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IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA FAMILY LAW RULE OF PROCEDURE 12.410

SC21

REPORT OF THE FAMILY LAW RULES COMMITTEE

Cory Aaron Brandfon, Chair of the Family Law Rules Committee, (the "Committee"), and Joshua E. Doyle, Executive Director of The Florida Bar, file this report pursuant to Florida Rule of General Practice and Judicial Administration 2.140(b)(1).

By a vote of 15-0-1, the Committee approved amendments to Rule 12.410 (Subpoena). By vote of 46-1, the Florida Bar Board of Governors recommends the rule amendments' acceptance. Pursuant to Florida Rule of General Practice and Judicial Administration 2.140(b), the proposed amendments were published in the August 2020 edition of *The Florida Bar News*. (See Appendix C.) A comment supporting the amendment was received by the Family Law Section. (See Appendix D.) For the Court's convenience, a publication summary was provided as Appendix E. The amendments, as shown in Appendix A (legislative format) and Appendix B (two-column format), are proposed for the following reasons:

RULE 12.410. SUBPOENA

The Committee received a referral from attorney Jeff Grabel. (See Appendix F) Mr. Grabel proposed an amendment to Rule 12.410(d) that would not require that the notice of issuance of a subpoena be served on the opposing party the same day as the subpoena was issued. Mr. Grabel believes the current rule places small firms and other litigants who rely on proof of service from the sheriff's office at a disadvantage. For small firms, a huge burden is placed on a staff to be constantly checking their e-mail or mail for proof of service to arrive, and then the staff must draft the notice of subpoenas, and immediately e-file the notice the same day the person was served. For litigants who rely on the sheriff's office for service, the timing of this rule is not able to be met as the sheriff's office doesn't usually supply proof of service on the same day as service is completed. Mr. Grabel also expressed concerns regarding this requirement with cases for injunction for

protection against domestic violence, dating violence, sexual violence, and stalking. Mr. Grabel was concerned that the respondent may receive the notice of issuance of a subpoena via the e-portal service prior to being served with a temporary injunction by personal service. The Committee believed that this, in fact, could be dangerous for a victim of domestic violence. Under the current rule, the Committee believes that the respondent may be given notice on the same day a subpoena is issued without the sheriff's office yet serving the injunction on the respondent in person. The concern then becomes, based upon the type of witnesses who have been served with the subpoena issued by the petitioner, the respondent may incorrectly be given advance notice of the injunction being filed and may react violently prior to being served the injunction. The Committee also agrees with Mr. Grabel that the rule is unforgiving and disadvantages many litigants for the reasons he stated. Mr. Grabel did not provide a specific suggested amendment but expressed concerns regarding this rule, so the Committee considered amending the rule with Mr. Grabel's specific concerns in mind.

This notice of subpoena provision in Rule 12.410 was first adopted in *In Re: Implementation of Committee on Privacy and Court Records Recommendations—Amendments to the Florida Rules of Civil Procedure, the Florida Rules of Judicial Administration, the Florida Rules of Criminal Procedure, the Florida Probate Rules, the Florida Small Claims Rules, the Florida Rules of Appellate Procedure, and the Florida Family Law Rules of Procedure*, 78 So.3d 1045 (Fla. 2011). The only reason given in the report for the change to Rule 12.410 was to address the new redaction of personal information requirements if placed in Rule 12.280(a). However, the Committee now notes that adding a requirement that a party serve a notice on the same day of service of the subpoena is unrelated to redaction of personal information. A review of the Committee's minutes did not illuminate the reason why this particular subdivision was added. However, past members of the Committee stated the reason that these subdivisions were added were to prevent trial by ambush and to give parties notice of who was expected to attend and testify at a hearing or trial.

Prior to the 2011 case, the family proceedings were governed by Rule 1.410 with no exceptions.

The current subdivision (d) of Rule 1.410 is as follows:

> A subpoena may be served by any person authorized by law to serve process or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena on a person named within must be made as provided by law. Proof of such service must be made by affidavit of the person making service except as applicable under rule 1.351(c) for the production of documents and things by a nonparty without deposition, if not served by an officer authorized by law to do so.

For illustration, the relevant portion of Rule 1.410 as originally adopted (then subdivision (c)) in 1968 is as follows:

> A subpoena may be served by any person authorized by law to serve process or by any other person who is not a part and who is not less than twenty-one years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fee for one day's attendance and the mileage allowed by law. Proof of such service shall be made by affidavit of the person making service if not served by an officer authorized by law to do so.

The civil rule never contained a specific subdivision requiring a notice of subpoena be served on all parties the same day of service.

Given Mr. Gabrel's concern, the Committee didn't see any justification that would require the subdivision. Thus, the Committee recommends Rule 12.410(d) match Rule 1.410(d),thereby returning the rule to the Civil rule wording, which originally governed family law proceedings, since the adoption of the Family Law Rule appears unclear and the return to the civil rule wording does not cause any grave concerns.

Specifically, the Committee recommends deleting the number and title "(1) Generally", and the end phrase "if not served by an officer authorized by law to do so" in subdivision (d)(1), which will be substituted with "except as applicable under rule 12.351(c) for the production of documents and things by a nonparty without deposition, if not served by an officer authorized by law to do so." Subdivision (d)(2) is deleted in its entirety. This group of amendments will make the family law courts fair for all parties and participants.

WHEREFORE, the Committee respectfully requests that the Court amend Florida Family Law Rule of Procedure 12.410 as detailed above.

Respectfully submitted on April 23, 2021.

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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 April 23, 2021.

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CERTIFICATE OF COMPLIANCE

I certify that these rules were read against Thomson Reuters' *Florida Rules of Court—State* (2020 rev Edition). I certify that this report was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.045.

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