IN THE SUPREME COURT OF FLORIDA
Case No. SC22-122

IN RE: REPORT AND RECOMMENDATIONS
OF THE WORKGROUP ON IMPROVED
RESOLUTION OF CIVIL CASES

_____/

COMMENTS OF THE BUSINESS LAW SECTION OF THE FLORIDA BAR TO THE REPORT AND RECOMMENDATIONS OF THE WORKGROUP ON IMPROVED RESOLUTION OF CIVIL CASES

The Business Law Section of the Florida Bar ("BLS"), an organization within The Florida Bar, submits the following comments pursuant to the Court's request for comments regarding the report and recommendations of the Judicial Management Council's Workgroup on Improved Resolution of Civil Cases ("Workgroup).

The Section consists of almost six thousand members of the Florida Bar whose lawyers often represent parties in business litigation, including disputes involving contracts, business torts, intellectual property, and debtor-creditor transactions in state and federal courts throughout Florida. Using its expertise in business

law, the Section assists the Florida Legislature in drafting laws of interest to the public and the business community. The Section likewise serves the Bar by producing sophisticated CLE (continuing legal education) programs on the panoply of issues faced by business law practitioners. Due to the diversity of its members' practices, the Section seeks only to provide a comment on the proposed amended rules as an honest broker of the majority of the practices and views of its members.

Pursuant to Standing Board Policy 8.10(c)(4), the Executive Committee of the Florida Bar has expressly consented to the filing of this comment. Further, this comment is submitted solely by the Section and supported only by the separate voluntary resources of this voluntary organization.

I. Introduction

The BLS thanks the Court for giving it the opportunity to comment on the proposed rule amendments by the Workgroup. While the BLS acknowledges and appreciates the exhaustive efforts of the Workgroup, concurs in the goals to improve the judicial system that it has identified, including ensuring "the fair and timely

resolution of all cases through effective case management," and supports various changes to the rules that would further those goals, the BLS believes that many of the extensive and complex proposed amendments, especially if universally implemented throughout the state, are unnecessary and would in fact have the opposite effect of hindering, rather than promoting, the prompt and just resolution of cases. The rule changes proposed by the Workgroup are in many instances not grounded or based in rules found in either the federal court system, which the Florida Rules of Civil Procedure generally follow and with which many Florida practitioners and judges are familiar, or in the courts of other states.

The BLS proposes that the Court instead look first to the federal model as it recently did with respect to amendments to the Florida summary judgment rule, Rule 1.510, Fla. R. Civ. P. The Florida Rules of Civil Procedure were modeled on the Federal Rules and numerous decisions by this Court and other appellate courts have advised trial judges and practitioners in this state to look to caselaw developed by federal courts in interpreting the Florida rules where they are consistent with their federal counterparts. Moreover,

over the past several decades, distinguished groups of lawyers and judges in the federal courts have examined similar problems of clogged dockets and stasis regarding civil cases and have proposed numerous changes to the Federal Rules of Civil Procedure concerning case management, discovery, motion practice, and other pre-trial procedures. These rule amendments have since been interpreted and supplemented by an extensive body of judicial decisions by federal magistrate and district judges that provide additional guidance and precedent. They have in general proven to be understandable, practicable, and workable. While adopting the federal rule changes wholesale into the Florida rules may not be advisable, given the differences in resources and caseloads between the state and federal courts, in many instances, they could be applied in lieu of, or in addition to, changes proposed by the Workgroup.

If the Supreme Court nevertheless decides to adopt the extensive amendments proposed by the Workgroup, particularly with regard to motion practice and case management, the BLS proposes that this be done, at least initially, only on a limited basis in the form of a pilot program in one or more urban circuits. The

vast range of geographic and demographic diversity that characterizes the state of Florida is reflected in its courts. Some of the changes proposed by the Workgroup in these areas that may be shown to be practical and beneficial in the Eleventh Judicial Circuit may not prove to be so in the Third Judicial Circuit, for example, and may have just the opposite effect from the one intended. Alternatively, the chief judges of each circuit should be given the ability to opt out of the detailed and complex proposed rules regarding motion practice and scheduling of hearings, at least with regard to certain types of routine motions, such as motions pertaining to discovery.

We set forth below our comments to various proposed rule amendments. Except with respect to the proposed rules addressed below, the BLS takes no position with respect to the proposed amendments.

II. BLS Comments to Specific Proposed Rule Amendment

A. Proposed Rule 1.160. Motions; Proposed Rule 1.161. Scheduling of Hearings on Motions

The BLS shares the substantial concerns expressed by the Florida Bar Civil Procedure Rules Committee (the “CPRC”) that "the

procedures called for under proposed Rules 1.160 and 1.161 may result in clogging rather than freeing civil court dockets, and in certain respects denying procedural rights to some litigants." CRPC Letter, at 26.[1] As the CPRC emphasized, an "on the papers" system like that used in federal courts cannot be automatically impressed on our state courts, given lack of comparable support and staff systems in the state system. Id. Moreover, the Workgroup's proposed "motions" and "scheduling of hearing on motions" rules are far more detailed and complex than the local rules in Florida federal courts relating to motion practice, and the time periods for briefing the motions are longer and more involved under the Workgroup's proposed rules. *Compare* Local Rule 3.01, M.D. Fla. Rules; Local Rule 7.1, N.D. Fla. Rules; Local Rule 7.1 S.D. Fla. Rules.

Unfortunately, the changes that the Workgroup made to these proposed rules from the draft to its Final Report have not addressed or rectified these issues. As the Court is undoubtedly aware, Florida is a large and incredibly diverse state – geographically as

[1] The October 1, 2021 comment submitted to the Workgroup by the CPRC shall be denoted as "CPRC Letter."

well as demographically. Trial courts throughout the state, and their caseloads and dockets, reflect that wide diversity. The detailed and complex procedures relating to motion practice and scheduling hearings proposed by the Workgroup are better adapted, and may prove to be workable and beneficial, in urban heavily congested circuits. By contrast, in rural, less populated, judicial circuits, where hearing times are easier to obtain within reasonable times, they likely are unnecessary or may actually substantially impede the disposition of motions and cases. Furthermore, the BLS submits that many motions that are subject to the complex briefing standards under proposed Rule 1.160 and 1.161, such as routine discovery motions, may be much more easily and quickly resolved through uniform motion calendar hearings or other less complex and formal hearing procedures.

