IN THE SUPREME COURT OF FLORIDA

CASE NO. SC22-122

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

COMMENT TO PROPOSED RULES 1.460(b) AND 1.200(f)(5)

The undersigned attorney, Dan Cytryn, provides this comment to proposed Rules 1.460(b) and 1.200(f)(5) to the Florida Rules of Civil Procedure.

I have been a practicing trial lawyer in Florida for more than 40 years and have been a Florida Board Certified Civil Trial Lawyer for more than 30 years. I have tried 105+ jury trials and have argued before this Court on three occasions.

The proposed rules regarding trial continuances and proposed Rule 1.200(f)(5) regarding what happens if a trial does not happen during a trial period are untenable.

A. The proposed rules for trial continuances are beyond strict, they are punitive towards civil litigators

The proposed continuance rule may be the harshest in the nation. Proposed Rule 1.460(b)(1) states that “no continuance may be granted

except for extraordinary unforeseen circumstances involving the personal health of counsel or a party, court emergencies, or other dire circumstances that provide extraordinary cause." By way of example, the wording of the rule and the circumstances stated in the combined rules would potentially preclude continuances for, *inter alia,* the following reasons:

1. *Scheduled* attorney or client medical procedures, including surgeries.

2. *Scheduled* attorney vacations.

3. Family events such as weddings or graduations scheduled without a lot of notice.

One unintended consequence of proposed Rule 1.460(b)(1) is that it potentially prevents attorneys from ever going on vacation.[1] This is because pursuant to proposed Rule 1.200(f)(5):

> **When Trial Does Not Timely Occur.** If a trial is not reached during the trial period scheduled by the case management order, no further activity may take place absent leave of court, and the case shall be reset to the next immediately available trial period.

[1]Another question to ask is what if a lawyer has a previously *scheduled* elective medical procedure set at the same time as a trial period that was set pursuant to proposed Rule 1.200(f)(5)? A previously scheduled elective medical procedure may not necessarily fall within the scope of the permissible reasons for a trial judge to grant a continuance under proposed Rule 1.460(b)(1).

Let's say an attorney has 20 cases set for trial on multiple future dates (which many attorneys have at any one time—many defense attorneys have even more). The likelihood is that most, if not all, of these scheduled cases will not go to trial on the first scheduled trial docket because there are just so many other cases on the docket. Then, the cases that did not get tried are required to be "reset to the next immediately available trial period."[2] The result is that the attorney is going to be scheduled for trials potentially every month, precluding that trial attorney from taking much needed vacations essential to that trial attorney's mental health and family cohesion.

The proposed rule for trial continuances is one of the harshest continuance rules in the country and only allows for continuances in very limited circumstances. Attorneys will not have an opportunity to take time off for a vacation if they cannot obtain continuances of trials even for vacations scheduled with significant notice to the Court. As compared to other states and even federal courts, this rule is draconian.

In Texas state court (well-known as one of the most conservative jurisdictions in the country, if not the most conservative), they have a rule for

[2] This phrase itself is ambiguous as to what exactly is meant by "next immediately available trial period."

continuances which simply requires “sufficient cause supported by affidavit, or by consent of the parties, or by operation of law.” Tex. R. Civ. P. 251. The grant or denial of a motion for continuance is within the sound discretion of the trial court. *Wulchin Land, L.L.C. v. Ellis*, 13-18-00156-CV, 2020 WL 1303230, at *11 (Tex. App. Mar. 19, 2020), *reh'g denied* (May 6, 2020), *review denied* (Sept. 3, 2021).

