65751-8

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

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

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COMMENTS OF THE FLORIDA CHAPTERS OF THE AMERICAN BOARD OF TRIAL ADVOCATES (FLABOTA)

The Florida Chapters of the American Board of Trial Advocates (FLABOTA) submit the following comments regarding the report and recommendations of the Judicial Management Council's Workgroup on Improved Resolution of Civil Cases.

I. Format of the FLABOTA Comments.

The FLABOTA comments begin by introducing the Court to FLABOTA and the composition of the FLABOTA committee tasked with preparing the comments. We then provide an overview of FLABOTA's position on the proposed changes, including areas of agreement and disagreement. At the end of the comments in exhibit format, we provide specific recommended language changes to certain Rules.

II. Background of the FLABOTA Committee to Prepare Comments to the Final Report of the Workgroup.

Pursuant to the bylaws of the Florida Chapters of the American Board of Trial Advocates (FLABOTA), the general purpose of FLABOTA is to foster improvement in the ethical and technical standards of practice in the field of trial advocacy to the end that individual litigants may receive more effective representation and the general public is benefited by more efficient administration of justice consistent with time-tested and traditional principles of litigation. At FLABOTA, we support the independence of the judiciary, work for the preservation of the jury system and strive to elevate the standards of integrity, honor and courtesy in the legal profession. Membership in FLABOTA is by invitation only. The organization consists of half plaintiff and half defense attorneys and counts among its members some of the most experienced and skilled trial attorneys in the state.

In response to the Final Report of the Workgroup, FLABOTA convened a committee of 15 members who represent the category of attorneys most likely to be impacted by the proposed changes to the Florida Rules of Civil Procedure. The members of the FLABOTA Committee practice in small and large circuits throughout the state,

are members of both the Plaintiff and Defense bars and come from large firms as well as smaller practices. The FLABOTA Committee dedicated countless hours to studying the proposed changes and discussing their likely impact with FLABOTA members throughout the state, as well as our local judiciary. The FLABOTA Comments to the Final Report of the Judicial Management Council Workgroup on Improved Resolution of Civil Cases represent a consensus opinion derived from thoughtful and comprehensive examination of the Workgroup's Final Report.

III. Concern of FLABOTA that by eliminating judicial discretion, certain proposed changes to the Rules risk undermining long established Florida jurisprudence that the trial of a lawsuit should be a sincere effort to arrive at the truth.

As members of an organization established to preserve the right to a jury trial, FLABOTA recognizes the importance of delivering efficiency, stability and expediency to persons who have entrusted their disputes to Florida's legal system. We stand in admiration of the Workgroup's dedication to this massive undertaking and we applaud the extraordinary efforts they have put forth to improve the practice of law in the state of Florida. We also

recognize, however, that any undertaking of this magnitude risks running into the law of unintended consequences. FLABOTA members are uniquely situated to identify these unintended consequences because we can draw on the diverse experiences of our members, who have spent long and illustrious careers practicing law in courtrooms throughout the State. Notwithstanding FLABOTA's deep admiration for the Court and the Workgroup, we would not be serving our mission or our clients if we did not offer thoughtful and constructive criticism of this massive overhaul of the Florida Rules of Civil Procedure.

Over the next few months, the proposed changes to the rules will be discussed, debated and dissected by just about every judge or lawyer who practices in the civil system. Comments will be drafted, arguments will be heard and decisions will be made about proposed rule changes that stand to drastically alter the practice of law in the state of Florida. The decision makers will be lawyers and judges, many of whom have never themselves been a litigant. Likewise, the FLABOTA Committee members have tried hundreds of cases between us but very few members have sat on the other side

of the aisle, so to speak. We have never been an injured party filing a lawsuit to pay for much needed medical care, or a physician who is defending her hard earned reputation in a medical malpractice lawsuit. This is why the FLABOTA Committee members examined each and every proposed rule change with an eye towards the rule's impact on the "end users" - the clients who rely on us to be their advocates and counselors. FLABOTA recognizes that many of the proposed rules will positively impact our clients by bringing efficiency and expediency to our legal system. As our Committee debated the merits of the proposed rule changes, however, time and time again, we circled back to a concern that certain rules divest the trial judge of discretion in a manner that will ultimately be to the detriment of our clients. Thus, FLABOTA has chosen to focus its comments on those proposed rule changes that we perceive as positively or negatively impacting the discretion of the trial judge.