With these considerations in mind, the BLS supports a revision to proposed subdivision (a) of proposed Rule 1.160 to allow the chief judge of each judicial circuit to exempt additional types or categories of motions, including, but not limited to, discovery motions from the applicability of Rule 1.160 as well as Rule 1.161, if he or she determines that it will further the expeditious and just

administration and disposition of cases by trial courts within such circuit. In addition, or alternatively, the BLS proposes that the proposed amendments to Rules 1.160 and 1.161 be adopted as a pilot project in one or more urban circuits, such as the Eleventh, Ninth, or Thirteenth, before adopting them generally in courts throughout the state.

If the Court nevertheless decides to proceed with implementation of the amended proposed rules on motions and scheduling of hearings throughout the state, the BLS would provide the following additional comments with respect to specific aspects of the proposed rules:

1. We agree with the CPRC that counsel for the parties through email should be permitted as a means of making a good faith attempt to resolve or narrow the issues raised in a motion or discussing whether to schedule a hearing. (CPRC Letter, at 26.) While face-to-face or telephonic dialogue between counsel is generally preferred, imposing such requirement can sometimes lead to delays if one or counsel is unavailable for an in-person meeting or a call (either legitimately or through contrivance). Moreover,

email has the added advantage of creating a record of what was discussed.

2. We believe that the reference to subdivision "(5)" in the third sentence of proposed Rule 1.160((4) should instead be to subdivision "(c)(5)."
3. We note that Rule 1.160 does not appear to address a briefing schedule for motions decided with hearings, although subdivision (j)(2) contains a briefing schedule for motions decided without hearing. We therefore recommend insertion of a briefing schedule for motions with hearings either in subdivision (j)(2) or elsewhere in the rule.
4. We agree with the suggestion of the CPRC that the term "ex parte" under proposed Rule 1.160(e) should be defined. (CPRC Letter, at 35.)
5. We echo the CPRC's concerns regarding the inclusion of a separate sanctions provision in proposed Rule 1.160(f) that (i) it is unnecessarily duplicative of the general power of the court to impose sanctions under proposed Rule 1.275 (CPRC Letter, at 35) and (ii) including such separate provisions regarding sanctions in specific other provisions

of the rules creates an ambiguity whether the power of courts to sanction is limited under the new rules to only those places where it is expressly granted. (CPRC Letter, at 4-5).

6. We agree with the CPRC that proposed Rule 1.161(b)(3) regarding timing of a hearing should allow for scheduling a hearing later or earlier than the specified time parameters if the parties agree or if the court otherwise directs. (CPRC Letter, at 37-38.) The duration of the hearing may not always be indicative of the time frame within which the motion should be heard.

7. We do not believe that the language that the Workgroup added to proposed Rule 1.161(g) provides a sufficient and clear process for a nonmoving party to request an evidentiary hearing, as it simply refers to subdivision (i) and rule 1.161(b)(1), neither of which expressly deal with evidentiary hearings.

8. We believe that Rule 1.161(d) addressing cancellation of hearings should also provide for cancellations by the

moving party due to conflicts or other extraordinary situations that may arise (such as a death or serious illness of counsel) without the necessity of seeking approval of the court. While the approval of court may sometimes be obtained informally, we are concerned that requiring court approval may engender additional motion practice and court hearing time to simply cancel a hearing on a previously filed motion.

B. Proposed Rule 1.190. Amended and Supplemental Pleadings

The BLS agrees with the change proposed by the Workgroup in subdivision (b) regarding amending affirmative defenses involving comparative fault.

C. Proposed Rule 1.200. Case Management and Pretrial Procedures

1. General Considerations

The BLS supports the inclusion of more robust requirements for early and more frequent case management by trial courts to help move cases through the judicial system fairly and without

unnecessary delay. We nevertheless share the concerns of the CPRC that the intricate, and in certain instances seemingly inflexible, provisions of the proposed Rule 1.200 could create difficult problems with administration, unnecessarily burden limited judicial resources, and increase motion practice as parties have difficulty meeting the many deadlines that would be established at the outset of a case. (CPRC Letter, at 48.)

The BLS urges the Court to instead adopt the amendment to Rule 1.280(g) proposed by the CPRC, which tracks the language of Federal Rule of Civil Procedure 26(f). (CPRC Letter, at 29-32 and attachment to CPRC Letter.) Although there are differences between the Federal Rules of Civil Procedure and the Florida Rules of Civil Procedure, the Florida Rules were modeled after the Federal Rules, and Florida courts have historically looked to the federal case law for guidance in interpreting corresponding Florida rules, particularly when Florida courts have not had an opportunity to address them. *See*, *e.g.*, *Grangehoff v. Lokey Motors, Inc.*, 270 So. 2d 58 (Fla. 2d DCA 1972) (rule never construed in Florida which is identical to a federal rule may be construed pursuant to the case law enunciated in the federal decisions.); *Dinter v. Brewer*, 420 So.

2d 932, 936, n.2 (Fla. 3d DCA 1982) (decisions and commentaries under federal rules are persuasive as to meaning of similar Florida rules.) Indeed, this Court has gone so far as to say that "the objective in promulgating the Florida rules has been to harmonize our rules with the federal rules to the extent possible." *Gleneagle Ship Management Co. v. Leondakos*, 602 So. 2d 1282, 1283-84 (1992) (*quoting Miami Transit Co. v. Ford*, 155 So. 2d 360, 362 (Fla. 1963)). Moreover, many practitioners who appear in Florida courts also litigate cases in federal court and have familiarity with the federal rules, and many state court judges also litigated in federal court prior to their appointments to the bench.

