consider when ruling on such a motion. Finally, we identify additional issues that may be applicable to a court's ruling on a motion for continuance.

a. Standard

Two rules govern consideration of motions to continue in the civil setting. First, Florida Rules of Civil Procedure Rule 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 Rules of Judicial Administration Rule 2.545(e) provides:

> 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. Still, the rules complement one another to create a truly discretionary standard for the court. In fact, one 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)** (stating "[t]he 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.").

b. Factors

Although the applicable standard is discretionary in nature, there exist factors that the court should consider when ruling upon 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. The Court discussed this topic in the context of an appeal, but it is equally

applicable to the trial court. ***Stern v. Four Freedom Nat. Medical Services, Co.*, 417 So. 2d 1085, 1086 (Fla. 3d DCA 1982)**.

c. Other Considerations

– Right to Counsel

In order to meet the "realities of our adversary system of justice," additional factors may be considered when ruling upon 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)** (citing multiple cases to support the argument that courts recognize additional factors in addition to the three aforementioned factors). 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.

One court 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." While earlier in its opinion 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."

– Absence of a Witness

In addition to the requirements of Rule 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 1241 at 1244**. Nonetheless, the Authors' Comment-1967 to Florida Rule of

Civil Procedure 1.460 notes that many courts may require continuance motions be supported by affidavits or documentation as a matter of practice. *Id*. (quoting the Authors' Comment-1967 to Florida Rule of Civil Procedure 1.460). This too seems to be a reaffirmation of the discretionary nature of disposition of continuance motions currently existing in Florida.

Conclusion of Discussion of Florida Law

The applicable rules and case law provide that a truly discretionary standard is applied to motions for continuance. While the cases identify various factors that the court may consider when ruling upon such a motion, the court is free to adopt its own requirements for continuance motions. It is only upon 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 his or her discretion to determine whether granting a continuance is warranted based upon the specific facts of each individual case.

ANALYSIS OF SAMPLE OF FOREIGN STATE RULES

The committee did not have the resources to research the continuance rules of each other state. However, it examined rules of court in a sampling of the more populous states - Illinois, Massachusetts, New Jersey, New York, Ohio, and Texas – to determine whether any of these states have a rule or rules addressing the granting of continuances for parental leave. That review did not reveal any rules of the family leave focused nature proposed by the Diversity Committee, nor has the committee been made aware of any such rule during its review of secondary sources. We did find that not all of the states surveyed had rules expressly addressing continuances. In those that did, the rules focused on issues such as preservation of witness testimony, attorney scheduling conflicts resulting from other proceedings, and the right to speedy trial in criminal cases.

Illinois was the only state with a continuance rule directly referencing attorney scheduling conflicts.

Massachusetts has two criminal court rules that address continuances. One authorizes the judge to require the testimony of a witness to be taken and preserved for trial as a condition of granting the continuance, with the cost to be paid by the party requesting the continuance. The second Massachusetts continuance rule authorizes the judge to grant a continuance upon a finding that the ends of justice served by granting the delay outweigh the interests of the public and the defendant in a speedy trial.

In New Jersey, a rule on pretrial conferences does not specifically address continuances, but does provide that no change in trial counsel shall be permitted without leave of court if it will interfere with the trial schedule.

New York has a rule that permits parties to stipulate to as many as three continuances not exceeding 60 days. Continuances exceeding 60 days can only be authorized by the court.

Following are excerpts from the relevant foreign state rules reviewed:

ILLINOIS

19.2 Extensions of Time and Continuances

Extensions of time and continuances beyond the times specified in these rules shall be granted on motion of a party or interested person for good cause only, whether or not the parties are in agreement. Orders for extensions or continuances shall appear on the record, identify the moving party and state supporting reasons.

5.2 Continuances

a) Attorney engaged - A party shall be entitled to a continuance on the ground that his attorney (who filed his trial appearance at the pretrial conference) is actually engaged in another trial or hearing, but only for the duration of the particular trial or hearing in which the attorney then is engaged. No trial will be continued a second time upon the motion of the same party on the ground of prior engagement of his attorney.

(b) Addition or substitution of attorneys - A continuance shall not be granted upon the ground of substitution or addition of attorneys.

(c) Motion not to be renewed - If a motion for a continuance is denied by a central assignment judge, it shall not be renewed before the trial judge.

MASSACHUSETTS

Criminal Procedure Rule 10: Continuances
(Applicable to District Court and Superior Court)

(c) Preservation of Testimony. A judge may order as a condition upon the granting of a continuance that the testimony of a witness then present in court be taken and preserved for subsequent use at trial or any other proceeding. The witness shall be examined in open court by the party on whose behalf he is present and the adverse party shall have the right of cross-examination. The expense of taking and preserving the testimony shall be assessed as costs against the party requesting the continuance.

Criminal Procedure Rule 36: Case Management
(Applicable to District Court and Superior Court)

F) Any period of delay resulting from a continuance granted by a judge on his own motion or at the request of the defendant or his counsel or at the request of the prosecutor, if the judge granted the continuance on the basis of his findings

that the ends of justice served by taking such action outweighed the best interests of the public and the defendant in a speedy trial. No period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subdivision unless the judge sets forth in the record of the case, either orally or in writing, his reasons for finding that the ends of justice served by the granting of the continuance outweigh the best interests of the public and the defendant in a speedy trial.

NEW JERSEY

4:25-1. Pretrial Conferences

(14) In the event that a particular member or associate of a firm is to try a case, or if outside trial counsel is to try the case, the name must be specifically set forth. No change in such designated trial counsel shall be made without leave of court if such change will interfere with the trial schedule. If the name of trial counsel is not specifically set forth, the court and opposing counsel shall have the right to expect any partner or associate to proceed with the trial of the case, when reached on the calendar.

