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IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULE OF JUDICIAL ADMINISTRATION — NEW RULE 2.570 **CASE NO.: SC17–1611**

JOINT RESPONSE TO COURT

Michael J. Higer, President, and Michelle R. Suskauer, President-Elect of the Board of Governors ("Board"), Judson L. Cohen, Chair of the Rules of Judicial Administration Committee ("RJA Committee"), and John F. Harkness, Jr., Executive Director of The Florida Bar, file this joint supplemental report to explain the Board's authority to file the initial report that created this case.

The Court directed the Board to "file a supplemental report explaining the Board's authority to file an 'out-of-cycle report' proposing a new Rule of Judicial Administration that is not joined in by the Rules of Judicial Administration Committee." (September 19, 2017, Order.). Pursuant to the Order, the Board was to file its Supplement Report by November 9, 2017, and the RJA Committee then had until November 21, 2017, to file a response. The Board, RJA Committee and The Florida Bar agree on the procedural authority of the Board to propose a new Rule of Judicial Administration that is not joined in by the Rules of Judicial Administration Committee. Therefore, the Board and RJA Committee file this Joint Response to the Court.

First, the Board recognizes the incorrect titling of the initial pleading. As the Board does not file regular-cycle reports seeking rule of court procedure amendments, "out-of-cycle reports" are also not filed. Therefore, the Board seeks an amendment to that scrivener's error and requests the Court recognize and rename the document to be "Report of The Florida Bar Board of Governors." Second, the Board and RJA Committee urge this Court to recognize the Board has the authority to submit rule amendments or proposals if such are addressed but rejected by a committee because for these purposes, the Board is "The Florida Bar." In the alternative, the Board seeks the Court to recognize the professional value of the proposed rule and adopt the rule through the Court's own authority.

Board of Governors' authority to submit rule proposals

The Court's internal operating procedures state "The Florida Bar" has the authority to submit rule amendments. Specifically, Section II.G.3 of the Court's internal operating procedures states: "Petitions to amend any of the procedural rules promulgated by the Court are docketed only if filed by The Florida Bar or a committee specially designated by the Court." Because the Board *is* The Florida Bar, it has standing to submit rule amendments. Moreover, the Board also has authority under Florida Rule of Judicial Administration 2.140 (Amending Rules of Court), the accepted authority and procedure to adopt and amend rules of court procedure.

Rule 2.140(a)(5) requires committees to consider all proposed rules or amendments to rules and a committee may accept or reject such a proposal. Regardless of whether a proposal is accepted or rejected, the minutes of the proposed rule amendment must be shared with the Court and the Board.

All proposed amendments to a Rule of Judicial Administration must first be reviewed by the RJA Committee. That proposed amendment will then be "adopted by the supreme court as provided in subdivisions (a), (b), (c), (d), (e), and (f) of this rule." (Rule 2.140(g)(2).) Subdivision (g)(2) requires that rule proposals "be referred to or proposed by" the RJA Committee, but this subdivision is silent as to the procedure if the committee rejects a proposal. Subdivision (c) addresses that situation. Subdivision (c) provides that if "a committee rejects a proposal, the proponent may submit the proposed rule to the board of governors." (Rules 2.140(c).) The Board must inform the respective committee of that submission. If a committee desires, a minority report of that committee may be submitted "to both the board of governors and the supreme court." *Id.* This is exactly how the instant proposed rule began. Accordingly, the Board and RJA Committee are of the opinion that this proposed rule is properly before the Court.

It is helpful to review how this rule came before the Court. On December 30, 2015, Craig Leen, City Attorney, City of Coral Gables, and member of the RJA Committee submitted to the RJA Committee Chair an initial draft of a parental leave rule sharing the concern that he "learned of three recent incidents where an attorney was denied a continuance request based on parental leave." (Report Appendix C.) This initial draft of the proposed rule was mandatory in nature:

> A motion for continuance based on parental leave of the attorney, when consistent with the parental leave policy of the firm or

> governmental entity for which the attorney works, or for a reasonable time when the attorney is a solo practitioner, shall be granted unless exceptional circumstances are shown. If the court denies the continuance, the specific grounds for denial shall be stated in the order, and the court shall exercise its discretion to grant as much leave as would be reasonable under the circumstances.

