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

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

The judges assigned to the civil divisions of the Fourth Judicial Circuit of Florida submit the following comment to the proposed changes to the Florida Rules of Civil Procedure.[1]

I. Preliminary Comments

Thank you for the opportunity to provide comment to the proposed changes. We appreciate the Workgroup's efforts and offer these comments in the spirit of collaboration and our shared goal of efficient and effective case management. This comment is intended to outline the anticipated effect the proposed changes will have on the management of civil cases, particularly in the Fourth Circuit.

Unfortunately, we believe that many of the proposed rules will substantially delay the management and resolution of civil

[1] In addition to the concerns addressed herein, we also concur in the April 26, 2022, comment submitted by the judges with civil assignments in the Eighth Judicial Circuit of Florida.

cases. Though the intent is to expedite cases, the inflexibility and complexity of the proposed rules – compliance with which is impossible at current staffing levels – may well have the opposite effect. As justice delayed is justice denied, we strongly advise that the proposed rules not be adopted unless and until the legislature has committed to fund the judiciary in a manner that allows for each civil trial judge to have law clerks and additional support staff necessary to comply with the proposed rules.

Now that specific formal comments to the proposed changes have been submitted, we recommend that the proposals set forth in the Final Report of the Judicial Management Council Workgroup on Improved Resolution of Civil Cases be submitted to The Florida Bar's Civil Procedure Rules Committee. This feedback from different stakeholders has identified additional challenges and solutions that the Rules Committee is designed to address. Although the Workgroup and the Courts understandably want to do what we can to expeditiously improve efficiencies in the court system, doing more harm than good – as we submit many of these changes do

– will have the opposite effect. The Workgroup has not demonstrated an urgency that would justify circumventing the long-established practice of engaging the experts on the Rules Committee in the careful drafting of new rules. The Committee's fast-track procedures could be employed to ensure changes are adopted in an efficient, timely manner.[2]

Moreover, while federal court rules, procedure, and practice customs can be a helpful guide in some instances (*e.g.*, adoption of Fed.R.Civ.P. Rule 26(a)), state courts are not federal courts. We do not enjoy the same staffing or financial resources as federal courts, despite civil caseloads many times that of our federal colleagues. The Federal Rules of Civil Procedure (and the local rules which accompany them) work for federal judges and litigants because federal case loads are a fraction of state

[2] Speaking plainly, there is a feeling among judges and lawyers around the State, based on comments of those on the Workgroup and others engaged in this process, that proponents of this effort suggest it is "too far down the road" to delay or revise. However, the fact that every comment submitted so far has been critical of some or many of the Workgroup's recommendations shows that this Court should not simply adopt the recommendations as presented, but rather task the Rules Committee with recommending which of the proposals to accept or reject.

court caseloads. Federal courts are not required by existing rules and case law to hold hearings on as many motions as state judges are required to hold. Federal district judges and magistrate judges each have multiple clerks to help manage their caseloads. Without a similar commitment to fund and staff the state courts, the imposition of rules similar to the federal rules of procedure will dramatically increase litigation costs for parties and will result in more backlog and bureaucracy, not a more efficient civil justice system.

Think about what would happen to federal dockets if all the magistrates and law clerks were let go tomorrow, and district judges had only themselves and their judicial assistants to manage their dockets. That is similar to the position in which adoption of the Workgroup's proposals would place state civil judges.

We understand that the Court and the Workgroup are attempting to address an anticipated increased workload due to perceived delays in court proceedings caused by the Covid-19 pandemic. However, that has not been our experience. Civil court proceedings (other than jury trials) have not been delayed

due to or during the Covid-19 pandemic. To the contrary, owing to the absence of jury trials, we had more hearing time available during the pandemic, not less. With the support of the Court's directive that civil matters employ remote technology, lawyers continued their discovery via Zoom or other remote means and resolved cases at the same pace. Indeed, we have fewer civil cases pending now than we did before the Covid pandemic began.

Nevertheless, we welcome the Court's and the Workgroup's focus on case management tools that aid trial courts in the efficient resolution of pending cases. Some of the proposed rules would achieve that goal. Unfortunately, some of the proposed rules would result in delay and would unnecessarily impose case management requirements upon trial courts that far exceed their resources.

