IN THE SUPREME COURT OF FLORIDA

IN RE: REPORT AND RECOMMENDATIONS OF THE WORKGROUP ON IMPROVED RESOLUTION OF CIVIL CASES	**Case No. SC22-122**

The Attorney General supports the proposed changes to the Florida Rules of Civil Procedure. The proposed rules largely align Florida pretrial practice with federal practice, and the Attorney General considers this a positive development. The experience of attorneys in the Office of the Attorney General (OAG) in state court is consistent with the descriptions contained in the Final Report of the Workgroup on Improved Resolution of Civil Cases. Accordingly, the Attorney General supports many of the revisions contemplated by the proposed rule and further supports the larger goal of improving case management in civil cases. Below, the Attorney General offers both general and specific comments on the proposed changes.

I. THE ATTORNEY GENERAL SUPPORTS THE PROPOSED CHANGES.

The OAG represents the state, state officers, and state agencies in civil litigation in state and federal courts throughout the state. The litigation in which the OAG appears includes tort, employment, civil

rights, tax, and constitutional claims. The cases vary widely in their complexity. A substantial number of cases involve pro se litigants.

The situation described by the Report generally accords with the experience of OAG attorneys in state court. Judges adhere to the traditional approach to judicial management, responding to matters when the parties call it to their attention.[1] In state court litigation, particularly in larger counties, it is difficult to obtain hearings and cases remain active for too long. OAG attorneys experience delays in obtaining orders entered after hearings. OAG attorneys also face discovery abuses and unnecessary litigation over discovery. Consistent with the trends described in the Report, only a small percentage of OAG cases end with a jury trial. Most end with settlement or a dispositive motion. By contrast, OAG's federal cases are resolved more quickly and with less litigation over discovery. This

[1] This Court's COVID case management directives, which require scheduling orders to be entered in civil cases earlier than usual and impose deadlines for case resolution, have somewhat, though perhaps temporarily, altered the status quo. Although not discussed in the Report, the increased use of remote hearings and conferences because of the pandemic has saved both time and resources. The Attorney General supports the continued use of remote proceedings, particularly for routine matters; judges should be encouraged to use them in civil cases where appropriate.

efficiency results in large part from the use of scheduling orders and the consistent enforcement of those orders.

The proposed revisions would ameliorate delays and streamline litigation in state court. Active judicial case management from the outset of the case is imperative. Likewise, setting the trial schedule early, with a definitive discovery cut-off, is essential. Adoption of the initial disclosure requirement and a substantive "meet and confer" deadline for the parties early in the litigation will tighten the scope and extent of discovery.

OAG attorneys frequently face parties who refuse to cooperate in selecting hearing dates, particularly pro se parties and inmate litigants. Often, these disagreements must be resolved at a hearing. An established procedure for selecting hearing dates is a much-welcomed addition to the rules and will save attorney and court resources when scheduling disagreements arise.

And in light of the experience of OAG attorneys litigating opioid and tobacco cases, the establishment of a Pretrial Coordination Court is a significant improvement, as consolidating similar cases in complex matters would demonstrably contribute to the efficient resolution of those cases.

For these tools to be meaningful, however, judges must enforce them. Pretrial requirements and deadlines are often flouted in state court, with little to no consequences, and cases are too easily continued. The Attorney General is encouraged to see that the proposed amendments require judges to uphold pretrial deadlines and schedules. The Attorney General also supports differentiated case management. The three-track approach outlined in the Report will help keep the expenditure of judicial resources proportional to the complexity of each case.

II. RULE-SPECIFIC COMMENTS.

A. Proposed Rule 1.200

Many of the additions to civil pretrial practice have the potential to streamline litigation and the Attorney General welcomes these developments. Although many of the proposed changes to Proposed Rule 1.200 would streamline litigation, some requirements of the proposed rule may be difficult to meet in practice.

For example, under Proposed Rule 1.200(e)(3)(A), parties must meet and confer within 30 days after service of the complaint on the first defendant served. OAG attorneys frequently defend tort cases in which the conditions precedent to suit contained in § 768.28, Florida Statutes, have not been satisfied and a motion for stay or abeyance

is filed. In such cases, the Proposed Rule would require the parties—even when the agency defendant has not been served or even noticed—to meet and confer and discuss exhibits, witnesses, ESI issues, and even jury instructions. Even in non-tort cases, 30 days after the first defendant is served is usually an insufficient amount of time to obtain, review, and analyze the case materials needed to productively discuss a scheduling order.