We also concur with the CPRC that, by not focusing early case management on discovery, the Workgroup's proposed Rule 1.200, unlike CPRC-proposed rule 1.280(g) and Federal Rule 26(f), is likely to require intensive, and sometimes unnecessary, labor by the courts and counsel on issues that are not ripe for consideration so early in the case. (CRPC Letter, at 29-31). The BLS submits that the rules generally should provide a roadmap for the parties and their counsel to shepherd a case through the system with the assistance of the court, as may be needed to resolve disputes which

arise from time to time and to ensure that the case progresses though the system in an expeditious and just manner. The lawyers, especially early in the case, usually know far more than the judge what the case is about. Moreover, while intensive involvement of the court in all aspects of the case may help certain cases, in others it may cause additional work for counsel, unnecessary expense to clients, and untimely steps that may actually hinder rather than promote the just and inexpensive resolution of cases.

2. Discovery of Electronically Stored Information

Furthermore, although the subject of electronic discovery is required to be discussed at the parties' meet and confer under both the Workgroup's and the CPRC's proposed rules, the wording of the Workgroup's proposed rule in fact would give the parties an "out" on meaningfully addressing ESI issues.

> (3) General Cases. (A) Meet and Confer. Parties shall meet and confer within 30 days after service after initial service of the complaint on the first defendant served. The parties should discuss and identify deadlines for: (i) … ; (ii) their anticipated disclosures of documents, including any issues ***already known to them*** concerning electronically stored information

Workgroup Proposed Fla. R. Civ. P. 1.200(e)(3) (emphasis added).

Under the proposed Workgroup rule, the parties and their counsel would have no affirmative duty to educated themselves about ESI issues prior to the case management conference and, indeed, as a matter of strategy to avoid disclosing information to an opponent, they may decide to remain "willfully ignorant." Furthermore, whereas the CPRC proposed rule and the federal rule mandate that "disclosure, discovery, and preservation" as well as "the form of production" of the ESI be discussed, the proposed Workgroup rule does not require discussion of any specific topics of ESI.

In contrast, the CPRC proposed Rule 1.280(g) and Federal Rule 26(f) do not limit the required discussion during the meet and confer to issues "already known" to the parties or counsel and are much more specific regarding the requirements concerning ESI. They require the parties to meet and confer and report, among other things, on

> any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced

CPRC Proposed Fla. R. Civ. 1.280 (g).

Based on the nature of electronic evidence, it is essential to address early in the case preservation and issues relating to the manner of production, including the form of production, as well as the scope of electronic discovery, costs, staged discovery, and evidence of particular interest that must be preserved but may be routinely overwritten or lost if not addressed (like surveillance footage or the like). In contrast to the Federal Rules, Florida's eDiscovery rules currently provide an excellent framework for requesting and producing ESI, but do not require an early meet and confer between counsel to discuss these issues. Failing to have this early discussion can result in lost information, allegations of spoliation, unnecessary inefficiency and excessive costs of production.[2]

---

[2] The Committee Notes to the 2006 Amendments to the Federal Rules of Civil Procedure address this issue as follows:

> Rule 26(f) is amended to direct the parties to discuss discovery of electronically stored information during their discovery-planning conference. The rule focuses on "issues relating to disclosure or discovery of electronically stored information"; the discussion is not required in cases not

Furthermore, federal case law is particularly instructive in the cases involving electronically stored information, which involves rapidly evolving technology and emerging issues on which federal district and magistrate judges write frequent extremely helpful opinions. Florida trial and appellate courts see eDiscovery issues

---

> involving electronic discovery, and the amendment imposes no additional requirements in those cases. When the parties do anticipate disclosure or discovery of electronically stored information, discussion at the outset may avoid later difficulties or ease their resolution.

When a case involves discovery of electronically stored information, the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and of the parties' information systems. It may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference. With that information, the parties can develop a discovery plan that takes into account the capabilities of their computer systems. In appropriate cases identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful. *See* Comm. Notes on Rule 26 - 2006 Amendments. The Committee Notes go on for several more paragraphs on the types of things lawyers should discuss about ESI at the Meet and Confer. That detail is instructive on the significance the federal courts place on the role of the Meet and Confer discussions on ESI in a more efficient and effective process of discovery, which is the avowed goal of the Workgroup's efforts. Adopting the CPRC-proposed Rule would allow Florida practitioners and trial courts to look to these comments as precedent as guidance.

much less frequently, and the case law is still relatively rare and virtually insignificant in volume when compared to federal precedent. The federal model has seen a significant amount of success in heading off costly ESI issues, and ESI and eDiscovery issues will continue to be a leading issue in case management. We therefore urge the Court to adopt the language of CPRC-proposed 1.280(g) in lieu of the provisions of proposed Rule 1.280(e).

3. Case Track Assignments

The BLS agrees that assignment of cases to case management tracks would enhance the ability to fairly schedule the progress of cases though the system and inform the courts about those cases that need increased judicial attention. The three-track system of "complex," "streamlined," and "general" cases proposed by Workgroup is similar to the procedures established by many federal courts by local rule or practice. *See, e.g.*, Rule 16.1, Local Rules, S.D., Fla. Nevertheless, there is one aspect of the proposed Rule 1.200(e) as to which the BLS takes **strong** exception - the presumption in subdivision (2) that groups bench trials, along with uncontested cases, as "streamlined." While some cases that are to be resolved through bench trials are less complex than those to be

resolved before a jury, the opposite is also often true, particularly in cases involving business disputes. In fact, cases such as shareholder derivative disputes, internal affairs or governance or dissolution or liquidation rights involving business entities, and intellectual property disputes often involve equitable or declaratory claims for which there is no right to jury trial. Furthermore, in other business disputes that involve claims for economic damages the parties frequently agree not to demand jury trial because they believe the business and financial issues involved could likely better be resolved by a court. Indeed, these are among the types of cases, which by reason of their specialization and complexity, several circuits (the 9th, 11th, 13th, and 17th) have assigned to separate business/complex divisions. These cases often should be designated as "complex," or at least as "general," within the proposed track assignment; rarely should they be classified as "streamlined."

