

**IN THE SUPREME COURT OF FLORIDA  
CASE NO. SC22-122**

**IN RE: REPORT AND RECCOMENDATIONS  
OF THE WORKGROUP ON IMPROVED  
RESOLUTION OF CIVIL CASES. /**

**COMMENT OF THE FEDERATION OF DEFENSE AND CORPRATE  
COUNSEL (FDCC).**

The Federation of Defense & Corporate Counsel (FDCC) is a not-for-profit corporation with national and international membership of over 1,500 defense and corporate counsel working in private practice or as in-house counsel, and as insurance claims representatives across the country, as well as over 110 in the state of Florida. FDCC members practice in the state and federal trial and appellate courts of Florida and across the country. The FDCC's efforts center on affording unfettered access to justice for all while also working to protect and advance the rule of law.

Since 1936, its members have established a consistent and strong legacy of representing the interests of civil litigants, including publicly and privately-owned businesses, public entities, and individual defendants. The FDCC seeks to assist courts in addressing issues of importance to its membership that concern the fair and predictable administration of justice and, in that regard, has been requested to file numerous *amicus curiae* briefs

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in the courts and provided testimony to state legislators and regulators. With that mission in mind, FDCC provides this comment regarding the proposed changes to the Florida Rules of Civil Procedure as found in the Report and Recommendations of the Workgroup on Improved Resolution of Civil Cases in SC22-122.

FDCC applauds the commitment to increasing the efficiency and thus lowering the costs of litigation in civil cases. Effective case management is essential to the administration of justice. The Final Report of the Workgroup sets out the data that makes the case that changes to the rules are required to empower case management. To that end, FDCC is supportive of the amendments to allow an effective management of civil litigation. However, FDCC echoes the concerns expressed by Wicker, Smith, O'Hara, McCoy & Ford, P.A. regarding proposed Rule 1.460 that can be read as stripping the authority of trial judges to grant continuances in appropriate circumstances.

FDCC is further supportive of the Comment filed by the International Association of Defense Counsel (IADC). In particular, FDCC supports the IADC's proposed rule regarding the need for a proportionality requirement and the disclosure of Third-Party Litigation Funding ("TPLF").

Regarding proportionality, Chief Justice John Roberts explained in his 2015 Year-End Report on the Federal Judiciary, Rule 26(b)(1) “crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality.”<sup>1</sup>

The amended rule states, as a fundamental principle, that lawyers must size and shape their discovery requests to the requisites of a case. Specifically, the pretrial process must provide parties with efficient access to what is needed to prove a claim or defense, but eliminate unnecessary or wasteful discovery. The key here is careful and realistic assessment of actual need. That assessment may, as a practical matter, require the active involvement of a neutral arbiter—the federal judge—to guide decisions respecting the scope of discovery.

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<sup>1</sup> 2015 Year-End Report on the Federal Judiciary at p. 6; <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> (last visited April 30, 2022).

*Id.*, at p. 7. See also, *Sprint Communs. Co. L.P. v. Crow Creek Sioux Tribal Court*, 2016 U.S. Dist. LEXIS 23689, \*13-14 (D.S.D. Feb. 26, 2016) (omitting internal quotations).

Under Federal Rule 26(b), proportionality is assessed by considering “the importance of 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). Such a requirement forces the parties to be specific in discovery because “[m]ere speculation that information might be useful will not suffice; litigants seeking to compel discovery must describe with reasonably degree of specificity, the information they hope to obtain and its importance to their case.” *Cervantes v. Time, Inc.*, 464 F.2d 986, 994 (8th Cir. 1972) (*cited in Schultz v. Sentinel Ins. Co.*, 2016 U.S. Dist. LEXIS 72542) (S.D. June 3, 2016).

Proportionality thus recognizes a desired balance in discovery whereby a litigant is permitted to obtain information that he or she needs in order to prepare adequately for issues that may develop without imposing an onerous burden and cost on the opposing party. The Workgroup noted its

concerns about the high costs associated with discovery; the concept of proportionality is an obvious solution to this identified problem.