This Workgroup's report does not say whether it believes the suggested rule changes would require more staffing, or what the staffing would cost. Such sweeping changes should not be implemented before realistically determining what the cost of implementation will be.

Finally, we are concerned that the proposed rule changes will impose an unworkable "one-size fits all" approach to case management throughout the state. This approach will make the Fourth Circuit much less efficient in the management and resolution of civil cases. Without substantial revisions to the proposed rules, there is a risk of widespread non-compliance by the bench and the bar due to impossibility, and we predict substantial and expensive delays in the resolution of civil cases in our circuit. The result could unfortunately be an erosion of public perception regarding the operation of Florida's trial courts. Indeed, each of the three metrics identified in Section III.A.1.a. of the Final Report will be worse, not better, as a result of the implementation of the proposed rules.

II. Fourth Circuit Practices and Procedures

In evaluating our comments, it is perhaps helpful to understand the caseload and procedures employed in our circuit. In Duval County, each civil division has approximately 1,300 cases.[3] We do not have the resources to identify and keep

[3] This is down from an average of 1600 cases before the Covid-19 pandemic.

track of all motions filed in each of our cases.[4] Indeed, we are without notice that a motion has been filed in a pending case until and unless a lawyer requests a hearing on such motion or a ruling without a hearing. In advance of a hearing on a motion, each judge prepares by reviewing those motions coming up on the judge's hearing calendar. Hearings are set in a variety of time increments, including 5-, 10-, and 15-minute hearings for uncomplicated matters, as well as longer hearings, including full-day hearings for complex matters. Hearings are set at counsel's request by emailing or calling our judicial assistants. We routinely hear good feedback regarding their responsiveness and feel that our system of scheduling hearings needs no alterations or improvements.[5]

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[4] Even with the recent addition of a case manager, our case manager is responsible for the management of thousands of civil cases across three counties, in both County and Circuit courts. The addition of that resource, while appreciated, is still insufficient to track every motion filed in every case, or to engage in preliminary review of every motion and dialogue with counsel for purposes of setting hearings or determining whether memoranda will be submitted or if a hearing is necessary. Law clerks, not non-legal staff, are critical to successfully accomplishing that task.

[5] This is distinguished from an acknowledgement that hearing dates are often set further out than either the Court or counsel

Cases are set for "date-certain" jury trials rather than on a rolling multi-week trial docket. This provides the litigants with the requisite certainty needed to keep litigation costs to a minimum, as neither lawyers nor expensive experts are required to keep their calendars open indefinitely for several weeks on end to attend a 4-day jury trial. We are successful with our date-certain trial approach because the judges in our circuit routinely try each other's cases. For example, the eight civil divisions in Duval County are split into two groups, referred to internally as trial pods. These two pods alternate trial weeks, meaning that four divisions are in trials one week, and the other pod the next. If all trials in a division resolve, that judge can

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would prefer. This is the result of the other demands on a judge's schedule, including being in jury trials, multi-day bench trials, serving as the duty judge for emergency domestic violence petitions or for officers in need of warrants. Each division ebbs and flows on available hearing time given the rotating demands on each judge's time. If a matter is time-sensitive, each judge and their judicial assistant work to find hearing time to address these urgent matters. The solution is more hearing time, not a change to how hearings are scheduled. As set forth herein, we are of the strong opinion that the Workgroup's proposed changes will force judges and their assistants to spend more time and resources unnecessarily setting hearings, which will result in less hearing time, not more.

step in and try a case for another judge in the pod who may have more than one trial that week. We also seek assistance from senior judges and, occasionally, appellate judges who have indicated an interest in assisting with trials when their busy calendars permit. This system enables us to try more cases and, importantly, signals to trial counsel that a case will not be continued simply because the judge has another case to try that week. The effect this trial system has on the resolution of cases is evident.

We are able to achieve these results and resolve cases by setting cases for actual, reliable trial dates. One data point upon which the Workgroup's recommendations are based is that "only a tiny proportion of civil cases go to trial – 0.8% of cases in Florida's circuit civil divisions (excluding real property and mortgage foreclosure cases)." Although our statistics reflect a 3% trial rate for circuit civil cases from 2019 through the present, it is certainly true that only a small percentage of civil cases are resolved through jury trials. However, what the Workgroup fails to note is that most settlements are reached

within weeks, if not days, of the jury trial date. This is only possible because the lawyers know their trial date is certain.

