IN THE SUPREME COURT OF FLORIDA

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

**COMMENTS OF JONES DAY AND HILL WARD HENDERSON AND REQUEST TO PARTICIPATE IN ORAL ARGUMENT**



Jones Day and Hill Ward Henderson thank the Workgroup on Improved Resolution of Civil Cases for its efforts seeking out ideas for making Florida civil practice more efficient. We share the Workgroup's goal of ensuring the fair and timely resolution of cases through effective case management. It is in the spirit of advancing this worthy cause that we write to address three areas.

*First*, drawing on our experience litigating mass-tort cases in Florida, we support the Workgroup's recommendations to adopt federal-style discovery rules that require initial disclosures (with a minor but important modification recommended by the Civil Rules Committee) and that impose an obligation to supplement discovery responses.

*Second*, and again based on our experience litigating mass-tort cases in Florida, we recommend that certain of the Workgroup's substantive proposals be omitted from or modified in any final set of proposals adopted by the Court.

*Third*, given the extent of the proposed changes, we recommend that the Court postpone implementation of the Workgroup's recommendations while trial courts work through the backlog of cases created by the pandemic and evaluate whether to retain some of the changes to Florida practice that have occurred during the pandemic. These last two-plus years have caused a shock to the Florida judicial system, and the Court should let that shock subside before making further, potentially disruptive, changes.

On this point, we echo commentors who have suggested that before the Court implements any changes on the scale the Workgroup proposes, it should commission an empirical study—perhaps a small pilot program—to test those of the Workgroup's proposals the Court is considering enacting. The Court could do this while the pandemic-related issues are working their way through the system. This would

allow the Court to have a better understanding of the real-world impact of these changes before imposing them on Florida's entire judicial system.

## I. We support the Workgroup's proposal to require initial disclosures and supplemental discovery responses.

We support the Workgroup's proposal (in Proposed Rule 1.280(a)) to require initial disclosures and (in Proposed Rule 1.280(f)) to require parties to supplement their discovery responses. We believe these provisions will advance the efficient, fair adjudication of cases on a full record.

We agree with the Civil Procedure Rules Committee, however, that Proposed Rule 1.280(a) should be revised to track the federal requirement that a party must disclose information that it "may use to support its claims or defenses, unless the use would be solely for impeachment." Ltr. from Jason Sterns, Chair, Civil Procedures Rules Committee, to Tina White, Office of the State Courts Administrator, et al. at 11–12 (Oct. 1, 2021). The Workgroup's proposed language (which requires disclosure of information a party thinks "may be relevant to the subject matter") potentially invades protected attorney

opinion work product, as it could require a party to disclose information *because* that party's counsel thinks the information harmful to the party's position (and thus, "relevant to the subject matter").

Thus, the Court should adopt the Workgroup's initial disclosure requirement, but it should follow the language in Federal Rule of Civil Procedure 26(a)(1).

## II. The Court should consider omitting or revising certain of the Workgroup's proposals.

### A. The Court should reject the PCC proposal or, at the very least, omit provisions that require trial judges to obtain approval from the PCC before deviating from pretrial rulings.

We advise the Court against adopting the Workgroup's proposal to create a Pretrial Coordination Court (or PCC) in each circuit for two reasons. *See* Proposed Fla. R. Civ. P. 1.271. *First*, the Workgroup's proposal would deprive Chief Circuit Judges of needed flexibility to tailor the management of mass litigation to local circumstances. *Second*, Proposed Rule 1.271(f)'s requirement that certain of a PCC's pretrial rulings bind trial judges runs contrary to longstanding law-of-the-case principles and deprives trial judges of the authority and flexibility they need to manage trials efficiently, fairly, and consistent with the Evidence Code.

**1.** The proposed PCC rule would deprive Chief Circuit Judges of the flexibility they need (and presently have) to fashion fair and efficient procedures for managing mass litigation based on local conditions. Chief Circuit Judges are best situated to decide whether to use coordinated proceedings and, if so, which of many potential forms of pretrial coordination to use based on local circumstances and the needs of a given litigation. *See* Cmt. of the Judges Assigned to the Civil Divisions of the Fourth Jud. Cir. of Fla. at 19 (May 17, 2022) (terming Proposed Rule 1.271 "wholly unnecessary" and citing it as "a prime example of why each jurisdiction should have the discretion to employ its own case management tools"); Cmts. from Judges of Eighth Jud. Cir. at A4 (Apr. 26, 2022) (explaining that proposed PCC procedures "are complicated and will require new resources" to accomplish and will "require a taxing amount of work on the administrative judge" to accomplish coordination that is "being efficiently handled" under the current regime).