FDCC believes that disclosure of TPLF promotes principles of justice, fairness, and requisite transparency consistent with a lawyer's ethical obligations of candor and independent judgment. TPLF gives hidden third-party financiers a vested interest into the litigation and distributes the risk inherently found in that litigation. While the structures vary from funding to funding, the financier may well have a say in strategy, including who and how many experts are hired; how much discovery is conducted; and when and for how much a party might settle. This is a non-delegable function the Code of Professional Responsibility imbeds within the Client - Lawyer relationship. It is therefore imperative for the court and parties to understand who the decision-makers are that influence such decisions. Without the disclosure, the true decision-influencer may well be shrouded in the darkness defeating the purpose of the Federal Rules of Civil Procedure that the rules be "employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." FRCP 1. The court should know who is truly in the courtroom—who are the real parties in interest—for a great many reasons.

One such reason is that the court cannot make accurate decisions

about subjects such as discoverability, sanctions, and cost-shifting without that information. Proportionality, which defines discoverability, under FRCP 26 is assessed by considering “the importance of 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) (emphasis added). TPLF cuts to the heart of a party’s resources and, without the disclosure, a court is misled as to the true facts of proportionality.

Failure to disclose TPLF may well violate the principles of FRCP 26. Likewise, a court is misled when making party resource decisions involved in discovery sanctions and cost-shifting requests. Without this information, a court cannot accurately make such decisions and orders may unintentionally be unfair.

As members of the bar, a lawyer’s ethical responsibilities must always be a top consideration in behavior and actions. TPLF calls into question a number of ethical obligations that cannot be satisfied without disclosure. Some states do not allow an attorney to share a fee with a non-lawyer, and thus some TPLF structures may violate an ethical duty. See New Jersey Rules of Professional Conduct 5.4(a); Advisory Committee on Professional

Ethics, Opinion 732 (concluding that a legal referral service Avvo violated this rule) (June 21, 2017). Conflicts of interest may arise that must be disclosed to the client or the court, especially where a funder has decision-making authority or where there is a funding of multiple litigation that goes beyond the single client. See American Bar Association Best Practices For Third-Party Litigation Funding (August 2020) (“When portfolio financing is involved, the possibility of tensions, and even concrete conflicts of interest, may arise if the lawyer or a single client begins to have difficulties with the funder involving one of a group of matters.”). In such instances, TPLF may violate an attorney’s duty of candid advice and independent professional judgment. See Ohio Sup. Ct. Ethics Opn. No. 2012-3 (concluding that a lawyer must ensure the funder “does not attempt to dictate the lawyer’s representation of the client.”).

Disclosure of TPLF would put Florida in line with the best practices suggested by the American Bar Association, at least six federal courts of appeals and 24 district courts requiring disclosure, and the Litigation Funding Transparency Act introduced and referred to the United States Judiciary Committee in February of 2019. Patrick A. Tighe, Memorandum: Survey of Federal and State Disclosure Rules Regarding Litigation Funding 209 (Feb.

7, 2018);<sup>2</sup> American Bar Association Best Practices For Third-Party Litigation Funding (August 2020).

The FDCC thanks the Court and the Workgroup for its hard work in considering the issues involved in these amendments. We will be pleased to provide additional comment or evidence from the experience of FDCC members as warranted to establish the basis upon these reforms are required.

Respectfully submitted this 2<sup>nd</sup> day of May, 2022.

Sincerely,

*/s/ Francisco Ramos, Jr.*

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<sup>2</sup> <https://judicialstudies.duke.edu/wp-content/uploads/2018/04/Panel-5-Survey-of-Federal-and-State-Disclosure-Rules-Regarding-Litigation-Funding-Feb.-2018.pdf> (last visited April 30, 2022).



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## **CERTIFICATE OF COMPLIANCE**

I certify that this comment was prepared in Arial 14-point font and complies with the font requirements in Florida Appellate Rule of Procedure 9.045.

/s/ Francisco Ramos, Jr.  
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## **CERTIFICATE OF SERVICE**

I certify that on May 2, 2022, the foregoing was electronically filed via the Florida Courts E-Filing Portal and a copy was sent by first class U.S. Mail, postage prepaid, addressed to the following:

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