NEW YORK

Section 202.8 Motion procedure

(1) Stipulations of adjournment of the return date made by the parties shall be in writing and shall be submitted to the assigned judge. Such stipulation shall be effective unless the court otherwise directs. No more than three stipulated adjournments for an aggregate period of 60 days shall be submitted without prior permission of the court.
(2) Absent agreement by the parties, a request by any party for an adjournment shall be submitted in writing, upon notice to the other party, to the assigned judge on or before the return date. The court will notify the requesting party whether the adjournment has been granted.

FEDERAL COURT RULES RELEVANT TO THE TOPIC

The committee found that of the ninety-four federal district courts, none 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 of witness be supported by a medical certificate. D. Mass. Local Rule 40.3(c); M.D. Pa. Local Rule 83.10.3.

IMPACTS ON PARTIES, OTHER COUNCIL

As noted earlier, in considering the efficacy of a possible rule establishing a framework for the granting in court actions of continuances based on parental leave, the 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 upon 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 any entity, or their clients, not a party to the court action, 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.

As also noted earlier, 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. As has been noted elsewhere in this report, 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 should be clear that a continuance granted under any circumstances has the *potential* to harm the litigation position of any party involved — including the party requesting such a continuance. However, the litigation position of a party opposing such a continuance, it stands to reason, 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); it could impact limitations periods and related litigation pending in other jurisdictions; it could heighten the potential for assertions that evidence has been spoliated; it could add to legal fees for the parties as attorneys would necessarily be required for representation for a longer period of time; and, in many civil contexts, it could add daily to a financial injury being suffered by a party which 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 type of financial effect on one or all 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" and the "inconvenience to all involved in the trial".

The committee wishes to be clear that its ultimate recommendation with respect to a rule dedicated to the family leave needs of trial counsel is made against the fundamental rule that an attorney's client — the actual litigant, or party to a case — is the entity whose interests should be served justly above all others through legal process. Thus, absent extraordinary circumstances, the committee believes that client opposition to a lawyer's motion to continue a matter should defeat any such request. And the client would continue to have the same voice he/she/it has now in that if the client wishes to express directly to the court a position on the client's attorney's request for continuance (based on parental leave or otherwise), there seems to be no reason why the client's position should not be heard on the matter, as it would be heard at the court's discretion on any other matter. While client-opposed continuance motions could implicate certain ethical duties, those questions are beyond the consideration of the proposed procedural rule.

Presently, the existing rules on continuances do not address whether the interests of non-parties (or their attorneys or clients) to a court action should be considered when ruling on motions for continuances. The committee believes that any overriding concerns brought to the court by non-parties to the litigation as to parental leave continuance motions would again be weighed by the court under the same current standard of "inconvenience to all involved in the trial", and there does not appear to be any reason for creating any explicit protection of the interests of non-parties to the litigation when considering motions for continuances based on parental leave.

Addressing the potential that the Florida Bar or the State of Florida could be exposed to any new theory of liability if a rule addressing continuances based on parental leave were adopted, it does not appear that any liability could adhere to either entity, so long as the officers of either were acting within the scope of their official duties when enacting such a rule. S*ee* ***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)**.

ANECDOTAL EVIDENCE

The members of the committee were aware from the beginning that one of the central questions which would be raised with respect to this referral was how the axiomatic saying, "if it aint broke, don't fix it." If academia had undertaken an exhaustive analysis of the matter, the committee's work would have been made easier as to its evaluation of whether the current system is "broke" with respect to lawyers seeking court approval to continue matters due to child birth or related challenges.

Therefore, the committee had to rely upon anecdotal evidence. The committee therefore made a broad request to a variety of Bar Members and associations seeking actual instances where:

(1) individuals have been denied a continuance requested due to parental leave and the harm it caused them, their families and their client(s), and

(2) individuals and their client(s) have been harmed by the granting of a continuance, based on parental leave, to the opposing party.

Due to time and resource constraints, the request was sent to approximately 50 lawyers known to committee members with the added request that the information request be passed on to their contacts, thus having a multiplier effect on the solicitation.

Recipients included lawyers with government agencies such as the City of Miami City Attorney's Office and the state Department of Children and Families, as well as other larger private offices and smaller firms. The request was also posted on social media outlets and Florida Association of Women Lawyers networks. To the results obtained from these efforts, the committee also elected to consider the detailed stories of difficulty which have previously appeared in articles addressing the topic.

While the committee included substantial details as to the events, the names of the persons providing the instances are not included so as to encourage persons to provide their information. Below is a compilation of the most relevant, recent examples provided by attorneys:

► I am a partner at a law firm and was lead trial counsel on a case in south Florida. I learned that I was pregnant in October 2013 and that I would be due in July 2014. In January, the judge granted opposing counsel a continuance. In April, opposing counsel requested another continuance which, if granted, would mean a trial period in July. I advised my client of the situation and the client made it clear that she wanted me to continue to represent her and as such, wanted me to object to the granting of the April continuance. (I will note that opposing counsel had been dragging his feet in this case.) At the hearing on the Motion for Continuance, I objected to the granting of the motion and stated that if the judge was inclined to grant it that the trial period be set for October, after my return from maternity leave. The judge was very annoyed at how this all affected his trial docket, stood up, stated that he needed to "calm down" and left the bench. He added, "How do I know you aren't going to come back from maternity leave and get pregnant again and we are never going to try this case?" And then, "I don't understand why you can't assign this case to someone else." The judge ultimately granted opposing counsel's continuance in April and left the trial date open. At the end of June, opposing counsel set the deposition of the most important witness in the case in another city. I objected because at that point my doctor will not let me fly. The judge ruled that the deposition will go forward and that I could participate by phone putting my client at a significant disadvantage.

► I was about 5 month pregnant in December 1989 and was definitely showing. I had a case set for trial after my due date, during the time that I would be taking maternity leave. I filed a motion to move up the trial or continue it until I

returned. At the hearing, opposing counsel did not object. The judge told me that he needed a letter from my obstetrician confirming my pregnancy and attesting that I would be out on maternity leave until the date I had stated in my motion. Opposing counsel jokingly stipulated that I was pregnant since it was so obvious. Nevertheless, the judge insisted that I produce the letter which I ultimately did. It was a humiliating experience.

