IN THE SUPREME COURT OF FLORIDA

IN RE: REPORT AND RECOMMENDATIONS OF THE WORKGROUP ON IMPROVED RESOLUTION OF CIVIL CASES **SC22–122**

COMMENT OF THE CIVIL PROCEDURE RULES COMMITTEE

Jason Paul Stearns, Chair of the Civil Procedure Rules Committee (the "CivPRC"), and Joshua E. Doyle, Executive Director of The Florida Bar, file this Comment pursuant to Florida Rule of General Practice and Judicial Administration 2.140, and this Court's request for comment dated February 10, 2022.

The CivPRC appreciates the opportunity to review and comment on the Final Report (Report) of the Workgroup on Improved Resolution of Civil Cases (Workgroup). The purpose of this Comment is to identify areas of concern based on the CivPRC's consideration of the proposal as a whole.

The CivPRC's typical charge is to review on a continuing basis, consider amendments to, and present to the Florida Supreme Court proposed revisions to the Florida Rules of Civil Procedure. The CivPRC is comprised of a broad selection of attorneys and judges from all geographic areas of Florida and from all substantive areas of practice. Coming from every sector of the Bar, the members of the CivPRC have tried to focus this Comment on the system of civil justice in Florida, and not each member's personal practice. This Comment is the result of an iterative process that began when the CivPRC received Clerk of the Florida Supreme Court Tomasino's August 9, 2021, letter directing the CivPRC to provide comments to the Workgroup's Draft Report. Since August 2021, the members of the CivPRC have devoted hundreds of hours to this effort. This Comment is the final product and it reflects the views of the CivPRC. The Florida Bar Board of Governors executive committee considered this comment and the CivPRC's recommendations and proposals and unanimously recommends acceptance of the proposals.

There are 3 sections to this Comment. **Section I** contains reactions to the Workgroup's Report and wholesale amendment of the Civil Rules. **Section II** contains general comments to the Workgroup's proposed rules. **Section III** contains the CivPRC's best attempt to address the specific rules drafted in the Report.

I. Reactions to the Workgroup's Report and Wholesale Amendment of the Civil Rules.

As an initial matter, the CivPRC fully supports reasonable and balanced efforts to improve the administration of justice in our civil courts. *See* Report, at p. 5 (discussing Goals 1.2 and 1.3 of the Workgroup). The CivPRC also supports rooting out delay, including delays caused by discovery violations, by asserting unsupported claims or defenses, and by failure to prosecute cases.

But the CivPRC believes that eliminating delay in the civil process does not necessarily require wholesale revision of the civil rules or immediate implementation of the entire package of restructured civil rules. The CivPRC believes that such significant and substantive changes to the civil rules would best be accomplished through a prioritized and phased-in approach. Importantly, the CivPRC recognizes that a significant—if not principal—focus of the Report is to change the civil rules to enhance judicial control over the case management process from start to finish. The CivPRC expresses its concern with transferring the primary responsibility to control litigation to that of the court, especially in light of the significant time and expense that the court system will have to invest. The CivPRC has thus recommended a more balanced approach of control in its response to several of the proposed rule amendments.

The CivPRC also recommends that a more collaborative approach be taken to drafting new rules and amended ones in the future. The Workgroup's mission and the process by which it studied this project is markedly different from the way the CivPRC and other rules committees function. The CivPRC and other affected rules committees, are uniquely situated to address drafting and avoid unintentional consequences of chosen language that, to

others, may appear benign. The CivPRC, therefore, respectfully suggests that this Court refer the Workgroup's final report and the public comments to the CivPRC as a suggestion to amend the rules under Rule 2.140(f). Alternatively, if this Court adopts any of the Workgroup's proposals, the CivPRC suggests that the newly-adopted and amended rules be referred to the affected rules committees, including this CivPRC, for final review and drafting. A prioritized and phased-in approach, such as that addressed above, will further facilitate this process.

Additionally, the CivPRC recognizes that there are key differences between litigation in the state and federal systems. Many of the procedures and devices utilized in the federal court system, with its heavily staffed and supported judicial officers, have helped reduce delays in those courts and should be considered for adoption into the Florida system of civil justice when appropriate. As discussed below, however, some federal practices do not mesh easily with the state system. But, if a decision is made to adopt any specific practice, the CivPRC suggests that the Court allow only the fewest and smallest deviations from the wording of the federal rule, and only to address a specific substantive issue particular to Florida as the basis for deviating. This was the course followed by the Court in adopting the bulk of Federal Rule of Civil Procedure 56 when rewriting rule 1.510. The Business Law Section of The Florida Bar and the Chief Judges of the Circuit and County Courts of Florida have commented on many of the key differences between our state and federal courts, and the CivPRC will not comment other than to say that our state court judicial officers are bereft of adequate resources to handle the much weightier caseloads of their federal counterparts.

