IN THE SUPREME COURT OF FLORIDA

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

Case No. SC22-122

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Comment of Thomas D. Hall Regarding Proposed Rules[1]

I submit this comment regarding the proposed revisions to the various rules of procedure in the Final Report (JMC Report) and Recommendations of the Judicial Management Council Workgroup (Workgroup) on Improved Resolution of Civil Cases. This Court treated the Report as a petition to amend certain rules of court. This Court then asked The Florida Bar to publish the proposed rules for comment and the Bar did so. I file this comment in response to that request for comments.

[1] I am a member of The Florida Bar. As background, I am currently a member of two different rules committees of The Florida Bar - the Rules of General Practice and Judicial Administration Committee and the Appellate Court Rules Committee (ACRC). I am also on the Executive Committee of the Appellate Practice Section of The Florida Bar (as a former Chair of the Section). Both of the committees have also filed comments. The Appellate Section supports the comment filed by the ACRC.

A. Introduction

The Workgroup, during its two-year period of evaluating the issues, obviously did highly detailed, excellent work in considering the issues it was directed to address. Among other things, it reviewed numerous and voluminous other sources dealing with the subject matter of the Report.[2] Principle among those sources was a report done by the Civil Justice Improvements Committee (CJIC Report) prepared as recommendations to national Conference of Chief Justices (CCJ). The recommendations, contained in the CJIC Report were endorsed in 2016 by the CCJ and the Conference of State Court Administrators. *See* JMC Report at 5, n.4. The CJIC Report can be found at https://iaals.du.edu/sites/default/files/documents/publications/cji-report.pdf. (Last viewed June 1, 2022).

Having served on any number similar court system committees and commissions during the twenty-five years I worked in the court

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[2] The JMC Report itself is 121 pages long and has 605 footnotes. The proposed rules go from page 122 to page 184 of the Report and are set forth in an Appendix to the Report. The Appendix continues the page numbering of the Report rather than start new page numbering. The Report is available at https://efactssc-public.flcourts.org/casedocuments/2022/122/2022-122_petition_79499_e39.pdf (last viewed June 1, 2022).

system, I fully appreciate the hard work the Workgroup did. The members of the Workgroup should be commended for all their hard work, dedication, and the final product they produced. Numerous comments have been filed that addresses the proposed rule changes on the merits.

I file this comment only to bring the Court's attention to the following discreet issues:

1. There has been no analysis of the cost of the changes and, if the costs are significant, how they will be funded,
2. The proposed changes include substantive law changes besides procedural changes. One of the fundamental principles expressed in the CJIC Report endorsed by the by the CCJ and upon which the Workgroup relied heavily[3] is that substantive law changes should not be made in trying to correct any identified problems. *See* CJIC Report at 7.

In addition, my comment notes my agreement with comments filed by certain other commenters.

[3] *See* JMC Report at 5, n.4.

B. DISCUSSION

1. Funding the Proposed Changes.

The Court should not implement any of the changes recommended in the JMC Report until the Court determines the cost to implement such changes and, if significant, secures funding for those changes. The JMC Report acknowledges:

> As a separate issue, not formally part of the Workgroup's assignment **but a significant one** nevertheless, the Workgroup notes that its rule proposals may entail the need for additional personnel (such as case managers), technology, and other resources in the trial courts. An updated weighted caseload study may be required.

(JMC Report at 9, n.14)(emphasis added).

It seems clear from the comments filed that most, if not all, commenters consider these changes a paradigm shift in the way the Florida's civil courts will operate. It seems fair to say that the Workgroup would also agree that the proposed changes are a major shift in how courts will operate. After all, that seems, without question, the intent of the proposals. The changes are extensive and complex.

As noted, many of the recommendations track recommendations made in the CJIC Report. That CJIC Report, as well, does not analyze

the costs of its recommendations, were they to be implemented. That is understandable given the scope of such an assessment. In fact, to do such a nationwide assessment would seem impossible. But the CJIC Report did make one thing clear: "[Courts] must give each matter the resources it needs—no more, no less—and prudently shepherd the cases our system faces now." CJIC Report at 3. And the CJIC Report also makes clear:

> The Committee rejects the proposition that a judge must manage every aspect of a case after its filing. Instead, the Committee endorses the proposition that court personnel, from court staff to judge, be utilized to act at the "top of their skill set."

CJIC Report at 27. One of the major recommendations of the CJIC Report was:

> RECOMMENDATION 7 Courts should develop **civil case management teams** consisting of a responsible judge supported by appropriately trained staff.
> 7.1 Courts should conduct a thorough examination of their civil case business practices to determine the degree of discretion required for each management task. These tasks should be performed by persons whose experience and skills correspond with the task requirements.
> 7.2 **Courts should delegate administrative authority to specially trained staff** to make routine case management decisions
>
> CJIC Report at 27 (emphasis added).

