Case No. SC18-1554
November 15, 2018

In Re: Amendments to the Florida Rules of Judicial Administration – Parental Leave

Honorable Justices of the Supreme Court of Florida,

The Florida Association for Women Lawyers ("FAWL") respectfully submits the following comment to express unequivocal support for proposed Rule of Judicial Administration 2.570, which requires continuance of trial be granted in the absence of substantial prejudice to the opposing party, where lead counsel is in need of time for parental leave.

FAWL is a non-partisan statewide voluntary bar association that advocates for the equality of women in the legal profession, the judiciary, and the community at large. FAWL has approximately 3,000 members, composed of male and female attorneys, judges, and law students who share a common dedication to the mission. FAWL is made up of twenty-four attorney chapters and eleven law school chapters throughout the State.

FAWL believes the Rule is necessary because it is increasingly aware of denials of requests for continuance based on parental leave and, more frequently, excessive opposition to such requests, which is not seen in any other scenario. Continuances are routinely granted without opposition for weddings, planned surgical procedures, football games, and Broadway shows. Yet, when months of advance notice of a need for continuance is presented by parents who are also trial lawyers, there seems to be a pattern of opposition and doubt as to the legitimacy of the request. As this Court knows, there is very limited ability to appeal the denial of a request for continuance and that ability is further limited where the order denying the continuance contains no findings, which is commonplace under the current rules.

All rules and statutes and even the Constitution, limit the discretion of judges. FAWL considered whether the Rule should be discretionary or mandatory and ultimately voted in support of "shall" because "may" would represent no change from the status quo.

Perhaps the biggest myth FAWL would like to dispel is that opposition to requests for continuance based on parental is not common. FAWL recently hosted a CLE on the proposed rule and the experience of women lawyers in taking parental leave and requesting continuances, which will be available at www.fawl.org for public viewing. As the panelists shared, it is their collective experience that opposition to continuances requested for the purpose of parental leave is more of the rule than the exception for women who serve as lead trial counsel.

Below, FAWL provides some examples of relevant experiences shared by women attorneys throughout the state. A majority of women who shared these experiences wish to remain anonymous. They have a duty first and foremost to their clients and a justified fear of retribution when they routinely appear in front of the judges and work with the opposing counsel involved in each situation. Their experiences are shared for the purpose of effecting improvement of the law.

FAWL provides the following examples of experiences of denial of continuance requests and opposition to such requests:

- In 2013, in a Circuit Court in Florida, a woman was denied a continuance and forced to go to trial over 200 miles away from her seven week old newborn daughter in Jacksonville, whom she was breastfeeding. She worked for a small firm, had been working on the case since its inception, and it was not possible for another attorney to step into the case with the intimate knowledge of the facts. When she went to trial, the judge was reluctant to allow her breaks to pump in order to feed her child and maintain her supply. Effectively, her choice was to tell her client to get a new lawyer or to go to trial no matter the circumstances related to her health and the health of her child.

- In 2017, in a Circuit Court in Florida, a woman was sanctioned sua sponte by the court for late discovery responses after the adoption of her son with less than two (2) weeks' notice even though she had reached agreement with opposing counsel prior to the hearing.

- In 2018, in a Circuit Civil Division in Florida, a woman lawyer requested a continuance to the next trial period due to the expected birth of her second child. Opposing counsel opposed her motion and referred to her pregnancy as an "illness." During the hearing, he implied that her motion was yet another delay tactic by the defense even though it was the first request for continuance by her client. Opposing counsel also implied the woman lawyer was fungible and could be easily replaced by the named partner at her firm, a man, even though she had clearly been lead counsel throughout the lengthy case. In granting the continuance, the court stated, "I don't believe [the woman attorney] got pregnant in response to this case. I do believe that [the woman attorney] is entitled to have some time for her to deliver her child and take care of her child before coming back to resume her duties as an attorney."

- In a recent case in a Circuit Court in Florida, the court stated that a woman lawyer could conduct the trial three days before her parental leave was scheduled to begin.

- In 2017, in a Circuit Court in Florida, a woman lawyer would not agree to set trial for two (2) weeks before her due date. Opposing counsel filed a motion to compel and referred to the parental leave as a "maternity vacation." The trial was set for the week the woman returned from parental leave.

