IN THE SUPREME COURT OF FLORIDA

IN RE: REPORT AND RECOMMENDATIONS
OF THE WORKGROUP ON IMPROVED
RESOLUTION OF CIVIL CASES Case No. SC22-122
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COMMENT BY THE FLORIDA JUSTICE REFORM INSTITUTE

The Florida Justice Reform Institute ("FJRI") is the state's leading organization of concerned citizens, business owners and leaders, doctors, and lawyers who seek the adoption of fair legal practices to promote predictability and personal responsibility in the civil justice system. FJRI represents a broad range of businesses who share a substantial interest in a litigation environment that secures the just, speedy, and inexpensive determination of civil disputes.

While FJRI shares the goals of the Judicial Management Council's Workgroup on Improved Resolution of Civil Cases ("Workgroup") to ensure the fair and timely resolution of civil cases through effective case management and the promotion of accountability, the sweeping rule amendments proposed by the Workgroup in their November 15, 2021 Final Report ("Report") will not accomplish those goals. Many of the proposed rule changes are

unworkable and will prolong and complicate litigation rather than streamline it. Consequently, FJRI opposes the Workgroup's proposed rule amendments.

FJRI asks the Court to consider two revisions to the Florida Rules of Civil Procedure that would vastly improve civil litigation in Florida and better effectuate the goals of the Workgroup. Specifically, this Court should: (1) revise Florida Rule of Civil Procedure 1.280 to state that discovery must be proportional to the needs of the case, in line with the comparable federal rule; and (2) require the disclosure of third-party litigation financing agreements.

A. The Proposed Rules Regarding Early Case Management and Disclosure Are Impractical and Ripe for Gamesmanship

The Report proposes comprehensive changes to the existing civil procedure rules applicable to early case management as part of an effort to move cases expeditiously from inception to resolution. While well-intentioned, the current proposals are often conflicting, impractical, and open to abuse.

Under proposed Florida Rule of Civil Procedure 1.200(e)(3)(A), the parties in cases designated as "General Cases" must meet and

confer "within 30 days . . . after initial service of the complaint on the first defendant served, unless extended by order of the court." As part of that early conferral, the parties must discuss and identify deadlines for various items, including anticipated witness disclosures, the motions expected to be filed, the discovery that will be required to be taken and the timing of that discovery, and the anticipated trial readiness date, among other things. Per the proposed rule, "[a]fter the meet and confer, the parties ***must*** file a joint case management report and a proposed case management order." *Id.* 1.200(e)(3)(B)(i) (emphasis added).

Each party would also be required to exchange certain items—including copies of all relevant documents and electronically stored information ("ESI"), and the name and address, telephone number, and email address "of each individual likely to have discoverable information relevant to the subject matter of the action, along with the subjects of that information"—within 45 days after service of the complaint. Proposed Fla. R. Civ. P. 1.280(a)(1), (3).

It is not difficult to imagine the problems with these requirements as currently drafted. Parties are required to meet to

determine and set anticipated case deadlines within 30 days of service of the complaint and to file a joint case management report thereafter. Parties must decide on these deadlines and discuss these numerous topics without the benefit of the mandatory disclosures that are not due until 45 days after service of the complaint—much less the results of discovery that would undoubtedly inform the numerous questions that must be answered in the initial case management report.

Of concern too is that in cases with multiple defendants, the parties must confer within 30 days of service on the ***first*** defendant and file a proposed case management order thereafter. Later-served defendants appear to be left out of the conferral process and have no input on the initial deadlines set in a case. The proposed rule has a mechanism for parties to agree to extend dates that do not affect the "ability to comply with the remaining dates on the schedule," *see* Proposed Fla. R. Civ. P. 1.200(f)(2), but there is no clear mechanism to change other dates in the case management order for a late-served defendant. The late-served defendant would have to move the trial court for an extension—and if a trial period or

date is already set, the late-served defendant would have to establish the high grounds for a continuance under Proposed Florida Rule of Civil Procedure 1.460. Proposed Fla. R. Civ. P. 1.200(f)(1). This oversight creates an opportunity for plaintiffs' counsel to strategically serve defendants in a staggered fashion to exact more control over the litigation and force harsh deadlines on later-served defendants.

