

IN THE SUPREME COURT OF FLORIDA

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

CASE NO. SC22-122

COMMENTS BY THE FLORIDA BAR

The Florida Bar provides these comments to the November 15, 2021, Final Report of the Judicial Management Council’s Workgroup on Improved Resolution of Civil Cases (the “Report”). These comments consist of general observations about the Report, followed by specific recommendations for the Court to consider in deciding whether, or how, to adopt the Report’s proposals.¹

General Observations

As the Report acknowledges, “traditional case management” – whereby the litigants and their counsel manage a case toward resolution – has long been the predominant model in Florida. (Report at 24). The proposed “differentiated case management”

¹ Comments on the specific rules proposals set forth in the Report and its appendices will be filed by the Bar’s Rules of General Practice and Judicial Administration Committee, Civil Procedure Rules Committee, Appellate Court Rules Committee, among others.

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model thus represents a sharp departure from past Florida litigation practice.²

The Report also acknowledges that “there are relatively few reports on empirical research that sort out which new [case management] procedures and practices do or do not work to move cases through the courts more efficiently while ensuring just resolutions” (Report at 34).³ The research data that exists comes from case management experiments in Michigan (in 1929), and in Massachusetts (in 1935); from a 1980 pilot program in California; from a 1980’s study in Kentucky (Report at 38-40); and from RAND and the Institute for the Advancement of the American Legal System (IAALS) studies in the federal courts (Report at 35-36). The Report also notes the difficulty of conducting meaningful case

² The Report describes its case management rules recommendations as “major changes,” (Report at 9) and states that “active case management [by judges] should become the norm” (Report at 27).

³ Citing to two recent articles on case management, the Report goes on to say that “[m]ost of the reforms . . . have been formulated and implemented without critical insight. While some of the reforms are based on empirical evidence, most are based on anecdotes and conventional wisdom rather than hard data that a problem even exists – let alone that the particular reform will solve the perceived problem” (Report at 34).

management “experiments” in real civil litigation circumstances (Report at 34, n.87).

Based on the experiences of many lawyers and judges, the majority of trial judges in Florida administer their dockets efficiently using the current rules (and do not tolerate practices that cause delays), and the majority of lawyers likewise move their cases without delays. Yet, the proposed wholesale case management revisions do not differentiate between courts and lawyers who keep their cases progressing and those who do not (See Report at 33 (observing that 60% of survey respondents stated that local legal culture includes active case management)).

The United States district courts are courts of limited jurisdiction, 28 U.S.C. §§ 1331, 1332, unlike Florida circuit courts which have general jurisdiction. Art. V, § 5, Fla. Const. One consequence of this difference is a significantly smaller caseload per judge in the federal district courts than in Florida circuit courts. For instance, there were 977, 544, and 385 pending cases per judge in the Northern, Middle and Southern Districts of Florida, respectively, as of December 31, 2018⁴ versus the approximately

⁴ See U.S. District Courts-Federal Court Management Statistics-

1,500 cases per circuit judge in fiscal year 2018-19 referenced in the Report.⁵ Each U.S. district judge is assisted by up to three full-time law clerks⁶ and, for discovery matters, by a full-time U.S. magistrate judge as well as law clerks.⁷ Florida circuit judges and county judges have one judicial assistant but no full-time dedicated clerks.⁸

Profiles-During the 12-Month Periods Ending December 31, 2016 Through 2021 (available at https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile1231.2021.pdf) (last visited April 11, 2022).

⁵ The Report cites to 158,464 “total circuit civil filings except ‘real property and mortgage foreclosure filings’” in fiscal year 2018-19. (Report, p. 20). In fiscal year 2018-19, Florida had 599 circuit judges. See *Florida Office of the State Courts Administrator, Florida’s Trial Courts Statistical Reference Guide FY 18-19, Overall Statistics (March 2020)*, <https://www.flcourts.org/content/download/642380/file/20200917-srg-18-19-overall-statistics.pdf> (last visited April 11, 2022).

⁶ See *Richmond School of Law 2021-2022 Judicial Clerkships Handbook*, https://law.richmond.edu/career/_pdf/Clerkship-Handbook.pdf (last visited April 11, 2022). See also 28 U.S.C.S. § 752 (LexisNexis, Lexis Advance through Public Law 117-81, approved December 27, 2021) (noting historical limitation to three law clerks and subsequent omission of limitation where more than three law clerks were serving in several courts).

⁷ See Peter G. McCabe, *A Guide to the Federal Magistrate Judges Program* (August 2014; updated October 2016), <https://www.fedbar.org/wp-content/uploads/2019/10/FBA-White-Paper-2016-pdf-2.pdf> (last visited April 11, 2022).