For example, while FLABOTA agrees that the trial date set in the case management order should be meaningfully enforced, we are concerned that proposed Rule 1.460 divests the trial court of discretion to continue the trial date except in "extraordinary

unforeseen consequences." As attorneys who have spent our entire careers trying cases, the FLABOTA committee members can envision many scenarios in which proposed Rule 1.460 will deny justice to our clients for reasons that are often out of our control and most certainly out of theirs. For example, Rule 1.460(b)(1) allows for trial continuances only in "dire circumstances" "extraordinary unforeseen circumstances" and for "extraordinary cause". Most trial lawyers have learned, however, that the most vexing trial problems are often the most mundane – an expert double books himself and is no longer available to testify or a witness who was once under your control will no longer return your phone calls. Even though the reason for the continuance might be mundane, the need for the continuance is no less critical to your client, whose health, prosperity or reputation may hang in the balance.

As stated by the Florida Supreme Court in *Cabot v. Clearwater Construction Co,* 89 So.2d 662 (Fla. 1956), "the trial of a lawsuit should be a sincere effort to arrive at the truth." As trial lawyers, we have heard this principle articulated by thoughtful and learned

trial judges who have often refused to strike a witness or deny a continuance because to do so would deny the litigants a trial on the merits. These judges are not attempting to delay justice or bog down our courts; rather, they recognize that even the most earnest and diligent of attorneys may occasionally fall victim to unforeseen circumstances. Moreover, many of these judges will have presided over these cases and watched them evolve from the inception of the litigation until trial. These judges know that justice is not furthered when litigants are forced to try cases without critical witnesses because a brief continuance is denied. FLABOTA recognizes that our trial judges must have tools at their disposal to control their dockets. By the same token, however, our Rules should not take discretion away from the very people who are in the best position to exercise it.

IV. Concern of FLABOTA that divesting the trial judge of discretion to grant continuances or extend deadlines except in the most extraordinary circumstances cannot be reconciled with the *Binger* decision and its progeny, which will create confusion and protracted litigation.

Under Florida Rule of Civil Procedure 1.010, the "rules shall be construed to secure the just, speedy and inexpensive

determination of every action". Paradoxically, certain of the proposed rule changes will likely prolong litigation because they are in direct conflict with the *Binger* decision and its progeny, which generally require a showing of prejudice before the trial court may deny a continuance or strike a witness.

If the proposed changes to the Rules are adopted in their current form, the trial courts will almost certainly experience an influx of motions requesting that witnesses be stricken, evidence be barred or sanctions be imposed for missed deadlines, regardless of whether the movant can show prejudice. Based on our reading of the proposed changes, the new Rules do not provide clarity as to whether a trial judge can, for example, strike a late disclosed witness absent a showing of prejudice. Moreover, assuming that the new Rules do not require a showing of prejudice before such a sanction can be imposed, upon appellate review (and there will almost certainly be appellate review), will the *Binger* line of cases still apply? One can easily imagine a scenario where the new Rules drastically increase the number of motions and appeals filed,

leading to the unintended consequence of protracted rather than shortened litigation.

V. FLABOTA supports proposed Rule 1.200 and agrees that trial judges must be provided with the necessary tools to manage their dockets.

Many of the FLABOTA committee members already practice in circuits that utilize case management orders and case managers. In general, these members have found that case management orders provide for efficiency and predictability in litigation. Establishing deadlines for litigation events such as fact witness disclosure, expert witness disclosure and expert discovery ensures that the case will continue to move toward resolution. Members of both the Plaintiff Bar and the Defense Bar shared positive experiences with case management orders with the FLABOTA Committee. Moreover, all of the attorneys who are already working under case management orders agreed that case management deadlines are taken seriously and mostly adhered to. In our experience, the vast majority of attorneys welcome the structure provided by case management orders, respect our courts and court

imposed deadlines and put forth their best efforts to comply with the orders.

VI. FLABOTA supports the Workgroup's emphasis on the enforceable expectation of attorney professionalism but is concerned by the repeated and at times redundant references to sanctions.