► I represented the defendant driver in a negligence case in Tampa. While the case was pending, the defendant got pregnant. Before the defendant became pregnant, a trial date was set. The date was within a month of her due date. She was put on bed rest during the last few months of her pregnancy. As soon as the doctor ordered the bed rest, I moved for a continuance, asking for a minimum of a 12-week continuance (the equivalent of FMLA). At the hearing, the judge denied the motion stating that it was the defendant's decision to have a baby and cautioned me not to mention breastfeeding because the defendant could do that at the courthouse during trial if necessary.

► While I was expecting my daughter, I had an attorney move to strike my Notice of Unavailability. The case had been going on for many months and was very contentious. After being granted many extensions, opposing counsel was granted another 20 days to file an Amended Complaint. In anticipation of my due date, I filed a Motion of Unavailability. In response, opposing counsel filed a Motion to Strike attesting that the postponement would cause extreme prejudice to his client. Opposing counsel then set the motion on a motion calendar after her due date. Luckily, the baby was late in arriving and I was able to appear at the hearing. The judge denied the Motion to Strike and admonished opposing counsel for his behavior.

► I tried a case before going on maternity leave when I was 7 ½ months pregnant and the judge could not have been any more accommodating, including granting all of my requests for bathroom breaks.

► I am a solo practitioner and I had filed my notice of unavailability for December 1, 2016 – March 1, 2017. After filing my notice, I was scheduled for a c-section on November 29th. The court set a hearing on November 29th at 8:30 a.m. stating that my unavailability would not begin until December 1st and also that it will not place the case on hold for 3 months. Separately, I had two attorneys object to my maternity leave stating that it was "an unreasonable" amount of time and demanding that I hire coverage counsel.

► A prosecutor in south Florida was hospitalized with complications during her eighth month of pregnancy on the third day of a trial. The judge told her to find a substitute but when she explained that no one else was familiar enough with the case to step in, the judge threatened to dismiss the case. The prosecutor ended up leaving the hospital against the doctor's orders in order to finish the trial.

► My wife was due to give birth. During pretrial motions, I made the court aware of the impending birth of our first child. I was not asking for a continuance but rather making the court aware so that I could be present during the birth. The judge's response was that this was not his problem. After the trial began, my wife went into labor. She labored without my support for hours. Thankfully, I was able to make it to the hospital just as the doctor was delivering our baby. I then went back to trial the following day. I would sleep at the hospital at night and return to court in the morning. While I was not lead counsel in the case, I was heavily involved from the beginning of the matter and my absence would have been detrimental to my client.

► An attorney sought a continuance so she could represent her clients – two police officers – in an upcoming trial scheduled during her maternity leave. It was the first continuance she sought in the matter. Nevertheless, the request was denied because she was told she could transfer her case to another attorney at the government agency she represented. She was very disappointed by the experience as she wanted to both handle the case and take parental leave.

FMLA'S APPLICATION TO THE TOPIC OF JUDICIAL LEAVE

The Family Medical Leave Act of 1993, Pub.L. 103–3; 29 U.S.C. 2601 *et seq.*; 29 CFR 825, is a federal law that requires covered employers to provide eligible employees job-protected leave for qualified medical and family reasons. The Act allows eligible employees to take up to 12 workweeks in a 12-month period (29 CFR §§ 825.200, .202, and .205) for certain purposes, including 1) the birth of the employee's child and to care for the newborn child within one year of birth or 2) the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement. An eligible employee is entitled to use FMLA leave for an incapacity due to pregnancy or prenatal care, and a spouse can use FMLA leave to care for the other spouse who is incapacitated due to pregnancy or child birth. 29 CFR §§ 825.115 and 825.120. Mothers and fathers have the same right to take FMLA leave for the birth or placement of a child and/or to be with the healthy child after the birth or placement.

The FMLA does not cover all employers and employees. Public agencies, including local, state, and federal employers, and public and private elementary and secondary schools are subject to the FMLA. 29 CFR § 825.104. Private sector employees that employ 50 or more employees for at least 20 workweeks in the current or preceding calendar year, including joint employers and successors of covered employers, are subject to the FMLA. 29 CFR §§ 825.105 and 108. This accommodation to small businesses in the law is of particular relevance to lawyers as many law firms do not have the requisite number of employees to trigger the law's coverage.

An employee must qualify for FMLA leave. An employee must 1) work for a covered employer, 2) have worked for the employer for at least 12 months, 3) have worked at least 1,250 hours during the 12 months prior to the start of leave, and 4) be employed at a work site with 50 or more employees within 75 miles. 29 CFR § 825.110. *See also* 29

CFR § 825.111. Employees seeking to use FMLA leave must provide 30-day advance notice when the need for leave is foreseeable and otherwise provide notice as soon as practicable when leave is unforeseeable. 29 CFR §§ 825.302-.303. If requested by the employer, the employee must provide a certification to support the need for FMLA leave (29 CFR §§ 825.305, .307-.308 and .313) and periodic status reports (29 CFR § 825.311), as well as a fitness-for-duty certification. 29 CFR § 825.312.

Employers must provide confirmation of FMLA leave eligibility within five business days of receiving a leave request or when the employer has knowledge that leave may qualify under the FMLA. If the employee is not eligible for FMLA leave, the employer must provide a reason to the employee. 29 CFR § 825.300.

The employer is required to maintain group health benefits during the leave as if the employee continued to work instead of taking leave. 29 CFR §§ 825.209-.213. An employee may elect, or the employer may require the employee, to use accrued paid vacation leave, paid sick leave, or paid family leave for some or all of the FMLA leave period in lieu of unpaid leave. 29 CFR § 825.207. Employees are entitled to return to their same or equivalent job at the end of their FMLA leave. 29 CFR §§ 825.214-.219.