Accordingly, the CivPRC agrees with many of the comments already filed that have expressed concerns about the lack of state judicial resources to implement the Workgroup's proposed rule changes. *See* Comment of the Chief Judges of the Circuit and County Courts of Florida, pp. 3-4; Comment of the Business Law Section of the Florida Bar, pp. 4-5. Florida's judicial branch has

been chronically underfunded for many years. While some judges may well have expressed a need to receive "empowerment" by having the rules rewritten, the CivPRC believes the empowerment that could be delivered by funding civil case managers and law clerks for the state's trial judges would immediately improve the resolution of civil cases. The CivPRC cannot comment on the political possibilities of this solution, but it believes that a "federal court" solution may not be automatically viable in our state courts.

Finally, a significant—if not principal—focus of the Report is to change rules to enhance judicial control over the case management process from start to finish. The CivPRC expresses its concern with transferring the primary right to control litigation to the court. The CivPRC adds that each individual case at a micro level is much more the "property" and concern of the clients/parties and their legal representatives than it is of the judge to whom that case has been assigned. That view, in part, has formed the CivPRC's response in this Comment.

II. General Comments to the Workgroup's Proposed Rules

Before turning to the particulars of the proposed rule changes, the CivPRC identified the following ten overarching matters of critical interest concerns with the proposals to amend the rules identified in the Workgroup's Report.

First, the CivPRC has concerns with the "Motions" and the "Scheduling of Hearing on Motions" rules. The CivPRC recognizes and agrees that one of the deficiencies in the current rules is the absence of a comprehensive system for making motions and scheduling them for hearing when appropriate. In creating these new rules, however, the CivPRC is concerned that the procedures called for may result in clogging rather than freeing civil court dockets, and in certain respects denying basic procedural rights to some litigants.

Part of the goal for these proposed rules was to create a system to allow judges to rule "on the papers." That system works well in federal courts, with their extensive support and staff. But an

"on the papers" system cannot be easily or automatically impressed on our state courts. By encouraging state court judges and their limited (if any) staff to rule "on the papers," the CivPRC believes that the expeditious resolution of many motions might be delayed, or worse, rushed to meet the 60-day deadline created by the proposed rules. As has been discussed elsewhere in this Comment, the present resources available to our state courts make the transition to a more significantly "on the papers" system very troublesome. The CivPRC has no insight into whether additional funding could be obtained with an initiative such as this.

Further, as proposed, Rule 1.060(j) seems to give the court the power to rule on motions without hearing from the opponent. The sequence in the consideration of a motion starts with the "meet and confer" between the parties before the motion is filed [with which the CivPRC concurs]. If the parties cannot agree on the need for a hearing, the movant or non-movant may request a hearing, and the court is authorized either to direct memoranda to be filed, or rule without any briefing or additional submissions. Except of course, only the movant has already explained its side of the issue. As drafted, a judge could deny or grant a motion before the opponent has been heard.

This sequence both unnecessarily stretches out the resolution time of a motion and risks a court ruling before the opponent can be heard, if the court rejects any briefing. The federal courts compress that process by requiring a supporting memorandum to be included in or with the motion when filed [after a meet and confer]. The CivPRC believes that a Florida state court rule should as well. And no ruling on papers should be authorized without explicitly allowing a written response, if the opponent wishes to do so. A response time could easily be scheduled within the time the court is allowed to consider the merits of the motion once it takes the matter under advisement. These two important rules would benefit from greater coordination. Particularized suggestions are contained in the next section of this Comment.

Second, the Workgroup's proposal seems to focus on the empowerment of judges and, in doing so, creates an absence of

discretion. One of the motivations for some of the proposed rules may be to "empower" judges to manage their dockets more efficiently. But the CivPRC believes that true judicial empowerment comes through giving judges power—with discretion—rather than taking that power away—with non-discretionary mandates.

There are examples throughout the Workgroup's proposals, but perhaps it is no more starkly presented by the juxtaposition of the proposed Comment to Rule 1.440 (Setting Action for Trial) and the text of the very next amended rule, Rule 1.460 (Continuances). After spelling out a more robust rule addressing setting actions for trial [in conjunction with a similarly beefed-up Rule 1.200], the Comment strikes a softer and more conciliatory [and it is suggested professional] tone when it recognizes the realities that lawyers and parties sometime face. It notes in part: "By this amended rule, the failure of the parties to move diligently to have pleadings filed or amended will no longer thwart the ability of the court to move a case to trial. Instead, bona fide difficulties in getting pleadings filed or amended will be addressed by the court on motions to continue a trial date, which are addressed to the sound discretion of the court."

The CivPRC agrees with this Comment and it is the proper basis for judicial action. A judge is empowered to prevent or stop avoidable delays and is given the "ability" to do so; but just as important, a judge should be empowered to "judge", consider, evaluate, and determine, when it is appropriate to grant or deny a continuance.