The FLABOTA committee members note that the word "sanctions" appears over 60 times in the proposed Rules. As an organization that was chartered to promote professionalism in the practice of law, FLABOTA agrees that the rules of our civil justice system must provide for consequences when court orders are not followed. FLABOTA, however, believes that the rules should favor simplicity over complexity. Complexity contributes to unintended consequences, internal conflict within the rules and inconsistency. Particularly, FLABOTA suggests that most references to sanctions in the individual rules be removed in favor of new Rule 1.275, which establishes the standard for imposing sanctions for violations of the rules. As described in more detail below, FLABOTA generally supports new Rule 1.275, with only minor recommended changes.

Additionally, the FLABOTA Committee feels that the frequent reference to sanctions throughout the report sends the wrong

message to the vast majority of attorneys who never cross a sanctions line. Moreover, the repeated references to sanctions may well encourage litigants to request sanctions frequently as a strategy and does not meaningfully add more empowerment to trial judges. Rule 1.275 already provides a standard for imposing sanctions in clear, precise verbiage.

VII. The FLABOTA Committee notes that there is more than one way to effectuate positive change within a system and supports incremental rather than radical change.

The Workgroup's report thoroughly identified the changes that are necessary to deliver efficiency, stability and professionalism to our civil justice system. Identifying the necessary changes, however, is only part of the solution. The other part of the solution involves implementing those changes in a manner that does not cause widespread disruption to our court system. FLABOTA believes that an incremental approach to implementing these changes will deliver the most long-term success. Incremental change attempts to solve problems with systematic steps that provoke change over time. By using incremental means, the Court can focus on trying to improve the system we already have in place,

rather than starting from scratch and creating a new one. Gradual change is a more stable approach to problems and allows for sustainable and continuous improvement.

If the proposed rule changes are adopted in their entirety, we will no doubt experience a long, protracted period of growing pains. Experienced and inexperienced attorneys alike will struggle to understand and abide by the new rules, already understaffed trial courts will struggle to adapt to their new case management role and the courts of appeal will have the difficult task of reconciling the new rules with existing case law. And all of these struggles will be taking place at once. One can imagine a scenario where this radical change to our system creates widespread confusion and instead of simplifying and streamlining litigation, has the exact opposite effect.

These proposed changes to our civil justice system should be implemented incrementally so as to not tax a court system that is already overburdened by COVID backlogs and lack of resources. FLABOTA supports a phased in approach to implementation that would begin by implementing the case management system that is already in place in some of our circuits statewide. FLABOTA also

supports new Rule 1.275, which gives trial judges the necessary tools to meaningfully enforce case management deadlines and court orders. Additionally, FLABOTA supports enforcement tools such as setting the trial period early in the litigation and eliminating the "at issue" requirement for trial settings. Providing trial judges with a robust case management rule and the necessary tools to enforce it may rectify many of the problems we currently have without the unintended consequences.

VIII. FLABOTA Comments on Specific Rules.

FLABOTA proposes language changes or comments on specific rules in attached Exhibit A, FLABOTA Comments on Specific Rules.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on May 19th, 2022, a copy of the foregoing was E-filed and electronically served with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, with a copy provided to the parties listed below:

/s/ Ashley P. Withers

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
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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this document complies with the type/volume requirements of Florida Rules of Appellate Procedure 9.045 and 9.100. This document is prepared in Bookman Old Style 14-point font and does not exceed 13,000 words.

/s/ Ashley P. Withers

EXHIBIT A, FLABOTA COMMENTS ON SPECIFIC RULES

RULE 1.275. SANCTIONS

(a) Generally. The court may impose a sanction if a party or attorney fails to comply with these rules or with any court order arising out of a case filed pursuant to these rules. ~~To the extent any rule of civil procedure specifies options for sanctioning misconduct, the sanctions set forth in this rule shall be deemed supplemental to such other rule, as appropriate~~.

