IN THE SUPREME COURT OF FLORIDA

CASE NO. SC22-122

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

COMES NOW the undersigned representatives of the Broward County Bar Association ("BCBA"), the undersigned representative of the American Board of Trial Advocates of Fort Lauderdale Fort Lauderdale ("ABOTAFTL"), the undersigned representative of the Broward County Trial Lawyers Association ("BCTLA") and the undersigned representative of the Broward County Women Lawyers Association ("BCWLA") and various practitioners throughout Broward County from a wide variety of voluntary bar associations covering multiple areas of civil practices in order to provide a range of perspectives on the practical application of the proposed rule changes. The following commentary includes those portions of the proposed changes that most concern the practitioners as a whole, as well as proposed alternatives or amendments.

The BCBA gives utmost deference to the Florida Supreme Court and fully supports and understands its concerns with backlog within the courts and the need to create rules to assist the Courts in working through this backlog. The suggestions made in this commentary are not based on a reluctance to embrace change but on genuine concern about the negative impact some of the proposed changes may have on our legal system. Our fellow practitioners are facing a significant impact to their practices and to the parties they represent when these proposed rules take effect.

The goal is to work towards a compromise that allows for the exercise of greater Judicial discretion while maintaining consumers' access to legal services in our state. The 17th Judicial Circuit has done an exemplary job to work through its backlog over the course of the last two years. It has done so without the application of significant rule changes and without causing undue burdens on the existing administrative staff.

Some of the concerns that our committee has highlighted through discussion on the application of the proposed rule changes, generally, are the increased burden on the judiciary and clerks of our state court system, potential for denied access to courts for consumers, "chilling effects" on litigation throughout our state, due process denials, and an overriding concern for mental health decline within the legal profession.

Alternatively, the committee asks the Supreme Court to consider drawing existing empirical data from those circuits that have been able to work through their backlog without major rule changes. In addition, the possibility of a "pilot program" to apply these proposed changes to a sampling of larger, mid-size and smaller circuits to determine the feasibility of the rules, the financial and administrative impact and to ensure the proposed changes will achieve their objective of reducing backlog without unintended adverse consequences. Lastly, this committee would propose incorporating an opportunity for judicial discretion in the new proposed rules by allowing a showing of "good cause," when a

proposed rule cannot be met. There are often circumstances that are well beyond the control of any parties to an action. The current proposed rules divest judges of discretion to consider "good cause." The simple addition of "good cause" language to many of the proposed rule changes can resolve several of the concerns detailed below.

THE PROPOSED RULES PLACE AN UNDUE BURDEN ON THE JUDICIARY AND THE EXISTING STATE COURT SYSTEM

Several of the proposed new rules have the potential to cause a significant administrative burden on the Courts. The application and enforcement of these rules will cause a strain on the existing judicial staff as well as the staff of the clerk of the courts. Our state court system lacks the human and technological resources to comply with many of these time-sensitive rules. Some specific examples of the undue administrative and judicial burden are as follows:

Rule 1.271 which creates a "pretrial coordination court" raises practical questions on whether existing judges will be used to create

this new court and the ramifications that will have on increasing caseloads and the administrative burden for the remaining judges, their staff, and the clerk's office.

Rule 1.460 removes judicial discretion and authority on the granting of continuances. Adding "good cause" language to this rule would allow the courts to consider exigent circumstances.

Rule 2.250 requires chief judges to submit quarterly reports identifying judges who are not complying with the new time standards imposed by the proposed amendments. This places extreme pressure on the judges who have no judicial discretion to provide valid bases as to reasons why a particular case may be delayed

Rule 1.160 regarding Motion practice places a burden on the courts to be monitoring the dockets on all of their cases to determine if a motion requires a hearing or can be ruled upon absent a hearing. However, per the website of Clerk of the Court in Broward, it takes an average of 14-21 days after a motion is electronically filed,

before the Judge would ever see it. This rule further burdens the Court by requiring the court to review a motion first to determine if a hearing is needed and then review it once again, to make a determination on the merits.

