Eighth Judicial Circuit of Florida

Alachua, Baker, Bradford, Gilchrist, Levy, Union Counties

Chambers of
Monica J. Brasington
Circuit Judge

Alachua County Courthouse
Family and Civil Justice Center
201 East University Avenue
Gainesville, Florida 32601
(352) 548-3793

April 26, 2022

Florida Supreme Court

Office of the Clerk

500 South Duval Street

Tallahassee, Florida 32399-1927

Dear Workgroup on Improved Resolution of Civil Cases,

Thank you for allowing us the opportunity to comment on the proposed changes to the Civil Rules of Procedure. We have spent a great deal of time reviewing these rules and considering the anticipated impact they will have on civil litigation, from the court's perspective. As judges with civil assignments in the Eighth Judicial Circuit, we would like to express that we have numerous, serious concerns about many of the proposed rule changes. While the stated purpose of these proposed changes is to "bring greater efficiencies" to our civil system, we are concerned that the application of these rules will, in fact, lead to the need for more hearings which will cause increased costs to litigants and less efficiency than is present in our current system.

In addition to the concerns relating to inefficiencies, we are also of the view that we do not currently have the resources needed in the state court system to implement these changes and that the deadlines and other requirements that these proposed rules impose on state civil judges are not attainable at this time. If you ultimately determine that these rules will increase efficiencies in the civil division and should be adopted, we would request that you consider implementing these rules if, and when, the state court system seeks and receives the funding from the Legislature that would be necessary to obtain the resources and FTEs needed to implement these rules changes.

Finally, we have concerns about the general removal of discretion from the trial court judges, who are in the best position to understand the complicated factors that affect their own civil dockets.

We have provided detailed comments on some of the proposed rules below. Given the significant scope of the proposed changes and the demands of our current civil assignments, we could not comment on every one of the individual rules that would, in our view, create additional hearings/increase inefficiencies (Exhibit A), require additional financial resources, technology, and/or FTEs (Exhibit B), or un-necessarily remove discretion of trial judges (Exhibit C). Therefore, our concerns are not limited to those expressed, but are an example of our concerns, given the time constraints we are under. Additional comments/requests for clarification are also provided (Exhibit D).

Our circuit has a long history of actively managing each of our cases, including those in the civil division. While we appreciate the hard work and time that must have been involved in developing such voluminous proposed changes to the civil rules, we feel certain that many of these rules will exacerbate and enhance any inefficiencies that currently exist. In addition, they will certainly require additional resources, well beyond what we currently possess in the trial courts. We appreciate your consideration of our comments.

Sincerely,

Honorable Monica J. Brasington
Administrative Judge, Civil Division

Honorable Mark W. Moseley
Chief Judge

Honorable Donna M. Keim
Circuit Civil

Honorable Craig C. DeThomasis
Circuit Civil

Honorable Gloria R. Walker
Circuit Civil

Honorable Meshon T. Rawls
County Civil

Exhibit A (3 pages)

Examples of Rules that May Increase Inefficiency to the Current Civil Justice System

1.61 – In circuits where hearings are manually scheduled, it is impractical to require judicial assistants to offer three potential hearing dates and then have them wait for 2 days for the parties to decide whether they agree as these dates. Currently, the dates are not held by the JA while waiting for an attorney's response due to the number of requests for hearings. If we are to "hold" dates for attorneys' responses, hearings will be pushed out further. In addition, additional resources will be needed to track "offered dates", "held/not confirmed dates", "dates that have not been confirmed and should be removed from held status", and "confirmed dates".

1.190 – This rule governs amended and supplemental pleadings. Section (a) is left unchanged in this rule and (a) provides "leave of the court shall be freely given when justice so requires." Section (a) controls the amending of Complaints. Section (b) specifically applies to "Affirmative Defenses", per the title, and provides that leave shall be requested within 15 days of when a party knew or reasonably should have known of the party or non-parties' fault. This rule creates different standards for amending complaints and amending affirmative defenses. If we are going to require the defense to amend affirmative defenses within 15 days of when they reasonably knew or should have known of a party or non-party, then the committee should consider applying the same standard to plaintiffs seeking leave to amend the complaint to add new parties. This would not only promote fairness, but also efficiency. In addition to questions of fairness, this amendment will likely result in additional hearings, most likely evidentiary in nature, as to when a litigant "knew or reasonably should have known" of these parties/non-parties.