4. Scheduling Orders

As noted, the BLS shares the concern of the CPRC (CRPC Letter at 29-31) that "frontloading" so many requirements of case

management at the beginning of cases, as contemplated by the Workgroup's proposed Rule 1.200, could result in overburdening and clogging, rather than freeing up, the judicial system, especially if the proposed changes in the procedures for resolution of motions and other recommendations of the Work Group are adopted. In contrast, the discovery conference envisioned under the CPRC's proposed rule 1.280(g) would be required to address those issues appropriate for consideration at the initial stages of the case: (i) the initial discovery disclosures, including the initial disclosures regarding documents and fact witnesses; (ii) a proposed plan and timing for document discovery, including discovery of electronically stored information, and for depositions of fact witnesses, (iii) issues regarding document preservation, privilege, or confidentiality orders, and (iv) a proposed date for completion of discovery. If the parties can agree these issues, the Court will enter an appropriate initial case management order. If not, the Court could set an initial case management conference to address the disputed discovery issues. Other issues, such as the scheduling motions for summary judgment, expert disclosures and discovery, and the final pretrial conference and trial could be reserved for a later case management

conference (and appropriate follow-on order) once the parties, have taken initial discovery and more information has been developed about the case.

D. Proposed Rule 1.201. Complex Litigation

The BLS supports continuation of Rule 1.201 in substantially its current form, as proposed by the Workgroup.

E. Rule 1.275. Sanctions

The BLS agrees with and adopts the position of the CPRC regarding this proposed rule. (CRPC Letter, at 4-6; 19-23; 43-44).

F.Rule 1.279. Standards for Conduct of Discovery

While proposed new Rule 1.279 lays out laudable standards of conduct and obligations of attorneys and parties and the requirement to advise clients of discovery obligations, the BLS wholeheartedly agrees with each of the comments of the CPRC (18-26, pp. 6-8). The BLS also supports and encourages adherence to and enforcement of the standards of conduct in the Oath of Admission, The Florida Bar Creed of Professionalism, The Florida Bar Professionalism Expectations, and the Florida Handbook on

Civil Discovery Practice, which are necessary components of professional practice. However, there is a difference between standards of professionalism, which are often broad and hortatory in nature, and specific sanctionable misconduct. Wholesale incorporation of standards of professionalism into rules of procedure backed by rules-based judicial sanctions for alleged lack of adherence to such standards conflates these two parallel, but historically separate, categories of guidance. Procedural rules should be applied on an objective and fact-based standard enforced by judicial application case by case. Expectations and creeds involving professionalism are a blend of aspirational conduct and collective norms that may be identified by judges for correction but should not be enforced routinely by judges through case sanctions, except to remedy misconduct under existing rules and case law. The new proposed rule makes the judge an arbiter of attorney professionalism on a case by case and virtually an issue-by-issue basis in discovery. It also makes a party the potential recipient of sanctions for the conduct of counsel. Sanctions in discovery should be remedial and measured to the case, not necessarily a routine means to govern attorney professionalism.

The role of trial judges in policing attorney conduct is compounded by fast-moving technological and electronic discovery developments. Having an increased scrutiny of discovery tactics through a professionalism lens as well as a rule-based matrix is a recipe for well-intended but overly aggressive application of so-called professional standards due to lack of understanding of the particular circumstances in a given case. It also may result in the judge driving discovery rather than working with both counsel to facilitate discovery. When problems occur, it is difficult for the court to discern an easily correctible misstep in a case from a pattern of misconduct in proposed Rule 1.279(b)(2)(B). Moreover, the vague and undefined conditions under which a court is arguably "obligated" to impose sanctions – when a party or attorney "interferes with the ability of the court to adjudicate the issues in the case or impairs the rights of others"[3] – will inevitably lead to fear and uncertainty by the bench and bar and inconsistent, if not

[3] In an earlier draft of its Report, the Workgroup referred to "frustrates the court's purpose or impairs the rights of others" as the applicable standard. The BLS submits that the new language crafted by the Workgroup does not remove the ambiguity of the proposed standard.

arbitrary, application. While unprofessional conduct may be reported to The Florida Bar or identified to the Court, it is potentially harmful and distracting from the justice of the cause for a lawyer to be prosecuting opposing counsel on professionalism grounds during discovery instead of advocating the client's position. Governing of professionalism should be left to disciplinary proceedings or attorney professionalism committees.[4] Based upon the foregoing, the BLS believes that the proposed Rule 1.279 not be adopted.

G. Proposed Rule 1.280. General Provisions Governing Discovery

---

[4] One more potential unintended consequence of the merger of procedural rules and professionalism is exemplified by proposed Rule 1.279(b)(3). The rule reads: "Attorneys shall advise clients of their discovery obligations and shall counsel them to comply with them. Courts may presume that attorneys have met this obligation in any instance of discovery abuse." There is no problem with having a professionalism rule or guideline that specifically states that attorneys shall advise clients of discovery obligations and counsel them to comply with them. However, it is problematic to have a rule of procedure that presumes in any case of discovery abuse that the court may presume the proper advice was rendered. That specific advice may or may not in fact have been effectively given to or understood by the client for any number of reasons. Further, inquiry on the issue of the extent of advice that was rendered on discovery compliance invades attorney client privilege and/or creates a conflict of interest, which complicates fashioning a fair sanction for lawyer and client.