In addition, federal courts have a much more lenient rule than proposed Rule 1.460(b). “A schedule may be modified only for good cause and with the judge's consent.” Fed. R. Civ. Proc. 16(b)(4). Generally, this rule is interpreted to give trial courts substantial discretion in deciding whether ‘good cause’ is warranted. This is apparent when looking, for example, at cases out of the Fifth Circuit Court of Appeals and federal district courts in Texas. In *HC Gun & Knife Shows, Inc. v. City of Houston*, the Fifth Circuit explained:

> “When the question for the trial court is a scheduling decision, such as whether a continuance should be granted, the judgment range is exceedingly wide, for, in handling its calendar and determining when matters should be considered, the district court must consider not only the facts of the particular case but also all of the demands on counsel's time and the court's.” *Fontenot v. Upjohn Co.,* 780 F.2d 1190, 1193 (5th Cir.1986). We will *not* “substitute our judgment concerning the necessity of a continuance for that of the district court”, unless

> the complaining party demonstrates that it was prejudiced by the denial. *Id*. at 1194.

HC Gun & Knife Shows, Inc. v. City of Houston, 201 F.3d 544, 549–50 (5th Cir. 2000).

"District courts have 'broad discretion' in deciding motions for continuances." *Myers v. CitiMortgage, Inc.*, 557 Fed. App'x 296, 298 (5th Cir. 2014) (citations omitted) (unpublished); *see also United States v. Colomb*, 419 F.3d 292, 300 (5th Cir. 2005) (noting that a district court has "broad inherent power to control its docket and manage trials"); *In re John F. Beasley Const. Co.*, 395-33293-RCM-11, 1997 WL 472503, at *2 (N.D. Tex. Aug. 13, 1997) ("The trial court's latitude in exercising discretion is extremely wide when it is handling calendar matters, for it must consider not only the facts of the particular case but also all of the demands on counsel's time and the court's.").

In the Southern District of Florida, the rule for trial continuances is probably the strictest in the nation at this time:

> A continuance of any trial, pretrial conference, or other hearing will be granted only on exceptional circumstances. No such continuance will be granted on stipulation of counsel alone. However, upon written notice served and filed at the earliest practical date prior to the trial, pretrial conference, or other hearing, and supported by affidavit setting forth a full showing of good cause, a continuance may be granted by the Court.

S.D. FLA. L.R. 7.6.

But a court may not "deny a continuance when the need for one is warranted." *Gastaldi v. Sunvest Resort Communities, LC*, 709 F. Supp. 2d 1284, 1291 (S.D. Fla. 2010). The rule in the Middle District of Florida states: "If requesting a trial continuance, trial counsel must certify the client consents to the continuance." M.D. FLA. L.R. 3.08(b). In the Northern District of Florida, an attorney of record on a case must immediately notify the court when "[a] party expects to move for continuance of a trial or hearing." N.D. FLA. L.R. 16.2(A)(4).

Federal district courts in Florida consider a combination of factors in determining whether to grant a continuance of trial, including the factors described below from *Romero v. Drummond Co*., 552 F.3d 1303, 1320 (11th Cir. 2008). There, the court set forth the factors it considers in determining whether a trial court abused its discretion in denying a motion for continuance, including:

> (1) the moving party's diligence in its efforts to ready its case prior to the date set for hearing; (2) the likelihood that the need for a continuance would have been remedied had the continuance been granted; (3) the extent to which granting the continuance would have inconvenienced the court and the opposing party; (4) the extent to which the moving party might have suffered harm as a result of the district court's denial.

Romero v. Drummond Co., 552 F.3d at 1320 (*quoting Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1296 (11th Cir. 2005)); *see also, e.g., Gastaldi v. Sunvest Resort Communities, LC*, 709 F. Supp. 2d at 1291; *Bahr v. NCL (Bahamas) Ltd.*, 19-CV-22973, 2022 WL 293255 at *4 (S.D. Fla. Feb. 1, 2022); *DeBose v. Univ. of S. Florida Bd. of Trustees*, 8:15-CV-2787-EAK-AEP, 2018 WL 8919849 at *1 (M.D. Fla. Sept. 2, 2018).

B. The proposed rules for trial continuances will discourage people from becoming (and continuing to be) trial lawyers and add undue stress to the profession

Attorneys, like persons in any other profession, are entitled to live a fulfilling life with a healthy work-life balance[3], as do appellate and trial judges. There is absolutely no reason to run attorneys ragged until they burn out to the point where nobody wants to engage in civil litigation of any kind because they have to sacrifice their family life and their mental health because of needlessly strict rules of procedure.