Unfortunately, it appears that the empowerment combination of giving judges the ability to act, as well as the discretion not to, is virtually absent from the very next rule after the Comment, dealing with continuances. After formalizing the procedures for requesting a continuance (see discussion of specifics below), the proposed Rule 1.460(b)(7) and (8) state that several of the most common causes for requested continuances (both the valid and invalid ones) can never be granted by the trial judge, no matter what the explanation. The reason for many requested continuances will become largely irrelevant because a judge is precluded—stripped of all discretion—

from granting a continuance of a trial set 12 or 18 months ago, regardless of what may have transpired in the intervening months or years. This rule change may well stop some continuance motions, and that indeed provides certainty, but not always justice. Under today's system and rules, no continuance happens without a judicial officer granting that continuance. The Workgroup, the JMC, and/or the Court may disagree with some number of those continuances, but it is suggested that the proposed solution of largely prohibiting continuances, with no judicial discretion, neither empowers the judiciary nor enhances the administration of justice.

Third, the CivPRC has concerns related to the appropriate use of sanctions in our civil courts. To be sure, the CivPRC does not speak unanimously on every aspect of the issue of sanctions. One thing that all members of the CivPRC do subscribe to, however, is that the practice of law in all courts be civil, be appropriately managed and regulated, and demonstrate the highest levels of professionalism in a decidedly adversarial system.

The CivPRC believes it is appropriate to create a specific sanctions rule, new Rule 1.275, and apply it generally to civil practice (except for those areas traditionally managed under Rule 1.380). This wisdom does not arise from any presumption that all attorneys are driven by improper motives all of the time, or even that it is true of some attorneys. The CivPRC believes that the majority of attorneys practicing in civil courts practice professionally virtually all of the time and need little more than the presence of a sanction rule.

Because of that perception and belief, the CivPRC generally disagrees with and finds counterproductive having any presumptive sanctions for any particular routine type of conduct. If a generally good lawyer crosses a line, that lawyer may well deserve to be sanctioned in that setting, all as decided by the trial judge in the judge's discretion. The CivPRC does not believe that our profession is enhanced by taking the judge out of the "whether to sanction" decision.

There is a repetitive use of a sanction threat in many of the Workgroup's proposed rules changes. A significant majority of the CivPRC's members, but not all, believes that the frequent reference to sanctions presented throughout the report sends the wrong message. It may well encourage litigants to request sanctions frequently as a strategy, it denigrates the majority of attorneys who seldom if ever cross a sanctions line, and it doesn't meaningfully add more empowerment to those judges. Rule 1.275 already says it in clear, precise verbiage. The CivPRC does not believe, however, that Rule 1.380 regarding discovery sanctions is repetitive. The issues there are different enough [and the rule already exists] so its continuation is warranted. When sanctions are mentioned in other rules as an available power of the court, often those rules add possible dismissal or default as available sanctions. *See* proposed Rules 2.251 and 1.279(c)(1). This specific reference to the ultimate sanction should be inappropriate except in the most extreme situations. It does not enhance the discretion of the court in those rules. For example, new Rule 2.251 is the most technical of rules, designed to make lawyers accurately report the active/inactive status of a case to allow a court to keep its active case counts down. The CivPRC believes that is a valid obligation, but the proposed rule goes perhaps too far, stating that "A party that fails to timely inform the court that a case's inactive designation has become unnecessary shall be subject to sanctions, including dismissal of the action and the striking of pleadings." A court should certainly be told when a case becomes active again, and possibly, in very extreme situations, an attorney who fails to do so might be due some sort of a sanction. But the CivPRC has difficulty anticipating a realistic situation in which the simple failure to tell the court of a case's return to activity could be worthy of the ultimate sanction. The reference to ultimate sanctions where not appropriate demeans their legitimate use elsewhere, and in the court's broad discretion.

The CivPRC has not reached a definite consensus on whether the rules mandate that sanctions be employed in a particular fact situation unless the attorney/party can show substantial justification, or whether the rules should allow sanctions in that same fact situation unless the attorney can show that same degree of justification for the conduct. In these times of increased concerns

for and emphasis on professionalism, the CivPRC urges the "may" selection is also consistent with its observation that most lawyers do not commit sanctionable conduct and a presumption of professional misconduct does little to enhance the Bar's standing. The "may" standard also vests the judges with complete discretion to sanction when appropriate.

One troubling sanction power is described in Rule 1.275(b)(7)—the reduction in the number of peremptory challenges available to a party. The CivPRC has difficulty assessing when that might be an appropriate sanction against a party. Theoretically something could happen during the jury selection of a trial that might affect peremptory challenges, but short of those unusual facts, it is suggested that this "power" to reduce peremptory challenges be removed from the list of available sanctions.

The CivPRC is concerned, as the courts have been, with who is sanctioned. Some sanctionable conduct is wholly the fault of the attorney, such as the attorney who misbehaves at a deposition. Other such conduct may well be the fault of a recalcitrant or otherwise noncompliant client. Or some combination of both. For example, Rule 1.335(e) deals with "a party" causing a motion to be filed to terminate a deposition, and sanctions being "imposable" from such a motion. But against whom are those sanctions truly to be imposed? Rule 1.335(f) deals with "a party" failing to attend or serve a subpoena for a deposition. Against whom should those sanctions be imposed? When a party fails to produce documents or fails to answer interrogatories, who picks up that sanctions freight? The answer is not clear, but it implicates attorney-client issues. No procedure is set forth to allow a fair resolution of that issue, but the reference to "party" throughout the rules suggests an answer that may not be universally appropriate.

