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

IN RE: AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEURE,
_____/

COMMENT OF THE FLORIDA JUSTICE ASSOCIATION

Respectfully submitted,

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Table of Contents

I. STATEMENT OF INTEREST AND INTRODUCTION

The Florida Justice Association (FJA) is a state-wide voluntary bar association of more than 3,000 members, including attorneys and members of The Florida Bar. FJA members are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the common law, and the right of meaningful access to courts. The members of the FJA are governed by the Florida Rules of Civil Procedure in the representation of their clients before the Florida courts. As such, the FJA, on behalf of its membership, has a vested interest in proposed rules amendments published by the Court for public comment.

The FJA created a select committee of experienced attorneys to review the Final Report of the Workgroup on Improved Resolution of Civil Cases and the proposed amendments to the Florida Rules of Civil Procedure. Our committee consisted of seasoned trial attorneys and distinguished appellate lawyers who have extensive experience in litigation procedure, case management and appellate practice throughout the twenty judicial circuits. The FJA committee, upon detailed review of the proposed amendments, held regular meetings

to discuss the intended purpose of each amendment proposal, the practical effect of the proposed language, and how each proposed rule amendment would affect the representation of clients before the courts. The FJA committee met via Zoom no less than 11 times during our review of the Final Report. In addition to meeting as a committee, we also conferred with our colleagues in other volunteer bar organizations to discuss the proposed rule amendments. This comment is a product of these efforts, with the underlying goal of assisting the Workgroup and the Court in producing the best work product that is fair to all litigants, improves the resolution of civil cases, and maintains the trust and integrity of our judicial process.

Two of the voluntary bar associations that the FJA conferred with during this process were the Florida Chapter of the American Board of Trial Advocates (FLABOTA) and the Florida Defense Lawyers Association (FDLA). Although there may be some differences in concerns or recommendations to specific amendment proposals, there are many shared concerns among the three organizations. The FJA has also reviewed the comment of the Chief Judges of the Circuit and County Courts of Florida filed on April 26, 2022, and the

comment of Honorable Thomas P. Barber filed on March 28, 2022. The FJA shares the concerns raised in these comments.

II. PREFACE

Comments on Judicial Management Council's Workgroup on Improved Resolution On Civil Cases (Workgroup): Recommendations

At the outset we want to acknowledge the hard work that has been put into this project by the Workgroup and the important role the Supreme Court has taken in trying to improve the process and procedures by which civil cases are handled throughout the twenty circuits in the state of Florida. It was an ambitious undertaking, and it is clear that the Workgroup put an enormous amount of time and effort into the project. We commend all those involved for their work and dedication to the judicial system.

General Overview

There are concerns of implementing such a massive rules overhaul at this particular time due to court backlogs and the effect COVID has had on the legal system. There are also concerns that such an overhaul, if implemented all at once, would be overwhelming

and confusing for both the litigants and the courts. As such, it is highly recommended that if such large-scale changes in the rules occur, that it be done so over time and in phases. This would also allow time to educate members of the bar and judiciary on the changes.

To some of the proposed amendments the FJA has no objections. Other proposed amendments may be acceptable with revisions, while some clearly need much more extensive work.

Further, there is legitimate concern that many of the proposed amendments divest the trial court of much-needed discretion to manage their cases and dockets. We understand and appreciate the need to provide appropriate enforcement tools, but a balance must be struck between discretion and enforcement. It is critically important to not lose sight of the fact that while the Florida Rules of Civil Procedure guide the conduct of the lawyers in the state, it is ultimately the clients who are impacted by how they are interpreted and enforced.

Since the first adoption of the Florida Rules of Civil Procedure, there has been an extensive body of case law developed interpreting

the rules, which informs the court and lawyers so as to guide conduct and behavior. We hope that these proposed changes are not ushering in an era where decades of decisions are deemed abandoned and concepts such as *demonstrating prejudice before enforcement can occur* are no longer relevant because trial courts are stripped of their judicial discretion. But we are concerned that, as written, this could very well be the end of an era in which the slate of precedent interpreting the rules of civil procedure is wiped clean and both practitioners and judges are left to create an entirely new body of law.

One of the goals of improving the resolution of civil cases should be to try to make the rules simpler, as opposed to more complex, while providing the circuit court judges the tools necessary to enforce the rules. The specific rules which appear more complex than necessary are discussed below and where possible, proposed recommendations and solutions are presented.

On a broader level, it must be recognized that Florida is a very large and diverse state and that a "one size fits all" approach for every circuit needs to be better understood before all of these rules amendments are adopted. There are many circuits where there are

no court divisions and individual judges are responsible for handling cases across the entire legal spectrum (civil, criminal, probate, family, etc.). In the smaller circuits, things are likely working well, and these new rules may actually impede the good work that is already being done as it relates to case management, securing early trial dates, and enforcement of the rules. Accordingly, it is recommended that broader language be included as it relates to some of the specific rules amendments, which acknowledge and allow each circuit to have flexibility to modify certain rules. The current drafts of Rule 1.160 and Rule 1.161 could greatly benefit from this approach. (We say "current drafts" because the FJA is proposing a complete re-write of Rules 1.160 and 1.161 that keep the concepts of the Workgroup's draft rules but omits the over complexity.)

Another critically important factor is that if adopted, some of these rules will likely challenge the current technology infrastructure in the state court system. It is recommended that an appropriate fiscal analysis be completed prior to implementation of any proposed amendments to determine what additional resources the courts will need in order to implement the proposed changes. This analysis

should include the costs of additional staffing, including secretarial staff and law clerks. While many of the proposed rules are patterned after the Federal Rules of Civil Procedure, the state system has a much larger volume of cases, judges have limited or no law clerks to assist with research, drafting and more ministerial tasks, and there is no uniform PACER system to help manage the court's dockets.

As written, the rules amendments appear to apply to both the circuit and county courts. Both the Workgroup and the Supreme Court should look very carefully as to whether or not the proposed amended rules should be applied statewide across all of the county court systems. County court case loads are quite high and very fluid with many *pro se* litigants. Given the enormous number of new tasks which are going to be required by the judges, one has to be sure that the rules will be helpful rather than harmful to the county court system.

As one reads through the amended and new rules, it is quite clear that the Supreme Court and the Workgroup believe strongly in appropriate and aggressive case management of all cases filed and assigned to their respective divisions. We too believe that case

management is critical to the resolution of civil cases and wholly support it. We also support the fact that obtaining and holding on to trial dates is a key tool towards the disposition of cases. To that end, the elimination of the requirement that cases be "at issue" seems quite appropriate and could be one of the more significant and helpful changes.

It is obvious that as the new and amended rules appear now, there is going to be the need for continuing legal education programs not just for the attorneys practicing in the state but for the judiciary and judicial staff. We would all like to avoid "unintended consequences" that would significantly impact in a negative way the individual rights of all litigants. It is anticipated that there will be a large number of comments to the proposed amendments, both relatively simple and some more complex, submitted from various and diverse groups as well as judges and lawyers throughout the state. The current deadline for the Workgroup to receive, analyze, and report back to the Supreme Court is June 22, 2022. This is only a three-week period to review what could be some of the most comprehensive and technical comments ever received as it relates to

rules changes. With problems being identified and potential solutions suggested, it would be advisable to extend the deadline of the Workgroup's work to be completed to at least July 20, 2022. It may also be advisable to invite into the Workgroup, for the limited purpose of working on the comments, other lawyers and judges from around the state with a goal towards having a larger and more diverse group of lawyers and judges carefully and critically analyzing the comments that will have been received.

III. RULES TO WHICH THE FJA HAS NO OBJECTION

The FJA does not object to the Workgroup's proposed amendments to the following rules and believes these amendments could be implemented in a "first phase" of rules changes:

1. **Rule 1.190** – Amended and Supplemental Pleadings[1]
2. **Rule 1.201** – Complex Litigation

[1] It is clear that the courts will be required to aggressively manage their cases with appropriate Case Management Orders. Concerns with late filed amendments to pleadings, including the possibility of Fabre defenses will undoubtedly be addressed in such orders.