Further, under proposed Rule 1.161, there are time schedules provided for setting hearings on Motions, however, the schedules "may be amended by administrative order in local jurisdictions…" On one hand, this rule does provide the Court discretion over its schedule which is a positive. However, under the new proposed rules if a Court is delayed on scheduling a Motion for hearing or on issuing their Order on a Motion, said delays would not be grounds for granting a continuance. This would create serious due process concerns as well as denial of access to justice as litigants may have the inability to proceed with investigating and preparing their cases for trial before the trial date arrives. The parties will be faced with very real possibilities that it can take 3 to 4 months for a motion to be ruled upon. Litigants and their attorneys will have to make impossible choices on dismissing their case without prejudice or

proceeding to a trial potentially underprepared due to undecided motions. The former phenomenon will produce skewed results for the State because the number of cases on the docket will appear reduced, however, this would simply be a redistribution of the existing caseloads.

Furthermore, in the federal courts, and in some state courts that have adopted the federal court rules, there is increased personnel, such as staff attorneys, clerks and additional support personnel that we lack in Florida state courts. These resources would be necessary to apply the proposed without causing undue administrative stress.

SEVERAL OF THE PROPOSED RULES RAISE CONCERNS OF DENIED ACCESS TO JUSTICE FOR FLORIDA CONSUMERS AND "CHILLING EFFECT" ON LITIGATION

Generally, compliance with the new time-driven case management order would cause increased costs for practitioners due to the need for additional staffing and the likely need to purchase new software programs to allow for tracking of new deadlines. This will have a disproportionate effect on solo and small firms that

operate on a tighter budget. It will also reduce the number of clients that attorneys can take on in their practices. This will have a direct effect on consumers of legal services and raises concerns of denied access to the Courts.

Further, the proposed new deadline-driven, time-sensitive rules can be used as a strategic tool against small and solo firm practices. Larger firms with larger budgets have the resources to hire additional staff and create programming within their offices to meet the deadlines and will have the advantage over practitioners who simply don't have the means to follow the exhaustive rules. This will have a chilling effect on litigation as individuals will not be able to find attorneys who can afford to take on lower value cases when they are still being held to the same case management order standards and pretrial practices as complex litigation cases.

Rule 1.420 provides for dismissal of actions where is a lack of prosecution for the reduced time period of only 6 months and removes consideration of "excusable neglect" which makes time-

keeping and deadlines the sole consideration. The "chilling effect" caused by the risk of having a case dismissed if a document fails to be filed, without any opportunity for the party to show good cause, places incredible pressures on practitioners.

In proposed Rule 1.200 (8), after a case management conference, proposed orders reflecting the ruling is to be filed within 7 days. However, if the parties are relying on a court reporter to transcribe the conference in order to draft the proposed order, regular Court Reporting turn-around time is 10-14 days. Requiring parties to have this Order within 7 days would require parties to have to pay for expedited transcription which comes at a much higher cost. This causes concerns of access to courts for parties who do not have the financial means to keep up with this standard. The proposal here would be to provide at least 14 days so the parties can order transcripts through standard service.

Proposed Rule 1.280 requires initial disclosures within 45 days. A problem may arise if an insured defendant fails to provide

its insurer with prompt notice of service. After an insurer receives notice of service, it must perform an initial investigation. After the investigation is performed, the insurer must assign the case to defense counsel. After the case is assigned, defense counsel must review the file counsel receives from the insurer and may need to perform supplemental investigation to prepare the initial disclosures required by Rule 1.280]. The 45-day time period does not provide sufficient time for parties to properly disclose information. A proposal would be to extend this deadline to 60-90 days.

MENTAL HEALTH DECLINE WITHIN THE LEGAL PROFESSION MUST BE CONSIDERED

Mental health decline is a critical issue that the Florida Bar and courts are facing throughout our state. With the increase in suicide rates in our profession and more stress involved in the practice, when forming new rules, the placement of undue pressure on practitioners, the judiciary, and support staff should be considered.