(b) Available Sanctions. On a party's motion or on its own motion, the court may enter appropriate sanctions concerning such conduct unless the noncompliant party or attorney shows good cause ~~and~~ or the exercise of due diligence. Such sanctions may include, but are not limited to, one or more of the following measures:

(1) reprimanding the party or attorney, or both, in writing or in person;

(2) requiring that one or more clients or business-entity representatives attend specified hearings or all future hearings in the action;

(3) refusing to allow the party to support or oppose a designated claim or defense;

(4) prohibiting a party from introducing designated matters in evidence;

(5) staying further proceedings, in whole or in part, until the party obeys a rule or previous order;

(6) requiring a noncompliant party or attorney, or both, to pay reasonable expenses (as defined in this rule) incurred by the opposing party because of the conduct;

~~(7) reducing the number of peremptory challenges available to a party;~~

(8) dismissing the action, in whole or in part, with or without prejudice;

(9) striking pleadings and entering a default or default judgment;

(10) referring the attorney to the local professionalism panel or The Florida Bar; and

(11) finding the party or attorney in contempt of court.

FLABOTA Comments:

Sub-section (a): The word "sanctions" appears at least 60 times throughout the amended rules. We believe deleting these multiple references to sanctions and allowing Rule 1.275 to serve as the main vehicle for sanctions simplifies the standards for sanctions. As a result, there is no need to make this rule "supplemental" to other rules.

EXHIBIT "A"

Sub-section (b): Replacing "and" with "or" is more practical. For example, an attorney may have missed a deadline by only a day or two with no good cause, but if acted upon with due diligence, then sanctions should not be issued.

Sub-section (b)(7): "The right to the unfettered exercise of peremptory challenges […] is an essential component of the right to trial by jury, a right that 'is fundamental to the American scheme of justice." *Tedder v. Video Elecs., Inc.*, 491 So. 2d 533, 535 (Fla. 1986) citing *Duncan v. Louisiana,* 391 U.S. 145, 149, 88 S. Ct. 1444, 1447, 20 L.Ed.2d 491 (1968).

Florida law has recognized that each party has the right to an equal number of challenges. Reducing the number of peremptory challenges not only creates an imbalance, but will likely lead to a variety of appellate issues.

RULE 1.279. STANDARDS OF CONDUCT FOR DISCOVERY

~~**(c) The court's obligations.**~~

~~(1) Where a party or attorney interferes with the ability of the court to adjudicate the issues in the case or impairs the rights of others, the court has the authority to sanction parties, law firms, and individual attorneys, to strike pleadings, and, in extreme or repeated conduct, to dismiss the action or defenses. The courts have an obligation to prevent unreasonable delay or disruption of litigation.~~

~~(2) Judges shall take appropriate steps to require parties, law firms, and attorneys to abide by these rules.~~

FLABOTA Comments:

Sub-section (c): For consistency and simplicity, FLABOTA believes Rule 1.275 should be the sole rule for sanctions.

RULE 1.280. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Initial Discovery Disclosure.

(1) In General. Except as exempted by subdivision (2) or as ordered by the court, a party must, without awaiting a discovery request, provide to the other parties the following initial discovery disclosures unless privileged or protected from disclosure:

~~(E) answers to all questions on any applicable standard interrogatory forms approved by the Florida Supreme Court and included in Appendix I to these rules. When a party responds under this subdivision to questions on a standard interrogatory form, the questions responded to shall not count toward the proponent's 30 question limit under rule 1.340(a).~~

(g) Supplementing of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired. A party or attorney who has made an initial discovery disclosure, who has been ordered by the court to disclose specified information or witnesses, or who has responded to an interrogatory, a request for production, or a request for admission must supplement or correct its disclosure or response: (1) promptly after the date on which the party or attorney learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or (2) as ordered by the court. ~~If a party or attorney fails timely to supplement a disclosure or response pursuant to this subdivision, the court may impose sanctions as provided in rule 1.380~~

FLABOTA Comments:

Sub-section (a) (1) (E): While FLABOTA supports the inclusion of initial discovery disclosure, similar to Federal Rule 26, the use of form interrogatories should not be mandatory. It is our experience that the use of form interrogatories are not effective and are overly time consuming.

Sub-section (g): For consistency and simplicity, FLABOTA believes Rule 1.275 should be the sole rule for sanctions.