An employer is prohibited from 1) interfering with, restraining, or denying an employee FMLA rights; 2) discriminating or retaliating against an employee for having exercised FMLA rights; 3) discharging or in any other way discriminating against an employee because of involvement in any proceeding related to FMLA, including filing a complaint, cooperating with the Department of Labor Wage and Hour Division, or bringing a civil action; and 4) using the taking of FMLA leave as a negative factor in employment actions. 29 CFR § 825.220.

At the state level, the Florida Legislature has adopted the "Family Support Personnel Policies Act". Florida Statutes §§ 110.1521-110.1523 (2016). Under the Act, the Department of Management Services (DMS) developed a model rule establishing family support personnel policies for all executive branch agencies, excluding the State University System. "Family support personnel policies" is statutorily defined to mean "personnel policies affecting employees' ability to both work and devote care and attention to their families . . . ," including maternity or paternity leave for employees with a newborn or newly adopted child. The DMS model rule became part of the personnel rules of all applicable state agencies 150 days after the effective date of the rule to the extent that each agency did not adopt a rule that set forth the intent to specifically amend all or part of the DMS model rule.

DMS subsequently adopted the "Family Supportive Work Program" rule (Rule). Rule 60L-34.0051, F.A.C. Pursuant to the Rule, agencies are required to approve parental or family medical leave to assist employees in meeting family needs, including approving leave for up to six months for a parent within one year following the birth or adoption of a child. An employee that is granted this leave may request to use accrued leave credits; otherwise, the agency will place the employee on leave without pay.

The committee has taken the space in its report to review these laws so as to ensure the current leave laws surrounding the employment relationship are understood by those who would advocate for or against, or make decisions concerning, the proposed court rule on family leave continuances. The committee sees two issues bringing together these laws and the rule proposal.

The first issue is that many law firms within the State of Florida do not meet the employee threshold to be covered. Indeed, many firms house only a few staff, and a growing trend the Bar is aware of is the typically young sole practitioner operating virtual practices from home offices, and perhaps obtaining primary income serving as "coverage attorneys" for others. Since the laws associated with family leave do not apply to these lawyers, and these lawyers are just as likely to have family leave issues as lawyers in larger firms and perhaps less likely to have alternative support mechanisms, a rule allowing special focus on the importance of granting continuances for litigating lawyers who have such issues is all the more important.

The other issue is that even where a Florida lawyer practices within a public sector office or a larger law firm covered by the law, an employer's compliance with the law may not be enough. Unlike most other types of employment, a lawyer involved in litigation seeking to be absent from the workplace for family leave reasons without negative consequences must not only gain the approval of his or her employer, but must also get the approval of the court in which the litigation is pending. This added layer of scrutiny could result in instances where a firm grants approval for an absence, yet the court compels attendance. While the committee is well cognizant of the judiciary's need to move cases and opposing counsel's duty to advance his or her client's case, a denial of a continuance for a less than justified reason could make the federal and state policy decisions of the Congress and the Florida Legislature hollow rights for the unsuccessful movant. And while the committee unanimously agrees that the great number of trial judges in the state are being as accommodating as they possibly can, the anecdotal evidence reviewed in this report would certainly reveal that in at least some settings, continuances based on family leave needs are being denied where a factual basis for the denial does not seem to be present.

IMPACT OF ABILITY TO TAKE FAMILY LEAVE ON LEGAL CAREERS

There is a growing trend in more generous parental leave policies throughout the legal profession. Research was conducted looking into the specific effects of parental leave policy on wages and salaries, as well as the long-term effects of parental leave policies. These studies are posted on the committee's Bar web page, and are incorporated into this report by reference. In the committee's overall review of the studies it could find 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 attorney 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.

a. The Challenges of Parental Leave for Attorneys and Modern Trends

To begin with, the practice of law brings a unique set of circumstances when faced with the challenge of taking paternity leave. From the beginning, 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, deadlines, extensions and continuances. Extensions and continuances, or a lack thereof, will oftentimes prompt these discussions with clients earlier on due to the uncertainty of whether or not 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 caseload. 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 put at a disadvantage. However, modern trends in the legal profession are leaning towards offering significant parental leave policies for mothers and fathers.

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 Law 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.

b. Motivate Male Attorneys to Use Parental Leave

Studies show workplace culture and gender stereotypes prevent men from seeking to take more extended paternity leave. A recent survey of highly educated professional fathers who had more access to parental leave than most U.S. workers found a substantial portion took less than the full amount of paid leave available. In that survey, fathers cited workplace pressures as a factor into the length of leave they took. *See DOL Policy Brief, Paternity Leave: Why Parental Leave for Fathers Is So Important for Working Families retrived at* https://www.dol.gov/asp/policy-development/paternityBrief.pdf. *Citing to* Harrington, et al found in a 2014 survey of highly paid professional U.S. fathers that only about 5% took no paternity leave, but over 80% took two weeks of leave or less. Brad Harrington, et al. 2014. *The New Dad: Take Your Leave*. Boston College Center for Work and Family, retrieved from: http://www.bc.edu/content/dam/files/centers/cwf/news/pdf/BCCWF%20The%20New%20Dad%202014%20FINAL.pdf (last visited June 17, 2015).

A 2012 Department of Labor survey found that 70 percent of men taking leave for parental reasons took 10 days or less. Jacob Alex Kler-man, et al. 2012. *Family and Medical Leave in 2012: Technical Report.* (Prepared for U.S. Department of Labor.) Cambridge: Abt Associates, at 141. Nepomnyashy and Waldfogel (at 433-37) similarly find paternity leaves in the U.S. are short and that 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. 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 retrived 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 an increase of fathers' use of it.

c. Increase Productivity and Reduce Turnover

Additionally, research 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 also contribute to increased productivity by reducing turnover, increasing the length of time workers stay at firms or in the labor market, thus helping workers accumulate increased human capital, which enhances their productivity at work. A study of OECD countries shows that family leave, especially when paid, can have a positive impact on productivity. Every one-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.

d. 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 the traditional gender expectations.