There may be no way to answer those questions in advance in a rule, but the courts should be sensitive to the resolution for the attorneys practicing before it. The Report mandates certain communications between an attorney and a client, and while some of these seem misplaced in a procedural rules set, they at least keep the client informed.

One related issue regarding sanctions arises, especially with the increased number of sanctions orders that this Report seems to expect or possibly even require. The CivPRC suggests that the Workgroup, or Court, consider creating two levels of "sanctionable" or inappropriate conduct—one that is truly a "punishment" sanction for disobedience or misconduct, and one that merely seeks to level the playing field for unnecessarily incurred costs and fees. The first category—true sanctions—might have to be reported to certification committees or to others who periodically receive professional applications, or to malpractice carrier. The second category—the shifting of fees and costs, as for an unsuccessful motion—seems to be less professionally unfavorable and might not require the wide disclosure that a true sanctions order does. The CivPRC has not had the resources to explore this idea through nationwide research but considers it worth considering.

Fourth, the CivPRC recommends removing reference to objectives and professional standards from the Workgroup's proposals to amend various rules. Beyond the new and amended rules of procedure contained in the Report, the Workgroup has also recommended, largely in Rule 1.279, but also in Rule 1.200, the inclusion of various professional behavioral standards, oaths, "expectations", and "creeds", into Workgroup's proposals. Much more importantly, the Report then elevates these expectations and creeds and equates them with a procedural duty of which attorneys must comply. And if there is now a procedural duty prescribed in a rule, one also has under the Report's structure another potential field for the imposition of sanctions.

The CivPRC supports and encourages professionalism in all forms, in every court, by every lawyer and judge. But including these broad behavioral norms into a set of procedural requirements conflates two different types of guidance for attorneys. The CivPRC recommends retaining the separation between professional standards and procedural rules. If, notwithstanding the above, the Workgroup desires professionalism guidelines and expectations in the rules, it is suggested that references to these guidelines and expectations be either references to the Rules Regulating the Florida

Bar or be limited to broad, professional goals, and not a procedural requirement that can constitute an independent basis to gauge compliance or impose sanctions. Also, the CivPRC notes that a Special Committee has been recently created by Florida Bar President Elect Gary Lesser that can address these professionalism concerns.

Fifth, the CivPRC has concerns about the system's ability to accommodate the number and management of hearings under the Report's proposals. The CivPRC has not had the full benefit of the research that the Workgroup has drawn upon, and cannot predict with any certainty the effects of some or all of these changes proposed in the Report. But the CivPRC members collectively have had the benefit of hundreds of years of litigating in Florida's civil courts, and, perhaps more significantly, have been actively litigating in courts throughout the state in the several months since the Supreme Court's case management administrative order and since the 20 Circuits have issued their own implementing administrative orders.

That experience has led many members of the CivPRC to worry about the capacity and elasticity of the system to be able to accept, process, and expand to handle the many changes called for in the Report while at the same time managing the day-to-day functioning of the civil justice system and the cases already filed and active.

Because of the above concerns and because of numerous discussions with sitting circuit judges about the anticipated functioning of the civil justice system under proposed Rules 1.160 and 1.161, the CivPRC has taken what it believes are the best parts of these two rules proposals and has combined them into one composite rule 1.160, intended to address both motions and hearings.

The main goal of this proposed alternative is to achieve a much greater degree of simplicity. As proposed by the Workgroup, the number of interactions between counsel/parties and the civil trial judge and/or JA has been drastically reduced. There does not appear to be any viable system in place to allow the court to

manage and participate in all the back and forth that seem to be required by the current proposal.

The current goal of creating a means by which a judge can rule "on the papers" is preserved, although it also has been simplified. First, the judge enters the motion process only after all briefing has concluded, allowing each party to have a say before any ruling on the papers. Second, while the ability of the judge to rule on the papers is preserved, the new CivPRC draft proposal recognizes the reality that judges will normally make the "rule or not" on the papers when they are first informed of the motion's status as ready. Since the bulk of the motions currently clogging the civil justice system cannot be more expeditiously treated by multiple reviews by the Court, the CivPRC's proposal defaults to the hearing process if the trial judge does not identify the motion early on as one to be decided on the papers.

As noted above, the combination of current proposed Rules 1.160 and 1.161 is viewed by the CivPRC as a major difficulty with the Workgroup's approach. Consequently, whatever approach to these topics the Court chooses [if any], the CivPRC suggests that consideration be given to either trying this new rule/these new rules out as a pilot project in one of more circuits, or phasing them in after some of the less controversial proposals, such as the revision of the case management system in general.