3. **Rule 1.271** – Pretrial Coordination Court

4. **Rule 1.310** – Depositions Upon Oral Examination

5. **Rule 1.320** – Depositions Upon Written Questions

6. **Rule 1.340** – Interrogatories to Parties

7. **Rule 1.350** – Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

8. **Rule 1.351** – Production of Documents and Things Without Deposition from Nonparties

9. **Rule 1.370** – Requests for Admissions

10. **Rule 1.410** – Subpoena

11. **Rule 1.440** – Setting Action for Trial.

12. **Rule 1.650** – Medical Malpractice Pre Suit Screening Rule

13. **Rule 1.820** – Hearing Procedures for Non-binding Arbitration

14. **Rule 2.215** – Trial Court Administration.[2]

15. **Rule 2.250** – Time Standards for Trial and Appellate Courts and Reporting Requirements

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[2] *See* n.17 infra. If the language proposed by the FJA for Rule 1.160(g)(3) is adopted, then the time periods stated in Rule 2.215 would need to be amended. This is discussed in further detail in n.17 infra.

16. **Rule 2.546** – Active and Inactive Case Status

17. **Rule 2.550** – Calendar Conflicts

18. **Rule 7.020** – Applicability of Rules of Civil Procedure

19. **Rule 7.070** – Method of Service of Process

20. **Rule 10.420** – Conduct of Mediation

IV. RULES FOR WHICH THE FJA HAS CONCERNS THAT CAN BE ALLEVIATED BY REVISIONS

The FJA has concerns with the proposed amendments to the following rules, however with some revisions to the proposed language, we believe these concerns can be alleviated:

Rule 1.200 – Case Management

(f) Extensions of Time, Modifications of Deadlines

The proposed language to Rule 1.200(f) should be modified to conform to the language in Rule 1.201 that states that such modification of deadlines and extensions of time should rarely be granted and only upon good cause being shown. Any such modification or extensions should be based on a definitive agreement

among the parties with a written plan to comply with such extensions or modifications and be approved by the court.

(f)(2), (h)(4)(C)(i), and (h)(5) – Concern over the use of three different standards

Proposed amendment to Rule 1.200(f)(2) allows for modification of a deadline in the case management report if there are "**extraordinary unforeseen circumstances**."

But the proposal to Rule 1.200(h)(4)(C)(i) allows for amendment when there is a "**significant unforeseen change of circumstances**."

Then, the proposal for Rule 1.200(h)(5) says that, at any case management conference, the court "may revisit any of the deadlines previously set where the parties have demonstrated a good faith attempt to comply with the deadlines or have demonstrated a "**significant change of circumstances"** *[but not unforeseen as required in the prior provisions*], such as the addition of new parties."

Essentially, there are three different standards for when deadlines can be changed: *extraordinary unforeseen circumstances*,

significant unforeseen circumstances, and *significant changes of circumstances*.

The need for three different standards is unclear. If the Workgroup meant to have three different standards, then the FJA asks that the Workgroup create a comment so that judges implementing the rule would know the difference. If there is no intended difference, then consistent use of a single phrase would remedy the very strong potential for confusion.

(f)(5) - Concerns for clarity

The proposed amendment to Rule 1.200(f)(5) says that, if a trial is not reached "during the trial period set by the case management order…the case shall be reset to the next immediately available trial period." At a minimum, to be precise, the language of rule 1.200(f)(5) should be modified to say:

> **When Trial Does Not Timely Occur.** If a trial is not reached during the trial period ~~scheduled by the case management order~~ set pursuant to rule 1.440(c)(2), no further activity may take place absent leave of court, and the case shall be reset to the next immediately available trial period.

But further modification is necessary to explain what "reset to the next immediately available trial period" means. Does it mean that the case jumps in front of the cases that are already set on the next trial docket? Or does it mean that the case goes to the end of all assigned trial dockets? Is the case supposed to be prepared to go "next" every time a trial docket comes up? Without knowing what the Workgroup intended, it is difficult to suggest alternative language. But clarification is definitely necessary, if not by amending the current language, then by adding a comment that provides the clarification.

(h)(8) – Concern over unnecessary rush and need for clarity about who pays

The proposed amendment to Rule 1.200(h)(8) calls for the parties to provide the court with a transcript of any case management conference within 7 days of the conference if the parties cannot agree on a proposed order. To get a copy of a transcript within 7 days requires an "expedited" fee for the court reporter. Expedited transcript service is very expensive (often double the cost of normal delivery). Adding this expense not only defeats a primary purpose of

the rule revisions (to lessen the expense of litigation), but the rush is almost certainly unnecessary because it anticipates that the proposed orders will be ruled upon immediately. The reality of most judge's dockets is that resolving a dispute about the language of an order may not be the judge's highest priority.

This is an amendment that needs to yield to the realities of both practitioners and judges. Most court reporter's "standard" delivery time is 10 to 15 business days. The FJA suggests that the arbitrary "7 days" be expanded to 12 business days to give the court reporter time to transcribe and the parties two days to confer once the transcript is available.

In addition, the FJA requests that a line be added to the rule stating, "In the event a transcript is necessary, the parties shall split the cost of the transcript fee." At a minimum, if the Workgroup is going to require the parties to provide a transcript, the rule should state who is responsible for paying for the transcript.

Rule 1.335 – Standards for Conduct in Depositions

The FJA, FLABOTA and FDLA agree the directive that "any violation of this rule creates a presumption of prejudice and will result in expenses, fees, or other sanctions" is too broad. Courts can tell the difference between a lawyer who misinterprets the law in a deposition and a lawyer who is purposely mishandling a situation. By way of example, as drafted, proposed Rule 1.335(g) would require a court to sanction a lawyer who instructed his client not to answer a question based on a good-faith interpretation of law.

To remedy the inequity of such a situation, we suggest that the word "knowing" be placed in front of "violation" so that Rule 1.335(g) would read:

> **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. Knowing violations of this rule adversely impact the perception of our judicial system and the administration of justice. Knowing violations also potentially create prejudice that is frequently difficult and time-consuming to determine. Therefore, any knowing 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.

Rule 1.420 – Dismissal of Actions

(e)(2) – Concern over how this rule impacts cases that are moved to next docket or when a trial order has been entered

Two clauses need to be added to the rule to reflect that a case cannot be dismissed for failure to prosecute where the reason for inactivity is that: 1) a trial order has been entered and the trial date is pending; and 2) when the case was not tried during the trial period for which it was set. It is very possible that, regardless of what it means to be "placed on the next immediately available docket," the parties could wait more than six months. Obviously, a case should not be dismissed for failure to prosecute if Rule 1.200(f)(5) requires that "no further activity may take place" while a case is awaiting the next available trial date. The FJA suggests that the following language be added to the proposed rule:

> (2) <u>Except for cases where a trial did not take place and the case has been moved to the next available docket pursuant to rule 1.200(f)(5), or in a case where a trial order is entered and the trial date is pending, in</u> any actions in

> which it appears on the face of the record that no activity by filing of pleadings or other paper has occurred for a period of 6 months, and the court has not issued an order staying the action or approving a stipulation for stay, any interested person, whether a party to the action or not, the court, or the clerk of the court may serve notice to all parties that no such activity has occurred.

Rule 1.280 – General Provisions Regarding Discovery

(a)(1)(A) – Concern for overbroad production requirement

The proposed rule says that this is a category of information that must be contained within a party's initial disclosures:

> the name and the address, telephone number, and e-mail address of each individual likely to have discoverable information relevant to the subject matter of the action, along with the subjects of that information, unless the use would be solely for impeachment;

This provision is taken from Fed. R. Civ. P. 26(a)(1)(A)(i). However, the federal equivalent rule requires a party to disclose documents "that the disclosing party ***may use to support its claims or defenses,*** unless the use would be solely for impeachment" as opposed to the proposed amendment which requires disclosure of documents that "***are relevant to the subject matter of the action,*** unless the use would be solely for impeachment."

(a)(1)(B) – Concern for overbroad production requirement

The proposed rule says that this is a category of documents that must be contained within a party's initial disclosures:

> a copy of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control (or, if not in the disclosing party's possession, custody, or control, a description by category and location of such information) and **that are relevant to the subject matter of the action, unless the use would be solely for impeachment**;

This provision is taken from Fed. R. Civ. P. 26(a)(1)(A)(ii). But the federal equivalent requires a party to disclose documents "that the disclosing party ***may use to support its claims or defenses*****,** unless the use would be solely for impeachment" as opposed to the proposed amendment which requires disclosure of documents that "***are relevant to the subject matter of the action,*** unless the use would be solely for impeachment."