In compliance with the RJA Committee's Internal Operating Procedures, this request was assigned to a subcommittee, worked on in detail, and at the January 2016 RJA Committee meeting both a mandatory and a discretionary version of this rule were proposed to the full committee. At the January 2016 meeting, the RJA Committee neither accepted nor rejected either proposed rule. Instead, the RJA Committee voted to have the Committee Chair send a letter to various court organizations encouraging a policy of granting continuances based on parental leave. The RJA Committee then tabled the proposed rule change with direction that it be returned to the subcommittee. (Report Appendix D.) Following the January 2016 meeting, a letter was drafted and later sent to the Conference of Circuit Court Judges, the Conference of County Court Judges, the Florida Court Education Council, Office of the State Court Administrator, and the Florida Conference of Appellate Court Judges. (Report Appendix E.) The proposed rule was also shared with The Florida Bar Diversity and Inclusion Committee ("Diversity Committee") who unanimously supported the mandatory version of the proposed rule. Thereafter, Subcommittee A of the RJA Committee voted unanimously to recommend approval of the discretionary version of the rule to the RJA Committee at the upcoming June 2016 meeting. (Joint Response Appendix M, January 2016 Subcommittee Committee Report.) The discretionary version of the proposed parental leave rule was considered at the June 2016 RJA Committee meeting and the RJA Committee voted 25-5 not to approve the proposed rule.

After this negative vote, the proposed rule, in compliance with Rule 2.140(c), was submitted to the Board by the proponent. In response, the Board created a Special Committee on Parental Leave from Court Actions ("Special Committee") to consider the proposed rule which was rejected by the RJA Committee. In compliance with subdivision (c), the chair and vice chair of the affected committee were made aware of this submission and the chair was asked to appoint 5 members of the RJA Committee to this Special Committee. The RJA Committee chair was also asked to suggest a chair for this Special Committee, and

the work of the Special Committee was included within the RJA Committee's October 2016 and January 2017 agendas.

The Special Committee's January 2017 report to the Board president detailed the history of the rule proposal, the RJA Committee's negative vote, and the support of the rule by the Diversity Committee. The Special Committee extensively researched whether other states had expressed a need for a parental leave rule; this history is shared in the report. (Report Appendix H.) The pros and cons of the proposed rule were also researched and thoroughly detailed in the Special Committee's report. Ultimately, the Special Committee voted 6–4 in favor of a discretionary parental leave rule. The proposed rule was then published for comment. (Joint Response Appendix N, Publication Notice.) On May 26, 2017, Rule 2.570 was presented to the Board of Governors and approved unanimously.

The wording of the proposed rule recommended by the Special Committee differs slightly from the rule considered and rejected by RJA Committee. However, the substance is nearly identical to the previously rejected rule. For this reason, it appeared redundant and unnecessary to approach the RJA Committee for another negative vote. Instead, it made the most sense to follow Rule 2.140(c), bringing the RJA Committee's history and concerns, and other practitioner's support and concerns, to the Court as a de facto minority report that would accompany the filed report and the appendices.

The Court appears to recognize this procedural option in the Chief Justice's letter, received as a response to the RJA Committee's letters to the Court and court conferences. In that letter, the Court states that "it seems appropriate to defer any action until such time as the Bar's recommendations are finalized." The Court specifically stated the "Bar's" recommendations, not the "committee's."

The Court's Internal Operating Procedures, like Rule 2.140(c), recognize that the rules committees may not be the only entities that can file a proposed rule of procedure amendment, but that The Florida Bar may also file proposed amendments. The IOPs allow for amendments to procedural rules to be "filed by The Florida Bar or a committee specially designated by the Court." (Court IOP G.3.) It is true that the Special Committee that proposed the rule is not a "committee specially designated by the Court" but it is, de facto, part of The Florida Bar. Moreover, the Board of Governors is, in fact, The Florida Bar. Therefore, because a rule of court committee serves under the Board of Governors

and cannot be submitted to the Court without prior submittal to the Board for its review and recommendation. Though all other proposed amendments may be forwarded to a rule of court committee, that committee is under the umbrella of the Board, thereby, in fact, all referrals are actually under the auspices and responsibility of the Board.

Client and Practitioner concerns

The Board and proponents of the proposed rule set forth several practical reasons that urge the acceptance of jurisdiction over this case. The clients of trial practitioners could be greatly harmed if they have been working closely with a particular attorney and that attorney is forced off a case because of parental leave needs. When a client agrees to a continuance due to an attorney's parental leave, the court should not harm that client's choice by denying the continuance. If either the attorney, the opposing attorney, or any of the clients feel there would be a harm or prejudice to any party due to the requested continuance, the requesting attorney has the burden of proof to show that lack of substantial prejudice. In addition to preventing harm to a client by requiring that the client start anew with a new attorney, the attorney may also have personal professional reasons to request a continuance; specifically, for example, appellate attorneys are required to have a certain number of oral arguments within a certain span of time to become board certified, yet the number of arguments scheduled is becoming fewer. If a court refuses to reschedule an oral argument for a specific attorney and requires the case to go forward with another "named" attorney who is not actually the lead attorney, the client will suffer and the attorney may be unable to obtain certification qualifications.