Sixth, the CivPRC also questions whether there will be the availability of sufficient judicial time to attend to all expected necessary judicial events—hearings and trials. One of the most common complaints about the court system by many attorneys as it existed before the recent changes in case management focused on the substantial delay in obtaining an adequate hearing time in the foreseeable future. It is not a new complaint, but recent procedural changes have exacerbated that problem.

From anecdotal reports, the increased difficulty in getting hearings recently is coincident with the recent case management emphasis. There is only so much time in a judge's day, and if that time is directed to be spent in trials and case management

conferences, there must be a "trade off." At present, it appears to many CivPRC members that the tradeoff has come to scheduling hearings. Many on the CivPRC worry that adding more up-front case management conference obligations to our circuit courts' time exacerbates this delay in obtaining meaningful hearings in time to allow new case management guidelines to be met. Rather than adopting the Workgroup's proposal, many on the CivPRC suggest adopting the CivPRC's proposed changes to Rule 1.280.

The CivPRC has been working on a significant rules proposal to amend Rule 1.280, and its proposal is similar to the Workgroup's with certain material differences. The CivPRC's version of Rule 1.280 is modeled on and uses much of the exact wording from Federal Rule 26. It is a "lawyer-centric" rule, putting the onus on the parties and their counsel to initially address the primary and most immediate pressing problem in civil litigation—educating both/all sides on what the case is about, what the strengths and weaknesses of the opposition's case and their own case are, and what discovery will be needed to bring the case to a conclusion. The CivPRC-proposed Rule 1.280 adopts essentially Federal Rule 26(f) and calls for an initial discovery conference. The Court has a significant role in that conference, but the scope of that conference is smaller than that envisioned by Rule 1.200 in the Workgroup proposal. It would be a relatively simple task to turn the CivPRC-proposed 1.280(g) conference into a tailored 1.200 conference as generally required by the proposed Rule 1.200. Adoption of the CivPRC's proposed rule 1.280(g) conference in conjunction with an initial scaled-down Rule 1.200 conference proposed would mean that the courts would not have to be involved in the granular details of the entire case from the beginning. Putting the first conference onus on the parties, rather than on the judges, would alleviate what the CivPRC fears is about to become a crushing burden on our trial court judges' time.

The somewhat scaled-back initial Rule 1.200/1.280(g) conference could then focus on those things that are essential, to get the case on track. It would in all likelihood have to include at least the following: (a) the case track assignment, (b) detailed considerations of the issues and scheduling concerns expressed by

the parties in their Rule 1.280 disclosures and report, (c) initial fact witnesses disclosures, (d) documentary discovery, and (e) the proposed trial period or a date for a case management conference to set a trial period.

These components of the Workgroup's proposed Rule 1.200 would establish judicial control over the two issues most critical in the first days of a new case: how can the Court assist the parties in learning about the case through discovery and disclosures and what is the projected end of the case. The remaining control features anticipated in the Workgroup's Rule 1.200 can then be brought or phased in at a time when more is known about the case and the granular scheduling details called for in the Workgroup's 1.200 first conference. Many of the CivPRC's members are concerned that the time needed for a judge to sort out all the many other intermediate issues that may or will eventually arise in the ensuing many months consumes substantial judicial time at a point in the case when the parties may not have decided when or if such matters may arise or what challenges they pose.

Such things as the identification of needed areas for expert testimony, the search for/identification of/and availability of experts in each such area, their ultimate disclosure, the discovery necessary from them, the possible need for *Daubert*-type challenges to them, and the scheduling thereof are beyond the available knowledge of the parties at this early date. Similarly, the type and number of inspections or the type and number of medical examinations, or even the possible length of the trial, are usually murky at the early stage.

Each of these topics, and certainly others as well, is a ready topic for a case management conference at some relatively early stage of a proceeding, but to put all of these many and varied topics on the judge's plate at the very start of the case will likely increase disputes among the counsel, parties, and the judge. And increased disputes equal increased hearings. As with each aspect of this Comment, the CivPRC stands ready to assist in any way that it can to help achieve an improved set of civil rules to govern and manage

our civil courts more effectively. Members of the CivPRC would gladly assist in the refinement of these issues if requested.

Seventh, the CivPRC identified multiple issues with the Workgroup's proposal and its interaction with other rules sets.

Interaction with the Florida Rules of Appellate Procedure. In addition to trying to confer more authority on trial judges, the Workgroup has also injected heightened standards for reviewing those decisions on appeal. While these reactions might more appropriately come from appellate specialists, the CivPRC [with a number of appellate specialist members] suggests that the following appellate considerations be reworked:

a. The CivPRC has a general question as to whether appellate standards of review should be properly placed in the civil rules. There is one such standard already in the civil rules [1.061(a)], but the CivPRC questions that also.

b. The appellate standard of review of "abuse of discretion" cannot, or should not, be imposed for all sanctions orders. [See proposed Rule 1.275(i).] Any order based purely on a factual finding or on the judge's determination of culpability of the attorney being sanctioned may well carry that restricted standard of review. However, many sanctions orders raise in part an issue of law decided by the Court, and those orders should remain subject to a de novo standard, or a mixed standard based on the factual findings and legal conclusions of the judge.