The critical difference between the federal version and the proposed state version of the two aforementioned rules is that the proposed state rule requires the disclosure of work product. It does so by forcing not only the production of documents the party may use, but all other documents, including relevant documents that the

attorney thinks could be harmful but would not be used by the attorney.

This is an overbroad requirement because Florida law protects, as work product, the thought processes of counsel in identifying relevant but harmful documents. If "the evidence or material is reasonably expected or intended to be disclosed to the court or jury at trial," you have to disclose it; otherwise, you do not. *Northup v. Acken*, 865 So. 2d 1267 (Fla. 2004); *see also Grinnell Corp. v. Palms 2100 Ocean Blvd., Ltd.*, 924 So. 2d 887, 889 (Fla. 4th DCA 2006); *Hargroves v. R.J. Reynolds Tobacco Co.*, 993 So. 2d 978 (Fla. 2d DCA 2007).

In *Northrup*, the Florida Supreme Court specifically criticized, the Fourth District's "approval of an order requiring 'counsel to "cull" through various surveys and personnel files ***to determine which ones are relevant***." 865 So. 2d at 1272 (quoting Gardner v. Manor Care of Boca Raton, Inc., 831 So. 2d 676,678 (Fla. 4th DCA 2002)). The Court said that even the Fourth District acknowledged that such a requirement "may indicate counsel's strategy" (*id.*); but the

Supreme Court was unequivocal that such a requirement "***goes entirely too far***." *Northrup*, 865 So. 2d at 1272.

If the Florida Supreme Court says requiring production of all documents counsel thinks are "relevant" is something that "goes too far," then it is entirely inappropriate for the creation of a rule that does just that.

In addition, the proposed rule 1.280(a)(1)(B) deviates from the federal rule by requiring the production of documents rather than permitting a description by category and location. For complex cases or cases with a great deal of ESI, this requirement is unworkable.

First, the sheer volume of documents in some cases makes immediate production impossible. This is usually true in products liability cases and cases with a great deal of ESI because outside vendors have to be hired, documents have to be accessed via servers (sometimes located in storage) and searches must be run.

Second, in high-document cases, requiring production on such a tight time frame will eviscerate a party's ability to go through the documents, evaluate them for privilege, and create a privilege log. Currently, the Workgroup requires initial disclosures within 45 days

of service of the complaint, unless a later deadline is created in a case management order. But parties serve their case management order 30 days after the complaint is served. Unless they get lucky and the court enters their proposed case management order (which would likely contain a longer deadline for initial disclosures), the parties will be stuck with the 45 days given in rule 1.280. In cases with high volumes of documents, that is not workable.

We recognize that the Final Report indicated that the Workgroup saw no reason to amend the Florida rule to track the revisions made in the federal rule. Final Report, pp.80-81. Given the magnitude of the changes the Workgroup is already making, and the clarity tracking the federal rule brings, we hope this comment had raised enough concern to persuade the Workgroup to see the issue differently. (Among other things, and as noted in the Supreme Court's opinion adopting the federal summary judgment standard, one benefit of adopting the language of a federal rule is that the adoption brings with it the body of federal caselaw interpreting the federal rule. That is lost where the Workgroup does not track meaningful language.) If the Workgroup is going to track the

language of the federal rule on this initial disclosure provision, then it should track the language of the entire clause from the federal rule. The FJA suggests that rule 1.280(a)(1)(A) and (B) be changed to track the federal standard and say:

> (A) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
>
> (B) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

Alternatively, the Workgroup needs to leave a comment. If the Workgroup is going to track the language of most of the federal rule, then it should leave a comment explaining the reason for not tracking it all.

V. RULES FOR WHICH THERE ARE OBJECTIONS AND WHERE REVISIONS MAY OR MAY NOT BE SUFFICIENT TO FIND THEM ACCEPTABLE

The FJA has strong concerns about the proposed amendments to the following rules, and believes that the rules cannot be published without significant changes to the proposed language:

Rule 1.160 and Rule 1.161– Motions

The Workgroup's proposed Rule 1.160 and rule 1.161 are unnecessarily complicated. The FJA suggests that a rewrite of both rules that removes the complication while keeping the concepts of the Workgroup (parties must confer before filing a motion, courts can decide non-evidentiary matters without hearings, etc.) is necessary. The FJA's proposed re-write of Rule 1.160 and Rule 1.161 is contained in Section V of this comment.

Rules 1.275 and 1.380 – Sanctions (broadly applies to all rules)

The FJA, like the FDLA and FLABOTA, is concerned about how often the amended rules refer to "sanctions." Like the FDLA and FLABOTA, the FJA believes that sanctions should be reserved for egregious or obstructive behavior and that unintentional or accidental behavior should never be sanctioned. The FJA believes

that judges should be taught that they have the power to sanction, but they should exercise discretion in their use of this power. And, like the FDLA and FLABOTA, the FJA is concerned that the repetition of sanctions will have the unintended effect of weaponizing the rules by encouraging litigants to seek sanctions against each other.

Along with the FDLA and FLABOTA, the FJA shares the concern that the repeated emphasis on sanctions will have unintended consequences. For example, good lawyers who make unintentional mistakes could be sanctioned and therefore unable to become board certified. Sanctions may also affect malpractice rates. While there are no statistics to cite, ask any practicing lawyer and they will tell you that malpractice carriers request information related to sanctions. If malpractice rates in Florida rise, then hourly lawyers have no choice but to pass the cost along---which is contrary to one of the goals of the Workgroup to increase the affordability of legal services.

The word "sanctions" or some derivative thereof appears approximately 50 times in these rules. It is recommended that there be one consolidated Sanctions rule that is applicable to all the rules.

The FJA has reviewed the comment filed by attorney Maegen Peek Luka on these two rules and adopts Section II(F) of that comment regarding concerns and suggestions for changes to both rule 1.275 and rule 1.380.[3] (The adopted pages are attached as Appendix 1 to this comment.) The FJA believes that adoption of these changes will empower judges with discretion while retaining the dignity of a practice where the majority of lawyers do not need to be governed by a constant threat of sanctions.

Rule 1.279 – Standards of Conduct for Discovery

The FJA believes that these standards do not belong in a procedural rule.

Rule 1.460 – Continuances

For consistency within the rules, we recommend adopting the language regarding continuances found in Rule 1.201 which states

[3] The one area where we disagree with the Appendix is Rule 1.275(b)(7), reducing the number of peremptory challenges as a sanction. The FJA does not support the loss of a peremptory challenge as a sanction as it goes to the procedure of the trial and the potential prejudice to a party far outweighs the desired effect.

"continuances of the trial of an action should rarely be granted and then only upon good cause shown". We support the motion setting forth in detail each reason a continuance is being sought; what further work is required; the plan to complete the work; and the date upon which the work will be completed and the earliest possible date that the case can be reset for trial.

VI. SUGGESTIONS/POTENTIAL SOLUTIONS FOR CONSIDERATION

The FJA recognizes the task before the Workgroup and respects the work performed in preparing the draft to these amendments. In an effort to assist the Workgroup and the Court in obtaining the best work product, the FJA respectfully puts forth suggested solutions to the proposed rules amendments for which we objected to.

FJA Proposal for rule 1.160:

RULE 1.160[4] MOTIONS

[4] The Workgroup's proposed rules refer to parties acting through counsel and parties appearing pro se, and repeatedly contain language explaining that represented parties act through counsel, while unrepresented parties act personally. That format increases the complexity of the rules. The addition of a provision in the general statements of the rules, explaining that where the rules refer to "parties" they mean either attorneys representing the parties,

(a) Application. ~~This rule shall apply to all motions other than motions made~~ This rule applies to all motions except those made pursuant to rules 1.480, 1.500, 1.510, 1.525, 1.530, 1.535, and 1.540.[5] In the event of contradiction between this rule and a rule governing a specific type of motion, the ~~latter shall prevail~~ rule governing the specific motion applies.