There is another glaring problem with the mandatory disclosure requirements. Under proposed rule 1.280(a)(1)(B), within 45 days after service of the complaint, the parties must exchange copies of all documents and ESI that "the disclosing party has in its possession, custody, or control . . . that are ***relevant to the subject matter of the action***." Proposed Fla. R. Civ. P. 1.280(a)(1)(B) (emphasis added). Under the comparable federal rule, the parties must exchange ***a copy or "a description by category and location***" of all documents and ESI that the disclosing party has "and ***may use to support its claims or defenses***." Fed. R. Civ. P. 26(a)(1)(A)(ii) (emphasis added).

The differences between the proposed Florida rule and existing

federal rule are significant, particularly in requiring the production of any documents and ESI "relevant to the subject matter of the action" 45 days into the life of the case. The review and production of ESI alone is a Herculean task in many instances. Gone are the days where an attorney would simply confer with his or her client, identify the relevant documents, collect them from filing cabinets, review them, and then produce them. The review and production of ESI often requires working with the client to identify the databases from which responsive documents may be retrieved, hiring a third-party ESI vendor to assist in retrieval and review of documents, determining and negotiating with opposing counsel the relevant record custodians against whose accounts document searches will be conducted, negotiating predictive coding and search terms with opposing counsel, and then reviewing thousands and thousands of documents for relevancy and privilege before providing that ESI to the opposing party.

As just one example, the defendants in *County of Cook v. Bank of America Corp.*, No. 14 C 2280, 2019 WL 5393997 (N.D. Ill. Oct. 22, 2019), projected to spend more than $1.3 million on an ESI

vendor to assist in the defendants' review of 400,000 ESI documents drawn from 38 record custodians responsive to the plaintiff's discovery requests; it still took over six months to produce even a portion of those documents, after the defendants' lawyers tasked some 36 attorneys to work full time on the project over a three-month period to speed up that review, *id.* at *2-*3.

Although not every case is like *County of Cook*, the idea that parties will be able to identify and produce all documents and ESI "relevant to the subject matter of the action" within 45 days of service of the complaint is simply not feasible, even in less complex cases.[1]

B. Requiring Ongoing Monitoring and Supplementation of Discovery Responses Would Impose an Untenable Burden on Parties

It has been well-established in Florida since 1972 that there is

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[1] It also seems inherently inconsistent with current Florida Rule of Civil Procedure 1.280(d), for which the Workgroup suggested no change. *See* Report at 78. Rule 1.280(d) authorizes a party to object to discovery of ESI if the information is not reasonably accessible because of burden or cost. But it is not clear whether a party may use this provision to object to the production of ESI under the proposed mandatory disclosure rule, and even if they could, it seems antithetical to the goal of streamlining litigation to require motion practice early in the case to object to the scope of mandatory disclosures.

no duty to supplement discovery responses. *See In re Fla. Bar*, 265 So. 2d 21 (Fla. 1972). If a discovery response is accurate and complete when made, the responding party's job is done; the need to supplement a response can be drawn as necessary by the inquiring party through a subsequent discovery request. *See* Fla. R. Civ. P. 1.280(f).

The Workgroup's proposal would impose a duty to supplement any and all discovery responses, including the initial mandatory discovery disclosures, upon learning that "in some material respect the [prior] disclosure or response is incomplete or incorrect." Proposed Fla. R. Civ. P. 1.280(g). This will impose a significant and unrealistic burden on all parties, but particularly large corporate entities. A party will bear the ongoing and intensive responsibility for periodically recanvassing new information that just might be responsive to prior discovery requests or disclosures, a costly and time-consuming endeavor divorced from considerations of case complexity or subsequent immateriality.

Indeed, the supplementation burden grows exponentially in light of how broad the mandatory discovery disclosures are under

proposed rule 1.280(a)(1). The burdens of requiring endless supplementation of discovery seem counterproductive to the desired goals of streamlining of litigation and reducing discovery costs and attorneys' fees.