The BLS supports the concept of requiring initial discovery disclosures as a means for expediting the process of discovery, setting parameters for additional discovery during pretrial, and ensuring that discovery can be completed, and the case disposed within the time standards under the applicable track assignment. Although the Workgroup's proposed Rule 1.280(a) providing for initial disclosures generally follows the language of Federal Rule 26(a), there are significant differences, as is the case with the Workgroup's proposed Rule 1.200 when compared with Federal Rule 26(f). In the view of the BLS, these differences are unwarranted and could cause major administrative problems and delays in the progress and disposition of cases.

The Workgroup specifically noted in its Final Report that, during initial discovery disclosures, "most states, as well as the federal jurisdiction, do not require actual documents or other materials to be handed over: "a description of documents is sufficient at this stage." (Final Report, at 88). Yet the Workgroup's proposed Rule 1.280(a) (1) (B) **mandates precisely that**. It requires each party to provide to the other parties "a copy of all documents,

electronically stored information, and tangible things that the disclosing party has its possession, custody, or control and [sic.] may be relevant to the subject matter of the action, along with the subjects of that information, unless use would solely be for impeachment." In contrast, Federal Rule 26(a), and revised Rule 1.280(a) as proposed by the CPRC, allows the parties the option of producing copies of the actual documents and electronically stored information or providing a description of the documents and ESI by category and location. Although in simple cases involving a few documents and ESI, it may be realistic for the parties to exchange the actual materials during the initial discovery disclosures, in most document-intensive cases this will be impractical so early in a case, since parties and their counsel will not have yet had sufficient time to identify all of the potentially relevant materials, their custodians, and locations. And, if documents or ESI have not been identified or are overlooked and not produced through the initial discovery disclosures, the opposing party will inevitably complain that the rule was violated, and burdensome and unnecessary motion practice and sanctions hearings will ensue.

Furthermore, as the CPRC observed, the Workgroup's proposed Rule 1.280(a) also contains another critical difference from Federal Rule 26(a): instead of requiring a party to disclose documents (or a description of them) "that the disclosing party may use to support its claims or defenses," as required by Federal Rule 26(a)(1)(A)(ii), the Workgroup's proposed Florida rule would require the production of all documents that "may be relevant to the subject matter of the action." (CPRC Letter, at 11-12). The BLS concurs with the CPRC that this would potentially require the production of work-product protected documents harmful to that party's case that the party or its counsel would never intend to use at trial.[5]

Any unwarranted differences from the Rule 26(f) will potentially defeat the ability to rely upon federal precedent as persuasive authority. In those instances where it is appropriate to adopt a particular federal rule into the Florida Rules of Civil

[5] As discussed below, although the Workgroup has not proposed to change the scope of discovery under Rule 1.280, the BLS urges this Court to amend the standard: "relevant to the subject matter of the pending action," to correspond to the current standard under Federal Rule 26(b): "nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case."

Procedure, the BLS agrees with the CPRC that the language of the federal rule be followed with "only the fewest and smallest deviations, and only to address a specific substantive issue particular to Florida as the base of deviating." (CPRC Letter, at 3). We therefore urge the Court to adopt the language of Rule 1.280(a), with respect to initial discovery disclosures as proposed by the CPRC, in place of the language of the Workgroup's proposed rule.[6]

1. Proportionality

Another concern is the manner in which the Draft Final Report deals with the concept of proportionality (pp. 82-4 and footnotes 384-90). The Draft final Report appears to unnecessarily downplay the significance of proportionality in Florida rules and the federal rules. (p. 83-84 and fn 387). Under the 2012 amendments to

[6] Contrary to the suggestion of the CPRC (CPRC Letter, at 13), the BLS does not believe that including an exception for impeachment materials under the initial discovery disclosure requirements of the Florida rules (as under Federal Rule 26(a)(1)) would contravene *Northrup v. Aiken*, 865 So. 2d 1267(2004). Impeachment materials would remain discoverable but could be produced later in response to a document request. Nevertheless, if the Court feels impeachment materials should not be exempted from the initial disclosures, the BLS urges that the Court to otherwise adopt the wording of Federal Rule 26(a) (1)(A), subject only to removal of that exception.

Florida Rule 1.280 (d), proportionality is expressly required to be considered in connection with discovery of electronically stored information. Nevertheless, proportionality is **not** required by the rules to be considered with respect to other types of discovery. Moreover, although courts have applied concepts of proportionality as a basis for refusing to allow discovery of certain other types of materials, such as pre-judgment discovery of financial information of an opposing party, absent a claim for punitive damages, or when an "unduly burdensome" objection to a discovery request is sustained, "proportionality" has rarely been expressed as a justification for denial of unnecessary and unreasonable discovery, other than with respect to EIS under the new Rule 1.280(d).

The 2015 amendments made proportionality more prominent in Federal Rule 26. If data or information requested is not proportional to the case, it is not discoverable.[7] Under amended

[7] The Draft Final Report of the Workgroup incorrectly suggests that federal courts are not supporting the idea of proportionality and cites the statement in the 2015 year-end report by Chief Justice Roberts as a "Cf." rather than the prevailing trend of authority. In fact, it is clear from Chief Justice Roberts's comment and the way many judges approach the rules post-2015 that proportionality is an important element in enforcing the economy and efficiency goals of FRCP 1. Justice Roberts said this and much more in the year-

Rule 26(b), parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case considering the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Fed. R. Civ. P. 26(b)(1).

Although the Workgroup includes a consideration of the principles of proportionality under the Objectives of Case Management under proposed Rule 1.200(b)(4),[8] contrary to Federal

---

end report: "Rule 26(b)(1) [as amended in 2015] crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality."

[8] Proposed Rule 1.200(a)(4) would require the court to manage a civil action with the objective, *inter alia*, of

> ensuring that discovery is relative to the needs of the action, considering the importance of the issues at state in the action, the amount in controversy, the parties' relative access to relevant information the parties' resources, the importance of discovery in resolving the issues, and whether the burden or expenses of discovery outweighs its likely benefit.

