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Wednesday, March 23, 2022

Hon. Chief Judge Robert Morris, on behalf of, Florida Supreme Court and Chair of its Workgroup on Improved Resolution of Civil Cases Second District Court of Appeals P.O. Box 327 Lakeland, Fl 33802 Served by Florida E-filing	Tina White OSCA Staff Liaison, on behalf of Florida Supreme Court and its Workgroup on Improved Resolution of Civil Cases 500 South Duval Street Tallahassee, FL 32399 Served by Florida E-filing

Re:

- Workgroup on Improved Resolution of Civil Cases
- Limited Comments by Bar Member Jay Bruce Grossman, Fla. Bar No 147036
    - Comments On Final Report as to Proposed rule 1.275 and Revamping of Fla. R. Civ. P. 1.380

The Supreme Court of Florida, via the Florida Bar, invited comment, on its Workgroup on Improved Resolution of Civil Cases' "Final Report" issued November 15, 2021. The Final Report examines Florida's current civil litigation process and makes new process recommendations to achieve more efficient litigation progression in the

areas of case management, discovery, motion practices, and non-prosecution of pending matters. The Final Report may likewise be described as an insightful study on how best to 'establish' a more results-oriented civil judicial system. I commend the work but provide two comments on the Report's discovery schemata for the Court's further consideration.

Three and a half months prior to the Workgroup's delivery of its study to the Supreme Court of Florida, I offered seven Florida law school's Law Reviews or Journals my article "Seeking Sanctions under Florida Rule of Civil Procedure 1.380: A More Arduous Endeavor Than Portended by a Reading of the Rule." The paper studies the Florida discovery process and sanction pitfalls universally and per each Florida-based court system. The article still awaits consideration by five of those publications.

The 'Seeking Sanctions . . .' article presents the conundrum that the present discovery enforcement system provides recalcitrant discovery litigants opportunity to tactically employ discovery obstruction. A recalcitrant discovery litigant has strategic leeway not

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to produce during the first or second go-around in discovery because existing case law requires a showing of "willful disdain for the court or its process" before a case affecting sanction can be put forth.[1] The impediment to sanctioning does not end there, if willfulness is determined, case law still requires the sanction itself may not be too harsh – compared to the discovery recalcitrance.[2]

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[1] Florida case law is ubiquitous in the requirement of willful recalcitrance before sanctioning. The willful requirement was first announced as a standard in the Supreme Court of Florida case Mercer v. Raine, 443 So.2d 944, 946 (Fla. 1983) (". . . [n]or is this a case where the record was devoid of any evidence reflecting willful disregard of an order of court, . . ."). The willful requirement was then further developed in, inter alia, Wallraff v. T.G.I. Friday's, Inc., 490 So.2d 50, 51 (Fla. 1986) ("deliberate and contumacious disregard of the court's authority,"), and Commonwealth Federal Sav. and Loan Ass'n v. Tubero, 569 So.2d 1271, 1273 (Fla. 1990) ('willful or deliberate refusal,' etc.).

[2] On the impermissibility of too sever of a sanction see, Mercer, 443 So.2d at 946 ("We agree that the striking of pleadings or entering a default for noncompliance with an order compelling discovery is the most severe of all sanctions which should be employed only in extreme circumstances." Referencing to, Hart v. Weaver, 364 So.2d 524 (Fla. 2d DCA 1978)).

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These two criteria, sometimes obstacles, requiring a showing of willfulness and then the least harsh coercion to overcome or punish the discovery recalcitrance is then further confounded by the fact that in over one hundred cases reviewed, the words used to explain how to measure willfulness, were divergent not only among the multiplicity of cases but often within any singular case.[3] As matters stand now judges are rightly hesitant in punishing discovery recalcitrance and thus, the intractable discovery participants are encouraged in their wanton ways.

I support the Workgroup's product but I have two concerns that I believe the Workgroup did not sufficiently extricate in the Final Report. I present those concerns herein and ask that these comments be

[3] In the all-important case of Commonwealth, the terms designating willful or deliberate refusal, was dramatically inconsistent in setting out the willful or deliberate standard as its measuring tool because in this single decision the Court used a plethora of verbiage when referring to its therein announced standard measuring criteria. 'Willful disregard,' 'willful or deliberate,' 'willful,' 'willful failure,' Commonwealth, 569 So.2d at 1272, and 'willful refusal,' 'willful noncompliance,' 'willfulness,' and willfulness or deliberate disregard,' Commonwealth, 569 So.2d at 1273.

