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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 BY COLE, SCOTT & KISSANE, P.A. TO THE REPORT AND RECOMMENDATIONS OF THE WORKGROUP ON IMPROVED RESOLUTION OF CIVIL CASES

Cole, Scott & Kissane, P.A., hereby submits the following comments to the Judicial Management Council's Workgroup on Improved Resolution of Civil Cases, and states as follows:

With the goals of the Workgroup's proposed changes in mind, specifically ensuring the fair and timely resolution of all cases through effective case management, and utilizing caseload and other workload information to manage resources and promote accountability, CSK writes to share its concerns regarding the proposed rule changes.

Rule 1.160 – Motions

A limit on the number of pages for memorandums of law attached to motions should be left to the discretion of each individual judge. Each judge is best equipped to manage her own docket and resources. Creating a page limitation requires parties that seek to exceed the page limit to file a motion and potentially schedule a hearing. This creates additional work for both the parties and the court and is contrary to judicial economy.

Additionally, a judge cannot decide whether a hearing on any particular motion is necessary, when the judge has only the movant's motion. Rather than streamline litigation, this proposed change amplifies judicial labor. It now requires each judge to review the movant's motion, determine whether, without the benefit of a response, a hearing is necessary, issue an order, and schedule the hearing.

Further, the affirmative obligation that the parties meet and confer only in person, by telephone, or videoconference is sometimes impractical. Scheduling a videoconference between multiple parties with conflicting and demanding schedules generally requires weeks

of advance notice. E-mail is an effective means of communication that often allows for more prompt resolution than scheduling a formal conference between all parties. E-mail also allows the parties to have a record of what occurred during the meet and confer.

Rule 1.190 – Amendment of Pleadings

Pursuant to the proposed change to Rule 1.190, a party seeking to plead the fault of a party or nonparty must amend its pleading within 15 days of when it knew or reasonably should have known of the party or nonparty's alleged fault. This places an unreasonable burden on defendants seeking to include Fabre defendants. The 15-day deadline does not provide counsel with the opportunity to conduct discovery on the nonparty to determine potential fault and will likely result in an inability to apportion fault to nonparties. The proposed rule change will also leave open to interpretation when a defendant knew or reasonably should have known of the party or nonparty's alleged fault, thereby creating more litigation.

As an alternative solution, the rules should require a defendant to identify potential Fabre defendants a set number of days before trial. This will allow defendants time to investigate whether a

nonparty is a true Fabre defendant and allow plaintiffs sufficient time to discover the fault of the Fabre defendant, and amend their pleadings, if applicable.

Rule 1.200 – Case Management

The meet and confer requirements for the general case track require the parties, not counsel, to meet and confer within 30 days after initial service of the complaint on the first defendant. However, where there are multiple defendants in one case, and they are not served within 30 days of the first defendant, they will be prevented from discussing the initial litigation deadlines.

CSK further seeks to clarify whether the proposed rule's use of "parties" permits counsel to meet and confer on the parties' behalf or whether the parties must also attend, scheduling of which could impair the ability to timely comply.

Rule 1.275 – Sanctions and Rule 1.380 – Failure to Make Discovery; Sanctions

i. Uniformity and Due Process Concerns

Rule 1.275 neither provides for a hearing, nor requires a written order with findings of fact that support the sanctions selected. This presents a due process problem. Additionally, without a hearing or

a written order with findings of fact, the party/attorney sanctioned cannot have a meaningful appeal.

Rule 1.380, on the other hand, uniformly requires that sanctions can be imposed related to a discovery issue, only "after opportunity for hearing." *See* Rule 1.380(a)(5)(A), (a)(5)(B), (a)(5)(C), (b)(1), (b)(3)(A).

Thus, to provide uniformity and correct any potential due process concerns, rule 1.275(a) should be amended to include a specific reference to the need for a hearing. Similarly, to provide uniformity and protection of the right to a meaningful appeal both 1.275 and 1.380 should require the court to "make findings on the record." Currently, only rule 1.380(b)(2) (when a party violates a court order to produce discovery or supplement it) contains this requirement. A written order is only required under rule 1.275 if the attorney is the one being sanctioned and the attorney requests the order. There is no justification for why only one subdivision of one sanctions' rule requires factual findings but other subdivisions do not. Further, the comment from the judges of the Eighth Judicial Circuit indicates that it is more efficient to require a written order

with findings for all of rule 1.275. *See* Comment of Eighth Judicial Circuit, p.A2.

ii. Clarification When a Case is Stayed

Rule 1.275(b)(5) gives the court the option of "staying further proceedings, in whole or in part, until the party obeys a rule or previous order." A stay could easily create a situation where future dates in the case management order are now impossible to meet. Thus, the rule should provide a remedy such as staying all proceedings and adjusting the case management order upon the offending party coming into compliance, for example.

iii. Removing Peremptory Challenges is Not an Appropriate Sanction

Rule 1.275(b)(7) gives the court the option of reducing a party's peremptory challenges as a sanction. Taking away peremptory challenges impacts the constitutional right to trial by jury. If this sanction should be permitted to remain, it should be limited to situations where a court determines that the conduct of the party, not counsel, is the basis for this severe sanction.