1.200 This rule is incredibly complex and may benefit from increased simplicity. In our circuit, we attempt to follow the existing rule by scheduling case management conferences to take place 6 months after the answer is filed. We have found this rule to be an effective case management tool because at that point, counsel has (or should have) a realistic understanding of the issues in the case. Perhaps, rather than rewriting these rules, the current rule might be amended to set forth time frames for the court to enter a case management order requiring the filing of case management statements and scheduling of a case management conference. The proposed changes require the parties to come up with a plan for the case within 30 days of service of the complaint on the first defendant. The plan requires a discussion by the parties of evidence, witnesses, experts, documents, discovery, and jury instructions within 30 days of service on the first defendant. However, within thirty days after service, the defense has not had an opportunity to engage in discovery and has not even received Plaintiff's required initial discovery, which will be due 45 days after service; therefore, it seems highly unlikely that counsel will be able to meaningfully come to an agreement on the expansive issues required to be discussed by the proposed rules. We speculate that counsel may use standard forms that are not truly case specific and will then seek multiple amendments to the orders before the trial date. This will cause additional motion practice and hearings and/or multiple case management conferences which will take additional time rather than streamlining the process. Finally, this new rule does not address the fact that plaintiffs regularly request extensions of the 120 days to serve the defendant and what should occur in that case; nor does it address the large number of cases that involve multiple defendants (often served at various times).

1.200 (f)(2) creates language that is ripe for attorneys to litigate. This section governs extensions of deadlines and contains language like "extraordinary unforeseen" as a standard. In our experience, most

unforeseen events are extraordinary and language, such as the above, will likely lead to increased requests for hearings on motions to extend deadlines with attorneys litigating whether the circumstances leading to the requested extension were unforeseen or extraordinary unforeseen, or none of the above.

1.200 when read as a whole, seems to envision the court conducting multiple case management conferences and following up with attorneys to address deadlines, determine good faith efforts to comply with deadlines, etc. At least in our circuit, this is counter to what we have done historically and will increase inefficiencies here. We currently set a case management conference when the case is "at issue" and at that point we issue a trial order which contains all of the deadlines for discovery, mediation, expert disclosures, etc. Additional case management conferences are nearly non-existent (except in complex actions) and proposed rule requirements to conduct additional case management conferences will decrease efficiencies to our current practice.

1.271 – Pretrial Coordinating Court requirements are complicated and will decrease efficiencies in our circuit. This new rule appears to require the creation of a new division specifically for the purpose of addressing pretrial issues and then requiring the return of the case to the original court for trial. The issues this rule appears to attempt to address are currently being efficiently handled by Motions to Consolidate for discovery and/or trial pursuant to 1.270 with the case being transferred to the division which has the earliest filed case. To require additional resources and transferring of cases back and forth between the "PCC" and the trial judge does not seem to improve efficiencies.

1.275 (d), (e), and (f) provide for reasonable expenses to be awarded as a sanction for noncompliance and provide the standard to impose these sanctions. These sections will likely lead to mini trials to prove the value of the reasonable expenses and "other financial loss reasonably arising as a result of the sanctioned conduct" and will require adjudication to determine whether the noncompliance was "substantially justified". A circuit civil trial judge has a limited amount of hearing time available in any given week. Conducting hearings to determine potential sanctions for parties means that we give up that amount of hearing time to consider other motions that may dispose of a case or lead to the settlement of a case, such as Motions for Summary Judgment, Daubert Motions, Motions to Strike, etc. Although sanctions may be a tool to compel compliance, the nuances and new standards in these proposed rules (which will all be cases of first impression when appealed to the appellate courts) seem to be so severe as to lead to inefficiencies in the adjudication of the actual matter at hand (i.e. the underlying case).

1.275 (f) requires the court to include written findings of the factors if an attorney requests them within 15 days of the entry of the order. This rule is inefficient, in that it will require the court to go back and reconstruct its findings, often without the benefit of a transcript. If efficiency is the goal and findings will be required, upon request, it would be more efficient to require the written analysis of the factors in the order, to prevent further hearings and additional (retroactive) work for trial judges.