Court Authority and Preference

Ultimately, it is this Court's decision whether to adopt a rule of court procedure or not. That decision falls squarely within the Court's discretion. But independent of the relative merits of the proposed rule regarding parental leave, the question addressed in this filing is whether the Court's door is open to receiving and reviewing proposed rules or rule amendments when a committee declines to lend its support to advancing such proposals.

Only the Court has the authority to adopt a rule of court procedure and that jurisdiction is mandatory as well as exclusive. The Court has the ability to adopt

any rule of court procedure that it deems appropriate. Therefore, if this Court disagrees with the Board's and the RJA Committee's understanding of Rule 2.140 and concludes that it does not have authority under that procedural path, the Board suggests that this Court nonetheless has the authority to address this important proposed rule by changing the number of the proposed rule so that it falls under Part II or III of the Florida Rules of Judicial Administration thereby staying within the absolute purview of this Court. This would exclude the concern from any procedural conflict between Rules 2.140(c) and 2.140(g)(2) questioned in this case.

WHEREFORE, the Board and RJA Committee respectfully request that the Court accept jurisdiction of the renamed Report of The Florida Bar Board of Governors and consider the proposed rule change. The RJA Committee asks that the requirement to file a Response be waived in light of this Joint Response.

Respectfully submitted on November 9, 2017.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished by e-mail, via the Florida Courts E-filing Portal, on November 9, 2017, to:

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CERTIFICATE OF COMPLIANCE

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

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THE FLORIDA BAR RULES OF JUDICIAL ADMINISTRATION COMMITTEE

SUBCOMMITTEE A ACTION REPORT

TO: Amy Borman, Chair RJA

FROM: Mark A. Romance

Date: January 14, 2016

Please be advised that Subcommittee A conducted a meeting on Wednesday, January 13, 2016, by conference call to discuss the action item listed below.

Subcommittee attendance was as follows:
Mark Romance – Present
Judson Cohen – Present
Judge Gagliardi –Present
David Jones – Not Present
Craig Leen – Present
James McKee – Present
Bill Vose – Not Present
Stephen Williams –Present
Tom Hall – Not Present

Additional participants included:
Krys Godwin
Amy Borman
The Subcommittee took the following action:

Item A: Proposal from Committee Member Craig Leen Regarding Parental Leave

1. Determined that the submission is within the scope of Subcommittee authority. **Yes.**
2. The Subcommittee made the following work assignments: **See attached.**
3. The Subcommittee made the following decisions: **The Subcommittee approved in concept a new rule 2.565 regarding Parental Leave. The proposed rule suggested by Mr. Leen included a presumption that a motion for continuance based on parental leave of the attorney should be granted unless exceptional circumstances exist. By a 4-2 vote, the majority of the Subcommittee members in attendance approved the concept of a new rule but with the caveat that the court have more discretion to grant the continuance based on all the circumstances. Mr. Leen was amenable to revising the proposed rule to afford the court more discretion and provided a revised rule for the Committee's consideration.**
4. The Subcommittee prepared the attached written report which includes a summary of the issues, factors considered, majority position, minority position if applicable and proposed change in legislative format, if any. **See attached.**

The Subcommittee Chair will be prepared to report to the full Committee at the meeting in January 2016.

Mark A. Romance
Subcommittee A Chair

Cc: Judson Cohen, Vice-Chair, Subcommittee A
Krys Godwin

REPORT OF SUBCOMMITTEE A

ITEM A. Proposed New Rule 2.565 – Parental Leave, proposed by Committee Member Craig Leen

Summary of Issues Discussed

Committee Member Craig Leen proposed the following new Rule and Comment:

RULE 2.565 PARENTAL LEAVE

A motion for continuance based on parental leave of the attorney, when consistent with the parental leave policy of the firm or governmental entity for which the attorney works, or for a reasonable time when the attorney is a solo practitioner, shall be granted unless exceptional circumstances are shown. If the court denies the continuance, the specific grounds for denial shall be stated in the order, and the court shall exercise its discretion to grant as much leave as would be reasonable under the circumstances.

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 presumption that a continuance for parental leave will be granted unless an exceptional reason is shown. An exceptional reason could be the need for emergency or time sensitive relief, or the fact that many continuances have already been granted and the substantial rights of the parties may be affected.