(b) Relief and Grounds. A request for court action must be made by motion. The motion must be in writing, except that the court may at its discretion consider an oral motion when grounds arise during a hearing or trial, subject to any other relevant rules and orders of the court. If written, a motion must state with particularity the grounds upon which it is based and the requested relief, [6] explain the legal basis for the relief requested with citations to any rule or other supporting authorities, and include a certificate of compliance with subdivision (c).[7] The motion may also include a memorandum of law.

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or unrepresented parties acting personally, would clarify the meaning of the rules and reduce the complexity of the later provisions.

[5] This sentence is much clearer than what the Workgroup originally proposed.

[6] This concept is copied from the Workgroup's proposed rule 1.160(j)(1), which requires the party to state the preferred disposition of a motion as part of a memorandum of law. We think it best that all motions state the requested relief, not just those with a memorandum.

[7] The Workgroup's proposed rules contemplate the motion and response being filed without incorporated memoranda of law, the court then ordering memoranda, and then a complicated process (subdivision j) of resolving motions with memoranda or summarily. This is inefficient. If a party is going to file a motion, it should be aware of the facts and law that support the motion and provide them at the time of filing. This suggested rule requires a description of the

(c) Obligation to ~~Meet and~~ Confer. With the exception of ex parte motions filed under subdivision (h) and motions requiring expedited resolution under subdivision (i), prior to the filing of any motion to which this rule applies~~filed~~, the parties shall ~~meet and~~ confer to discuss the motion.

(1) **Substance of the conference.** The parties shall confer to attempt to resolve or limit the issues of any proposed motion. In addition to discussing the merits of the dispute, the parties shall discuss whether one or more parties desire a hearing and, if so, the amount of time desired. If a party desires a hearing, immediately before the conference, the party should ascertain available hearing dates so that, in addition to discussing the amount of time, the parties shall coordinate scheduling of the hearing during the conference. The conference may take place in person, by telephone or video conference, through e-mail or texts, or any method of communication in general use by attorneys.[8] If the conference does not occur after the movant

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factual and legal basis for a party's position in both the motion and response; thereby removing the need for additional court action to order the filing of memoranda and different processes for motions with and without memoranda. The incorporation of memoranda as a matter of course in both the motion and the response will better inform the court on the merits of the parties positions, how the matter should be resolved, whether a hearing is necessary, and will allow the court to enter an order summarily without further procedure.

[8] The Workgroup's proposed rules limit conference communications to in person, telephone, or video conference. That limitation hinders communication, especially as the number of parties increases. For example, scheduling a zoom conference among multiple parties with demanding schedules, in different time zones or even different countries, routinely requires weeks of advance notice. E-mail and text communications are routinely used effectively

has attempted to contact opposing parties in at least 3 good-faith attempts on three separate business days with at least one attempt being in writing and one attempt being via telephone with a message left, the movant shall identify the dates, times and methods of communication of the attempts to confer in the certificate of compliance.

(2) **If resolution occurs.** If the parties successfully resolve the dispute in the conference, the movant shall file the motion. The title of the motion shall indicate that it is an agreed motion and the motion itself shall include a statement that the parties resolved the matter during the conference and have agreed to the entry of an order. The moving party shall serve a copy of the agreed motion and a stipulated, proposed order to the court.[9] If the parties are able to resolve some, but not all issues as a result of the conference, the motion shall identify the issues agreed upon and the remaining issues which require the court's attention in the motion.

(3) **Certificate of Compliance**. The movant shall include at the end of the motion a certificate of compliance stating that the conference has occurred. The certificate of compliance shall indicate the date of the conference, the names of the participants, and whether a hearing is requested. If the conference did not occur, the certificate of compliance shall ~~describe~~ state the dates, times and methods of contact for the 3 or more good faith attempts to schedule the conference.

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in practice and allow for the requirement to confer to take place expeditiously.

[9] Because this provision, relating to resolution of the motion at the conference, includes the procedure for submitting an order, there is no need to include a separate section for Stipulated Motions as was included in the Workgroup's proposed rules.

(d) Timing and page limits. Within 15 days after the motion is filed, any party, or non-party against whom the motion is directed, shall file a response which explains the legal basis for the objections to the relief requested with citations to any supporting authorities.[10] The response may also include a detailed memorandum of law. The movant may file a reply within 7 days of the response. Absent receipt of permission from the court, page limits for documents filed pursuant to this rule are: motion and response, 15 pages; reply, 10 pages. These limits exclude the page containing the style of the case and any page containing only the certificate of service and/or certificate of compliance.

(e) Extensions of time. If a party or non-party against whom the motion is directed needs additional time beyond that stated in this rule, the party may file a motion for extension of time to file a response or reply. The motion must state the reason an extension is necessary and must propose a deadline by which the response or reply will be filed. The filing of the motion for extension of time will toll the deadlines set forth in this rule; however, if a hearing has been noticed, then the requested extension to serve a response or reply cannot exceed the date of the hearing. If the party requested a 10-day or less extension and the court has not ruled upon the motion by the time the deadline proposed in the motion has passed, any response or reply filed by the proposed deadline in the motion shall be considered timely filed.[11]

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[10] By requiring a response, this facilitates a judge being able to rule on the papers without further orders from the judge.

[11] This subdivision is necessary to account for times when a movant files a motion and the non-moving party's counsel or the affected non-party is in trial, on vacation, sick, or any other myriad of circumstances that would not allow for a response to be filed within the number of days an inflexible rule cannot anticipate. The extension could also be necessary if the issue is complicated and requires more time to prepare a response or if affidavits or other evidence gathering is necessary. The provision also creates reprieve

(f) Request for Decision.[12] Within 5 days after the deadline for serving a response if the moving party does not seek to file a reply, or within 5 days after serving the reply, the moving party shall file and serve on all parties and the court a request for decision.[13] The request shall indicate the title of the motion and the dates the motion, response and reply, if any, were filed. If no response was timely filed, the request for decision shall so state. If no party has noticed the

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for judges by removing a requirement for issue a ruling if the party requests less than 15 days of extension.

[12] The provision is intended to eliminate the multiple filings that would arise from the Workgroup's current proposed rule 1.160. Under our proposal, a party files a motion, the opposing party/parties respond. Perhaps there is a reply. Once that process is complete, the moving party files a "request for decision," which starts the clock under rule 2.215. The request tells the court when the filings took place, whether there is a hearing, and when the hearing is set. The court is now empowered to choose to rule on the papers prior to the hearing (*see* subdivision (g)(3) below) or conduct the hearing and then rule—but, unlike the Workgroup's proposal, the court is not required to issue multiple orders to reach the desired outcome. The rule also leaves open the possibility that neither party desires a hearing, in which case the request for decision starts the clock for a ruling under rule 2.215 and the court is aware that no hearing has been scheduled. Please note that we propose amending rule 2.215 (see n.17, below).

[13] For the purposes of this provision, to "serve on… the court" a request for decision requires sending an email to the judicial assistant. It would be ideal if clerk's offices statewide could be automated to recognize a "request for decision" and alert the judicial assistant without burdening the assistant with an email from the party.

motion for hearing, then the request for decision shall be titled "Request for Decision Without Hearing." If any party noticed the motion for hearing, the request shall include the date and time the hearing is scheduled, the party/parties that requested it, and the title of the request for decision shall be "Request for Decision with Hearing." If resolution of the motion requires the court to decide issues of material fact, then the request shall state the date and time the hearing is scheduled, the party/parties that requested it, and the title of the request for decision shall be "Request for Decision with Evidentiary Hearing."

(g) Hearings.

(1) Except for motions listed in subdivision (a), which are excluded from this rule,[14] or as otherwise specifically provided in these rules or other applicable legal authority, the court has discretion to decline to conduct a hearing on all matters except those that require the court to decide issues of material fact in order to rule upon the motion. A case management conference is distinct from a hearing and judges lack discretion to decline to conduct a case management conference.[15]

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[14] The reference creates much needed clarity on whether or not a court has the authority to decline to conduct a hearing on motions for summary judgment. Confusion will exist because motions for summary judgment, by definition, are not supposed to require a ruling on any material fact. So that there is no room for doubt, this subdivision should make clear that a court cannot decline to conduct a hearing on a motion for summary judgment or any of the other excluded rules.