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reflected upon in conjunction with your consideration of the Workgroup's Final Report and recommendations.

Issue 1: Proposed rule 1.275 and the Kozel Factors

The Executive Summary, Part II, Subpart A., Court case management, at page 9, the bullet point entitled, "Proposed new section rule 1.275," informs there presently does not exist a focused set of authorized sanctions for the case management process and proposes a to-be-promulgated new sanction rule 1.275, at page 14 of the Final Report. Further, the proposed rule 1.275, is to be 'supplemental to' the currently prevailing discovery sanction rule, Fla. R. Civ. P. 1.380, Failure to Make Discovery, Sanctions.

Presently, under Fla. R. Civ. P. 1.380 and related case law, when an attorney is to be made subject to a trial court discovery order or sanctioned for non-compliance, the trial court must consider the

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factors outlined in Kozel v. Ostendorf, 629 so.2d 817 (Fla. 1993).[4/5] The factors' characteristics are guidelines appropriate when sanctioning a party's attorney not when a trial court is considering the sanctioning of a party litigant. Nevertheless, the Final Report and its proposed rule 1.275(f) require, when considering the issuance of a

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[4] The Kozel factors are:

> 1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created significant problems of judicial administration. Upon consideration of these factors, if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative.

Kozel, 629 So.2d at 818.

[5] Kozel was not a discovery issue case. It concerned a counsel's failure to timely bring a matter before the court. Nevertheless, one will find it cited as a controlling law factor and thus as a required component of proper analysis in all post-Kozel discovery sanction cases examining whether a counsel should be subject to sanctions.

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"dismissal with prejudice or default" sanction, the 'whether-to-sanction' Kozel factors are now to be used in reaching a party litigant or attorney sanction determination.

That application raises an issue that seems not to be considered in the Final Report. Deployment of the proposed sanction rule 1.275(a) will apply equally to either ". . . a party or attorney [who] fails to comply with the rules or with any court order . . ." The Kozel factors do not necessarily comport with considering whether a party litigant's recalcitrant actions should be sanctioned or be sanctioned distinctly from the party's counsel.[6] I take note that another proposed rule, 1.279(b)(3), directs attorneys to advise their clients of their discovery obligations and pursuant to proposed rule 1.279(c) (1 - 2) provides authority for the trial court to sanction a party litigant's malfeasance under any rule. Nevertheless, informing a client of the attorney's (and

[6] For example, Kozel, seeks to determine a litigation counsel's experience, as a factor in the discovery failure, while it should not be a factor applied to a party litigant before issuing sanctions for a party litigant's disdain for the court or its process.

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client's) obligations under the rules of civil procedure do nothing for reformatting the Kozel inquiry for applicability to a party litigant when a sanction is to be issued for a party litigant's recalcitrance as opposed to the recalcitrance of the litigating coun

Experience informs that in some cases a party litigant's recalcitrance impedes the case management process as opposed to any failing of representative counsel. Furthermore, the client litigants have the advantages of the Florida litigation process, to resolve their dispute, thus, the party litigant as the beneficiary of the state court system should bear, at least an equal responsibility for discovery recalcitrance, but be so subject to criteria applicable to their situation as a public litigant not an officer of the court.

Kozel should be the base layout from which a party litigant set of criteria are reformatted when considering the sanction of a party litigant. A comment accompanying the proposed rule 1.275 noting that some of the Kozel factors may not be applicable to party litigant sanctions or that other factors may be appropriate when sanctioning

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a party litigant should be sufficient to make future litigant counsels and trial courts aware of the matter.[7]

Issue 2: Willfulness and, Revamp of Fla. R. Civ. P. 1.380 and Maintaining a Schedule

The Executive Summary, Part II, Subpart B., Maintaining the schedule, the bullet point entitled, "Discovery," at pages 15 - 16, speaks of a proposed enhanced discovery sanction in the form of a

[7] The reader should be aware though that at least the Fourth District Court of Appeal, believes its and the Supreme Court of Florida's requirement of case dismissing orders be analyzed in accordance with the Kozel factors is not being well received, and not necessarily followed, by the circuit courts. In Bank of America, N.A. v. Ribaudo, 199 So.3d 407, 408 (Fla. 4th DCA 2016) the court announced its frustration with the circuit courts failing to deploy Kozel and stated:

> We have held time and time again (and apparently must do so once more) that before a case can be dismissed as a sanction for a discovery violation, the trial court must consider the six factors established in Kozel to determine if dismissal is appropriate and set forth explicit findings of fact in the order that imposes the sanction of dismissal.