Rule 26(b), it does not mention proportionality in setting forth the scope of discovery. The Workgroup's refusal to include a consideration of proportionality within the generally scope of discovery under Rule 1.280 fails to take account of the burgeoning cost and inefficiency in discovery. Excessive and unnecessary discovery may result from strategic reasons by one or both sides in an attempt to gain an advantage or to encourage or coerce a settlement, from an unreasonable fear of failing to uncover the elusive "smoking gun," or simply from a failure of lawyers to follow exercise forethought and care in drafting. The use of overbroad boilerplate requests rather than case specific, tailored requests and the failure to meet and confer with the opposition to jointly manage discovery contribute to state court woes.

To ignore the elephant in the room, which is the massive delays, costs, and inefficiency brought on by lawyers using old-time advocacy tactics and boilerplate requests in discovery and motion practice, will regrettably circumvent an opportunity to make the

---

Nevertheless, the Workgroup's failure to recommend amendment of the broad scope of discovery allowed under Rule 1.280(b) to include a consideration of proportionality arguably conflicts with (and at the least de-emphasizes) this important objective.

system better. We can learn from the federal approach. The federal model does not need to be adopted wholesale, but many of the important changes under the federal rules, like adjustments to Rule 1 and Rule 26 in 2015 are helping. They could help litigants in Florida … and lawyers and judges if they will listen, learn, and adjust.

The BLS submits that Rule 1.280 should be amended to apply the same standards of proportionality to the scope of all discovery as under Federal Rule 26(b).

2. Overall Scope of Discovery

The Workgroup acknowledges that, to attempt to address perceived abuses in discovery practice and the rising costs of discovery, the overall scope of discovery under Federal Rule 26 has also been amended from the former standard (still applicable under the Florida rule) of "obtain[ing] discovery regarding any matter not privileged, which is relevant to the subject matter involved in the pending action" to its present wording of "obtain[ing] discovery regarding any nonprivileged matter that was relevant to any party's claim or defense." The reasons that the federal rules committee

cited in recommending the amendments to the federal rules are the same concerns expressed by the Workgroup. *See* Final Report, at 19.[9] Yet, the Workgroup declares, without further reasoning, "in the absence of any apparent need to bring this phrase of Florida Rule of Civil Procedure 1.280(b)(1) into precise alignment with Federal Rule of Civil Procedure 26(b)(1), the Workgroup does not recommend an amendment." (Final Report, 81).

As above noted, the BLS believes that the Workgroup has given insufficient weight to the problem of discovery abuse, though overbroad, unnecessary, and disproportional discovery, as one cause of the delay and congestion in the judicial system. *See*, *e.g.,*

---

[9] The 2015 amendments to the Federal Rules represented an attempt by the Advisory Committee on Civil Rules to address the growing concern that "in many cases civil litigation has become too expensive, time-consuming, and contentious," and that these growing burdens were ultimately "inhibiting effective access to the courts." John G. Roberts, Jr., 2015 Year-End Report on the Federal Judiciary (2015), https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf, at 4. A symposium, sponsored by the Advisory Committee to explore these concerns, identified the need for procedural reforms that would: (1) encourage greater cooperation among counsel; (2) focus discovery--the process of obtaining information within the control of the opposing party--on what is truly necessary to resolve the case; (3) engage judges in early and active case management; and (4) address serious new problems associated with vast amounts of electronically stored information. *Id* at 4-5.

John H. Beisner, *Discovering a Better Way: the Need for Effective Civil Litigation Reform*, 60 Duke L. Rev. 547 (2010). The amorphous standard of "subject matter of the case," although arguably qualified by the verbiage that follows "whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party," has all too often been used by litigants as a justification for virtually unlimited discovery and by courts as an excuse to refuse to carefully examine the relevance or importance of it. Moreover, the phrase "reasonably calculated to lead to the discovery of admissible evidence," in the last sentence of existing Rule 1.280(a) has likewise become a virtual mantra for allowing unfettered discovery, regardless of its significance or cost. *See, e.g.,* Philip J. Padovano, *Trawick's Florida Practice & Procedure*, § 18.3, at 282 (2021) ("Courts find it easier to permit the discovery than to analyze the objection and give a precise ruling. This abdication of judicial responsibility is a major problem.") While changes in these rules to comport with the revisions under Federal Rule 26(b) will not, in and of themselves, cure the problem of abusive discovery, they can at least give courts some tools to help do so, especially if those tools are accompanied by the enhanced

judicial education and continuing legal education regarding appropriate discovery practice, as the Workgroup recommends. Final Report, at 119-121.[10]

H. Proposed Rule 1.335. Standards for Conduct in Depositions, Objections, Claims of Privilege, Termination or Limit, Failure to Appear, and Sanctions.

Depositions are ancillary to court proceeding and should not be described as court proceedings themselves as does proposed Rule 1.335(a). While civility and professionalism are appropriately shown at depositions, equating depositions with trials or other court proceedings threaten to invoke a whole host of behaviors appropriate in court that are not appropriate in the deposition context. Indeed, unduly formalizing depositions is inconsistent with good discovery practice that requires a certain amount of informality.

Moreover, taken in concert with the proposed amendments to Rules 1.275 and 1.279 (and 1.335(g)) that would enhance the policing role and sanctions authority of trial courts, proposed Rule

[10] The recent amendment of Rule 1.280(h) by this Court to codify and apply the "Apex" doctrine to high- ranking corporate officers provides another example of the desirability of providing additional guidance to courts so as to limit the expansive scope of discovery in appropriate circumstances.