Studies show that when men share the care work at home through policies like parental leave, women's participation in the paid labor force increases. At least one study, cited by the U.S. Government Accountability Office (2007) finds that paid leave for fathers helps to foster gender equity, both in the workplace and in the home, since it shortens leaves for mothers, increasing their job tenure and potentially their wage growth. Further, 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, according to the Organization of Economic Coordination and Development reports that if women in the U.S. worked at the same rates men did, U.S. GDP could grow 9 percent; France's by more than 11 percent; and Italy's would see a 23 percent climb. On average, across OECD countries, if women's participation in the workplace were to converge with men's rates by 2030, we could see an overall increase of 12 percent in GDP. 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 relative to a business-as-usual scenario.

e. Missed Promotions & Opportunity

A recent report produced by "The Visier Insights: Gender Equity" revealed women are more likely to leave the workforce between the ages of 25 and 40; the range in which most women commonly have children. This time frame in which most women are known to take maternity leave is simultaneously the time frame in which workers are known to get the greatest gains in their compensation. The lack of women in the workplace leads to what has been coined as the "managerial divide."

Statistics reveal the gender wage gap widens at age 32, starting with women earning 90 percent of the wages of men and decreasing to women earning 82 percent of the wages of men by age 40. The timing of this widening gap aligns with a pronounced dip in the ratio of women in the workforce.

Just as women's income increased in Sweden for each month that her partner took leave, the same is true when women take leave. The data showed men are more likely to be promoted if there is less female competition in the workplace. As a result, women are estimated to lose $1.3 million during their lifetime in pay alone. Forty-two percent of working mothers had reduced their hours to care for a child in comparison to twenty-eight percent of working fathers. The result is an inevitable gender wage gap.

However, the report suggests there are a number of steps to make meaningful progress toward closing the manager divide and reducing the gender pay gap. Among the recommendations in the report:

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

► 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.
► 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.

Another global survey the committee reviewed reveals that mandated maternity leave is not correlated with female corporate leadership, though paternity leave is strongly correlated with the female share of board seats. It is argued that countries in which fathers have access to more leave have significantly more women in corporate positions. See study *Women Miss Promotions for Maternity Leave:* (Nov. 14, 2016): http://www.benefitnews.com/news/women-miss-promotions-for-maternity-leave-study.

It stands to reason that policies that allow childcare needs to be met but do not place the burden of care explicitly on women increase the chances that women can build their careers and grow within their professional field. More gender-neutral family leave would also cut off the expectation by employers that young men will necessarily provide greater returns to training and mentoring than young women. This suggests that policies that place a disproportionate burden of childcare on women are one barrier to female corporate advancement.

OTHER REMEDY ISSUES

The committee attempted to determine what the remedy would be if a continuance is incorrectly denied under the proposed rule. The denial of a motion for continuance is subject to an abuse of discretion standard of review on appeal. *See* ***Fleming v. Fleming*, 710 So. 2d 601, 602 (Fla. 1st DCA 1998)**. As can imagined, an appeal of a denial of a continuance would typically come up if a default is granted because a continuance was denied. An appeal would then follow regarding whether the continuance should have been denied. Of course, that is not the situation we are addressing here. Here, there would be no issue of a default if the continuance was denied; the issue would be whether the attorney would be allowed to both take the leave and continue as the attorney on a case. Accordingly, the way to address the erroneous denial of a continuance based on parental leave would be by interlocutory review via a petition for writ of certiorari. In a situation where the denial of a continuance causes irreparable harm (which has been found in situations where there is a medical issue or emergency), certiorari review is available. *See, e.g.,* ***Carnival Cruise Lines v. Bonavia*, 773 So. 2d 1212, 123 (Fla. 3d DCA 2000)**; ***SSJ Mercy Health Systems, Inc. v. Posey*, 756 So. 2d 177, 179 (Fla. 4th DCA 2000)**. The order denying the continuance could then be quashed, and the continuance would then be allowed.

If the Supreme Court ultimately adopts this Rule, it would be determining that there should be a specific rule addressing and protecting parental leave. If a trial court were then to not apply the rule, or if the motion for continuance were denied without justification (under an abuse of discretion standard), the committee believes there would be a good argument that a petition for writ of certiorari could be filed to protect the attorney's ability to both take parental leave and remain as attorney on the case (as there would otherwise be irreparable harm that could not be cured through an appeal).

Ultimately, I do not think the appellate remedy is so important though. **Simply having the parental leave rule will ensure that the motion is made and granted more often, which will address most of the concern.** It will let the trial courts know that the Bench and Bar view this as a significant consideration, which will allow the Judges to exercise their discretion under the rule in a manner that would grant parental leave unless there was substantial prejudice to the other side. As long as the trial court applies the rule and the substantial prejudice standard, I believe it would be unlikely that the court's decision would be overturned considering the abuse of discretion standard.

Conclusion

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.

INPUT AND ANALYSIS FROM REPRESENTATIVES OF THE JUDICIARY

As part of its work on the various proposals for a parental leave amendment to the court rules, the committee sought input from the judiciary. Specifically, the chief judges of each circuit and DCAs were requested to circulate the proposals and seek comment from their colleagues. The committee did not receive a substantial percentage of responses from judicial officers.