We agree with the judges from the Eighth Judicial Circuit that "Pretrial Coordinating Court requirements are complicated and will decrease efficiencies." Cmts. from Judges of Eighth Jud. Cir. at A2 (Apr. 26, 2022); *see also* Cmt. of the Judges Assigned to the Civil

Divisions of the Fourth Jud. Cir. of Fla. at 20 (May 17, 2022) ("[T]he mandatory and overly complex nature of the PCC process would slow down the pretrial system, not expedite it.").

The Court should not impose a one-size-fits-all arrangement on them.

**2.** Proposed Rule 1.271 also needlessly limits trial judges' control over trials, in some instances requiring the trial judge to follow the PCC's prior rulings unless the PCC gives the trial judge written permission to depart from them. *See* Proposed R. 1.271(f)(2).

**a.** The Workgroup's proposal would bind trial judges to decisions made at the trial-court level by a PCC. This conflicts with law-of-the-case doctrine, which requires trial courts to follow only *appellate* decisions, and that vests trial judges with broad flexibility to revisit interlocutory orders before entry of final judgment. *See, e.g.*, *Drdek v. Drdek*, 79 So. 3d 216, 218–19 (Fla. 4th DCA 2012) ("The doctrine of 'law of the case,' a principle of judicial estoppel, 'requires that questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings.' . . . . The doctrine of law of the case . . . applies only when matters are remanded to a trial court from an *appellate*

*court*." (emphasis in original)); *accord Empire Club, Inc. v. Hernandez*, 974 So. 2d 447, 449 (Fla. 2d DCA 2007); 3 Fla. Jur. 2d Appellate Review § 442 (Mar. 2022 update) ("The law of the case is not established by a trial court's initial ruling. The doctrine of law of the case applies only to a decision from an appellate court."). The Workgroup does not acknowledge that its proposal conflicts with longstanding Florida law, nor does it justify the change to the settled law-of-the-case doctrine.

**b.** The law-of-the-case doctrine does not apply to interlocutory trial court rulings for good reason: trial judges need flexibility to revisit prior rulings to ensure that trials proceed fairly and efficiently and consistent with the Evidence Code. As this Court has recognized, "[t]he weighing of relevance versus prejudice or confusion [required by section 90.403, Fla. Stat.] is best performed by the trial judge *who is present* and best able to compare the two." *Sims v. Brown*, 574 So. 2d 131, 133 (Fla. 1991) (emphasis added). And decisions admitting or excluding evidence based on section 90.403 weighing are reviewed on appeal for abuse of discretion precisely because the judge "who is present and observes what transpires in the courtroom" perceives things "from [its] superior vantage point [that]

may not be evident from a cold record." *Currie v. Palm Beach Cnty.*, 578 So. 2d 760, 764 (Fla. 4th DCA 1991).

But Proposed Rule 1.271(f) ignores the trial judge's "superior vantage point" and denies trial judges the authority to adapt or revisit evidentiary rulings without first seeking and obtaining permission from the PCC. Proposed Rule 1.271(f)(2) prohibits trial judges from "vacat[ing], set[ting] aside, or modify[ing] PCC orders" "[w]ithout the written concurrence of the PCC." Proposed Rule 1.271(f)(3) then gives trial courts some ability to revisit evidentiary rulings—but only "when necessary because of changed circumstances, to correct an error of law, or to prevent manifest injustice." And even then, the trial judge is expressly barred from revisiting rulings concerning "expert evidence" without the PCC's written permission. *See* Proposed Rule 1.271(f)(3).