c. Similarly, proposed Rule 1.460(b)(11) directs that a "gross abuse of discretion" standard be used for the review of all continuance orders. While probably written to try and dissuade appellate or certiorari review, it appears that the Workgroup may have unintentionally elevated the "normal" abuse of discretion standard. There is a very limited "gross abuse of discretion" standard

recognized in Florida (although it is difficult to differentiate from the "abuse of discretion" standard). Perhaps the Workgroup intended to elevate the review standard to that of the review of Rule 1.540 orders or orders vacating defaults; more likely it was a message-sending phrase rather than an attempt to change the present law.

d. Finally, Rule 1.460(b)(11) accurately states that an order on a continuance motion benefits from the presumption of correctness. While a true statement, the same can be said of a majority of trial court orders. As discussed above, the CivPRC, as a matter of rule-writing preference, generally tries not to repeat truisms in multiple rules, or unnecessarily in any single rule. If there is no compelling reason for the presence of repetitive or unnecessary verbiage in one rule, it is better left out.

Interaction with other Florida rules sets. The charge to this Workgroup was to improve the resolution of civil cases. In doing so, its Report focuses most heavily on the Rules of Civil Procedure. The CivPRC wants to elevate two issues in that regard:

a. It does not appear that the Workgroup considered improving the resolution of family law cases, but it may be well advised to coordinate its final report with the Family Law Rules Committee to avoid creating unnecessary differences between the two very similar sets of rules.

b. Consistent with the general practice in the last ten years of putting rules that have general application across various court types into one place—the Rules of General Practice and Judicial Administration—the Workgroup may want to consider whether parts or all of Rule 1.271, Pretrial Coordination Court, could or should be better placed in the Rules of General Practice and Judicial Administration. From the perspective of practitioners, it seems that the procedural portions of the new rule might

> be better suited in the civil rules. We cannot readily envisage cases in divisions other than civil warranting the employment of the Pretrial Coordination Court, but it is possible. But the creation of a new division [or section] of a Circuit Court could easily be a proper topic of the Rules of General Practice and Judicial Administration, particularly the rules in Part II of those rules.

Eighth, the CivPRC has some concerns about the word and phrase choices within the rules proposals. The verbiage selected by the Workgroup in its rules proposals may have been selected to try and deliver a message of "earnestness." While perhaps effective in communicating that idea, some rules proposals are written with a conversational, or somewhat informal tone, employing a number of new "standards" to measure the conduct of lawyers and self-represented parties. Words and phrases such as "dire circumstances" and "extraordinary unforeseen circumstances", "cure", and "revisit" seem out of place in traditional procedural rules.

The members of the CivPRC have developed over the years a decided facility in saying things in a precise, consistent manner to allow ease of understanding. The CivPRC is available to assist in performing a more thorough final review and "wordsmithing" of any language proposed by any other organization involved in this process. The strictly abbreviated time frame allowed for this Comment has not allowed that degree of granularity by the CivPRC.

Ninth, the CivPRC believes that several of the Workgroup's proposals to amend the civil rules contain drafting concerns, including latent ambiguities that may cause unintended consequences. These are addressed in more detail in the substantive comments to the proposed rule amendments. One example is taken from the proposed initial disclosures required by the proposal to amend rule 1.280. In subdivision (a)(1)(B), a party is required to disclose "documents . . . [that the party has that] may be relevant to the subject matter . . . unless the use would be solely for impeachment."

The CivPRC has several comments to this provision. As an initial matter, this provision is taken, but not quoted exactly, from Federal Rule 26. The federal equivalent language requires a party to disclose "documents . . . [that the party has that] the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment." The critical difference is that, as drafted, the proposed rule requires the disclosure of work product and thought processes of the attorney, 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. This is an overbroad statement of current Florida law which protects, as work product, the thought processes of counsel in identifying relevant but sometimes harmful documents from discoverable materials. The test is whether they may be used at trial. *See e.g.*, *Northup v. Acken*, 865 So. 2d 1267 (Fla. 2004); *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). The federal language most properly tracks Florida law on discovery of such documents and limits the disclosures to those documents that a party may use to support its claims or defenses.

Additionally, this one subdivision highlights the importance, when appropriate, of using the federal rule language as often and as precisely as possible. The CivPRC does not believe that there should be a wholesale adoption of the federal rules, because some of them simply do not fit into our current state court system. For any particular rule, however, once the Court decides to adopt some or all of a federal rule, it should carefully consider adopting the exact federal language, so as to incorporate the many years of construction and application that the federal rules have accumulated. In this one application, the limitation of what must be disclosed to only those documents that a party may use to support its claims or defenses, is superior to that selected by the Workgroup and is consistent with Florida law. The Court took this path in its recent adoption of amended Rule 1.510 in Florida on summary judgments.

As discussed above, the CivPRC has also been working on an extensive proposed change to Rule 1.280, which substantially addresses disclosures and has approved the version attached to this Comment on first reading. It is suggested that the CivPRC version of or approach to Rule 1.280 may offer other benefits as well.