With that said, the committee did receive more responses from judges and courts than it did from Bar members offering anecdotal evidence of improperly denied continuances. A total of fifteen individual judges drafted responses to us. However, several Chief Judges indicated that they were speaking not just for themselves but also for some number, if not all of the members of their respective courts. Unless otherwise set forth, the committee has removed the names of the judges who provided written comments since focus on the personal identity of the judges is less important than hearing what each

had to say. The number of male to female respondents were roughly the same. The written comments received by the committee were as follows:

1. Saw the proposed rules and am wondering what is generating the interest in having a rule to govern this specific ground for a continuance. Are judges routinely denying continuances for this reason when they would grant them for other reasons? My own experience has been that on the relatively rare occasion when a continuance is sought because an attorney is going on maternity/parental leave, everyone is quite agreeable and respects the need for a continuance if the attorney's presence is essential to the trial. Unless there has been some history of a significant number of judges arbitrarily refusing to even consider this particular ground as compared to other grounds for continuance, I wouldn't think that such a rule would be even considered. Additionally, it would put the Supreme Court in the position of "prioritizing" grounds for continuance and imposing its ideology on trial judges regarding one particular reason to consider a continuance. In my view, parental leave should remain one of many reasons why a continuance may be granted and not given any priority over other equally valid reasons. Whether phrased as a mandatory or discretionary rule, a rule like this would unnecessarily invade the independence of trial judges. For these reasons, I would not be in favor of such a rule. Thanks for inviting input. [Circuit Judge, 8th Judicial Circuit]

2. I agree with Judge **********. Thanks for seeking input. [Circuit Judge, 8th Judicial Circuit]

3. I do not have anything new to add to the discussions, other than I believe it would be appropriate for there to be a Rule rather than a "policy." It seems to me to be a distinction of substance, because a judge's failure to follow "policy" would be non-reviewable and thus of little force or effect. [Circuit Judge, 1st Judicial Circuit]

4. November 14, 2016

   Re: Proposed Rule Focusing on Family Leave

   Dear Chairman Eschenfelder:

   While the Third District Court of Appeal is committed to lawyers being able to balance work and personal life, including specifically family matters and parental leave, the Court is in unanimous agreement with the position of the Rules of Judicial Administration Committee, which on two separate occasions declined to approve a Rule in this regard.

   The nature of this issue makes it one best left to the exercise of the sound discretion of the court, subject to review as provided by existing rules. We approve including a segment on work/life issues in judicial training, as appropriate.

Sincerely,
Richard J. Suarez, Chief Judge

5. Thank you for seeking input on the rule. I agree with the rule that would require it to be mandatory, with the Court having to explain the denial. However, I believe the rule should include a requirement for the attorney (male or female) expecting* a baby to file their motion upon receipt of the trial order, or as soon thereafter as is known, if the projected parental leave would somehow interfere with pre-trial deadlines or conflict with the trial period, so that the matter may be timely addressed. Of course, this requirement would not apply if the case can proceed, pre-trial deadlines met, etc., without the attorney that is expecting a baby. For example, if co-counsel is able to handle matters. (The attorney expecting the baby would be the one to decide – not the Court – by either filing or not filing the motion.) Failure to timely file the motion would provide the court with sufficient grounds for denial of continuance based on parental leave. Giving birth does not usually come as a surprise. Unless there are unexpected complications, attorneys know the approximate due date way in advance. Although I grant the continuance or, at a minimum, excuse them for a portion of the trial period, (usually it's the father seeking a continuance) I've never understood why they wait until calendar call to advise that their wife will be having a baby during the trial period. So, while I agree with the mandatory rule, I propose it include parameters for the timeliness of the motion, as well as the possible consequences for failure to comply.
   * "Expecting" refers to the future mother or father of the child to be born, not the person that is actually pregnant. Would also apply to those that are adopting a child to be born from a surrogate.
   [Circuit Judge, 11th Judicial Circuit]

6. Our court plans to write a letter agreeing with the Judicial Administration Committee that a special rule should not be created. Offhand, can you advise where and to whom the letter should be sent? If an email is sufficient, let us know to whom and email address. [Judge of the Third District Court of Appeal]

7. While I do not know nearly enough about the laws relating to issues of family leave, if they bind us and say what we must do in this circumstance, we do not need a redundant court rule. If they do not, our obligation to be reasonable at all times will guide us.

   My thought is rules of this type are borne of unnecessary hand-wringing over what must have been the persistent, misguided actions or policies of a few of our colleagues. I am unwilling to believe that this is a systemic problem. If it is, let the rule be served. If not, it is clutter in the cupboard.

   While these sorts of rules, it might be argued, are designed to present to the public a view of the courts that is fair, just, and reasonable, I am of the opinion they work just the opposite result – reflecting a wild judiciary with no sense of decency or humanity. We are supposed to be resting upon the summit of these virtues and the public should perceive that we are implicitly trusted to so rest. "Good people

do not need laws to tell them to act responsibly." - didn't some sage Greek once proclaim this? The more rules we have to tell us how to be "good", the less likely the public is to view us as inherently so.

There are mechanisms in place to address errant judicial conduct – ethics complaints, extraordinary writs, and the dread branding of "the learned trial judge", for instance. I know when confronted with a lawyer requesting a postponement on grounds of recent parental responsibility, I have without hope of escape found myself under the microscope of decency. If our elected lawmakers have spoken, by damn I will abide. If not, I rely upon those traits I must believe had something to do with my being entrusted with this position. I can only hope I will do the right thing. I must have confidence the vast majority of my colleagues are of similar ilk. Allowing the public to observe we are fair and decent despite commandment goes much further than making room for the perception we are doing this, that, or the other thing only because required by edict.

If on the committee, I would vote no on the rule and yes on judicial education.
[Circuit Judge, 10th Judicial Circuit]

8. I'm with **********. The measure of morality is "what you do when no one is looking." [Circuit Judge, 10th Judicial Circuit]

9. I agree w/ Kevin, too! There is a rule in place; however, humanity & decency should guide us through these situations. [Circuit Judge, 10th Judicial Circuit]

10. I understand the importance of wanting to address this issue, but agree with Roger that it is already addressed with the "good cause" language in the Rule. However, if it needs to be spelled out, then perhaps Rule 2.545(e) should be revised to elaborate on "good cause" to include, but not limited to, not just parental leave but other types of leave covered under FMLA, to avoid future revisions. [Circuit Judge, 10th Judicial Circuit]

11. I am certainly supportive of the discretionary rule, although the mandatory version may be a distinction without a difference. I am, however, concerned with the stated need for any rule being based upon "anecdotal" evidence. [Circuit Judge, 3rd Circuit]

12. Adding to my earlier response; I am certainly supportive of the spirit of the discretionary rule although I wonder if it is a solution in search of a problem when the stated need for the rule is, according to the petition, based upon "anecdotal" evidence. The question is also begged as to whether establishing continuance protocols for sole practitioner parental leave situations will signal a need to establish future rules dealing with other specific scheduling conflicts facing attorneys or the parties, including but not limited to parental leave situations involving the parties or essential witnesses. Having said that, I certainly think that emphasis on having sensitivity to sole practitioner parental leave issues (I was

a sole practitioner for the last decade of my practice) arising in the context of continuance motions is something that should be stressed in judicial training especially during new judges college.