By contrast, the case management system which is the subject of the April 13, 2021 Administrative Order No. 20-23 and which is contemplated by the proposed changes to Rule 1.200 anticipates that parties will receive a "projected trial date," not an actual, reliable trial date. Since the issuance of that order and implementation of the case management system, across the state (including in the Fourth Circuit) trial judges must issue orders that front-load all other deadlines, but only give approximate projected trial dates of "18 months from the date of the case management order." There are several practical effects of setting "proposed" or "projected" – rather than reliable – trial dates: (1) the litigants are forced into a "hurry up and wait" trial system, where all deadlines occur in the first 12-18 months, but they do not get an actual trial date for many more months; (2) because the parties do not have a reliable trial date, but only a six-month window, there is little incentive to settle a case as they are not facing an actual trial deadline; and (3) given the first two effects, the lawyers routinely move to extend all the

deadlines, correctly arguing that even after most deadlines pass there are many months remaining until an actual trial date. Current caselaw largely focuses on surprise and prejudice to parties for a variety of amendments before trial, either to expert disclosures or pleadings. Thus, with an actual trial date many months away, a trial judge applying current caselaw would be hard-pressed not to allow amendments that render many of the case management deadlines moot.

Additionally, there are only so many cases each judge can set for trial in a trial period. For example, here in the Fourth Circuit, we have increased the number of trial days we set in any trial week to 100 or more. This roughly translates to setting a minimum of 20 cases for trial in each trial week, as most counsel request 4- and 5-day trials. We have found that if we set more cases than that for trial in any week, we likely will not have the trial coverage from either pod judges or senior judges, which would create a rolling domino effect with trials stacking up for months. Approximately one-quarter of our cases are currently set for an actual trial date. Even with this more aggressive trial-set system, we are currently setting trials in the

Fall of 2023 – almost 15 months out. If we were to assign an actual reliable trial date to each case at its inception, we would currently be setting cases into 2024 and 2025. Instead, our system of setting cases for trial when they are at issue and ready to be set works far better in the Fourth Circuit.

The Workgroup's recommendations are modeled after the federal system. However, the state civil system is not analogous to the federal civil system. First, in addition to magistrate judges and their clerks, federal judges have at least two, and usually three, full time law clerks; not support staff, law clerks, who are attorneys themselves. These clerks help them review motions and actively case manage. It is our understanding from speaking with our federal colleagues that the vast majority of those law clerks' time is spent on civil cases. Second, a case management order issued by a federal court includes a more reliable trial period than that which the current case management system or the Workgroup suggests as a model. Finally, the federal courts can do this active case management because they have approximately one-third of the civil case load yet triple the resources.

Our systems for setting motion hearings and trials have, to date, worked well in our circuit. We fear that the Workgroup's attempt to bring uniformity to these tasks will have significant deleterious effects on our productivity, as our challenges are not the same as those faced in larger (or smaller) circuits.

Given the scope of the proposed changes, and the demands of our current assignments, there are many proposed changes we do not address here. We have attempted to set forth herein some proposed changes or goals we support and identify those we think are problematic and would do more harm than good.

III. **Proposed Changes We Support:**

Rule 1.280 (a):

The adoption of this rule, which mirrors Fed.R.Civ.P. 26(a), will start the discovery process sooner, cutting down unnecessary delay at the beginning of a case.

Rule 1.280(g):

Likewise, the adoption of this rule will eliminate the need for multiple rounds of discovery requests and responses and will generally expedite the discovery process.

Rule 1.420(e)(3):

The change from 10 months to 6 months for record inactivity is a good change and will require lawyers and parties to advance their cases more consistently.