A collaborative drafting process would mitigate any potential consequences of the chosen language. The CivPRC, therefore, respectfully suggests that upon adoption by this Court, any newly-adopted and amended rules be referred to the affected rules committees, including this CivPRC, for final review and drafting.

Tenth, the CivPRC believes that it is unnecessary to repeat certain procedural rules in multiple places. The CivPRC ascribes to the belief that the "say it once" process is cleaner, more forceful, and will ultimately provide the courts with more discretion. It also avoids the argument about why a new particular procedure was not written into every rule in the set. This manner of drafting is consistent with how other bodies of rules are drafted, including e-filing and service rules contained in the Rules of General Practice and Judicial Administration, but are not restated for emphasis or for any other reason throughout the rules sets. Even if the Workgroup believes that these concepts need extra "power," the CivPRC maintains that a single clear rule is preferable. The Workgroup's proposal, for example, repeats the court's sanctioning powers and the parties' "meet and confer" obligations throughout.

The CivPRC favors a simple statement found in one place, that communicates a required procedure, without repeating the same concept. The CivPRC believes that repeated use of procedural vehicles for sanctions and meet and confers could lead to imbalanced use. The CivPRC, therefore, recommends that such requirements be contained in one place and not restated.

III. Observations and Comments on Specific Rules Proposals

As noted above, the CivPRC's review of the Report focused first on the very big picture that has been painted of possible changes to the Florida Rules of Civil Procedure. The foregoing constitutes the CivPRC's responses to that very detailed big picture. This section focuses on the details of the Report.

The CivPRC conducted its assessment of the Report in multiple stages, beginning when it received Mr. Tomasino's August 9, 2021 letter directing the CivPRC to provide comments to the Workgroup's Draft Report. Following the Workgroup's submission of its final report to this Court, the Court directed all interested parties to submit comments. Following multiple requests for extensions of time, the Court directed all comments to be filed no later than June 1, 2022.

The entire CivPRC was divided into four subcommittees, each group being chaired by a Vice Chair and/or a senior member of the CivPRC. Each subcommittee attempted, as much as possible, to consider each individual rule as a separate proposal. During that process, questions, issues regarding format, wording choices, and uncertainties surrounding the effect of each rule were collected separate from the big picture responses above. The pinpoint comments, by proposed rule, are set forth in Appendix A to this Comment in a three-column chart containing: (1) the Workgroup's proposed rule, (2) the CivPRC's comments to that proposal, and (3) where applicable, the CivPRC's proposed alternative to the Workgroup's proposal in legislative format.

As an additional aid, the following is a list of affected rules and a brief statement about the CivPRC's position on those rules.

Rule 1.090 (Time)

No Comments

Rule 1.160 (Motions)

The CivPRC does not agree with amendments to Rule 1.160 or the new Rule 1.161 in concept. However, if the concept is accepted by the Court, the CivPRC suggests the Court

consider its alternative Rule 1.160 that would replace the Workgroup's proposed Rule 1.160 and Rule 1.161. See Appendix A, pages 1-20.

Rule 1.161 (Scheduling of Hearings on Motions)

The CivPRC does not agree with the proposed Rule 1.161. See the alternatively proposed rule in Appendix A, pages 1-20.

Rule 1.190 (Amended and Supplemental Pleadings)

The CivPRC has no objections to or suggested edits to the text of the proposed subdivision (b), the CivPRC merely suggests proposed subdivision (b) be placed at the end of this rule so as not to require renaming the various subdivisions of this rule. This change will prevent confusion by practitioners doing research involving this rule or case law in which citations to this rule as included. See Appendix A, pages 20-22.

Rule 1.200 (Case Management; Pretrial Procedure)

The CivPRC continues to recommend the Court consider adopting its proposal to amend Rule 1.280, in lieu of wholesale adoption of the Workgroup's proposal to amend Rule 1.200. However, if the Court adopts proposed Rule 1.200, the CivPRC suggests the Court consider the alternative language. See Appendix A, page 22-39.

Rule 1.201(Complex Litigation)

The CivPRC continues to support the use of Rule 1.201, largely unchanged. The CivPRC, however, is concerned with the Workgroup's decision to exclude motions in complex cases—subject to Rule 1.201—from the purview of Rule 1.160.

Rule 1.271 (Pretrial Coordination Court)

The CivPRC fully understands the concept of a PCC, and supports implementing that concept to see whether it is valuable in a significant number of state civil cases. The CivPRC believes, however, that a trial judge, following remand, faces a complex and dynamic setting in a trial of a PCC case. Consistent with (1) the general practice of a court's being able to reconsider previous rulings, and (2) this Court's interest in

empowering and not unduly restricting the authority and discretion of a trial judge, but fully mindful of the nature of a PCC case, the CivPRC recommends allowing the trial judge to reconsider any previous PCC ruling. Such a reconsideration may only be exercised if the judge specifically states the reasons for the change or departure from a PCC order, giving specific findings and conclusions for that departure. This limitation is thought to be a sufficient caution to trial judges that the PCC [or common] orders are to be treated specially. The ability to modify a previous ruling allows the trial judge to consider that change as a potential sanction or at least an adjustment to the trial flow as that trial actually enfolds. The CivPRC provides alternative language in the attached Appendix A, pages 40-42.