RULE 1.335. STANDARDS FOR CONDUCT IN DEPOSITIONS, OBJECTIONS, CLAIMS OF PRIVILEGE, TERMINATION OR LIMIT, FAILURE TO APPEAR, AND SANCTIONS

(e) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of a party or of the deponent and on a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, or that an objection or an instruction to a deponent not to answer are being made in violation of subdivision (d), the court in which the action is pending or the circuit court where the deposition is being taken may order the officer conducting the examination to cease immediately from taking the deposition or may limit the scope and manner of the taking of the deposition under rule 1.280(d). If the order terminates the examination, it shall be resumed thereafter only on the order of the court in which the action is pending. Upon demand of any party or the deponent, the taking of the deposition must be suspended for the time necessary to make a motion for an order. ~~The provisions of rule 1.380(a)(5) apply to the award of sanctions or expenses incurred in relation to the motion~~.

(f) Failure to Attend or Serve Subpoena; ~~Expenses and Sanctions~~.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to the other party the reasonable expenses incurred by the other party and the other party's attorney in attending, including reasonable attorneys' fees~~, and may impose other sanctions as appropriate under rule 1.380~~.

~~**(g) Sanctions for Improper Conduct During Depositions.** Attorneys are officers of the court who are responsible to the judiciary for the propriety of their professional activities. Violations of this rule adversely impact the perception of our judicial system and the administration of justice. Violations also potentially create prejudice that is frequently difficult and time-consuming to determine. Therefore, any violation of this rule creates a presumption of prejudice and will result in expenses, fees, or other sanctions as provided in this rule and in rule 1.380. The court has the discretion to assess expenses, fees, and other sanctions against the attorney, the law firm, the client, or any combination thereof where warranted by the violation that occurred.~~

FLABOTA Comments:

For consistency and simplicity, FLABOTA believes Rule 1.275 should be the sole rule for sanctions.

Sub-section (g): At the very least, a presumption of prejudice should not be a part of the rule. As written, the rule is confusing. For instance, the proposed rule says that "violations also potentially create prejudice…" The very next sentence says that a violation "creates a presumption of prejudice." FLABOTA recommends deleting this entire section. In the alternative, it is recommended that section (g) read as follows:

> **Sanctions for Improper Conduct During Depositions.** Attorneys are officers of the court who are responsible to the judiciary for the propriety of their professional activities. Violations of this rule adversely impact the perception of our judicial system and the administration of justice. The court has the discretion to assess expenses, fees, and other sanctions against the attorney, the law firm, the client, or any combination thereof where warranted by the violation that occurred.

RULE 1.460. CONTINUANCES

(b) Motions to Continue Trial.

~~(1) Motions to continue trial are disfavored. Once the case is set for trial, 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. Lack of preparation is not grounds to continue the case. Where possible, trial dates shall be set in collaboration with counsel and self-represented parties as opposed to the issuance of unilateral dates by the court.~~

To be replaced with:

Continuance of the trial should rarely be granted and then only upon good cause shown. Lack of preparation is not grounds to continue the case. Where possible, trial dates shall be set in collaboration with counsel and self-represented parties as opposed to the issuance of unilateral dates by the court.

(5) No motion to continue shall be granted upon any of the following grounds:

(A) failure to complete discovery;

(B) failure to complete mediation;

(C) outstanding dispositive motions;

(D) counsel or witness unavailability except where the record demonstrates ~~new~~ circumstances beyond counsel or witness control;

(E) ~~withdrawal of counsel within 60 days of trial; or~~

(F) trial conflicts, which are subject to resolution under Florida Rule of General Practice and Judicial Administration 2.550.

FLABOTA Comments:

Removes language in 1.460(b)(1) and instead would substitute language in Rule 1.201: "Continuance of the trial should rarely be granted and then only upon good cause shown." This change allows for consistency within the rules and recognizes that continuance should be rarely granted.

Removes word "new" from subpart (D) because it is ambiguous.

Removes subpart (E) in its entirety.

RULE 2.546. ACTIVE AND INACTIVE CASE STATUS

(b) Removal of Designation as Inactive. The parties shall file a motion to remove a case's "inactive" status within 30 days after an event occurs that makes it unnecessary. A party may move to restore a case to active status when otherwise permissible. ~~A party that fails to timely inform the court that a case's "inactive" status has become unnecessary may be subject to sanctions, including dismissal of the action or the striking of pleadings~~.

FLABOTA Comments:

Removes reference to sanctions in favor of Rule 1.275