IV. **Proposed Changes We Oppose**:

Rules 1.160 and 1.161:

We ***strongly*** recommend that proposed Rules 1.160 and 1.161 not be enacted. The current rules on motions and hearings give judges the necessary tools to sanction lawyers for delay and refusing to confer. At most, imposing a basic requirement to confer on disputed motions could help with case management. However, these rule changes micromanage the bench and the bar and will result in much more delay and dispute, not less. For example, the prohibition in proposed Rule

1.160(c)(3) on conference by email or correspondence will delay simple communication between counsel until such time as all counsel involved in a case are mutually available for an in-person or telephonic meeting. Days of counsel exchanging voicemails before even attempting to confer will unnecessarily delay resolution of disputes, where an exchange of emails would easily suffice to set forth a party's position on a motion. Complex cases with many counsel will be most delayed by this requirement. Though the obligation to actually confer rather than simply attempt to confer is a good one, limiting the methods by which such conference may occur is counterproductive.

Additionally, even though many of these new requirements impose obligations on the lawyers rather than the judges, the more rules imposed on lawyers means more time spent in hearings arguing why lawyers should be sanctioned for not following the rules. The level of detail/direction in these proposed rules elevates form over substance. Trial judges will spend more of their time "enforcing rules" and less time managing the cases to resolution.

Moreover, the scheduling of hearings on motions varies by judge and jurisdiction. If lawyers do not need a hearing on a motion and simply wish for it to be ruled upon by the court, they usually advise the judge of that agreement. If one (or both) side wants a hearing on the motion, they contact the judicial assistant and set a hearing on parameters established by the court and subject to the availability of both the judge and the lawyers.

Much of Rules 1.160 and 1.161 either strip a trial court of discretion or unnecessarily codify discretion already used by trial courts regarding whether and when to hold a hearing on a motion. Case law and existing rules dictate when hearings are required. Rule 1.160(j) adds to the Court's work by setting (and therefore require tracking) timelines to advise counsel to submit memoranda and strips a judge of discretion to request necessary information. For example, what if a judge initially decides memoranda are unnecessary, but then changes his or her mind after more than 10 days – is it too late under 1.160(j)(1) to request the memoranda? Similarly, giving an opposing party 20 days to submit a memorandum (when 10

may suffice given the subject of the motion) unnecessarily delays the resolution of the case.

Likewise, Rule 1.161(b)(4) will result in much more time spent on scheduling a hearing than on resolving the motion at issue. That wastes court and staff time/resources and increases the costs of litigation to the parties, resulting in less access to courts, not more.

Giving a trial court 10 days to rule on a motion, as proposed in Rule 1.160(j)(2), fails to consider the realities of a civil docket. Our judges are routinely in trial for 10 days or more and spend many other hours in hearings or attending to other responsibilities. This impractical directive assumes the trial judges are the delay in the system, without regard for the under-resourced nature of the trial court system to address these challenges. As with appellate courts, who often cannot issue opinions within 10 days of denying oral argument or the close of briefing, trial courts do not always have the resources or time to meet this threshold. The staggering and counterproductive level of micromanagement found in these rules will dramatically increase workloads for trial courts, delay the resolution of

disputes, and disrupt certain established well-functioning court processes.

Rule 1.190(b)

This change is unnecessary. Existing case law provides sufficient direction regarding how to exercise this discretion. For example, this change will almost guarantee that lawyers will initially plead an affirmative defense with all potential *Fabre* defendants at the start, which will result in motions to strike the affirmative defense for lack of specificity. At the hearing on that motion (which would otherwise be unnecessary), lawyers will say they only pled it "in an abundance of caution and so as not to waive it." Judges will then waste hearing time reminding lawyers of the case law on the specificity required of affirmative defenses and the liberal policy in case law regarding amending when facts require. This rule will increase – not decrease – time spent in hearings regarding defenses involving comparative fault. Without a corresponding change to existing case law, this rule change will unnecessarily waste many hours of valuable hearing time.

Judges will also be asked to hold evidentiary hearings on whether the knowledge forming the basis for the amendment was learned within 15 days of moving to amend the pleading, not 16 or 18 days, or more. These time-consuming hearings, which we predict will occur with regularity, will greatly reduce available hearing time for other matters.

Rule 1.200

The changes to this rule are unnecessarily complex and unduly burdensome on the trial courts. For reasons more fully expressed in the comments filed by the Eighth Judicial Circuit and the Business Law Section, we submit that the provisions of this proposed rule will cause judges to be in hearings more, not less (leaving less time for hearings on substantive motions) and will not have the intended effect of more efficiently moving cases through the court system. The system proposed by this new rule will be far more expensive for litigants – individuals, and businesses alike – as each case will have many more hearings on the way to resolution.