[15] This reference is necessary because case management conferences, while similar to a hearing, appear to be mandatory—clarification that courts must hold case management conferences is necessary.

(2) The party seeking a hearing, or the movant, if all parties desire a hearing, shall schedule and notice the hearing pursuant to rule 1.161. If the moving party was unable to confer with the non-movant(s) after three good-faith attempts, the moving party may unilaterally schedule the hearing pursuant to the timeframes in rule 1.161.[16]

(3) If there are no issue of material fact to be resolved and the court desires to rule on the motion without a hearing, the court shall rule on the motion before the date the motion is set for hearing.[17] For hearings of 15-minutes or less, the court shall

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[16] This provision is intended to create some "teeth" for people who are not responsive to conferring with opposing counsel. If counsel fails to respond regarding a request to confer, counsel does so at his or her peril because the hearing can be unilaterally set.

[17] After discussing rule 1.160 with multiple judges, many of them do not believe they need hearing time to decide issues. However, the Workgroup's proposed rule required a judge to decide within 5 days of a motion being filed whether the judge will conduct a hearing is unworkable. The Workgroup's proposed rule allowed for a barebones motion with no requirement for legal support. Thus, the 5-day requirement meant the judge would be deciding whether to have a hearing based on a potentially barebones motion and without the benefit of any response. A judge cannot evaluate whether a hearing is necessary unless he or she is given the full argument of both the moving party and the respondent. This proposal gives the judge the ability to evaluate the motion, response and any reply and to make a decision whether further argument is necessary. This proposal also encourages parties to organize their thoughts and bring their best arguments at the time they file rather than the system of ordering supplemental briefing contemplated in the Workgroup's proposed rule. (Although a judge is always free to request further briefing, it is so infrequent that we see no reason to complicate the rule with requirements related to the occurrence).

issue the order at least 3 days[18] before the date the hearing is scheduled; for hearings of more than 15 minutes, the court

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At the same time, this proposed rule also imposes time limitations on the judge because the request for decision will trigger the 30-day time frame in amended rule 2.215. (NOTE: If this revised rule was adopted, then rule 2.215(f)(1)(B) must also be amended. For pre-trial motions, we propose that a judge have no more than 30 days after hearing to enter an order. Alternatively, if the judge does not want a hearing, then he or she must rule within 30 days of the request for decision. The proposed amendment to rule 2.215(f)(1)(B) is:

> Unless another rule of procedure requires a different timeframe, a judge ~~shall~~ must enter an order on ~~a motion within~~ all matters submitted to the judge for determination prior to trial within 30 days after the date a request for decision was filed where no hearing is conducted or within 30 days after the date the motion was argued at a hearing.

[18] There is a two-fold reason for three days for 15-minute hearings versus 7 days for longer hearings. First, 15-minute hearings are based on simple motions. Attorneys will not prepare as far in advance for simple hearings, so the court can get closer to the hearing date before a ruling is necessary. In contrast, more hearing time is needed for more complicated motions; 7 days in advance of the hearing prevents the parties from preparing for a hearing that will not take place.

The shorter time frame for 15-minute hearings is also necessary in order to give the non-moving party 15 days to respond, the moving party 7 days to reply, and the court the opportunity to rule without a hearing. Taking into account the proposed change to rule 1.161 that a "reasonable" time frame for hearing 15-minute motions is 35 days from the date the motion was filed, an assuming all parties take the maximum time allotted, the math works out like this:

Day 1 – file motion and set hearing
Day 16 – response filed

shall issue the order at least 7 days before the date the hearing is scheduled.[19] If the court rules before the date of hearing, the party that requested the hearing shall cancel the hearing within 3 days of receipt of the order.

(4) If no hearing is conducted, the court shall indicate the basis for its decision in the written order. If the court conducts a hearing, then the basis for the decision may be stated on the record and the order may refer to the reasons stated on the record as the basis for decision in addition to or in lieu of indicating the basis for the decision in the written order.[20]

Day 23 – reply filed
Day 28 – request for decision filed (informing court that hearing will take place on day 35)
Court has five days to rule upon the motion if it does not want to conduct the hearing.

[19] Whether it is 3 days or 7 days, the advance notice exists so that: (1) there is a small cushion to account for any delay between the date the court signs the order and the date the clerk serves it on the parties; (2) there is time to cancel the hearing; and (3) the parties do not waste their time preparing for a hearing where the judge intends to rule on the papers. All of these are goals encompassed within the Workgroup's commission to make cases go faster and cost less. Note that the proposed re-write to rule 1.161 says that parties cannot cancel a hearing unless they submit an agreed order to chambers at least two full business days prior to the hearing—because judges indicate that they usually prepare one day before the hearing. The rules are complimentary in the goal of reducing wasted time and resources.

[20] This sentence is necessary in order to ensure the opportunity for meaningful appellate review. The requirement is modeled after the same explicit requirement currently present in rule 1.510(a).

(h) Ex-Parte Motions. A party seeking ex parte relief may file an ex parte motion when permitted by law. The title of the motion shall indicate that ex parte relief is requested. The incorporated memorandum of law shall include the legal authority authorizing ex parte relief to be issued. At the time the motion is filed, the movant shall also submit a copy of the motion and proposed order to the court.

(i) Motions Requiring Expedited Resolution ("Emergency" Motions). A motion seeking expedited resolution must state in the title that expedited resolution is requested. Because conferral prior to filing the motion is not required, in lieu of the certificate of compliance, the motion shall include a certificate of exigent circumstances signed by the attorney for a represented party, or personally by an unrepresented party. For purposes of this subdivision, the only circumstances that will be considered exigent are when irreparable harm, death, manifest injury to person or property, or dispossession from real property will occur if expedited relief is not granted, or situations where extraordinary unforeseen circumstances require an immediate ruling from the court. Failure of a party or an attorney to act timely shall not constitute exigent circumstances or the required basis for an expedited hearing. At the time of filing, the moving party shall serve a copy of the motion on the court. Within 2 business days of filing, the court shall issue an order according to one of the following options: (1) rule upon the merits; (2) require an expedited response; or (3) order that the matter does not warrant expedited treatment and direct that the motion be denied without prejudice and, if the moving party desires, refiled after the parties confer.

(j) Abandonment of Motions. A motion shall be deemed abandoned and moot if the movant does not timely file a request for decision. A motion that has been abandoned may be refiled.

(k) Motions Grantable by the Clerk. All motions and applications in the clerk's office for the issuance of mesne process and final process to enforce and execute judgments, for entering of clerk's

defaults, and for such other proceedings in the clerk's office as do not require an order of court shall be deemed motions and applications grantable as of course by the clerk. The clerk's action may be suspended or altered or rescinded by the court upon cause shown.

FJA Proposal for Rule 1.161

RULE 1.161. SCHEDULING OF HEARINGS ON MOTIONS

(a) Procedure.

(1) Any party desiring a hearing or the movant, if both parties desire a hearing (the "scheduling party"), must schedule the motion for hearing in accordance with the reasonable times defined in subdivision (2) and notice the hearing within 5 days after the filing the motion.

(2) The scheduling party must participate in the rule 1.160(c) conference with available hearing dates and times and coordinate among the parties a date and time for the hearing.[21] If the non-moving party did not respond to requests to confer, or if the parties cannot agree on a date and time or the length of the hearing, the scheduling party may schedule the hearing on any available date within the time frames set forth in subdivision (2), and certify that the parties could not agree on scheduling. Where a circuit provides, a party dissatisfied with

[21] In jurisdictions where judicial assistants control hearing time, this rule will require the judicial assistants to inform the parties of available hearing times before a motion has been filed. While this may be a change from current procedure, it should result in better efficiencies as the parties can coordinate the hearing during the conference regarding the motion as opposed to the potential "back and forth" contemplated in the Workgroup's proposed rule 1.161.

the date, time or amount of hearing time can seek relief in a court's short motions calendar.[22]

(3) A reasonable time from the date of scheduling the hearing to the date of the hearing is as follows:

(A) no more than 35[23] days for matters requiring a hearing time of less than 15 minutes;

(B) no more than 45 days for matters requiring a hearing time of 15 minutes to less than 30 minutes;

(C) no more than 60 days for requiring a hearing time of 30 minutes to less than 1 hour; and

(D) no more than 75[24] days for matters requiring a hearing of 1 hour or longer.