Proposed Rule 1.200(e)(3)(A), moreover, creates a mismatch for state defendants. Defendants other than the state must respond to a complaint within 20 days. Meanwhile, under existing Rule 1.140, the state has 30 days to respond to a tort complaint, and 40 days to respond to other complaints. So in cases involving non-state defendants, the parties have 10 days following the defendant's response to the complaint within which to prepare for the meet and confer—with defendant's response guiding that preparation. When the state is a defendant, however, the meet-and-confer must occur either simultaneously with the state's response to the complaint or 10 days *before* that response is due. Although Proposed Rule 1.200(e)(3)(A) does contemplate extensions for the meet-and-confer, the proposed 30-day deadline would mean that in most cases

involving a state defendant, extension requests would likely become routine, creating needless motion practice.

The Attorney General therefore respectfully suggests that the Court revise the proposed rule. The Court could amend the rule to provide more time for state defendants by setting the meet-and-confer deadline in such cases for 10 days after the response to the complaint is due. This proposal would give the state more time in real terms than other defendants, but it would align the timeline with that in other cases—providing all defendants 10 days after the response to the complaint to prepare for the meet and confer. If the Court concludes that the 30-day deadline is too short for all parties, it could amend the rule to provide that the meet-and-confer must occur 60 days after the first defendant is served.

B. Proposed Rule 1.280

In 2015, Federal Rule of Civil Procedure 26(b)(1) was amended to expressly address proportionality in discovery; it now identifies a number of factors for courts to consider: "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." The JMC declined to adopt amendments to Rule 1.280 which would harmonize it with this amendment.

The Attorney General respectfully submits that the Court should reconsider. Rule 1.280 should be amended to mirror the analogous provision in Federal Rule of Civil Procedure 26(b)(1), including its provisions focusing on relevance and proportionality. The JMC noted that Florida's rules do not expressly address proportionality and that there was "occasional" reference to proportionality in discovery without using the term. JMC at 83-84. As the JMC noted, a number of other states have adopted similar provisions. JMC at 83-84, n.388.

Florida trial courts exercise broad discretion in overseeing civil discovery. *Rojas v. Ryder Truck Rental, Inc.*, 641 So. 2d 855, 857 (Fla.

1994). Appellate courts typically intervene in discovery proceedings in non-final cases only where a trial court departs from the essential requirements of the law, causing material injury to a party that cannot be remedied on post-judgment appeal. *See Farach v. Rivero*, 305 So. 3d 54, 56-57 (Fla. 3d DCA 2019). This Court has emphasized that "[o]verbreadth is not a proper basis for certiorari review of discovery orders." *Bd. of Trustees of Internal Improvement Trust Fund v. Am. Educ. Enters.*, 99 So. 3d 450, 456 (Fla. 2012). It has also held that "irrelevant discovery alone is not a basis for granting certiorari" unless there is a showing of irreparable harm to the producing party. *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995).

Because published Florida court opinions on discovery issues are infrequent, fashioning clear discovery rules is essential. Overly broad and irrelevant discovery can impose substantial costs on litigants that cannot be recovered in most cases. Hewing closely to the federal rules provides a source of caselaw that can help guide Florida trial courts and parties, reducing discovery disputes and forum shopping.

Expressly putting proportionality considerations in Rule 1.280 would elevate the focus for trial courts, ensuring that the requested discovery—beyond the initial disclosures and discovery mandated by

the new rules—is proportional to the needs of the case. The Rule 26 factors guide the exercise of judicial discretion. While additional objections to discovery based on the proportionality factors might occur, the meet-and-confer obligations and more active judicial intervention can ensure that discovery costs do not outpace the value and needs of the case.

C. Proposed Rule 1.280(a)(3)

The Attorney General respectfully submits that the Court should revise Proposed Rule 1.280(a)(3), which would require parties to serve initial discovery disclosures within 45 days after service of the complaint. This proposed rule creates a similar issue to that created by Proposed Rule 1.200(e)(3)(A), discussed above. Non-state defendants must respond to a complaint within 20 days, so the parties' initial discovery disclosures are due 25 days after the defendant's response. Under existing Rule 1.140, state defendants have either 40 or 30 days to respond to a complaint (depending on the type of case), and so the parties' initial discovery disclosures would be due either 15 days or 5 days after the state defendant's response.

The Attorney General therefore respectfully suggests that the Court revise this proposed rule as well. As with Proposed Rule

1.200(e)(3)(A), the Court should include state-specific deadlines for the initial discovery disclosures to align the case timeline with that in cases not involving a state defendant. To accomplish this, the Court could provide that in cases involving a state defendant, initial discovery disclosures are due 25 days after the defendant's response. Alternatively, the Court could revise the rule for all parties by tying the initial discovery disclosure deadline to the time for responding to a complaint.

CONCLUSION

The experience of OAG attorneys is that state court litigation would benefit immensely from active judicial case management. The proposed revisions are a significant step in that direction and should for the most part be implemented as proposed.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing brief has been furnished via the E-Filing Portal on this 1st day of June, 2022, on all parties required to be served.

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in Bookman Old Style, 14-point font, in compliance with Rule 9.045(b) of the Florida Rules of Appellate Procedure.

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