A judge presiding over a PCC cannot envision every potential issue of admissibility that could arise at trial. For example, a PCC could deem certain expert testimony admissible, only for the proponent to fail to lay the predicate required for that expert testimony to be relevant or reliable. *See, e.g.*, *Bowers v. State*, 104 So. 3d 1266, 1269 (Fla. 4th DCA 2013) (detective's testimony identifying defendant

"was inadmissible" because the state "failed to lay the proper predicate" to support "qualification as an identity expert"); *see also* Ehrhardt's Florida Evidence, § 105.2 Conditional Relevance (2021 ed.) ("Evidence of the preliminary fact frequently will not have been introduced at the time the ultimate fact is offered. . . . If the evidence is not subsequently connected up, the burden is upon the adverse party to make a motion to strike the evidence that was admitted."). Or the expert could make a key admission on cross-examination that undermines the expert's methodology. *See, e.g.*, *Waldera v. Waldera*, 306 So. 3d 1037, 1042 (Fla. 3d DCA 2020) (cross-examination revealed that expert "did not rely on any methodology to frame his opinion"). Or certain testimony that seemed innocuous before trial could, during trial, be exposed as substantially more prejudicial than probative—or even as needlessly cumulative.

Yet under the Workgroup's proposal, in these situations, the trial judge would have to pause the jury trial and seek the PCC's permission to deviate from the pretrial ruling. And the PCC judge (being unfamiliar with the trial) would then have to get up to speed with the trial proceedings—presumably hearing arguments from both the party moving to strike the evidence and the party that offered it—

before ruling. That requirement will unnecessarily delay trials and hinder the efficient and fair administration of justice. *See* Ltr. from Judges of Eighth Jud. Cir. at A2 (Apr. 26, 2022) ("To require additional resources and transferring of cases back and forth between the 'PCC' and the trial judge does not seem to improve efficiencies.").

Also, the Proposed Rule does not explain how a PCC would address the admissibility of expert testimony if parties call different experts in coordinated cases. Nor does the Proposed Rule address, for example, whether a PCC should rule on the admissibility of every opinion by every expert, no matter how case-specific, which would be an arduous and nearly impossible task when it comes to issues like medical causation. And the Proposed Rule does not explain whether a PCC could issue general rulings on the reliability of a particular methodology, with the judge presiding over the trial resolving any challenge based on how the method applies in each case.

Chief Circuit Judges should not be deprived of their authority to decide whether such coordination is merited in the first instance. Nor should trial judges be inhibited in making essential changes to PCC rulings, necessitated by what has actually happened at trial.

The Workgroup identifies tobacco cases as the quintessential situation where the pretrial coordination it envisions would be most appropriate. But many of the potential expert issues in those cases—from potential issues relating to a multiplicity of brands marketed over a half century or more, to inherently case-specific experts addressing medical causation—are necessarily specific to individual cases. *See Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1266 (Fla. 2006) (affirming decertification of the statewide class action due to individual issues "including legal causation, specific medical causation, reliance, and awareness of risks"); *see also, e.g.*, *Vila v. Philip Morris USA Inc.*, 215 So. 3d 82, 84 (Fla. 3d DCA 2016) (discussing testimony from case-specific medical-causation expert in *Engle*-progeny case).

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In sum, the Court should not deprive Chief Circuit Judges of the flexibility afforded to them by the current regime, and therefore should reject the PCC proposal entirety. Alternatively, if the Court does adopt some portion of Proposed Rule 1.271, it should omit the provisions in Proposed Rule 1.271(f) that limit trial judges' essential

authority to depart from pretrial rulings based on the evidence presented at trial.

### B. The Court should not adopt certain proposed amendments to rules governing scheduling and continuances.

Some proposed amendments would significantly limit trial courts' discretion over scheduling and continuances. The Workgroup aims to promote efficiency by pressing cases to trial, but its proposed amendments could unintentionally crowd trial dockets with cases that cannot be reached (and that are not ready to be tried), resulting in more backlogs and trial conflicts. The Court should therefore allow trial judges to maintain their broad latitude over these quintessential matters of docket management and not amend the Rules to (1) restrict cases that can remain in inactive status, (2) eliminate the "at issue" rule, (3) limit the bases on which trial courts can grant continuances, or (4) require all cases that are not reached on one trial docket to automatically roll to the next trial docket.

**1. Active and Inactive Case Status**. The Court should not adopt the proposed amendments to Florida Rule of General Practice and Judicial Administration 2.546, which significantly limit when cases can remain in inactive status. Inactive status is an important

informal tool that trial courts use to manage their dockets and prioritize cases. The proposed amendments to Rule 2.546 substantially curtail trial courts' discretion to sequence cases in this fashion, and thus would create significant problems for the parties and courts.