C. The Conferral and Hearing Requirements for Motions Are Impractical and Invite Abuse

The Workgroup identifies motion practice as a cause of delay in case resolution, ostensibly because motions are often resolved unnecessarily at hearings rather than on the papers. While FJRI shares the Workgroup's aim of timely resolution of motions more often on the papers rather than through costly and time-intensive hearings, what the Workgroup has proposed is needless or unworkable.

Under proposed Florida Rule of Civil Procedure 1.160(c), prior to the filing of any motion, the parties must meet and confer to discuss the motion, subject to limited exceptions. The meet and confer must be "a substantive conversation in person or by telephone or videoconference"; an exchange of correspondence is not enough. Proposed Fla. R. Civ. P. 1.160(c)(3). If the parties are unable to resolve the motion, the party seeking relief may file and

serve the motion. As drafted, Rule 1.160(c) would require conferring even on dispositive motions, which is not the norm. *See, e.g.*, N.D. Fla. Loc. R. 7.1(D) ("An attorney conference and certificate are not required for a motion that would determine the outcome of a case or a claim[.]"). Undoubtedly a plaintiff will object to a defendant's summary judgment motion that dispenses with their entire case or a claim; there is little need to waste attorneys' fees "conferring" on whether the plaintiff agrees with such relief.

Also of concern is the Byzantine procedure proposed for setting motion hearings. A party desiring a hearing on a motion must, within five days after filing and serving the motion, schedule the motion for hearing or risk a claim that the motion has been "abandoned." Proposed Fla. R. Civ. P. 1.160(k); Proposed Fla. R. Civ. P. 1.161(b)(1). But actually getting that hearing set within five days turns on numerous factors, including on opposing counsel promptly agreeing to a hearing date and time.

In cases where a hearing is set through the trial judge's chambers, the scheduling party must contact that office and obtain three dates and times for a potential hearing. *See* Proposed Fla. R.

Civ. P. 1.161(b)(1)(B). If the judicial office provides those dates and times two business days later, the parties then have two more business days to either or accept those dates. *Id.* If rejected, the rejecting party must then obtain three alternative dates and times from the judicial office within two business days. *Id.* By this time, however, it has been more than five days since the movant filed and served its motion, and despite not being the cause of any delay, the movant risks an argument that they "abandoned" the motion. Even in situations where online hearing scheduling is available, it is still the responsibility of the party seeking a hearing to "coordinate among the parties a time and date for hearing," *id.* 1.161(b)(1)(A); if the opposing party drags their feet, they have conveniently created an argument that the motion has been abandoned.

Meanwhile, at the same time the movant is scrambling to set a hearing within five days, the judge is deciding if he or she even wants one. Under proposed rule 1.160(j), if the trial court declines to conduct a hearing on a motion, the court must inform the parties of that decision by order "within 5 days after the date on which the hearing was scheduled or requested." It makes little sense to

require the parties to arrange a hearing at the same time the trial court may decide it does not want one at all.

All in all, the Workgroup's proposed process for conferring and setting hearings on motions necessitates a lot of needless and costly busywork.

D. The Proposals to Deter Trial Continuances Impose Too High a Burden and Discourage Resolution Outside of Court

The Workgroup proposes several rule changes to "establish ***disincentives*** to continuances," particularly for trials. Report at 113 (emphasis in original). But those proposed disincentives are far too harsh and run counter to the public policy of this state encouraging resolution of disputes outside of the courts.

First, this Court should reject the Workgroup's recommendation to impose an evidentiary burden on obtaining a continuance. Under the proposed rule, "[a]ll orders granting motions to continue [trial] shall state the factual basis, including the reason for the continuance, shall schedule the action required to resolve the need for the continuance, and shall set a new trial date." Proposed Fla. R. Civ. P. 1.460(b)(8). Subsection (10) of the proposed rule further states that "[o]rders granting or denying

motions to continue shall benefit from [a] presumption of correctness on appeal where the trial court has made ***factual findings regarding its ruling*** and shall only be reversed upon a finding of gross abuse of discretion." *Id.* 1.460(b)(10) (emphasis added). But requiring the trial court to make fact findings—presumably after an evidentiary hearing—to support a trial continuance will make courts less inclined to grant them, even when necessary.