1.335(a) threatens to make viable a whole range of objections to behavior that would not be appropriate in court that is appropriate in a deposition. This increases the possibility of process disputes that will interrupt the flow of discovery and will afford additional opportunities for unscrupulous litigants to abuse the process. In sum, it is a recipe for more fights about the conduct of proceedings that will distract from the timely progress of the case.[11]

Further, although witnesses obviously should act with honesty, respect, and fairness during a deposition, the BLS has significant concerns about how the requirement under subdivision (b) that attorneys instruct witnesses within their control to conduct themselves in that manner during depositions would operate in practice. Does this instruction need to happen before or during the deposition? If a witness is rude, is it the attorney's job to counsel them on the record as to not be rude? Would that be coaching the

[11] As noted above, the BLS opposes the adoption of proposed Rule 1.279, which we believe improperly conflates standards of professionalism, which while laudable are often hortatory, with mandatory rules backed by the sanctions authority of the court. If Rule 1.279 is nevertheless to be adopted, there is, however, no need to repeat the reference to Rule 1.335(c) in that rule, given that proposed Rule 1.279 cannot reasonably be read as not applying to depositions.

witness during the deposition? Is the attorney's failure to control the witness' honesty, fairness, respect, and courtesy something that is sanctionable? If not, why have this rule targeting attorneys? The BLS submits that this would be better phrased in the form of an obligation imposed on witnesses than on attorneys, and if it must be imposed on attorneys, at most it should be directed as a pre-deposition obligation.

We also note an apparent typographical or transcriptional error in Rule 1.335(e) regarding motions to terminate or limit examination, which authorizes the court to order the officer conducting the examination to cease taking the deposition or limit the scope of the deposition if, among other things, "an objection or an instruction to a deponent not to answer are (sic.) being made in violation of the subdivision (d)". We assume that this was intended to read "an objection *and* an instruction" since it is difficult to see how an objection, without an instruction, could be in violation of subdivision (d), which itself requires an instruction not to answer.[12]

I. Proposed Rule 1.340. Interrogatories to Parties

[12] Use of the conjunction "and", instead of "or", in the subject of the phrase would also conform with the form of the corresponding verb "are."

In addition to the amendment to subdivision (a) of the rule that addresses responses to unobjected to interrogatories, with which the BLS agrees, Rule 1.340 should also be amended, as was done under Rule 33(b)(4), Fed. R. Civ. P., to require that objections to interrogatories be stated with specificity. *See* Advisory Committee Notes to 1993 Amendment to Rule 33. This would serve to limit the use of "boilerplate" objections, which are commonly (and improperly) asserted in response to interrogatories and other discovery requests, and often result in unnecessary motion practice and prolong discovery.

J. Proposed Rule 1.350. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

In addition to the proposed amendment to subdivision (b) regarding responses to unobjected to requests to produce, with which the BLS agrees, Rule 1.350 should also be amended, as Federal Rule 34 was in 2015, to require objections to document requests to be stated with specificity, provide that copies of documents may be provided as well as originals inspected, and, if a request is objected to, require the party responding to state whether

any documents are being withheld pursuant to the objection. We believe that these amendments will further serve to eliminate improper discovery practices that can result in unnecessary motions to compel and delay the discovery process.[13]

---

[13] The comments to these amendments to the 2015 amendments to Federal Rule 34 explain these changes, as follows:

> Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with specificity. This provision adopts the language of Rule 33(b)(4), eliminating any doubt that less specific objections might be suitable under Rule 34. The specificity of the objection ties to the new provision in Rule 34(b)(2)(C) directing that an objection must state whether any responsive materials are being withheld on the basis of that objection. An objection may state that a request is overbroad, but if the objection recognizes that some part of the request is appropriate the objection should state the scope that is not overbroad. Examples would be a statement that the responding party will limit the search to documents or electronically stored information created within a given period of time prior to the events in suit, or to specified sources. When there is such an objection, the statement of what has been withheld can properly identify as matters "withheld" anything beyond the scope of the search specified in the objection.
>
> Rule 34(b)(2)(B) is further amended to reflect the common practice of producing copies of

K. Proposed Rule 1.351. Production of Documents and Things without Deposition from Nonparties

The BLS agrees with the change proposed in subdivision (b) regarding responses to unobjected to requests to produce, but also

---

> documents or electronically stored information rather than simply permitting inspection. The response to the request must state that copies will be produced. The production must be completed either by the time for inspection specified in the request or by another reasonable time specifically identified in the response. When it is necessary to make the production in stages the response should specify the beginning and end dates of the production.
>
> Rule 34(b)(2)(C) is amended to provide that an objection to a Rule 34 request must state whether anything is being withheld on the basis of the objection. This amendment should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections. The producing party does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection. An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been "withheld."

submits that a specificity requirement should be added to any objections asserted under this rule as with respect to Rule 1.350.

L. Proposed Rule1.370. Requests for Admission

Subdivision (c), requiring a trial court to award attorney's fees upon a motion arising from a failure to admit a matter that is later proven at trial does not take into consideration longstanding existing law that fees are not be awarded for denials of requests for admission that go to a hotly contested central issue of the case. *See Hahamovitch v. Hahamovitch*, 133 So. 3d 1020, 1023-1024 (Fla. 4th DCA 2014); *Arena Parking, Inc. v. Lon Worth Crow Ins. Agency*, 768 So. 2d 1107, 1113 (Fla. 3d DCA 2000). As the court noted in *Hahamovith*, "if the result were otherwise, then 'where a party denies a request to admit a fact which is the central issue of fact in the case, prevailing party attorney's fees would become the rule, rather than the exception.'" *Hahamovitch*, *supra*, at 1024, *quoting Shaw v. State ex rel Butterworth*, 616 So. 2d 1094, 1096 (Fla. 4th DCA 1993). Such a change in existing law would thus, in effect, allow attorney's fees to be awarded to a prevailing party in any case through the simple expedient of serving a request for admissions.

The BLS submits that this should not be the law. Florida courts and other courts throughout this country continue to follow the "American Rule" with respect to responsibility for payment of attorney's fees. *See, e.g., Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1147-1148 (Fla. 1985). We therefore propose that an exception be added to subdivision (c) of the rule when the request relates to a hotly contested central issue of the case.