The question remains, whether the newfound and proposed status for Kozel, will do anything to uplift its use before the trial courts?

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revamp to Fla. R. Civ. P. 1.380. The undersigned supports, this proposed update of Rule 1.380.

As noted, present state law, as engendered in Florida case law, requires willful disdain for the court or its process to validate a case effecting or case ending order. It needs to be understood that neither the existing Fla. R. of Civ. P. 1.380 nor the proposed revamped version deploys the word willful, or some variation thereof, as a criterion. That is singularly a matter of case law. See n. 1, supra. As matters exist now per the Final Report Fla. R. of Civ. P. 1.380 will require a finding of willfulness, but, the new proposed rule, 1.275(g), by its terms, says, ". . . [a] finding of willfulness shall not be necessary to impose a sanction provided in this rule."

The Final Report leaves unexplained why the requirement of willfulness remains, in Fla. R. of Civ. P. 1.380. This leaves open the opportunity for misunderstood decisions on sanctioning. I am not sure all litigants and trial courts will insightfully manage the distinction why the general discovery sanction rule requires a finding

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of willfulness but the supplemental sanctioning rule by its formatting does not.

In the federal system, pursuant to Fed. R. Civ. Pro. 37, the trial court only needs to determine a failure to provide as the discovery rule permits to sanction.[8] In 'Seeking Sanctions . . .' the article, I discussed the dichotomy between Fla. R. Civ. P. 1.380, and the federal system found in Fed. R. Civ. P. 37, while discussing Chambers v. NASCO, Inc., 501 U.S. 32. 111 S.Ct. 2123 (1991) (WHITE):

> The distinction . . . is in the Florida system the act of coercive enforcement must demonstrate the recalcitrant deponent has not made an adequate response to a request but additionally prove: 1) the recalcitrant litigant has not claimed a valid inability to produce; 2) there has been a demonstrated willful disdain for the court or its process, and 3) the proposed sanctions do not punish the recalcitrant too severely. In the federal system the 1) through 3) criteria will not necessarily act as a gatekeeper rule; with the trial court obligated to use their case-specific

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[8] The federal trial court's breath in its power to sanction was enumerated in Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers, 357 U.S. 197, 207(1958) (HARLAN) (. . . whether a court has the power to dismiss a complaint because of noncompliance with a production order depends exclusively upon Rule 37, which addresses itself with particularity to the consequences of a failure to discover by listing a variety of remedies which a court may employ as well as by authorizing any order which is 'just.')

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> judgment in applying, Rule 37 or otherwise power. (Italics supplied)

The above quote should be understood to mean to enforce a discovery right in Florida, one must show willful disdain for the court or its process while in the federal system one only needs to demonstrate a failure to provide as the discovery rule encompasses.

The Final Report does not discuss why willfulness is removed from the new proposed sanction rule 1.275 but, per case law, remains in the proposed revamped rule 1.380. The proposed revised rule 1.380, should indicate, again perhaps in the associated comment section, whether the revised rule will require the willful analysis or whether the circuit courts should now follow the federal Rule 37 standard, that any failure to comply with the rule is actionable for a sanction by the court at the (unabused) discretion of the court.

Conclusion

I have provided two straightforward issues that will remain outstanding should the proposed rules come into existence. First, the Kozel case factors to be considered when an attorney is to be

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sanctioned for discovery recalcitrance may not be the correct set of factors for a trial court to consider when the sanctioning is to be evaluated for a party litigant's discovery recalcitrance. Second, the Court may want to clarify whether in a revamped Fla. R. of Civ. P. 1.380, one must show willful disdain for the court or its process, or as in the federal system, one only need demonstrate a failure to provide as the discovery rule encompasses, as it seems proposed rule 1.275 will now require.

I hope my comments are helpful to the Court and its Workgroup.

s/ J.B. Grossman
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served upon Hon. Chief Judge Robert Morris, on behalf of the Workgroup as its Chair; Improved Resolution of Civil Cases, Second District Court of Appeals, P.O. Box 327, Lakeland, Fl 33802, and Tina White, OSCA Staff Liaison, Workgroup on Improved Resolution of Civil Cases, 500 South Duval Street, Tallahassee, FL 32399, or their appointed surrogates for this matter, via Florida E-Filing.

s/ Jay Bruce Grossman

CERTIFICATE OF COMPLIANCE

I certify that this response was prepaed in compliance with the font requirementsof the Forida Rule of Civil Procedure 9.045.

s/ Jay Bruce Grossman

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