13. I received comments from several trial judges.

First, all who commented expressed sensitivity to parental leave. All recognized parental leave as an appropriate basis for accommodation, including trial continuances in many circumstances. More generally, the judges recognized how demanding the life of a trial lawyer can be and the need to make sensitive judgments.

Second, judges expressed misgivings about attempting to reduce these considerations to a rule generally and with some of the specific choices made in this proposal.

Many judges expressed concern regarding mandating a continuance, exceptional circumstances and written findings. One judge thought it inappropriate to incorporate the individual leave policies of law firms and agencies by reference.

Judges emphasized the representational responsibilities of trial work and the consequences of delay on parties, witnesses, law enforcement, clerks and other court personnel. Judges have legal and ethical responsibilities to resolve cases expeditiously for good reason and many legal principles and rules emphasize this responsibility.

Rule of Judicial Administration 2.250(a)(1) provides specific time standards for trial court litigation without reference to mandatory continuances, for example. Similarly, the proposal does not address whether a mandatory continuance under the proposal would relieve the lawyer of the responsibility of obtaining the client's written consent to a continuance under, for example, rule 1.460. Nor does the proposal impose on lawyers a responsibility to make the case by timely motion that they acted responsibly to anticipate, avoid and mitigate the consequences of delay that others may experience under the specific circumstances of an individual case.

I suggest that the Committee consider memorializing by rule that parental leave is an appropriate basis for a continuance but eliminating the mandate and the requirement for a written order of exceptional circumstances. I am doubtful that the proposal gives appropriate deference to the trial court's judgment about the circumstances of individual cases. I suggest it is more appropriate to provide lawyers a rule establishing parental leave as a specific basis for a continuance to present to the judge in support of a motion.

I suggest the following alternative language: “A court may grant, and shall closely consider, a motion for a reasonable continuance to accommodate parental leave.”

I also support inclusion of accommodation of parental and family leave as a topic for judicial education.

I hope these comments are helpful. I am confident that the Committee will make a careful judgment in its work.

Respectfully, [Circuit Chief Judge]

14. In response to your request for judicial feedback on the proposed parental leave continuances I believe the rule is necessary. The practice of law is changing, indeed the world is changing, but we should not leave our humanity behind. Each family situation is different and some judges may not have a frame of reference to fully appreciate all the differences. There are conceivably some families where the attorney is a solo practitioner who has no colleague that could reasonably be expected to cover cases during maternity or paternity leave. How does this attorney balance the requirement to care for young children with the need to effectively represent clients, earn an income, and maintain balance in an otherwise stressful situation? Many scenarios exist where parental leave is equitable and necessary and we need to both acknowledge and memorialize it.

    In the fluid environment of cases before the court, the judge may inadvertently miss a salient factor that goes toward whether a parental leave continuance, or even a continuance in general, should be granted. The courts are the gatekeepers of justice for the citizens of our communities, cities, states and nation. How can we be expected to fairly adjudicate on provisions related to parental leave in the contracts of many small and large corporate entities, if we as a court do not recognize the necessity for the same rights within our own profession?

    Based upon these reasons along with others, I strongly believe that any parental leave rule implemented should be consistent with the mandatory versions and not discretionary.

    Thank you for requesting our input on this important matter.
    [County Court Judge, 9th Circuit]

15. I apologize for the untimely response. Nonetheless, I am of the opinion that Fla. R. Civ. P. 1.460 is more than adequate to address the issue of parental leave. I am disappointed that I could not find any reference to or any consideration of the best interest of the client in any of the materials or the discussion. Lastly, as a tax payer I am disappointed that the county attorneys behind this proposal appear to be more interested in advancing their own careers rather than a speedy resolution of the litigation. As we all know, the longer a case takes the more expensive it becomes.
    [Circuit Judge, 17th Judicial Circuit]

16. I vote to recommend the mandatory rule in keeping with that premise that lawyers are people too with families and lives outside of the practice of law. I think the mandatory rule would work best because it creates the presumption of granting leave, rather than leaving it up to the judge's discretion. In criminal court the only hesitation is the defendant's speedy trial rights.
    [Circuit Judge, 11th Judicial Circuit]

17. I do not have anything new to add to the discussions, other than I believe it would be appropriate for there to be a Rule rather than a "policy." It seems to me to be a distinction of substance, because a judge's failure to follow "policy" would be non-reviewable and thus of little force or effect.
    [Circuit Judge, 1st Judicial Circuit]

18. Our court plans to write a letter agreeing with the Judicial Administration Committee that a special rule should not be created. Offhand, can you advise where and to whom the letter should be sent? If an email is sufficient, let us know to whom and email address.
    [Judge of the Third District Court of Appeals]

In addition to the written responses received by the committee, the committee member who primarily performed the work associated with this element of the report personally spoke to a number of other judges within the state who, though they did not wish to go on a written record, shared their comments with us verbally.

Suffice to say there was not a unanimous consensus for or against any of the proposals. However, the majority of those few who did respond were against any mandatory rule provision. While noting that the proposals were no doubt well intended, some questioned the need for a rule which would in essence prioritize parental leave above all other situations which might necessitate a continuance (such as calendar conflicts, illness of counsel party or essential witness, death of a parent, or the like). Also, it was noted by many judges that the parental leave proposals were aimed solely at leave requested on behalf of counsel in the case, without regard for parental leave requests on behalf of parties or witnesses. At least one responder commented that the rules of court were designed to provide a framework to process litigation through the courts, and should not be "tinkered with" in order help advance the career goals of attorneys. Judges felt that the best interests of the parties and witnesses, as well as the policy goal of the speedy administration of justice, should be paramount.