⁸ See generally *Florida Courts, Class Specifications*, <https://www.flcourts.org/Administration-Funding/Employment/Class-Specifications> (last visited April 11, 2022). However, some circuits have a “pool” of staff attorneys for use as needed. See, e.g.,

The Report also notes that “[t]he common themes that emerged from the survey of Florida’s circuit judges were that case management is a valuable means of ensuring timely and just resolution of cases, that it should be used to a greater extent, and that judges need to be provided with the structure (clear rules, training for themselves and court staff, and technology) to implement case management” (Report at 33). The Report elsewhere states that the Workgroup’s “rule proposals may entail the need for additional personnel (such as case managers), technology, and other resources for the trial courts,” (Report at 9) and that “[s]upport personnel, such as judicial assistants, case managers, technology staff, and clerk staff will also need training in case management” (Report at 18, 30).

Experienced lawyers know that oral argument of motions gives trial judges the opportunity to work through priority issues in a case with the assistance of counsel, a centuries-old common-law practice proven to be greatly beneficial to judges in reaching a just and correct decision and in moving cases forward in an orderly and

<https://jobs.myflorida.com/State%20Courts%20System/job/MIAMI-TRIAL-COURT-STAFF-ATTORNEY-22009345-FL-33128/856934100/> (last visited April 12, 2022).

flexible way. Written papers can assist with this process, but they are no substitute for oral argument, particularly with complex legal and factual issues. A good balance between written papers and oral argument usually produces the best and most effective method of managing cases.

Changes that would eliminate, or greatly curtail, oral advocacy will reduce the opportunity for younger practitioners to develop their skills through participation in hearings (Report at 103). While a reduction in the number of hearings may free-up judicial resources and provide a short-term benefit, the long-term effects of the underdevelopment of lawyers will decrease the quality of legal services provided to the public in the future. Furthermore, the organizational hierarchy of most firms will lead to young lawyers bearing a large part of the burden imposed by the strict proposed deadlines, reducing their quality of life and increasing the likelihood of adverse outcomes in their legal careers.

The Florida Bar recognizes the importance of the mental health and well-being of lawyers and judges. This benefits not only the profession, but also serves to protect the public to ensure that the participants in the judicial process are at their most effective.

Trial judges are uniquely suited to determine when a continuance may be appropriate to address concerns related to mental health and wellness. The proposed changes to Fla. R. Civ. P. 1.460, which significantly restrict judicial discretion related to continuances, may affect a trial judge's ability to grant a continuance when one may be appropriate to safeguard a lawyer's or judge's mental health and wellness, and in turn protect clients and the public. Further, although Fla. R. Gen. Prac. & Jud. Admin. 2.570 relating to parental leave remains intact, The Florida Bar notes that this is yet another circumstance where it is important to retain the trial judge's ability to exercise discretion.

Finally, although strict deadlines for responses to motions and for court resolution of motions are potentially effective case-management tools, giving parties in litigation and trial judges the discretion to temporarily waive or modify these deadlines allows the parties to allocate their resources to matters they have identified as priorities in the case. An overly rigid framework could actually work against effective and flexible case management.

Recommendations

In light of the foregoing considerations, The Florida Bar makes the following recommendations to help ensure that any proposals from the Report which are adopted do not unduly disrupt or delay civil litigation in Florida or negatively affect current civil case clearance rates:

1. Coordinate the adoption and implementation of any proposals from the Report to *follow* the deployment of specific adequate resources (additional personnel, infrastructure, systems, training, etc.) needed by the trial courts and Clerks of Court to successfully implement the proposals.
2. Consider whether proposed rules relating to professional conduct are more appropriately maintained in the Rules Regulating The Florida Bar (See Report at 58 (among other considerations, suggesting an amendment to the oath of attorney)).
3. Consider whether the proposed changes to the case management process (including strict deadlines for responses to motions and court resolution of motions) would create additional complexity and rigidity in the Rules

of Civil Procedure, would unfairly advantage larger law firms and wealthier litigants and may serve to deny access to justice and disadvantage litigants with fewer resources. Ultimately, the impact of the proposed changes may be inconsistent with the goal of the rules as provided in Fla. R. Civ. P. 1.010 to secure the “just, speedy, and inexpensive determination of every action” (Report at 24).

4. Recognize that removing judicial discretion detracts from judicial authority and that trial judges are generally best suited to decide matters such as sanctions and continuances, based upon their knowledge of the parties and the unique facts of each case (See Report at 98 (finding that sanctions for last-minute discovery violations should be based in discretion rather than rule-based remedy)). Limiting the trial court’s discretion may also negatively impact the mental health of lawyers and judges.
5. With regard to motions, adopt a cautious approach to comprehensive changes that would impose strict deadlines for motion responses or court rulings, or that would require,

or result in, the elimination of oral argument for substantive motions (See Report at 142).

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