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[22] This provision is meant to: (1) incentivize parties to agree on times and dates and (2) remove the requirement that judges have to review filings related to attorneys' inability to decide on hearing dates/times. To avoid situations where a party might purposely delay, by choosing a longer hearing time or later date, a party can seek relief during a court's "cattle call" or "short motions" time—which are typically freely available and designed for things such as a discrete dispute over the date of a hearing.

[23] As noted in the proposed amendment to rule 1.160, lengthening the timeframe to 35 days is necessary in order to give parties time to respond to the motion and give courts the opportunity to rule without a hearing.

[24] The Workgroup previously suggested 120 days for hearings of one hour or longer. This is too much time. If a case has two significant motions and each requires a party to wait 120 days to get a hearing (plus an extra 30 days to get a ruling—*see* rule 2.215), five months per motion—for a total of ten months—will have a dramatic, negative impact on the ability to get a case to trial within 18 months.

These schedules may be amended by administrative order in local jurisdictions.

(4) If a matter cannot be set within the timeframes defined in this subdivision because time is not available, the scheduling party must notice the motion for the earliest available hearing date outside the timeframe and certify in the notice of hearing that there was no hearing time available within the time limits herein.

(5) Nothing in this rule precludes a court from conducting group motion calendars for hearings requiring 5 minutes per side or less.

(b) Motions Requiring Expedited Resolution ("Emergency" Motions). A party seeking expedited resolution of a matter as defined by rule 1.160(i) must immediately file the motion and deliver a copy of the motion to the judge's chambers. As soon as is practicable, and in no less than 5 days, the court must determine whether the motion requires expedited consideration or should be handled in the ordinary course of business. If expedited consideration is warranted, the court may either set the matter for an emergency hearing or may enter an immediate order on the merits or a stay, as the circumstances may require.

(c) Cancellation of Hearings. Hearings set pursuant to this rule may be canceled by the parties only if, no less than 2 full business days before the hearing, an agreed order has been submitted to the court.[25]

[25] Parties tend to resolve disputes, whether it be on motions or trials, close in time to the event. The two business day time frame is based upon many judges indicating that they start preparing for hearings one or two days before the hearing. This would prevent a waste of judicial resources. We would suggest a comment to accompany the rule explaining how to calculate the time.

2022 Comment

Subdivision (c). This rule is intended to limit the waste of judicial resources that occurs when a judge prepares for a hearing and the parties cancel at the last minute or do not appear. If parties can resolve the dispute, they are required to give the court the professional courtesy of two full business days' of notice. For example, if a hearing is set for Tuesday at 9:00 am, the parties must notify the court that they have resolved the dispute no later than Friday at 9:00 am. Notifying the court at 5:00 pm Friday afternoon will not satisfy the requirements of this rule.

VII. CONCLUSION

Once again, our thanks go out to the Workgroup for all of the effort they have put into this project. If one comes to understand that the Florida Rules of Civil Procedure are designed to assist the litigants and their lawyers in bringing about a just and improved process for resolution of civil cases, these new and amended rules take an important step in the right direction. More specifically, what becomes clear when the rules are viewed at a high level is that if the courts will actively manage their cases; case management orders are entered with realistic deadlines; there is appropriate emphasis on the enforceable expectations of a reliable trial date; and the enforcement mechanisms provided in the rules are used with well exercised and thoughtful discretion, the circuit court system in this state will

certainly improve in terms of doing what it needs to do and that is to serve the residents of the state of Florida with fair, timely, and impartial justice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 25th day of May, 2022, a true and correct copy of the foregoing was filed with the Clerk of the Florida Supreme Court via the Florida Courts e-filing portal.

/s/ William T. Cotterall
Attorney

We further certify that a true and correct copy of the foregoing has been mailed via overnight delivery on this 25th day of May, 2022, to Workgroup Chair, Chief Judge Robert Morris, Second District Court of Appeal, P.O. Box 327, Lakeland, FL 33802, and sent electronically to OSCA Staff Liaison, Tina White, at 500 South Duval Street, Tallahassee, Florida 32399, white@flcourts.org.

/s/ William T. Cotterall
Attorney

Appendix 1

From the Comment by Maegan Peek Luka: Pages Addressing Rules 1.275 and 1.380

F. Rules 1.275 and 1.380 - Sanctions

We understand that the Workgroup purposely drafted the amendments to be "sanctions heavy." We have concerns that the proposed changes create a presumption that the majority of lawyers do not follow rules. We, like the FJA, FDLA, Civil Procedure Rules Committee, and ABOTA are concerned that a presumption in favor of sanctions will encourage, rather than discourage, the bad apples—because they will ***try*** to generate sanctions against their opponents.

While most of us disagree that the sanctions-heavy approach will bring about the desired changes, this comment will not endeavor to convince the Workgroup or the Court to turn that ship around. However, as drafted, the sanctions ship is listing badly. We propose that the Workgroup right the ship by remedying both the internal inconsistencies within rules 1.275 and 1.380 and the inconsistencies between the two rules.

Below, we have created tables so the Workgroup and the Court can see the inconsistencies.

Inconsistent standards
for when sanctions should not be imposed

Rule 1.275(b)	a court may impose sanctions for inappropriate conduct unless the noncompliant party/attorney "**shows good cause**" AND the "**exercise of due diligence**"
Rule 1.275(e)	The court may not order the sanction of payment of reasonable expenses if noncompliance was "**substantially justified**"

Rule 1.380(a)(5)(A)	If a motion for sanctions is granted, the court shall impose sanctions against the losing party "unless" the court finds that "the opposition to the motion was **substantially justified**"
Rule 1.380(a)(5)(B)	If a motion for sanctions is denied, the court shall impose sanctions against the loser "unless" the court finds that "the making of the motion was **substantially justified**."
Rule 1.380(a)(5)(C)	If a motion for sanctions is denied in part and granted in part, the court shall "apportion the reasonable expenses incurred as a result of making or opposing the motion." ***There is no substantial justification safety valve.***

Rule 1.380(b)(1)	If a party fails to comply with an order to provide or permit discovery, "the court shall…enter an order imposing discovery sanctions under subdivision (3)." ***There is no substantial justification safety valve.***
Rule 1.380(b)(2)	If a party misuses or abuses discovery rules, "[u]pon consideration of these factors, the court shall, ***if appropriate***, enter an order imposing discovery sanctions under subdivision (3)."
Rule 1.380(b)(3)(A)	If the court finds that a discovery violation or failure to obey a court order arising out of a discovery motion, the court shall order payment of reasonable fees "unless the court finds that the failure ***was substantially justified***."

1. If a noncompliant party failed to show good cause and due diligence under rule 1.275(a), it is difficult to imagine how that party could ever show that the conduct was "substantially justified" so as to avoid imposition of fees. Stated differently, the concepts of "good cause and due diligence" versus "substantially justified" have no meaningful difference. We presume the inconsistency of standards in rule 1.275 is a function of editing rather than a purposeful choice of substantive words. This is especially true given that rule 1.380 consistently uses a "substantially justified" standard. *See* Rule 1.380(a)(5)(A); Rule 1.380(a)(5)(B); Rule 1.380(b)(3)(A).

   We suggest changing 1.275(b) to remove "good cause and due diligence" and replace it with "substantially justified" to be consistent with 1.380.

2. It is unclear why rule 1.380(a)(5)(A) (where sanctions motion is granted) and (a)(5)(B) (where sanctions motion is denied) would give a court discretion not to award sanctions where conduct is substantially justified, but the court would have no such discretion where a motion is granted in part and denied in part. While rule 1.380(a)(5)(C) (motion granted in part and denied in part rule) does reference requiring reasonable expenses to be paid "pursuant to subdivision" (A) or (B), it would be much clearer if a clause was added to subdivision (C) that mirrored subdivisons (A) and (B) so that there would be no doubt that, under subdivision (C), the court retains the discretion not to award sanctions where the motion or defense of the motion "was substantially justified."