Further, many of the enumerated reasons why a trial continuance may not be granted are illogical. One of the enumerated reasons that a trial continuance cannot be granted is for "outstanding dispositive motions." Proposed Fla. R. Civ. P. 1.460(b)(5)(C). It is short sighted to categorically deny a trial continuance when a dispositive motion is pending. Otherwise the court and the parties would be forced to waste valuable resources in preparing for a trial that may never occur once the court grants a dispositive motion dispensing with the case.

It is not hard to imagine the predicament that might arise when a summary judgment motion remains pending as trial

approaches. Generally, summary judgment motions are not filed until the end of discovery. If a party files a summary judgment motion within the deadlines set by a case management order, the hearing must be set at least 40 days after the motion is filed, per Florida Rule of Civil Procedure 1.510. If the court has no available hearing time before the start of the trial docket, this proposed rule would not allow a party to seek a continuance of the trial for the dispositive motion to be heard. This appears contrary to principles of judicial economy if a case can and should be resolved by summary judgment instead of through a bench or jury trial.

The "failure to complete mediation" is another enumerated reason for which a trial continuance may not be granted. Proposed Fla. R. Civ. P. 1.460(b)(5)(B). This appears contrary to basic principles of efficiency, in addition to being contrary to the state's strong public policy favoring mediation and settlement of cases outside of court. *See Robbie v. City of Miami*, 469 So. 2d 1384, 1385 (Fla. 1985).

In sum, the Court should reject the Workgroup's attempted rewrite of Rule 1.460. Trial courts should be able to maintain

discretion over their dockets, including discretion over granting necessary continuances.

E. The Court Should Require Proportionality in Discovery

While the Workgroup acknowledged concerns with the high costs of discovery, it expressly declined to adopt the one change that might actually address those concerns: proportionality. This Court should require proportionality in discovery, just as the Federal Rules of Civil Procedure do.

Under Federal Rule of Civil Procedure 26(b)(1), the scope of discovery is defined as "any nonprivileged matter that is relevant to any party's claim or defense and ***proportional to the needs of the case***." Fed. R. Civ. P. 26(b)(1) (emphasis added). 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." *Id.* As Chief Justice John Roberts explained, Federal Rule 26(b)(1) "states, as a fundamental principle, that lawyers must size and

shape their discovery requests to the requisites of the 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." 2015 Year-End Report on the Federal Judiciary at 7.[2]

Put simply, proportionality is the common-sense consideration of what degree of discovery makes sense in a given case. The Workgroup declined to incorporate this concept into its proposal because, it said, "the net impact of adding the term would be to create yet another trigger point for discovery litigation—over what counts as 'proportional.'" Report at 84. But the suggestion that overbroad and unduly burdensome discovery is not already a trigger point for litigation is dubious. Requiring proportionality in discovery has worked in the federal system, and nothing suggests it would not work in Florida. Expressly incorporating the concept of proportionality into Florida Rule of Civil Procedure 1.280 would bring Florida in line with the federal rules, similar to what the Court has already accomplished in adopting the federal standards for

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[2] *Available at* https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.

expert testimony and for deciding motions for summary judgment. *See In re Amends. to Fla. R. Civ. P. 1.510*, 317 So. 3d 72, 75 (Fla. 2021) (largely replacing Florida's summary judgment rule with Federal Rule of Civil Procedure 56 and the federal summary judgment standard established in the *Celotex* trilogy); *In re: Amends. to Fla. Evid. Code*, 278 So. 3d 551, 551-52 (Fla. 2019) (replacing *Frye* standard for admitting expert testimony with the *Daubert* standard).