Mr. Leen explained that he has become aware of three specific, separate cases where female attorneys moved for a continuance of a trial because she wanted to take maternity leave at the time the trial was scheduled, and the motions were denied. He has reason to suspect that there are more similar instances. Mr. Leen explained that many judges believe that if a lawyer is employed by a large governmental agency or a law firm, that a continuance for maternity leave should not be granted because another attorney from the agency or firm can simply "cover" the trial. Mr. Leen further explained that even if another attorney could "cover" the trial, the inability of the lawyer requesting the continuance to handle the trial has adverse consequences on the lawyer, who may suffer lost advancement opportunities by not being able to conduct the trial. Accordingly, the risk that a court could deny the motion puts the lawyer in the difficult position of sacrificing significant family time in order to not hurt her career. Mr. Leen explained that female lawyers refrain from making such motions because they do not want to have a stigma attached to them within their firms and thus often do not even seek the continuance. Mr. Leen

further explained that male attorneys may also want to take family leave for the birth of a child, but the stigma attached to such a motion precludes the filing of the motion in the first instance. Mr. Leen suggested that having a rule in place will be an indication from the court that this critical family time is important and is a proper basis to request a continuance, hopefully removing the negative stigma presently attached to filing such a motion.

Several members of the Subcommittee expressed concern that lawyers could use such a rule for tactical advantages and "game the system." Several examples were discussed. Another concern raised was whether such a rule was necessary in light of the current rules on continuances that exist in the Civil Procedure Rules and elsewhere. Another concern was raised as to whether a rule that constrains judicial discretion was appropriate.

Committee Chair Amy Borman suggested that the Subcommittee consider whether the proposal could be incorporated into Rule 2.550 Calendar Conflicts. She also suggested that the Subcommittee consider whether the proposal should be part of the RJA or possibly put into the Code of Judicial Conduct.

Action taken by Subcommittee

The Subcommittee voted 4-2 that the proposed rule should be approved in concept because the policy issues justify enactment of a new rule. The majority, however questioned whether the mandatory nature of the proposed rule should be revised to allow a judge more discretion in evaluating a motion made under the rule. The votes in favor of the proposed rule uniformly limited their affirmative vote to the "concept" of a Parental Leave rule with the understanding that the rule should be revised to remove the mandatory inference of the rule and to instead permit the court more discretion.

The two dissenting votes supported the concept of having judges grant continuances based on family leave, that the policy being proposed is very important and one that should be promoted, but indicated concern about criticisms that there are simply too many rules, that more rules that restrain judicial discretion is not good for our system, and that the likelihood of abuse of such a rule was very high. An additional concern was whether it would be appropriate to limit the topic of the rule to maternity leave when there are other important public policy reasons for a continuance that should be considered such as the health of a lawyer and health of a lawyers' family member – spouse, parent or child.

Subsequent Activity

Following the Subcommittee meeting, Committee Member Craig Leen proposed an alternative rule that permits the judge more discretion in evaluating a motion for continuance based on family leave, which additional proposal has not been considered by the Subcommittee. The additional proposed rule is as follows:

RULE 2.565 PARENTAL LEAVE

In considering a motion for continuance based on parental leave of an attorney for a party, when the requested amount of time is consistent with the parental leave policy of the firm or governmental entity for which the attorney works, or for an otherwise reasonable amount of time when the attorney is a solo practitioner, the court should exercise its discretion to grant the requested continuance unless the opposing party would be substantially prejudiced. In such circumstances, the court should exercise its discretion to grant as much leave as would be reasonable without causing substantial prejudice to the opposing party.

Comment

The profession is committed to parental leave and to the importance for attorneys to be able to balance work and family. This rule establishes that a court should exercise its discretion to grant a continuance for parental leave unless there is substantial prejudice to the opposing party. Substantial prejudice could be the need for emergency or time sensitive relief, or the fact that many continuances have already been granted and the substantial rights of the parties may be affected.

In determining the time period that is reasonable for a continuance under this rule, the court is expressly encouraged to consider the parental leave policies of the firm or governmental entity for which the attorney works. Where no such parental leave policy exists, the court may also wish to consider the time periods provided in the Family and Medical Leave Act as a reasonable amount of time. Nevertheless, the ruling on a motion for continuance under this rule, as well as any time period provided, ultimately remains in the sound discretion of the court.

PROPOSED BOARD ACTION

Pursuant to Standing Board Policy 1.60, the Board of Governors of The Florida Bar publishes this notice of intent to take final action to recommend that the Supreme Court of Florida adopt new Rule of Judicial Administration 2.570 at its May 27, 2017, meeting in Key West, Florida. This is governed by Florida Rule of Judicial Administration 2.140. If approved by the board, this amendment must still be formally filed with the Supreme Court of Florida, with further notice and opportunity to be heard, before it is officially approved and becomes effective. All comments for the board's consideration must be submitted in writing, no later than May 15, 2017, to Krys Godwin, Director, Legal Publication, at kgodwin@floridabar.org.

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 NOTES

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.