Rule 1.271

This rule is wholly unnecessary, certainly in the Fourth Circuit. This rule is a prime example of why each jurisdiction should have the discretion to employ its own case management tools. In our circuit, we routinely manage these cases by conference among ourselves and with the administrative judge to discern the most efficient way to resolve cases involving one or more common questions of law or fact that require significant case management. We proactively consolidate cases under one judge's administration to address pretrial matters and substantive matters that, if left to eight different judges, could lead to inconsistent results affecting each case. At trial, individual cases are tried by the judge to whom they are assigned, following the pretrial rulings of the judge in whose division the matters were consolidated for pretrial purposes. This system works exceptionally well in our circuit. By contrast, the proposed PCC would unnecessarily delay these cases at every level – and would enable lawyers to forum shop on some cases if they liked the PCC judge more than the judge to whom their case was assigned. While the concept we employ is similar

to the PCC proposed rules, the mandatory and overly complex nature of the PCC process would slow down the pretrial system, not expedite it.

Rule 1.380(a)(5)(A)

Removal of the language "or that other circumstances make an award of expenses unjust" at the end of this rule completely divests the trial court of an ability to exercise its discretion in those limited circumstances where opposition to the motion may not be substantially justified but sanctions are not warranted. An example may be a failure to provide discovery arising from excusable neglect or inadvertence from counsel who otherwise have acted appropriately and in good faith.

Rule 1.380(a)(5)(C)

Changing "may" to "shall" divests the trial court of discretion to impose appropriate sanctions. The policy aim justifying that deprivation of discretion here is unclear.

Rule 1.460(a)(1)

Each circuit has its own manner of setting and conducting hearings to suit the needs of that circuit. In our circuit, almost

all hearings are "special set hearings." We do not have "cattle calls," "uniform motion calendars," or "open docket soundings." That has worked well for the court, litigants and lawyers in our circuit, providing certainty and efficiency. The requirement that every motion to continue every hearing (which would be the result in our circuit) be signed by a client will result in last-minute confusion, will invite violation, and will hamper the court and counsel's ability to reschedule a hearing. For example, if a lawyer takes ill at the last minute, the lawyer should not be required to get a client's signature before asking to reschedule a hearing. If the Court approves the cancellation/continuance, that should be sufficient, especially since the hearing is likely to be re-set for a time shortly thereafter, such that the client's interests were not compromised by the continuance.

Rule 1.460(b)(1)

This rule severely limits a trial court's exercise of discretion and could easily result in unjust resolution of matters set for trial. For example, only the "extraordinary

[and?] unforeseen circumstance involving the personal health of counsel or a party" justify continuance. But what about a bona fide health emergency of a witness? There are many examples of situations other than the near death of counsel or a party which are beyond the control of counsel, and certainly beyond the control of the actual litigants, that would justify a continuance. Such examples would include, *inter alia*, the unanticipated unavailability of a witness, new treatment or change in the medical condition of a claimant, or a lawyer's personal family commitments that arise in the 15 months after a case is set for trial. A rule that forbids the exercise of judgment in this regard is wholly unnecessary and, in our opinion, unjust. There are ways to reduce unnecessary continuances other than the total deprivation of all discretion.

Rule 1.460(b)(5)(E)

This rule could result in an unrepresented party going to trial because the client and lawyer had an "irreconcilable difference" at the last minute. Under existing case law, circumstances usually dictate that motions to withdraw be

granted; but if that happens within 60 days of trial, this proposed rule could leave the unsuspecting client at a severe disadvantage. This rule change does nothing to prevent the lawyer from withdrawing but shifts the consequences of that withdrawal entirely to the client to now proceed to trial *pro se*, even though the client may have done nothing wrong. The client would likely be unable to retain new counsel as few lawyers would sign up for a new case going to trial in less than two months. That result, though unintended, would be unjust.