1.280(3) relates to discovery and requires that all of the parties provide initial discovery within 45 days of service of complaint. Historically, in practice, the plaintiff (presumably the party with the most information about the case that has been filed), provides discovery and then the Defendant can respond appropriately once the issues have been framed. If the new rules purpose is to improve efficiency, then it makes sense that the Plaintiff might provide the initial discovery responses with the service of the complaint and then the defendants respond within 45 days of service of the complaint, as the complaint

does not always necessarily frame the issues clearly enough for defendants to respond to discovery. To require the defendant to respond to initial discovery when the plaintiff has not done so, will likely lead to the filing of increased motions requesting additional time to respond which will require hearings or agreed orders especially if there is a motion to dismiss pending. This rule does not seem to improve, meaningfully, efficiencies in the civil system.

1.380 (5) covers discovery sanctions. Historically, these sanctions have been in the court's discretion and the rules currently provide that the court "may" impose sanctions. Under the new rule, there is a requirement that the court "shall" award attorneys' fees. This not only removes the discretion of the presiding trial judge, who is in the best position to know all of the circumstances of the case, but it may also encourage these motions and result in additional hearings rather than advancing the merits of the cases.

1.460(6)(F) provides that trial conflicts are not a basis for a continuation if subject to resolution under the current rule. We believe that true trial conflicts should be a basis for continuance because one of the trials will need to be continued in the event of a true conflict after the presiding trial judges have conferred. If we do not allow continuances when there is a true conflict, this rule will have a negative impact and dramatically increase the length of time in which we can get cases to trial because counsel will be hesitant to "double book" trials and it will be difficult to schedule counsel for multiple trials on the same docket – something we regularly do now with the understanding that a conflict will be continued per the conflict rules under the Rules of Judicial Administration.

2.250(a)(1)(B) If the goal of these new rules is to improve efficiency, we suggest that the time standards should somehow account for failure to serve within 120 days, and/or address the multiple motions for extension of time to serve process that are regularly filed and which are a recurring problem that delays the entire case.

Exhibit B (3 pages)

Examples of Rules that would require Additional Resources-Financial/Technology/FTEs

1.160 and 1.161 – Under these rules, the Court will be required to be involved in decisions regarding whether to schedule a hearing within 5 days of filing a motion. This is an unrealistic time frame when judges are frequently in trial for 5 days (or more) at a time. In addition, the judge will be required to review the motion to determine whether a hearing is needed, enter an order on that issue, then issue another order with a briefing schedule for memorandum. It appears for every motion filed, the judge will be required to enter 3 orders and comply with time frames regarding same. This will require additional resources (likely many additional FTEs so that we have individuals to track the motions filed, calendar when the court must act, make recommendations for judges, and draft proposed orders for judges). These rules will require the court to calendar multiple deadlines to comply with something as simple as scheduling a hearing or ruling without a hearing (again, FTEs will be needed here; it is wishful thinking to imagine that judicial assistants will be able to take on this burden in addition to their current responsibilities).

1.200 The new rule requires that ". . .the court must assign a case to the appropriate track within 120 days of case *filing*, by either a case management order issued in an individual case or a standing administrative order" (emphasis added). It seems inefficient to require the court to engage in active case management such as this based on the date of filing when the Plaintiff often does not even obtain service of process until after the required 120-day period. Also, how will the court assign a case to a track without expending substantial time reviewing the complaint in each case as that stage? Additional resources would be required to follow this rule as drafted (in the form of FTEs for case managers, etc.).

1.200 e(3)(E) will also require additional court resources. This rule requires the court to enter a Case Management Order as soon as practicable after receiving the parties' proposed case management order or after a case management conference. Resources beyond what we currently have will be needed to track deadlines for case management orders to be submitted by counsel and/or for the court to enter case management orders. These resources will be in the form of FTEs.

1.200e(3)(B)(iii) will also require additional court resources for the court to accurately track a party's failure to timely file a case management order. Funding for new technologies to track these dates and prepare form orders and/or FTEs will be needed to meet this requirement.

1.271 – Pretrial Coordinating Court requirements are complicated and will require new resources for the courts to comply. They require a taxing amount of work on the administrative judge, who we suspect, in many/most circuits is a presiding civil judge with a full civil assignment. This new rule appears to require the creation of a new division specifically for the purpose of addressing pretrial issues and then returning the case to the original court for trial. The issues this rule appears to attempt to address are currently being efficiently handled by Motions to Consolidate for discovery and/or trial pursuant to 1.270 with the case being transferred to the division which has the earliest filed case. If we are required to create a PCC, we will need additional resources to include Senior Judge Days, case manager FTEs, etc.