**2. The "At Issue" Rule**. We oppose eliminating the "at issue" rule currently in Rule 1.440. Eliminating the "at issue" rule would substantially change longstanding Florida procedure, displacing an easily administrable, bright-line rule with a heavily contextual inquiry that injects uncertainty into cases as they approach trial. Moreover, eliminating the "at issue" rule would invite gamesmanship by parties seeking to add new claims or defenses at the last minute.

Florida adopted the "at issue" rule more than half a century ago, and Florida courts have unsurprisingly developed extensive case law concerning its application. *See, e.g.*, *Gawker Media, LLC v. Bollea*, 170 So. 3d 125, 129, 133 (Fla. 2d DCA 2015); *Tucker v. Bank of New York Mellon*, 175 So. 3d 305, 306 (Fla. 3d DCA 2014); *Leeds v. C. C. Chem. Corp.*, 280 So. 2d 718, 719 (Fla. 3d DCA 1973) (per curiam). The clear and precise nature of the "at issue" rule has allowed for straightforward administration at trial and on appeal: Courts and parties know the effect of an amendment to the pleadings, and the

delay resulting from an amendment ensures that they also know the issues to be tried. *See Harmening v. BAC Home Loans Servicing, L.P.*, 198 So. 3d 668, 669 (Fla. 2d DCA 2015) (failure to comply with "at issue" rule resulted in a "lack of proper notice" that "deprived" party "of due process"). The Workgroup's proposal eliminates that certainty—developed over more than half a century—and would replace it with a risk of gamesmanship.

Indeed, eliminating the "at issue" rule creates a real risk that a party could amend a pleading shortly before trial to assert new claims or defenses, forcing a trial judge on the eve of trial to decide whether to allow the amendment and proceed with the trial date, allow the amendment but continue the trial date, or reject the amendment. And a party who wanted to use a late amendment to gain an upper hand on its adversary could game this out knowing that trial judges are generally reluctant to either deny amendments or move cases off of set trial dates.

Finally, the proposal to eliminate the "at issue" rule runs counter to this Court's recent decision to amend the Rules of Appellate Procedure to allow for immediate review of rulings on motions for leave to amend a complaint to include punitive damages. *See In re:*

*Amends. to Fla. R. App. P. 9.130*, No. SC21-129, 2022 WL 57943 (Fla. Jan. 6, 2022) (per curiam). That amendment will have very little practical effect if cases regularly go to trial before appellate review can occur—or before an aggrieved party can even perfect an appeal and seek an appellate stay.

If the Court does eliminate the "at issue" rule, it should (at a minimum) require that case management orders include hard deadlines for amendments to the pleadings. Such a deadline is not included in the Workgroup's current Proposed Rule governing case-management orders. *See* Proposed Rule 1.200(e)(2)(d)(10). The Court should also require, or at the very least permit, trial courts to reconsider the trial date in light of any post-deadline amendment. These revisions will give some protection against last-minute amendments to the pleadings—although keeping the clarity-promoting "at issue" rule intact is the best way to achieve that goal.

**3. Limits on Continuances.** The Court should not adopt Proposed Rule 1.460, which would severely limit a trial court's discretion over when to continue a case or stay proceedings pending an appellate decision. *See Friedman v. Heart Inst. of Port St. Lucie, Inc.*, 863 So. 2d 189, 195 (Fla. 2003) (explaining that there is "no need to limit"

trial courts' "sound discretion" over whether to stay civil actions); *Onett v. Ahola*, 780 So. 2d 979, 980 (Fla. 5th DCA 2001) (per curiam) ("A motion for continuance is addressed to the sound discretion of the trial court.").

Trial judges, of course, must manage their dockets to decide which of the many cases that are competing for available trial dates and jurors are best suited for a given trial setting. Currently, trial judges are able to efficiently prioritize cases for trial based on the availability of local resources. Eliminating the flexibility that trial judges currently have to decide which cases are ready for trial and which should be continued hinders the Workgroup's goals of ensuring the fair, timely, and efficient resolution of cases.