Rule 1.279 – Standard of Conduct for Discovery

The aspirations listed in rule 1.279(a)(1) through (3) should not be in a procedural rule. While the information in these subdivisions could surely be mentioned by the Florida Supreme Court opinion that adopts the new rules, and could surely be used by the District Courts in their opinions so that the ideals become part of the common law, the "intent of the rules" (subdivision (a)(1)) or the "best interests of the justice system" (subdivision (a)(2)) and the functions of the legal system (subdivision (a)(3)) do not belong in procedural rules. The proper place for this language is in caselaw.

Further, a duty already exists for parties to timely comply with discovery rules. It is therefore unnecessary to write this duty into the rules of civil procedure.

Rule 1.280 – General Provisions Governing Discovery

CSK's main concern with proposed rule 1.280(a)(1) is its requirement that a party must provide opposing parties with certain initial discovery without awaiting a discovery request. Additionally, subsections (a)(3) and (a)(4) are similarly problematic. Requiring a party to make initial discovery disclosures within 45 days after

service of the complaint and without a discovery request is impractical. More concerning is the rule's requirement that a "party is not excused from making its initial discovery disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's initial discovery disclosures." Rule 1.280(a)(4).

The time constraints contained within this proposed rule will place a huge burden on counsel and will be almost impossible to comply with. This is especially true if one is in a defense firm like CSK.

When a plaintiff hires an attorney, the plaintiff's attorney investigates the facts of the case and the applicable law. This investigation may take months or even years. The plaintiff's attorney then decides when to file the lawsuit. Once the lawsuit is filed and service is perfected, defense counsel may not be retained until a few days before a response to a complaint is due. At that point, defense counsel's only knowledge of the case may be what is contained in the complaint and defense counsel may only have 25-30 days to provide the initial discovery disclosures. It is therefore impractical to expect

defense counsel to make its initial discovery disclosures on the same date as plaintiff's counsel. The time period should be extended for both parties so defense counsel has a reasonable opportunity to investigate the case. Alternatively, the dates should be staggered with plaintiff's initial discovery disclosures due within 45 days of service and defendants 45 days thereafter, or the 45 day deadline should run from the date of appearance of counsel, not service.

Rule 1.460 – Continuances

Proposed Rule 1.460 would strip the trial court of its discretion to grant a motion to continue trial except for "extraordinary unforeseen circumstances involving personal heath of counsel or a party, court emergencies, or other dire circumstances that provide extraordinary cause." The proposed rule then explicitly lists six circumstances that may not form the basis of a motion to continue. However, as the March 31, 2022 comment submitted by Wicker Smith noted, the proposed list ignores the realities of trial practice.

In addition, strict enforcement of this proposed rule may result in a benefit to the party evading discovery to the detriment of the diligent non-evasive party. The proposed rule also does not factor in

the presiding court's schedule, or that hearing time may not be readily available within the time deadlines mandated by the proposed rule. Finally, the proposed rule strips the trial court of the discretion to grant continuances in these instances.

General Comments

We thank the Workgroup for their efforts to streamline litigation. We believe, however, that the current rules enable judges to streamline the cases on their respective dockets. If the current rules were enforced, many of the proposed rule changes would be unnecessary. Finally, we believe the proposed rule changes create additional and unfair burdens for defense firms like ours.

Thank you for allowing our law firm the opportunity to comment on the Final Report of the Judicial Management Council's Workgroup on Improved Resolution of Civil Cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 24th day of May, 2022, a true and correct copy of the foregoing was filed with the Clerk of the Florida Supreme Court by using the Florida Courts e-Filing Portal, and served via United States First Class Mail upon the Workgroup Chair, Chief Judge Robert Morris, Second District Court of Appeal, P.O. Box 327, Lakeland, FL 33802; and via United States First Class Mail and Electronic Mail upon the OSCA Staff Liaison to the Workgroup, 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 font requirements of Florida Rule of Appellate Procedure 9.045.

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