1.275 is the sanctions section. As judges, we understand the role of sanctions and we have regularly imposed sanctions, such as attorney's fees/costs, striking of pleadings, etc. for willful disregard for court orders or for noncompliance with deadlines that causes prejudice to the opposing side. However, we

respectfully suggest that the proposed sanctions, in some instances, go too far, and in some instances need clarification (see below). We also believe that additional resources will be needed to conduct the flood of evidentiary hearings that will likely follow that relate to this section and the offending attorney's attempts to demonstrate "good cause" and "due diligence", "substantially justified", and "financial loss". Special magistrates, Senior Judges, or other FTE types may be needed to conduct these mini trials. Given the severity of the potential sanctions, we predict that these hearings will be lengthy and contentious.

1.275 (b)(4) & (b)(7) These sanctions allow a court to prohibit a party from introducing evidence and allow the court to reduce a party's peremptory challenges for failing to comply with any rule or court order. These are extremely punitive sanctions that are substantively prejudicial to the rights of the litigants and not reasonably related to the offending conduct. Such sanctions will result in motions for re-hearing and an increase in appellate issues anytime such extreme sanctions are imposed. More resources will be required for both trial and appellate courts.

1.275 (d), (e), and (f) provide for reasonable expenses as a sanction and provide the standard to impose these sanctions. These sections will likely lead to mini trials to prove the value of the reasonable expenses and "other financial loss reasonably arising as a result of the sanctioned conduct" and adjudication to determine whether the noncompliance was "substantially justified". Again, given the amount of potential financial exposure at risk, these hearings will likely be lengthy and contentious. Special masters, Senior Judges, or other FTE types may be needed to conduct these mini trials.

1.370 (c) provides for expenses on failure to admit. This section will allow a party to seek reasonable expenses and if disputed, the court will have to determine the genuineness of the document, the truth of the matter, whether the request was objectionable, whether the admission was substantially important and whether there was any other good reason for the failure to admit. We do not have the resources to conduct these additional hearing. Special masters, Senior Judges, or other FTE types may be needed to conduct these mini trials

1.380 (5) covers discovery sanctions. Historically, these sanctions have been in the court's discretion and the rules currently provide that the court "may" impose sanctions. Under the new rule, there is a requirement that the court "shall" award attorneys' fees. We predict that this language will encourage these motions and result in additional hearings rather than advancing the merits of the cases. In addition, the possible sanction is an award of fees, costs, travel expenses and "any other financial loss reasonably arising as a result of the sanctioned conduct". This is very broad language with a high value of potential exposure. Increased numbers of lengthy evidentiary discovery hearings will require additional resources to support the civil judges, including Special Masters, Senior Judges, etc. to allow for the additional hearing time needed for these events.

1.440 sets out the timeframes in which a trial date should be "fixed". To track these deadlines, we would require additional resources (technological programs or case manager FTEs) than are currently at our disposal.

1.460(9) requires the court to "schedule the action required to resolve the need for a continuance". This rule requires the court to become involved in scheduling matters, such as the scheduling of an expert deposition, or otherwise. We do not have the time, nor the resources, to schedule activities/tasks that need to occur in individual cases. If this is a requirement, we would need case

managers, special masters, and/or senior judges to assist with this. An easier solution would be to modify the proposed language to allow the court to "extend deadlines to allow the parties to schedule the action required to resolve the need for a continuance."

2.215 (f) (2)(A) discusses "just cause" for a judge to provide a ruling on a motion beyond 60 days. As new, complicated legal issues continue to emerge in the civil arena, including issues related to COVID-19 litigation, complex medical and products actions, class actions, etc., and the civil trial judges are diligently presiding over a back log of civil trials, we suggest that "just cause" should include lack of adequate staff attorney support. It is unreasonable to expect a ruling on a complicated legal issue, often a case of first impression, within 60 days when (as in our circuit), we have one staff attorney shared between 5-6 judges and the turn around time to expect a staff attorney legal memoranda on a non-expedited matter is 4-6 weeks. Unless this rule is changed to include the recognition of the need for more staff attorneys, we will need more resources (staff attorney FTEs) to realistically be able to meet this deadline on the more complicated cases.