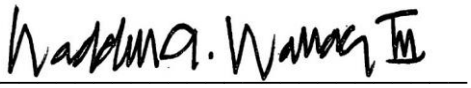
Rule 1.460(b)(8)

We fail to see the policy aim achieved by requiring that clients be served with orders granting the motions to continue trial. The clients are required to sign the motions, so they know of the requested relief. The original trial orders are not required to be served upon the client, so why are they required to get an order granting the motion? Our big-picture view of some of these changes is applicable here: additional rules just lead to additional time spent enforcing such rules.

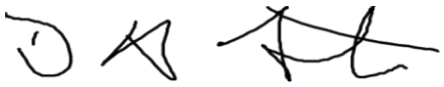
Rule 1.460(b)(9)

The requirement that continued cases be rescheduled within six months is wholly unrealistic given our current trial dockets. We are already setting cases for trial many months in advance (in some cases more than a year out) given the limited trial time available to civil judges and the number of cases to be set for trial. If trial terms in the ensuing six months are already full – as is almost always the case in our circuit – are we to continue other cases already set in those terms to make room for the continued cases? Cases that did not seek a continuance will be unfairly pushed and a domino effect will ensue, with a litany of cases being rescheduled at no fault of the parties to those matters. This result could be avoided by trusting judges to exercise judgment in the re-setting of these matters for the next reasonably available opportunity.

Respectfully submitted,

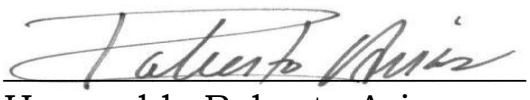


Honorable Waddell Wallace
Administrative Judge, Duval County Circuit Civil Division

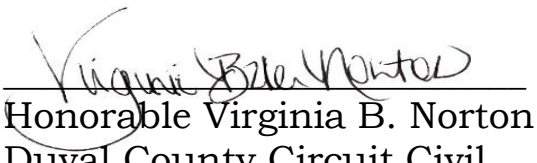


Honorable Don H. Lester
Administrative Judge,
Clay County

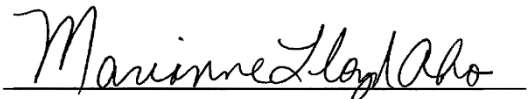
Honorable James Daniel
Administrative Judge,
Nassau County



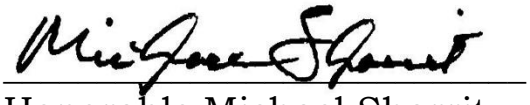
Honorable Roberto Arias
Administrative Judge,
Duval County Court



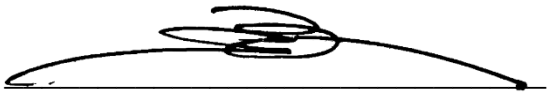
Honorable Virginia B. Norton
Duval County Circuit Civil Division



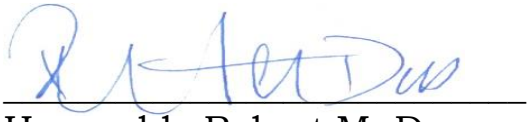
Honorable Marianne Aho
Duval County Circuit Civil Division



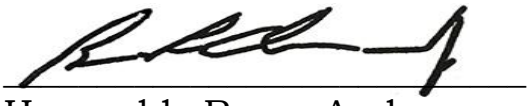
Honorable Michael Sharrit
Duval County Circuit Civil Division



Honorable Steven Whittington
Clay County Circuit Civil Division



Honorable Robert M. Dees
Duval County Circuit Civil Division



Honorable Bruce Anderson
Duval County Circuit Civil

Honorable Katie L. Dearing
Duval County Circuit Civil Division

Honorable G. L. Feltel, Jr.
Duval County Circuit Civil Division

CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing was electronically filed via the Florida Courts E-filing Portal on this 17th day of May 2022, with an electronic copy provided to Chief Judge Robert Morris, Second District Court of Appeal, P.O. Box 327, Lakeland, FL 33802, and to Tina White, 500 South Duval Street, Tallahassee, FL 32399 (whitet@flcourts.org).

CERTIFICATE OF COMPLIANCE

We hereby certify that the foregoing was prepared in compliance with the requirements of Florida Rule of Appellate Procedure 9.045(b).

KATIE L. DEARING