3. The "if appropriate" language in rule 1.380(b)(2) is clearly meant to be a safety valve, but it is, once again, inconsistent. Rule 1.380(b)(2) calls for sanctions where there is misuse or abuse of discovery rules or a delay/failure to make/supplement discovery. In deciding whether to impose sanctions, the first factor (b)(2) suggests the court consider is "whether the failure was willful, grossly noncompliant, or inadvertent **and whether the offending party offered a reasonable justification for the failure**." Rule 1.380(b)(2)(A) (emphasis added). This is the "reasonable justification" standard present throughout rule 1.380. Really though, all four factors in (b)(2) are meant to be an examination of whether sanctions are appropriate.

   We suggest that, if the "shall" in 1.380(b)(2) is changed to "may," (see comment 5, below) then use of the inconsistent "if necessary" language becomes moot, the Workgroup's intention to have a safety valve remains in place, and (b)(2) is consistent with the rest of rule 1.380.

   In other words, rule 1.380(b)(2) would conclude by saying, "Upon consideration of these factors, the court ~~shall~~ may~~, if~~

~~appropriate,~~ enter an order imposing discovery sanctions under subdivision (3)."

4. For the sake of clarity and consistency, we suggest similar changes to rule 1.380(b)(1). To wit, where a party fails to obey and order, "the court ~~shall~~ may enter an order imposing discovery sanctions under subdivision (3) unless the court finds that the conduct was substantially justified." (We recognize the need to enforce a court's orders and can appreciate why "shall" impose sanctions would be a knee-jerk reaction where a party did not comply with a discovery order. But judges know better than most that the reality of life is always far more bizarre than any fiction. A party might fail to comply with an order because they are spiteful. In which case, saying the court "may" impose sanctions means the court has the discretion to impose appropriate sanctions. But a party might also fail to comply with an order because they are in the hospital, the office burned down, or a myriad of other justifiable reasons. Precisely because life is unpredictable, judges should have the discretion to decline to enter a sanctions order where conduct is substantially justified.)

Inconsistency about
when to issue sanctions and whether to include fees and costs

Rule 1.275(a)	the "court **MAY** impose a sanction if a party or attorney fails to comply with these rules or any order"
Rule 1.275(b)	The court "**MAY** enter appropriate sanctions concerning such conduct unless the noncompliant party or attorney shows [the conduct was substantially justified]"

Rule 1.275(d)	If "reasonable expenses" are ordered as a sanction, then the court "**MAY**" include "attorney's fees…any out of pocket costs or travel expenses reasonably incurred, and any other financial loss reasonably arising as a result of the sanctioned conduct."

Rule 1.380(a)(5)(A)	if a motion to compel is granted… the court **SHALL** enter an order "**requiring**" the loser to pay "reasonable expenses, *including attorney's fees, AND COSTS*" unless the movant failed to make a good faith effort to obtain the discovery without court action or opposition to the motion was substantially justified.
Rule 1.380(a)(5)(B)	if a motion to compel is denied…the court **SHALL** enter an order "**requiring**" the moving party/atty/both to pay "reasonable expenses, *including attorneys' fees [NO MENTION OF COSTS]*" unless the court finds that the motion was substantially justified.
Rule 1.380(a)(5)(C)	Where a motion to compel is granted in part and denied in part… "the court **SHALL** apportion the reasonable expenses incurred…*including attorneys' fees and costs*." ***There is no mention of conduct that is substantially justified not being sanctioned.***
Rule 1.380(b)(1)	"If a party… fails to obey an order to provide or permit discovery … the court **SHALL**…enter an order imposing discovery sanctions under subdivision (3)."

Rule 1.380(b)(2)	"Upon consideration of these factors, the court **SHALL**, if appropriate, enter an order imposing discovery sanctions under subdivision (3)."
Rule 1.380(b)(3)(A)	If the court finds that a discovery violation or failure to obey a court order arising out of a discovery motion, the court **SHALL** enter an order "**requiring**" the disobedient party, the party's attorney, or both to pay "reasonable expenses, *including attorneys' fees and costs*, unless the court finds the conduct was substantially justified. The description of "reasonable expenses" stated in subdivision (a)(5)(D) shall apply to this subdivision."

5. Rule 1.275 consistently says that the court MAY impose sanctions whereas 1.380 consistently says the court SHALL impose sanctions. We suggest that both rules consistently say "may." We propose consistent use of "may" instead of "shall" not only because it provides the courts with the discretion to avoid unreasonable outcomes, but also because it allows for internal consistency in rule 1.380 (see below) and external consistency between rules 1.275 and 1.380.

   If the Workgroup is going to keep "may" impose sanctions in rule 1.275 but "shall" impose sanctions in rule 1.380, it is advised that the Workgroup create a comment explaining its justification for the differential treatment so that judges can understand the distinction and better apply the rules.

6. The inconsistency in when to award fees and costs must be remedied. Rule 1.275 and 1.380 both define "reasonable expenses" and both definitions say that "[i]n determining the amount of reasonable expenses that may be taxed as a

sanction under this rule, the court **MAY** include [attorney's fees and costs]."

While the definition of "reasonable expenses" says a court "may include attorneys' fees and costs," rules 1.380(a)(5)(a) and (a)(5)(B) and (b)(3)(A) say that the court "SHALL" enter an order "***requiring*** the payment of reasonable expenses…***including*** attorneys' fees and costs…." The definition makes fees and costs discretionary whereas the rule utilizing the definition makes fees and costs mandatory.

As mentioned in comment #1, we propose that rules 1.380(a)(5)(A), (a)(5)(B), (a)(5)(C) and (b)(3)(A) be changed to "the court MAY enter an order requiring the payment of reasonable expenses…"

To fix the problem that the definition of "reasonable expenses" in 1.380(a)(5)(D) conflicts with the language of the rules utilizing the definition (rules 1.380(a)(5)(A), (a)(5)(B), (a)(5)(C) and (b)(3)(A))), we suggest the provisions delete reference to fees and costs and rely solely on the definition.

For example, assuming the Workgroup adopts uniform use of "may," where a motion to compel is denied (1.380(a)(5)(B)), the court "~~shall~~ may require the moving [party/lawyer/both] to pay the [movant] reasonable expenses incurred in opposing the motion~~, including attorneys' fees,~~ unless the court finds that the making of the motion was substantially justified." The court then looks to the definition of "reasonable expenses" (1.380(a)(5)(D)), which says the court may include attorneys' fees and costs.

This suggestion also remedies the problem that rule 1.380(a)(5)(A), (a)(5)(C) and (b)(3)(A) say that a court shall sanction with fees and costs while rule 1.380(a)(5)(B) says the court shall sanction with fees but does not mention costs. We assume that was also a scrivener's error and that all three

provisions were meant to include costs. If the repetition of "fees and costs" is deleted from (a)(5)(A), (a)(5)(B), (a)(5)(C) and (b)(3)(A) so that the court looks solely to the definition of "reasonable costs," then the error is fixed.

If the Workgroup is not going to adopt this suggestion, then it needs to adjust either the language of rules 1.380(a)(5)(A), (a)(5)(B), (a)(5)(C) and (b)(3)(A) or the definition of "reasonable expenses" to harmonize the provisions. In addition, if the court is going to say that costs and fees are mandatory for violations of rule 1.380 but keep them discretionary for rule 1.275, it is advised that the Workgroup create a comment explaining its justification for the differential treatment so that judges can understand better how to apply the rules.

7. On a nit-picky (but necessary!) level, when speaking about fees, "attorney" is plural possessive in some places and singular possessive in others. In this "textualist" world, that inconsistency could be attributed meaning. The dominant trend in legal writing regarding fees is to use the plural possessive. We suggest that the Workgroup adopt that change uniformly.

8. Finally, rule 1.380(b)(3)(A) states "The description of reasonable expenses' stated in subdivision (a)(5)(D) shall apply to this subdivision." This is unnecessary given that the definition in (a)(5)(D) is that "In determining the amount of reasonable expenses that may be taxed as a sanction **under this rule**, the court may…" The definition says "under this rule," not "under this subdivision." The definition in (a)(5)(D) therefore applies to any use of "reasonable expenses" in rule 1.380.