As the Sedona Conference observed, "[a]chieving proportionality in civil discovery is critically important to securing the 'just, speedy, and inexpensive resolution of civil disputes'" under Federal Rule of Civil Procedure 1. The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 18 Sedona Conf. J. 141, 147 (2017). The same is true for achieving the identical goal of the "just, speedy, and inexpensive determination" of every case under Florida Rule of Civil Procedure 1.010. Accordingly, FJRI supports the incorporation of proportionality into Florida Rule of Civil Procedure 1.280. The proposed revisions to Rule 1.280 offered by the International Association of Defense

Counsel ("IADC") in its April 19, 2022 comment to the Court would be a good starting point for such an amendment.

F. The Court Should Require Disclosure of Third-Party Litigation Financing Agreements

FJRI also supports IADC's recommendation that this Court amend Florida Rule of Civil Procedure 1.280 to require disclosure of third-party litigation financing agreements as part of any mandatory disclosure requirement.

Litigation finance is a relatively new industry composed of institutional investors who invest in litigation by providing finance in return for an ownership stake in a legal claim and a contingency in the recovery. This in turn enables parties to shift the financial burden of legal disputes off their own balance sheets and minimize the risk of pursuing litigation.

But the practice also increases the probability that meritless claims will be brought, inserts questions about who is actually controlling the litigation other than the plaintiff and defendant, results in inevitable conflicts of interest among the lawyer, client, and litigation financier, and makes settling lawsuits far more difficult and expensive. *See* American Bar Association Best

Practices For Third-Party Litigation Funding at 6 (Aug. 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.").[3]

Florida courts permit these types of arrangements, *see Kraft v. Mason*, 668 So. 2d 679, 684 (Fla. 4th DCA 1996), and as a consequence, Florida has been cited as an attractive state for investing in litigation, particularly given its size. *See* Michael McDonald, Above the Law, *The Best and Worst States for Litigation Finance (Part II)* (July 11, 2017).[4] So long as these arrangements are allowed, the parties and the courts should be permitted to know whether third parties are driving litigation decisions. *See, e.g.*, Anusheh Khoshsima, *Malice Maintenance is "Runnin' Wild": A Demand for Disclosure of Third-Party Litigation Funding*, 83 Brook. L. Rev. 1029, 1053-54 (2018) ("With the court finally aware of the

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[3] *Available at* https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/111a-annual-2020.pdf.

[4] *Available at* https://abovethelaw.com/2017/07/the-best-and-worst-states-for-litigation-finance-part-ii/.

presence of the third-party funder, it will have the opportunity to address any suspicious legal strategies and hold lawyers accountable. Requiring disclosure of any personal interest in the lawsuit will ensure that the court is privy to any improper personal agenda or serious conflicts of interest." (internal footnotes omitted)). This is not much different than requiring the disclosure of any insurance policy which may be used to satisfy the judgment or indemnify a party, a disclosure requirement the Workgroup already recommends. *See* Proposed Fla. R. Civ. P. 1.280(a)(1)(D). Requiring disclosure of third-party litigation funders would also put Florida in line with the best practices recommended by the American Bar Association and at least six federal courts of appeals. *See* Patrick A. Tighe, *Memorandum: Survey of Federal and State Disclosure Rules Regarding Litigation Funding* 209 (Feb. 7, 2018).[5]

For all these reasons, FJRI supports IADC's suggested addition of Rule 1.280(b)(3), requiring the disclosure of any third-party litigation funding agreement.

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[5] *Available at* https://judicialstudies.duke.edu/wp-content/uploads/2018/04/Panel-5-Survey-of-Federal-and-State-Disclosure-Rules-Regarding-Litigation-Funding-Feb.-2018.pdf.

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In sum, although FJRI shares the Workgroup's goal of improving Florida's civil litigation climate, FJRI does not support the Workgroup's proposals. However, the two amendments suggested above—requiring proportionality in discovery and disclosure of third-party litigation funding agreements—would go a long way to accomplishing that goal.

Thank you for your consideration.

Respectfully submitted on May 25, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 25, 2022, a copy of the foregoing has been filed with 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 33208; and by email to Tina White, the Office of State Court Administration Liaison to the Workgroup, 500 South Duval Street, Tallahassee, Florida 32399 (whitet@flcourts.org).

/s/William W. Large
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