A number of those opposed to a parental leave rule also expressed concern that making such a provision mandatory, or even discretionary, could easily be used to "game" the system. Most if not all who responded or with whom the committee spoke to verbally expressed the belief that a request for continuance based on parent leave would, under most circumstances be well received. Anecdotal evidence of situations where a trial judge may have unreasonably denied such a request was to some insufficient to justify a rule change, while to other judges it 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 the words: "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." Likewise, conflicts could very well arise in cases entitled to statutory priority, such as an 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 which suggest a firm continuance policy with few requests being granted, such as time standards for disposing of cases, and written motions signed by counsel and client (Rules 1.460, 2.250, 2.545, and 1.460). The prevailing theme being justice delayed is justice denied, and there are many negative consequences to litigants and witnesses and the courts that flow from delay.

In addition to discussing the matter with judges, the committee spoke to a number of trial lawyers, and as to be expected some favored the rule, mandatory and discretionary, while others opposed it for many of the same reasons set out herein. One noted that paternity leave in the workplace does not mean that the work of the business, law firm, or government entity ceases during the duration of the leave. The business of the law firms continues, the business of their clients continues, and the services of government continue, albeit without the presence of those on leave. Hence the proposed rule may very well be perceived by an already distrusting public as geared in favor of attorneys and against the real users of the system, the litigants.

In summary those who opposed a rule change felt that parental leave was only one among various reasons that should be given reasonable accommodation, including providing for continuances when possible and that a rule change was neither necessary nor warranted. The concept of creating an increased awareness of the issue through judicial education and perhaps comments to the current rules were referenced as alternate means of addressing the issue.

A number of those judges who favored the rule felt that a mandatory rule would be preferable so as to provide for some enforcement mechanism. Others felt that a discretionary rule would suffice in that it would at least designate the matter as reasonable grounds for a continuance. Some we spoke with felt that some sort of 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.

POTENTIAL LEGAL QUESTIONS OR ISSUES

The committee did not take lightly the question of whether a rule of this type would be constitutional when examined under the Equal Protection Clause of the state and federal Constitutions. However, strict or intermediate scrutiny do not come into play absent a rule which attempts to make distinctions based, for instance, on race or gender. The proposal for a parental leave rule does not make such distinctions.

The proposal does, of course, create a distinction between lawyers seeking a continuance for parental leave vs. those seeking a continuance for some other reason. Clearly, the

proposal would, if adopted as a rule, create a distinction that by its nature would create different continuance standards, albeit modest in distinction. However, the courts would apply the lowest level of review, the "rational basis test", in reviewing the rule. Under this deferential standard, so long as the court would be able to demonstrate some rational factual and/or policy basis for the rule, it would likely be upheld. Indeed, in the legislative arena, there may be found a host of statutes and administrative regulations making similar distinctions. Examples include, of course, the federal Family Medical Leave Act.

With respect to the question of the evidentiary standard to be applied to motions under this rule, the committee does not find any reason to have any evidentiary standards different than those which apply to motions made pursuant to the rest of the various rule sets. Therefore, attorneys making a motion for a parental leave continuance under the proposed rule would be expected to provide the trial judge with admissible forms of evidence, including the most obvious testimony under oath, to support the motion.

Likewise, as to what remedy a lawyer would have should a trial court not, in the lawyer's opinion, enforce the rule, the committee believes that the same remedies would be open to unsuccessful movants of parental leave continuance requests as are available in other procedural rule settings, thus avoiding the need to create new common law on the subject. The committee does recognize that there are unique issues presented with this proposed rule inasmuch as the rule focuses not on the desire of the client (though, presumably, the client would have been consulted and would have not objected to his/her/its lawyer making the motion), but the familial needs of the attorney. So issues such as the billable nature of such motions and related appeals, as well as ethical conflicts, may arise. However, the committee did not believe that the proposed rule, being a rule of procedure, should attempt to parse these issues as they are informed by other authorities, such as fee statutes and the ethical rules applicable to all members of the Florida Bar.

Proposed Rule Language

The charge given to this special committee was not only to analyze the issue, but also to draft and submit rule language which could be considered by the Board of Governors and, if desired, be submitted by that body for approval by the Florida Supreme Court. Pursuant to that charge, and after careful debate and discussion over a variety of drafts, the committee submits the following rule along with a committee comment:

> RULE 2.570 PARENTAL LEAVE
>
> A motion for continuance based on parental leave of the lead attorney in the case shall 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 shall be 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 shall 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 shall have the burden of demonstrating the lack of substantial prejudice to the opposing party.

committee comment

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. Substantial prejudice to an opposing party could be the need for emergency or time sensitive relief that would be unreasonably delayed by a continuance, or the fact that many continuances have already been granted and the substantial rights of the parties may be affected.

Final Committee Action

Based on the foregoing discussion, and after debating the components of this report, the committee voted by a vote of **9** to **0** at its January 27th 2017 meeting to approve and transmit this report to the Florida Bar President and Board of Governors.

additionally

The committee voted by a margin of **5** to **4** to recommend that the draft rule on parental leave set forth in this report should added to the Rules of Judicial Administration by the Florida Supreme Court.

Acknowledgements

The Chair wishes to ensure the Governors understand the substantial work which make up the content of this report was diligently and thoroughly performed by each member of the committee and but for each member's agreeing to quickly undertake their assigned analysis components, the committee would not have been as successful in meeting its mandate for a speedy, yet thorough final product.

Finally, the committee wishes to commend its Bar staff liaison, Ms. Krys Godwin. Ms. Godwin's cheery persona, attention to detail, and invaluable behind-the-scenes assistance were greatly appreciated by all.

c: Krys Godwin—Florida Bar Liaison