Restricting a trial court's ability to continue a case may also waste considerable resources. For example, under Proposed Rule 1.460, a trial court cannot continue a case because a dispositive motion is pending. The Workgroup does not explain why it would disallow continuances based on pending dispositive motions, but that prohibition risks wasting trial dates on cases where no triable issues remain. It also runs counter to this Court's recent decision to adopt the federal summary-judgment standard in part to avoid needless

trials. *See In re Amends. to Fla. R. Civ. P. 1.510*, 317 So. 3d 72, 75 (Fla. 2021) (per curiam) (explaining that Florida has adopted the federal summary-judgment standard, which recognizes that "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of rules aimed at the just, speedy and inexpensive determination of every action" (internal quotation marks and alteration omitted)).

Given the number of issues that go into ensuring that trial time and jury pools are used most efficiently, the best way to minimize the number of wasted trial days and trial settings is to give trial judges the flexibility they need to manage their own dockets—as they can do currently but would be prevented from doing under the proposed amendments to Rule 1.460. As the Civil Procedure Rules Committee explained in an earlier comment to the Workgroup, the Workgroup's proposal would prohibit trial judges from granting continuances for the most common—and most appropriate—reasons. *See* Ltr. from Jason Sterns, Chair, Civil Procedures Rules Committee, to Tina White, Office of the State Courts Administrator, et al. at 18–19 (Oct. 1, 2021).

**4. Rollover Scheduling for Trials.** We urge the Court to not adopt the proposed amendments to Rule 1.200(f)(5), which provide that a case that is not tried on the original schedule must be automatically reset on the next trial docket. That proposed amendment would require hundreds, if not thousands, of cases to roll from one trial docket to the next—and then to the next, and so on. The parties and their counsel would presumably have to stand ready to try each rolled-over case—clearing their calendars of other cases and not knowing when the trial court will actually reach their case.

Notably, under Proposed Rule 1.460(b)(5)(F), a trial cannot be continued due to a trial conflict, and the proposed amendments contain no exception for situations where the conflict has been created by a case rolling from one trial docket to the next. Together, these proposals will inevitably back counsel into conflicts they cannot resolve and could not have planned for in advance—and that counsel are powerless to do anything about, except begging one of the trial

judges to yield (even though the judges' authority to do anything about the conflict under the Workgroup's proposals is questionable).[1]

Moreover, the Workgroup's proposal (in Proposed Rule 1.200(f)(5)) that cases be presumptively stayed once they have been continued runs directly counter to the goal of having cases proceed efficiently and fairly to trial and resolution. The Workgroup does not explain this proposal, but the best way to promote efficiency is to encourage the parties to continue working up a case that has been continued, not to impose a presumptive stay.

### C. The Court should not adopt certain proposed amendments to civil motions practice.

The meet-and-confer requirements in Proposed Rules 1.160 and 1.161 would make significant and unwarranted changes to civil motions practice. Accordingly, we join the Judges of the Fourth Judicial

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[1] The Workgroup proposes to add language to Rule of General Practice and Judicial Administration 2.550(c) to require that judges presiding over conflicting trial dates confer in an attempt to "resolve the conflict by agreement among themselves." But the Workgroup does not explain how the judges would accomplish this if the Court adopted Proposed Rule of Civil Procedure 1.460(b)(5)(F), which would equally bar each affected judge from continuing the trial before that judge due to the conflict. Nor does the Workgroup explain how this would work if one of the impacted judges sits in another state or in the federal system, and is thus not constrained by the Florida Rules of Civil Procedure.

Circuit, who "***strongly*** recommend that proposed Rules 1.160 and 1.161 not be enacted." Cmt. of the Judges Assigned to the Civil Divisions of the Fourth Jud. Cir. of Fla. at 20 (May 17, 2022) (emphasis in original).

At the least, the Court should (1) revise these Proposed Rules to require the meet-and-confer to occur *after* the parties have briefed the motion (or at least after the motion has been filed) and (2) exempt from the meet-and-confer requirement all dispositive motions and all motions made at trial.

**1.** To the extent the Court adopts Proposed Rule 1.160, it should modify Proposed Rule 1.160(c) to provide that the meet-and--confer should occur *after* the parties have briefed a motion (or at least after the motion has been filed) but *before* scheduling any hearing (or, if the hearing has already been scheduled, before the hearing is held). The Proposed Rule requires a moving party to meet and confer—or attempt three times to do so—*before* filing a motion. That would slow down cases because it requires the moving party to attempt to track down the opposing party—who may wish to obstruct or delay the motion—and schedule a call before filing anything. At

best, this will delay litigation; at worst it will create serious logistical problems as deadlines approach.