2.250 adds language that states that inactive cases are excluded from the calculation of time periods under these rules. While we appreciate that addition, we will also require additional resources to identify the inactive cases and re-categorize them into an "inactive" category so that the times are not being calculated. This will require either additional technology/computer programs or case managers.

2.250(a)(1)(B) provides for time standards to be calculated on an either/or, whichever occurs first basis. We do not currently have the resources to track our cases under these requirements and to do so would require additional resources in the form of additional technology/computer programs and/or case managers.

2.250(b) creates quarterly and annual reporting requirements for civil cases. We do not currently have the resources to track and/or report our cases under these requirements and to do so would require additional resources in the form of significant additional technology/computer programs and/or case managers. This would likely require coordination with the Clerks of Court and their tracking systems as well and we suggest inquiry should be made of this court partner to determine the funding impact that this section will have on them before implementation is required.

2.251 designates active and inactive cases and will require consultation with the Clerk of Court and additional resources on the Court's end. We suggest inquiry should be made of this court partner to determine the funding impact that this section will have on them before implementation is required.

Exhibit C (1 page)

Objections to Removal of Discretion from Trial Court Judges

1.161(b)(3) This rule presumes to inform the trial judge of what a "reasonable" time is to schedule a hearing. For example, it indicates that for hearings up to 30 minutes, a hearing must be set within 45 days. In practice, during any given month, a trial judge may cover a multi-week trial. Medical malpractice cases, product liability cases, class action suits, tobacco litigation, complex construction defect cases can all be set for two to three week trial terms. In those months, it may not be at all reasonable to require that a civil trial judge set a 25 minute hearing within 45 days. We suggest that in some months, given trial demands and the volume of requested hearings, a strict 45 day requirement will be unreasonable. Although there is a section in this rule that allows this schedule to be "amended" by administrative order in local jurisdictions with "docket stress", the term "amendment" suggests that the administrative order will set a new required number of days. We suggest that trial judges are under a professional obligation to effectively and efficiently adjudicate cases and that they are in the best position to determine the reasonableness of the timing of setting a hearing on any given motion on their specific calendar. With their limited hearing time, the trial judge may choose to prioritize summary judgment motions over a motion to dismiss or otherwise. The application of this rule may not allow for that prioritization. We oppose the removal of that discretion and suggest that if there are judge-specific concerns with getting hearings set in certain divisions, that those issues be addressed on a case by case basis.

1.271 Finally, rules that require the trial judge to "cooperate reasonably" with the PCC judge (a civil judge or a Senior Judge, in either case, who have completed case management education) are un-necessary and suggest that both judges will not display the professionalism that is required of them. In addition, to mandate that the trial judge cannot continue the case without the concurrence of the PCC authorizes one judge to control the trial judge's calendar. While we do not anticipate practical issues with this requirement in our circuit, we are philosophically opposed to one judge (who is not trying the case) having veto power over another judge's trial calendar.

1.460(b)(10) provides that no case may be continued beyond 6 months without factual findings of extraordinary good cause being made and articulated by the trial court. This rule eliminates the discretion of the trial court to set trials on its docket. We can imagine instances where there are non-extraordinary circumstances (just ordinary circumstances-attorneys with multiple months of trial conflicts given the pandemic back log that we are climbing out of around the state, for example) that could justify in the trial judge's mind, a continuance exceeding six (6) months and if the parties and court all agree to re-set the trial beyond six (6) months, the court should have the discretion to manage her own docket.

Exhibit D (1 page)

Clarification Requested/General Comments

1.275 (b)(3) provides as a sanction: "refusing to allow the party to support or oppose a designated claim or defense". How is this language any different from striking a claim or defense?

1.275 (c) provides that continuances are not to be used as a sanction but this section seems inconsistent with 1.275 (b)(5) which provides for a stay pending compliance of a rule or prior court order.

1.275 (h) We suggest that the attorneys be required to file a notice with the court that they have complied with this requirement.

1.279(c)(1) allows for an action to be dismissed. Is the dismissal with or without prejudice?

1.310 – Could this rule, relating to depositions upon oral examination, include a section with language allowing for court reporters to swear witnesses appearing remotely for depositions, via video (such as Zoom Teams, etc.)?

1.380 (b)(3)(B) We suggest adding as an additional factor that the court may consider other instances of similar conduct by counsel or counsel's law firm.