Despite that, the changes recommend by the Workgroup seem to place the entire burden of management on the judge, mainly because Florida's trial courts simply do not have the staff required to create the case management teams the CJIC Report anticipates. A number of commentators come to the same conclusion. For example:

- Another significant concern is the ability for these rules to be complied with due to the lack of staff available in the State court system at the disposal of each trial judge to assist in managing the cases they are assigned.

Comment of the Hon. Thomas P. Barber, United States District Judge, Middle District of Florida at 1.

- At present, however, Florida state court judges do not have the administrative support staff necessary to effectively implement that kind of case management system.

Comment of Williams, Leininger & Cosby, PA at 2.

And there is the Workgroup's already noted self-caution:

- [the changes] may entail the need for additional personnel (such as case managers), technology, and other resources in the trial courts. An updated weighted caseload study may be required.

Workgroup Report at 9, n.14.

But the trial court chief judges may explain it the best:

> Lack of Resources: While some of the proposal seems to track federal case management practices, distinctions between the caseloads and resources of the federal trial

> courts and Florida trial courts argue for caution. Our sense is that the federal trial courts have caseloads that are orders of magnitude smaller than the caseload of the typical Florida trial judge. At the same time, federal trial courts enjoy greater resources in law clerks, magistrates, and support staff. The chief judges report broad consensus that some of the proposed changes are likely to result in less instead of greater efficiency of case resolution because of these resource limitations. The lack of resources includes the lack of available trial judges and senior judges and the lack of jury trial courtrooms if additional trial judges or senior judges are available.

Comment of the Chief Judges of the Circuit and County Courts at 3.

There is no need to belabor the point. No one knows what resources are truly needed to implement the changes suggested by the Workgroup and certainly no one knows the cost. And, more importantly, no one knows whether the benefits of such changes will outweigh the costs. A number of commenters, for those reasons and more, suggest a pilot program (or programs) be implemented first so that cost and benefits can be analyzed. But even that seems premature and may be ill advised.

Pilot programs themselves are often notoriously unreliable suffering from what is called the Hawthorne Effect, i.e., "the change from the ordinary, or the mere act of being studied," is what causes

success. Megan McArdle, *Why Pilot Projects Fail*, The Atlantic, September 2011. The effect is named after a factory outside of Chicago which ran tests to see whether workers were more productive at higher or lower levels of light. When researchers raised the lights, productivity went up. When researchers lowered the lights, productivity also went up. *Id.*

The most prudent course would be:

1) Conduct a new weighted case load study,

2) Make a determination of the costs of implementing the program, and

3) Request the legislature to fund the costs.

There is precedent for such an approach. In the past, this Court has been asked to implement a program that would have been a fundamental departure from its traditional role, namely assuming responsibility the regulation of court reporters.

At first the Court outright rejected the suggestion based on lack of resources:

> At this time, we find that we do not have available the funds necessary to commence and implement this court reporter certification process. Accordingly, we deny the request to

> adopt rules for certification and regulation of court reporters at this time.

In re Amends. to Fla. R. of Jud. Admin. – R. 2.070 (a), (b), (c) and (d) – Certification and Regulation of Court Reps., 595 So. 2d 928, 929 (Fla. 1992).

However, subsequently the Court adopted the rules, with a caveat:

> Accordingly, we adopt the committee's proposal as modified in the appendix to this opinion **subject to the legislature's providing funds for the initial costs of implementing the program.**

Amends. to Fla. R. of Jud. Admin. 2.070-Court Reps., 725 So. 2d 1094, 1097 (Fla. 1998). A whole set of rules – Rule Set 13 – was adopted. Rule Set 13 can be found here: https://scholar.google.com/scholar_case?case=14060160617613084289&q=regulation+court+reporters&hl=en&as_sdt=4,10 (Last accessed May 31, 2022). Ultimately, Rule Set 13 went away because the legislature never provided the funding. *See Amends. to the R. of Jud. Admin.*, 780 So. 2d 819 (Fla. 2000).

In sum, this Court should not implement the proposed changes suggested by the Workgroup until it has determined how much the changes will cost and, if the

costs are significant, the legislature provides the needed funding.