- In 2015, in a Circuit Court Family Law Division, a woman lawyer was retained two months before trial and told the case was expected to settle. She soon learned this was not the case. The woman lawyer requested a short continuance of thirty (30) days due to the expected

birth of her child. Opposing counsel opposed the motion and accused the woman lawyer of lying about her pregnancy in open court because the woman lawyer did not appear to be pregnant. The judge asked the woman lawyer to respond and the woman lawyer was forced to come out in open court and state that her wife was carrying their child. The continuance was granted.

- In 2015, in a Circuit Civil Division in Florida, a woman lawyer planned to try a complex medical malpractice case with her partner. Her physician then informed her that the baby needed to be delivered at 39 weeks, which would be during the first week of trial. Opposing counsel opposed her motion to continue trial and argued the cesarean section was intentionally scheduled for the purpose of obtaining a continuance. Fortunately, in this case, the judge granted the continuance and delivered a lecture on professionalism.

- In 2006, in a Circuit Court in Florida, a woman lawyer had been handling a complex medical malpractice case by herself for years. She was put on bed rest at 24 weeks due to pregnancy with twins. She filed a motion to continue a four (4) week trial, which was opposed. Two of her partners tried the case instead. The woman lawyer left the firm as a result of the experience.

Denials are not limited to trial level courts. FAWL is aware of at least three denials of continuances requests for oral argument when lead counsel was in need of parental leave in three different district courts of appeal in Florida.

FAWL provides the following examples of unprofessional behavior by opposing counsel seeking to gain strategic advantage when lead counsel is on parental leave:

- One woman lawyer filed her motion for continuance months before her parental leave started and it was granted. The day before her leave was scheduled to begin, opposing counsel insisted he needed to conduct new discovery and set depositions. The woman lawyer believed this was a tactic to force settlement.

- Another woman lawyer experienced opposing counsel repeatedly attempting to set hearings and depositions while she was on parental leave even though she filed notices of unavailability five (5) months beforehand.

These are but a few recent examples. Parents should not have to forego lead counsel opportunities or lose their clients in the absence of substantial prejudice. Lawyer spouses should not be unnecessarily put under undo stress or concern that their significant other could miss the birth of their children in the absence of substantial prejudice. Clients should not have to pay for a new attorney to learn their case on the eve of trial—to the extent that is even possible—in the absence of substantial prejudice. Proposed Rule 2.570 would not change the Rule of Civil Procedure that requires clients to consent to requests for continuance. Newborn children should not be deprived of essential development in the first three months after birth in the absence of substantial prejudice.

FAWL believes the Rule adequately allows for the concerns of the Florida Public Defender Association, Inc. and the Department of Children and Families to be addressed, as both constitutional rights and the statutory scheme in Chapter 39 would be perfect examples of "substantial prejudice." Also, courts are well-equipped and routinely do apply the rules of construction to understand that constitutional rights, such as speedy trial, prevail over conflicting rules of procedure. FAWL would also note it is not aware of the issue of aggressive opposition to parental leave continuances or denial of continuances being prevalent in either of these areas of the law, where coverage counsel is more common. If, however, the Court is concerned by the possibility of confusion related to continuances in these areas, it could add a sentence the Comment that clarifies that violation of constitutional rights or Chapter 39 would constitute substantial prejudice.

The Court has plentiful materials from parents who have experienced disappointing opposition to and denial of their requests for continuance of trial. Results that are unpredictable and arbitrary cannot be just. FAWL would submit that all of the parents who are lawyers in Florida, as well as the judges and opposing counsel would benefit from written guidance from the Court on professionalism in responding to motions for continuance sought due to parental leave.

Women are vastly underrepresented in first chair roles in civil trials.[1] Being deprived of these critical trial opportunities likely contributes to underrepresentation of women in partnership of law firms and even board certification, which frequently has a trial requirement. Adoption of the proposed Rule will not cure gender bias in the legal profession or solve gender equality, but it is a tangible step in the right direction.

Sincerely,

Florida Association for Women Lawyers

_____

Jennifer Shoaf Richardson
President
Florida Bar No. 67998

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing letter has been electronically filed in compliance with Florida Rule of Judicial Administration 2.520 or Administrative Order AOSC13-7 and furnished via electronic mail to Committee Chair Eduardo I. Sanchez at eduardo.i.sanchez@usdoj.gov and Bar Staff Liaison Krys Godwin at kgodwin@floridabar.org on this 15th day of November, 2018.

[1] First Chairs at Trial: More Women Need Seats at the Table, ABA Commission on Women (2015) available at https://www.americanbar.org/content/dam/aba/marketing/women/first_chairs2015.authcheckdam.pdf .