[3]If the court wants to implement a temporary rule for one year that is stricter than the proposed rule below, it could do so just to attempt to clear the dockets somewhat. But the proposed rules relating to trial continuances and resetting cases that didn't go during a trial period appear to be, in part, a knee-jerk reaction to what is likely a temporary/non-permanent condition (Covid). The backlog of cases does need to be reduced, but at the same time, these two drastic rules should not become permanent rules of procedure.

Solo practitioners with busy trial schedules will be decimated by these proposed rules because they will not have anybody who will be able to cover a trial for them when they are unavailable for reasons not enunciated in proposed Rule 1.460(b). Small firms will also be severely affected if their lawyers are constantly on-call for trial, with no feasible way of ensuring reasonable trial continuances.

Even larger firms will run into situations where the lead lawyer is unavailable for trial, but a continuance is not warranted under the proposed rules. Thus, for that trial, the firm may have to replace the lead lawyer with another lawyer at the firm who is completely unfamiliar with the case but has to fill-in for the unavailable counsel. That will only reduce the quality of lawyering and reduce confidence in the judicial system. Adopting these two rules reduces Florida's legal system to one where the quality of representation and attorneys' mental health and family sanctity is sacrificed in a 'numbers game' to expedite cases.

C. Stress and Being a Trial Lawyer

Sadly, in recent years, I have noticed that trial lawyers are 'dropping like flies'. I see top notch trial lawyers retiring early from the stress of the job

as it exists today, well before the implementation of these proposed excruciatingly draconian rules, and even before Covid.

It is not groundbreaking news to anybody that the profession of law is already one of the most stressful professions in the state. Lawyers are now sometimes being called to trial with two hours' notice no matter where they are located. This is how it happened in some courtrooms 40 years ago, but not until recently have we seen this happening again. The Florida Bar News intermittently publishes articles about lawyer stress, and Florida Lawyers Assistance (FLA) exists so that a lawyer can call for help if they have a mental health or substance abuse problem. Regrettably, FLA may have to add staff to handle a lot more crisis phone calls and issues because many lawyers' stress levels will certainly increase substantially if these proposed rules are implemented.

On a more personal side, an example of something that would be emotionally devastating to me would be if I were unable to attend my youngest child's college graduation. But under the proposed rules, my request for a continuance based upon this event potentially would not constitute "dire circumstances that provide extraordinary cause." My 22-year-old son is graduating from the University of Miami on May 13, 2022.

Logan didn't tell us about his graduation until February. Now, I don't know if he didn't tell me earlier because he just forgot to tell my wife and I about it, or if the decision regarding when graduation day would occur was not decided by the University until February. Nonetheless, with the proposed continuance rule in effect, if I had a trial previously scheduled during that May time period (and in most circumstances, if I had a trial set for May, the trial order would have been entered well before February), would I be able to obtain a continuance of trial for me to attend my son's graduation? A trial judge would not abuse his or her discretion in determining that such a circumstance is not "dire" or "extraordinary." One definition of "extraordinary" in Merriam-Webster is "exceptional to a very marked extent."[4] The definitions of "dire" include:

1a: exciting horror
b: DISMAL, OPPRESSIVE
2: warning of disaster
3a: desperately urgent
b: EXTREME[5]

[4]https://www.merriam-webster.com/dictionary/extraordinary

[5]https://www.merriam-webster.com/dictionary/dire

The rules of procedure must be reasonable, particularly when we are talking about lawyers' and their clients' lives and mental health. These new proposed rules shouldn't cause an everyday crisis in our lives. What will happen with these new proposed rules is that every day there will be multiple deadlines we have to deal with and potentially preparing for multiple trials at all times, just making our lives miserable. The words "dire" and "extraordinary" shouldn't appear in a continuance rule. "Dire" is the situation going on in Ukraine right now. It should not be part of a continuance rule.