2. Substantive Law Changes.

The CJIC Report based its work and its recommendations for change on certain fundamental principles. One of the key ones was that "Outcomes from recommendations should be consistent with existing substantive law." *See* CJIC Report at 7. In other words, in making change do not change substantive law.[4] At least one of the changes the Workgroup proposes involves substantive law, although

[4] The full set is: FUNDAMENTAL FRAMEWORK/PRINCIPLES FOR CJI COMMITTEE RECOMMENDATIONS 1. Recommendations should aim to achieve demonstrable improvements with respect to the expenditure of time and costs to resolve civil cases. 2. Outcomes from recommendations should be consistent with existing substantive law. 3. Recommendations should protect, support, and preserve litigants' constitutional right to a civil jury trial and honor procedural due process. 4. Recommendations should be capable of implementation within a broad range of local legal cultures and practices. 5. Recommendations should be supported by data, experiences of Committee members, and/or "extreme common sense." 6. Recommendations should not systematically favor plaintiffs or defendants, types of litigants, or represented or unrepresented litigants. 7. Recommendations should promote effective and economic utilization of resources while maintaining basic fairness. 8. Recommendations should enhance public confidence in the courts and the perception of justice.

there may be more.[5] I am commenting only on one such change - changing a standard of review.

The Workgroup recommends changing the standard of review for review of a grant or denial of an order a motion for continuance. *See* Proposed Fla. R. Civ. P. 1.460(b)(10)("Orders granting or denying motions to continue shall benefit from presumption of correctness on appeal where the trial court has made factual findings regarding its ruling and shall only be reversed upon a finding of gross abuse of discretion.").

The Appellate Court Rules Committee (ACRC) comment regarding the change to Proposed Amendments to Florida Rule of Civil Procedure 1.460(b)(10) offers multiple reasons why the change should not be made. It is set forth in Section A of the Committee's comment

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[5] The Workgroup recommends changing Rule 1.275 dealing with sanctions. One of the key changes is set forth in subdivision (g). "Level of Conduct. Except as stated in this rule or elsewhere in these rules, **a finding of willfulness shall not be necessary to impose a sanction** provided in this rule. The sanction, however, shall be commensurate with the conduct." Proposed Fl. R. Civ. P. 1.275(g) (emphasis added). That seems clearly a substantive change. I will leave it to those with more trial experience to comment on the rule otherwise, but it seems a substantial substantive change and not in keeping with the principles of the CJIC Report.

starting on page 1. I fully support that comment and would urge the Court to agree with the ACRC's comment and reject the change. And I would also note that it is not procedural; it is substantive. As ACRC noted in its comments standards of review are not really procedural.

> Standards of review have been developed in the common law and through long-standing appellate practice. Kelly Kunsch, *Standard of Review (State and Federal): a Primer*, 18 Seattle U. L. Rev. 11, 14 (1994). In fact, Florida courts have reviewed decisions granting or denying continuances as discretionary for more than a century. *See, e.g.*, *Ahren v. Willis*, 6 Fla. 359, 362 (1855).

ACRC Comment at 4. The Court or the legislature may change the common law, *see Hoffman v. Jones*, 280 So. 2d 431, 441 (Fla. 1973), but standards of review are substantive not procedural and should not be changed via a procedural rule change. This Court should reject the proposed change for that reason alone.

3. Agreement with Other Comments

I fully support the comments of the following commenters:

- The Appellate Rules Committee of The Florida Bar,
- The Rules of General Practice and Judicial Administration Committee of The Florida Bar,

- The Florida Court Clerks and Comptrollers,
- United States District Judge, Middle District of Florida, Thomas P Barber,
- The Florida Chapters of the American Board of Trial Advocates,
- The Florida Justice Association,
- Attorney Kenneth B. Schurr, particularly his comment in footnote one of his comments,
- Attorney Edgar Velazquez, and
- The judges assigned to the civil divisions of the Fourth Judicial Circuit of Florida.

C. Conclusion

For the reasons set forth and explained above, I respectfully suggest that the Court:

- not implement the proposed changes suggested by the Workgroup until it has determined how much the changes will cost and, if the costs are significant, the legislature provides the needed funding,
- Reject any changes that are substantive law changes, but particularly the change of standard of review set forth in proposed Rule1.460(b)(10), and
- Rule consistent with the requests made by:
    - The Appellate Rules Committee of The Florida Bar,
    - The Rules of General Practice and Judicial Administration Committee of The Florida Bar,
    - The Florida Court Clerks and Comptrollers,
    - United States District Judge, Middle District of Florida, Thomas P Barber,
    - The Florida Chapters of the American Board of Trial Advocates,

- The Florida Justice Association,
- Attorney Kenneth B. Schurr, particularly his comment in footnote one of his comments,
- Attorney Edgar Velazquez, and
- The judges assigned to the civil divisions of the Fourth Judicial Circuit of Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was electronically filed via the Florida Courts E-Filing Portal, with a copy provided by U.S. Mail to Chief Judge Robert Morris, Second District Court of Appeal, P.O. Box 327, Lakeland, Florida 33801, and by email to Tina White, 500 South Duval Street, Tallahassee, Florida 32399, whitet@flcourts.org, on June 1, 2022.

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