Rule 1.275 (Sanctions)

The procedures for the imposition of sanctions should be consistent across the rules. Rule 1.380 requires the opportunity for a hearing before sanction may be imposed, and that comports with fairness and due process so the CivPRC adds a hearing requirement here. The CivPRC agrees, for several reasons, that the imposition of sanctions is always something within the Court's discretion and should not be mandated or automatic. The CivPRC provides alternative language in the attached Appendix A, pages 42-49.

Rule 1.279 (Standards of Conduct for Discovery)

The CivPRC recommends that the Court not adopt proposed Rule 1.279. However, if the Court adopts the proposed Rule 1.279, the CivPRC suggests the Court consider its alternative language. See Appendix A, page 48-52.

Rule 1.280 (General Provisions Governing Discovery)

The use of an amended Rule 1.280 for initial disclosures and for the supplementation of discovery responses is applauded. This rule, as revised by the CivPRC on first reading and as attached hereto as Appendix B and discussed above, forms the

basis for CivPRC's suggested revision to the scope of this package of rules and Rule 1.200 especially. See Appendix B.

Rule 1.310 (Depositions Upon Oral Examination)
No comments

Rule 1.320 (Depositions Upon Written Questions)
No comments

Rule 1.335 (Standards for Conduct in Depositions, Questions, Claims of Privilege, Termination or Limit, Failure to Appear, and Sanctions)
The CivPRC provides alternative language in the attached Appendix A, pages 53-54.

Rule 1.340 (Interrogatories to Parties)
The CivPRC agrees with the change proposed in subdivision (a) regarding responses to unobjected to interrogatories and has no other comments.

Rule 1.350 (Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes)
The CivPRC agrees with the change proposed in subdivision (b) regarding responses to unobjected requests to produce and has no other comments.

Rule 1.351(Production of Documents and Things Without Deposition from Nonparties)
The CivPRC agrees with the change proposed in subdivision (b) regarding responses to unobjected requests to produce and has no other comments.

Rule 1.370 (Requests for Admission)
The CivPRC generally agrees with the changes to Rule 1.370, but questions whether the continuation of the three criteria for a mandatory award of fees for a failure to admit properly recognizes the current law that fees are not to be awarded for denials of admissions that go to contested key issues in the case.

Rule 1.380 (Failure to Make Discovery; Sanctions)
The CivPRC provides alternative language in the attached Appendix A, pages 70-79.

Rule 1.410 (Subpoena)
No comments

Rule 1.420 (Dismissal of Actions)
The CivPRC provides alternative language in the attached Appendix A, pages 63-67. If this rule is approved as drafted, Form 1.989 will need to be revised as well.

Rule 1.440 (Setting Action for Trial)
No comments to the text of the rule. As discussed above, however, the Workgroup's proposed Comment to this rule gets the issue of court discretion in granting continuances just about perfectly. The contrast with propose new Rule 1.460, however, is jarring. The CivPRC therefore proposes an adding a subdivision, subdivision (e), so that this rule works in conjunction with the court's discretion to consider and rule on a motion to continue, as set forth in Rule 1.460.

Rule 1.460 (Continuances)
The CivPRC provides alternative language in the attached Appendix A, pages 84-90.

Rule 1.650 (Medical Malpractice Presuit Screening Rule)
No Comments

Rule 1.820 (Hearing Procedures for Non-Binding Arbitration)
No Comments

Form 1.989 (Order of Dismissal for Lack of Prosecution)
The form Notice of Lack of Prosecution states that the case will be dismissed "if no stay is issued or approved during such 60-day period[.]" But, proposed Rule 1.420(e)(1)(b) only requires the motion to be filed and set for hearing. This inconsistency

needs to be addressed. Form 1.989(b), Order Dismissing Case for Lack of Prosecution says "there was no record activity during the 60 days" before the notice. It should use the new term "post-notice record activity."

Rule 2.215 (Trial Court Administration)
No Comments

Rule 2.250 (Time Standards for Trial and Appellate Courts and Reporting Requirements)
No Comments

Rule 2.546 (Active and Inactive Case Status)
No Comments

Rule 2.550
No Comments

Rule 7.020 (Applicability of Rules of Civil Procedure)
No Comments

Rule 7.070 (Method of Service Process)
No Comments

Rule 10.420 (Conduct of Mediation)
No Comments

We appreciate the opportunity to review and comment on the Workgroup's report. If we can provide any additional assistance, we are prepared to do so.

WHEREFORE, the Civil respectfully requests that the Court consider all recommendations made in this comment.

Respectfully submitted on June 1, 2022.

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I certify that this report was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.045.

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