In a 2021 Bloomberg Law survey, the lawyers who responded to the survey "report experiencing burnout more often, and nearly half report a decline in well-being."[6] A 2017 Florida Bar News article notes one survey of lawyers that 43% of respondents would not or are not sure whether they would pursue the legal profession as a career if they were making the decision again.[7]

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[6]https://news.bloomberglaw.com/business-and-practice/analysis-survey-finds-lawyer-burnout-rising-well-being-falling

[7]https://www.floridabar.org/the-florida-bar-news/florida-lawyers-find-satisfaction-in-the-law/

It is unfortunate that such a great profession can cause so much stress and dissatisfaction for many of the people who dedicate their lives to it. It is true that we should make cases move faster, but at the same token, we also must avoid creating rules and procedures that discourage people from becoming trial lawyers or continuing to practice as trial lawyers.

D. <u>Suggested amendments to the proposed rules</u>

I agree with a stricter trial continuance rule than is presently in existence. However, the rule should still allow attorneys to live their lives without adding incredibly unnecessary and undue stress and emotional strain. The rule should simply be:

> The trial court may grant a continuance of a trial for good cause shown when the continuance rule has not been abused by the party or the attorney seeking the continuance.

This rule would allow judges to maintain a reasonable degree of discretion over their dockets and allow attorneys to not constantly be on-call for trial with no hope of obtaining a reasonable break from the call to "be down the courthouse at 'X' time to pick a jury". And it would preclude those trial lawyers who historically have abused the process by having a different excuse every time the case is up for trial from abusing the continuance privilege.

Proposed Rule 1.200(f)(5) should also be amended to allow consideration for the parties and their attorneys. Setting the case on the next immediate docket gives attorneys no break from the pressure of trial dockets. Anticipating a trial is itself work and stress and more pressure. "All work and no play makes Jack a dull boy" is an age-old expression. It traces back as far as 1659.[8] Life is about living. Work is important. But enjoying one's life is more important. Enjoying one's family and family sanctity is more important. We were placed on this earth not just to work. I'm certain that the members of this Court have plenty of time for vacations and to enjoy their families and their lives. We trial lawyers should have that same right.

That being said, proposed Rule 1.200(f)(5) should be changed from:

> **When Trial Does Not Timely Occur.** If a trial is not reached during the trial period scheduled by the case management order, no further activity may take place absent leave of court, and the case shall be reset to the next immediately available trial period.

to state:

> **When Trial Does Not Timely Occur.** If a trial is not reached during the scheduled trial period, the trial court shall reschedule the trial during a period when the trial may reasonably be reached, taking into consideration the number of cases on the court's trial docket, those cases likely to go to trial, and the length of the trials scheduled.

[8]https://www.oxfordreference.com/view/10.1093/acref/9780199539536.001.0001/acref-9780199539536-e-2501

The above rule will allow the trial judges to control their dockets to make sure it is manageable, not have 100 cases and 200 attorneys appearing at calendar call, and to not force attorneys to be on alert when there is really no chance that their case will be reached during a particular trial period.

Additionally, the portion of proposed rule 1.200(f)(5) that states “no further activity may take place absent leave of court” is unnecessary. It will only add to a court’s already burdened docket when parties have to obtain leave of court via filing a motion and getting a court ruling in order to conduct additional discovery after a trial is continued. It is not unusual for parties to conduct additional discovery after a trial is continued. For example, in a personal injury case, new medical treatment may occur after a trial has been scheduled to take place, but not reached, and the parties should be entitled to conduct discovery regarding the new treatment. Burdening the court with unnecessary motions or hearings to obtain additional discovery is just piling on more work for the trial judges.

Dated May 3, 2022,

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 3, 2022, a copy of the foregoing was electronically filed via the Florida Courts E-Filing Portal, with a copy provided by U.S. Mail to Chief Judge Robert Morris, Second District Court of Appeal, P.O. Box 327, Lakeland, Florida 33802, and by email to Tina White, 500 South Duval Street, Tallahassee, Florida 32399, whitet@flcourts.org.

CERTIFICATE OF COMPLIANCE

I certify that this document was prepared in Arial, 14-point font, in compliance with Florida Rule of Appellate Procedure 9.045.

/s/ Dan Cytryn, Esquire
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