M. Proposed Rule 1.420. Dismissal of Actions

In an attempt to make the avoidance of dismissal for failure to prosecute more difficult, proposed Rule 1.420(e)(1)(A) establishes a standard of proof beyond good cause, to "extraordinary cause." This unnecessarily eliminates the court's discretion to determine whether there is justification for the case to remain pending. The BLS submits that the last sentence of 1.420(e)(1)(A), "[m]ere good cause or excusable neglect is insufficient" should be stricken. This will allow for the court to consider lack of activity that is caused by something unforeseen, and consider circumstances based on good cause or excusable neglect, especially where the dismissal can have

significant repercussions, such as when the statute of limitations has run so that the dismissal would be effectively with prejudice.

The BLS is also concerned that the shortening of the time for dismissals for failure to prosecute under subdivision (e) of the proposed rule, coupled with the fact that discovery activity, absent being subject to motions to compel or for protective order, does not constitute "record activity" and is not expressly made an exception to under the proposed new rule, will result in unintended consequences and injustice in some instances. For example, parties who have been diligently pursuing discovery and preparing for trial while acting in a professional and cooperative spirit, just as the rules encourage, may not have made any filings during a six-month period that would toll the application of the rule. Under existing case law, discovery activities during the 10-month period under existing Rule 1.420 can constitute "good cause" to avoid dismissal. *Capital Inv. Group, Inc. v. Richburg*, 944 So. 2d 1232, 1232–33 (Fla. 5th DCA 2006). We believe that this exception to the applicability of the rule should be retained and spelled out in any amendment that would shorten or limit excusal from the requirements of the rule.

N. Proposed Rule 1.440. Setting Action for Trial

As noted above in Section II C of this letter, the BLS urges the Supreme Court to adopt the CRPC's proposed Rule 1.280(g) regarding case management in lieu of the Workgroup's proposed Rule 1.200. The Workgroup's proposed rule regarding case management includes a requirement for setting a "projected trial period" in the initial case management order, whereas the CRPC's proposed Rule 1.280(g) does not include such a requirement. If this Court decides to adopt the CRPC's proposed Rule 1.200, proposed Rule 1.440(a) would need to be revised to eliminate the references to a projected trial period. The BLS otherwise has no comments with respect to proposed Rule 1.440.

O. Proposed Rule 1.460. Continuance

The BLS agrees with the position taken by CPRC with respect to this proposed rule and adopts the CPRC's comments. *See* CPRC Letter, at 18-19; 49-51.

In particular, the BLS submits that the extreme strictness and rigidity for continuances under the proposed rule is unnecessary to achieve the objective of the prompt and efficient disposition of

cases, especially in light of other proposed revisions to the rules regarding case management, and are likely to lead to unjust outcomes in many cases. If this Court nonetheless believes that trial court's discretion to grant a trial continuance should be further limited, we believe that it is sufficient to require "extraordinary cause" under proposed subdivision (b). The absolute and inflexible strictures on the trial courts' discretion to grant continuances of trials under the circumstances listed in proposed Rule 1.460(b)(5) seemingly further restrict and conflict with that standard and should be removed. At a minimum, an exception should be added when the events described under subdivision (b)(5) result from any of the extraordinary foreseen circumstances described under subdivision (b)(1).

We further concur with the CPRC that (i) the requirement of a client's signed written consent to "continue" a scheduled hearing on "nontrial events" under proposed subdivision (a)(1) is unnecessary, given that such degree of client control or communication is not required by the Rules Regulating the Florida Bar, and potentially counterproductive to the efficient resolution of the evitable conflicts that arise in pretrial schedules; (ii) the requirement of a detailed

factual order for granting a continuance under proposed subdivision (b)(8) should also apply to orders denying a continuance; and (iii) the inclusion of an appellate standard of review for continuance orders with factual findings under proposed subdivision (b)(10) is inappropriate in a rule of civil procedure, rather than in a rule of appellate procedure, and in any event the stated standard of "gross abuse of discretion" is incorrect. (CPRC Letter, at 18-19; 41; 49-51).

P. Proposed Rule 1.989. Order of Dismissal for Lack of Prosecution

As stated in the BLS' comments regarding proposed Rule 1.420(e), the BLS disagrees with the proposed strict limits of post-notice record activity under that rule, which are incorporated in this form.

III. Conclusion

The Business Law Section fully supports the goals of this Court, but has significant concerns about some of the recommended rule changes. Every proposed change in the rules, and then the package globally, should be assessed against the goals of Rule 1.010. Does each rule and the package as a whole enable

the lawyers and the court to work together in balanced fashion to achieve the goals of Rule 1.010: a just, speedy, and inexpensive resolution of the case? We urge the Court to give serious consideration of the ramifications of these proposed amendments and whether, if adopted, they will actually further these goals.

Dated: April 20, 2022

Respectfully submitted,

BUSINESS LAW SECTION OF THE FLORIDA BAR

s/ *Russell Landy*
Russell Landy
Florida Bar No. 44417
DAMIAN & VALORI LLP
1000 Brickell Avenue, Suite 1020
Miami, Florida 33131
Telephone: (305) 371-3960
Facsimile: (305) 371-3965
Primary - rlandy@dvllp.com
Secondary – jflores@dvllp.com

CERTIFICATE OF COMPLIANCE

I hereby certify that document was prepared in Bookman Old Style, 14-point font, in compliance with Rule 9.045(b) of the Florida Rules of Appellate Procedure, and does not exceed 13,000 words, in compliance with Rule 9.210(a)(2)(B).

s/*Russell Landy*

CERTIFICATE OF SERVICE

I certify that on April 20, 2022 a copy of the foregoing was E-filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, with a copy provided to the parties listed below:

s/*Russell Landy*

Chief Judge Robert Morris
Chair, Judicial Management Council's
Workgroup on Improved Resolution of Civil Cases
Second District Court of Appeal
P.O. Box 327
Lakeland, FL 33802

Tina White
OSCA Staff Liaison to the Workgroup
500 South Duval Street
Tallahassee, Florida 32399
whitet@flcourts.org