Conflict in the necessity of a hearing and findings of fact

Rule 1.275 does not provide for a hearing. Neither does it have a requirement that there be a written order with findings of fact that support the sanctions selected. We agree with the FDLA that this is a due process problem. *See, e.g., Chambers v. NASCO, Inc.,* 501 U.S. 32, 50 (1991) ("A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees....") (citation omitted); *Wanda I. Rufin, P.A. v. Borga*, 294 So. 3d 916, 918 (Fla. 4th DCA 2020) ("Because the trial court imposed the attorney's fees sanction without notice and opportunity to be heard, we reverse and remand.") (citing *Rickard v. Bornscheuer*, 937 So. 2d 311, 311 (Fla. 4th DCA 2006) (reversing where trial court imposed personal sanctions against attorney without adequate notice and opportunity to be heard)).

Without a hearing or a written order with findings of fact, the party/attorney sanctioned cannot have a meaningful appeal. Moreover, as a practical matter, if sanctions can be avoided by the noncompliant attorney/party showing "good cause and the exercise

of due diligence" or "substantial justification" (what we hope the 1.275 standard will become), it is hard to imagine how that could happen without a hearing.

In what appears to be recognition of both of these problems, rule 1.380 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).

To provide uniformity in the sanctions rules and ensure that there is not a deprivation of due process, we submit that 1.275(a) be amended to include a specific reference to the need for a hearing.

To provide uniformity and protection of the right to a meaningful appeal, we also suggest that both 1.275 and 1.380 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. We would

note that the comment from the judges of the Eighth Circuit indicates that is more efficient to require a written order with findings for all of rule 1.275. Comment of Eighth Judicial Circuit, p.A2.

Clarification is necessary if a case is stayed as a sanction

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 needs to explicitly recognize this problem and provide a remedy (stay all proceedings and adjust the case management order upon the offending party coming into compliance, for example).

Removing peremptory challenges should never be a sanction for attorney conduct.

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. While we feel that the sanction should be deleted entirely, if it is kept, then it

should explicitly say that it is limited to situations where a court determines that it is the conduct of the party, not counsel, which is the cause for this severe sanction.

The court needs to be empowered to sanction the correct offender

Rule 1.380(b)(2) says that if a "party" "misuses or abuses discovery rules for tactical advantage or delay" or "fails to supplement," then the court can impose sanctions. But the "party" is not usually going to be the one who "misuses or abuses discovery rules." Usually, the offender is going to be the lawyer. Subdivision 1.380(b)(2) does not authorize a judge to do anything if it is the lawyer, not the party, who is behaving inappropriately. We suggest that rule 1.380(b)(2) needs to include both the party and the lawyer. This is particularly appropriate given that rule 1.380(b)(2) requires the court to make factual findings and then look to subdivision (b)(3) to select the sanctions. Subdivision (b)(3) contemplates that sanctions may be imposed against "the disobedient party, the party's attorney, or both."

Proposed changes to rule 1.275:

Rule 1.275(a):

(a) Generally. After opportunity for hearing, ~~T~~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. If a sanction is imposed under this rule, the court shall make findings on the record.

Rule1.275(b):

(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 the exercise of due diligence~~ that the conduct was substantially justified. Such sanctions may include, but are not limited to, one or more of the following measures:

…

(5) staying further proceedings, in whole or in part, until the party obeys a rule or previous order and, if necessary, adjusting the case management order after full compliance;

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

[or]

(7) reducing the number of peremptory challenges available to a party where the court makes a finding that it is the conduct of the party, not counsel, which gives rise to the sanction;

Rule 1.275(d):

(d) Reasonable Expenses. In determining the amount of reasonable expenses that may be taxed as a sanction under this rule, the court may include any ~~attorney's~~ attorneys' fees incurred by a party as a result of the offending party's or attorney's sanctioned conduct, any out-of-pocket costs or travel expenses reasonably incurred, and any other financial loss reasonably arising as a result of the sanctioned conduct.

Proposed changes to rule 1.380:

Rule 1.380(a)(5)(A)

(A) If the Motion Is Granted. If the motion is granted, and after opportunity for hearing, the court ~~shall~~ may require the party or deponent whose conduct necessitated the motion, the party or attorney advising the conduct, or any appropriate combination of these persons to pay to the moving party the reasonable expenses incurred in obtaining the order~~, including attorneys' fees and costs,~~ unless the court finds that the movant failed to certify in the motion that a good-faith effort was made to obtain the discovery without court action or that the opposition to the motion was substantially justified. If sanctions are imposed, the court shall make findings of fact on the record.

Rule 1.380(a)(5)(B)

(B) If the Motion is Denied. If the motion is denied, and after opportunity for hearing, the court ~~shall~~ may require the moving party, the party's attorney, or both to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion~~,~~

~~including attorneys' fees,~~ unless the court finds that the making of the motion was substantially justified. If sanctions are imposed, the court shall make findings of fact on the record.

Rule 1.380(a)(5)(C)

(C) If the Motion Is Granted in Part and Denied in Part. If the motion is granted in part and denied in part, and after opportunity for hearing, the court ~~shall~~ may apportion the reasonable expenses incurred as a result of making or opposing the motion, including attorneys' fees and costs unless the court finds that the making of or opposition to the motion was substantially justified. To the extent the motion is granted, the court shall require the reasonable expenses incurred as a result of making the motion to be paid pursuant to subdivision (A). To the extent the motion is denied, the court shall require the reasonable expenses incurred as a result of opposing the motion to be paid pursuant to subdivision (B). If sanctions are imposed, the court shall make findings of fact on the record.

Rule 1.380(a)(5)(D):

(D) Reasonable Expenses. In determining the amount of reasonable expenses that may be taxed as a sanction under this rule, the court may include any ~~attorney's~~ attorneys' fees incurred by a party as a result of the offending party's or attorney's sanctioned conduct, any out-of-pocket costs or travel expenses reasonably incurred, and any other financial loss reasonably arising as a result of the sanctioned conduct.

Rule 1.380(b):

(1) Failure to Comply with Order. If a party, including any officer, director, or managing agent of a party or a

person designated under rule 1.310(b)(6) or 1.320(a) to testify on behalf of a party, fails to obey an order to provide or permit discovery, including an order made pursuant to subdivision (a), such a failure shall be deemed to have interfered with the ability of the court to adjudicate the issues in the case. In such an event, the court ~~shall~~ may, after opportunity for hearing, enter an order imposing discovery sanctions under subdivision (3) unless the court finds that the conduct was substantially justified. If sanctions are imposed, the court shall make findings of fact on the record.

(2) Discovery Abuse and Failure to Provide or Supplement Discovery. If a party or the party's attorney misuses or abuses discovery rules for tactical advantage or delay or fails to make or supplement discovery, including an initial discovery disclosure, as required under these rules, the court ~~shall~~ may, after opportunity for hearing, determine whether the failure interfered with, or was calculated to interfere with, the court's ability to adjudicate the issues in the case. If the court determines that the failure did interfere with, or was calculated to interfere with, the court's ability to adjudicate the issues in the case, the court shall consider and make findings on the record as to the following factors:

(A) whether the failure was willful, grossly noncompliant, or inadvertent and whether the offending party offered a reasonable justification for the failure;

(B) the duration of the failure and whether the party responsible for the failure ultimately revealed it;

(C) whether the failure prejudiced the opposing party, or would have prejudiced the opposing party, had the information not been learned prior to trial; and

(D) whether and to what extent the party responsible for the failure mitigated prejudice to the opposing party.

Upon consideration of these factors, the court ~~shall, if appropriate,~~ may enter an order imposing discovery sanctions under subdivision (3) unless the court finds that the conduct was substantially justified.

(3) Sanctions for Discovery Violations Interfering with Adjudication of Case.

(A) If the court finds that a discovery violation or a failure to obey a court order has occurred under subdivision (1) or (2), the court ~~shall~~ may enter an order requiring the disobedient party, the party's attorney, or both to pay the reasonable expenses incurred by the opposing party arising out of such discovery violation~~, including attorneys' fees and costs,~~ unless the court finds that the failure was substantially justified. ~~The description of "reasonable expenses" stated in subdivision (a)(5)(D) shall apply to this subdivision.~~ In addition, the court may enter an order imposing one or more of the following additional discovery sanctions:

… [list options i through ix]

If sanctions are imposed, the court shall make findings of fact on the record.