Women lawyers of childbearing age are particularly concerned that the lack of flexibility in the proposed rules because of limited

judicial discretion will impose a unique burden on them because of their responsibilities outside the practice of law.

Mental Health is a priority for the Florida Bar in the coming years. This has been on the forefront of the practice and the fact that legal professionals operate in a high stress field. Having such a huge overhaul on the rules will have tremendous financial implications on practitioners to be able to comply. In addition, due to lack of resources of both the Courts and some practitioners, uniform application of the proposed rules may have a disproportionately harsh impact on certain types of cases.

For example, preparing a multi-page joint case management report at the commencement of suit may make sense for complex and larger cases but may impose an undue burden for smaller cases. A proposed amendment to this rule would be to apply the concept of "proportionality in case management." Case Management reports should be reduced or less detailed in smaller cases.

Case management reports will not only place pressure on the attorneys who must prepare them but on the judges who must review and enforce them. This will be a particular problem for judges in high volume courts with limited resources.

A phased implementation of the proposed rules may be desirable. It would allow the court to evaluate the positive and negative impact of the rules and allow for fine tuning before broader application. Lessons learned from early implementation could improve later implementation.

The imposition of sanctions (with limited juridical discretion) places additional pressure on practitioners. The new rules provide more ways to strike pleadings, strike defenses, and even dismiss a case. The sanctions now even provide for striking a party's peremptory challenges.

With any major change there will be a break-in period for practitioners to get accustomed to the rules. There will be a potential, in the beginning, for good faith non-compliance. However,

many of the new codified sanctions provide little discretion to the Court. An alternative would be to provide some leniency and tiered approaches to the application of sanctions while practitioners transition to the proposed rules.

Further, the rules on sanctions specifically state that the courts are able to issue sanctions without giving factual findings. As practitioners, how will the behavior be corrected in the future if the factual findings are not given? Also, how will a practitioner be able to respond to or appeal from sanctions without factual findings. The Court should consider amending the rules to provide for factual findings when requested by the party being sanctioned.

PROPOSED ALTERNATIVE: PILOT PROGRAM

In addition to the specific changes and alternatives discussed above, the concept of a "pilot program" would be an ideal way to determine the effects of rolling out such extensive changes to the rules of civil procedure. Creating a pilot program to be applied in a cross section of circuits would enable the court to evaluate the impact of the proposed rules on the judicial system and all who work in or

are affected by it and the human and financial resources required for effective implementation.

CONCLUSION

We thank you for your consideration of our concerns over the implications of rolling out extensive changes to the rules of civil procedure without providing an opportunity for practitioners and the Courts to find methods to adapt to these changes, all while facing the pressure of sanctions for non-compliance. We ask the court to consider the addition of "good cause" clauses to the rules, a tiered approach to the application of sanctions, a proportional consideration of case management orders that takes into account the specifics of the case and area of civil law that it applies to, and overall consideration of the mental health concerns for our practitioners and judiciary state-wide.

We urge the Court to strongly consider a pilot program so that the new rules can be tested and appropriate financial budgets can be made to roll-out the new rules in our existing court system.

Thank you for your consideration,

Respectfully submitted,

BROWARD COUNTY BAR ASSOCIATION

THE AMERICAN BOARD OF TRIAL ADVOCATES OF FORT LAUDERDALE FORT LAUDERDALE

BROWARD COUNTY TRIAL LAWYERS ASSOCIATION

BROWARD COUNTY WOMEN LAWYERS ASSOCIATION

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy hereof has been filed and electronically served via Florida ePortal on this 31st day of May 2022, with a copy provided by U.S. mail to Chief Judge Robert Morris, Second District Court of Appeal, P.O. Box 327, Lakeland, FL 33802, and by email to Tina White, 500 South Duval Street, Tallahassee, FL 32399 (whitet@flcourts.org).

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the foregoing was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.045.

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