By contrast, if the moving party files the motion and then approaches the other side, the issue can continue moving forward through briefing and toward a hearing *while* the parties confer. Moreover, our experience litigating and trying mass-tort cases has taught us that parties make better, faster progress toward resolving disputes when they have a concrete motion before them—especially when that motion is moving towards a hearing. Pre-filing conferences are often less productive because the nonmovant is left to rely on representations about arguments that the movant *might* press.[2]

**2.** The Workgroup appropriately recommends that certain motions be excluded from the requirements of Proposed Rule 1.160 (specifically, "motions made pursuant to rules 1.480, 1.500, 1.510, 1.525, 1.530, 1.535, and 1.540," *see* Proposed Fla. R. Civ. P.

[2] We also join the Civil Procedures Rules Committee in recommending that the Court amend the proposal to allow meet-and-confers to occur via email. *See* Ltr. from Jason Sterns, Chair, Civil Procedures Rules Committee, to Tina White, Office of the State Courts Administrator, et al. at 34–35 (Oct. 1, 2021). As the Rules Committee points out, email is often the most efficient method of conferring and has the benefit of creating a concrete record of any agreements.

1.160(a)). But that list is under-inclusive. Any new Rule 1.160 should also exclude (1) all dispositive motions (including Rule 1.140 motions and any motions directed at the pleadings) and (2) motions made at trial—*e.g.*, motions for mistrial, to strike testimony, for curative instructions, and to dismiss jurors for cause.

*First,* the proposed amendments to Rule 1.160(a) already exempt *most* dispositive motions—such as summary-judgment motions and directed-verdict motions—from its strictures. But Rule 1.160(a) does not exempt motions made under Rule 1.140 or motions directed at the pleadings. These motions are subject to very strict deadlines (as short as 10 days if directed to amended pleadings, *see* Fla. R. Civ. P. 1.190(a)), which are not consistent with Proposed Rule 1.160's detailed procedures. Moreover, these motions are unlikely to be resolved through meeting and conferring—unless the parties can settle the case. Presumably for that reason, federal courts in Florida have long exempted dispositive motions from meet-and-confer requirements. *See, e.g.*, S.D. Fla. Local R. 7.1(a)(3) (exempting from the meet-and-confer requirement motions for "judgment on the pleadings, for summary judgment, to dismiss or to permit maintenance of

a class action, to dismiss for failure to state a claim upon which relief can be granted," or "to involuntarily dismiss an action").

*Second*, motions made at trial should also be exempt from the meet-and-confer requirement. Under Proposed Rule 1.160, a trial court has *discretion* to entertain an oral motion despite noncompliance with the requirement of a written motion after meeting and conferring. That suggests the trial court also has discretion *not* to entertain an oral motion at trial—including, as examples, contemporaneous motions for mistrial or to strike testimony. The Court should eliminate that suggestion: Principles of appellate preservation—and practical necessity—often require counsel to make these motions contemporaneously at trial. *See, e.g.*, *Companioni v. City of Tampa*, 51 So. 3d 452, 455–56 (Fla. 2010) (holding that attorneys cannot engage in a "wait and see" approach following sustained objections if they wish to preserve the position that the misconduct requires further judicial action than simply sustaining the objection). And it is impossible to meet and confer and then prepare a written motion before moving for mistrial, for instance, during opposing counsel's closing. The Court should make clear in any adopted version of Proposed

Rule 1.160 that counsel still have the right to make contemporaneous oral motions at trial.

### D. The Court should not adopt the proposed rules that allow sanctions to be imposed without a show cause order or a showing of willfulness.

We join and adopt in full the prior comments of the Florida Defense Lawyers Association (FDLA) and the Civil Procedures Rules Committee objecting to the Workgroup's proposals for greatly expanding the availability sanctions. *See* Comments of the Fla. Defense Lawyer's Assoc. at 2–10 (May 16, 2022); Ltr. from Jason Sterns, Chair, Civil Procedures Rules Committee, to Tina White, Office of the State Courts Administrator, et al. at 4–5, 19–23 (Oct. 1, 2021).

Specifically, we join the FDLA in urging the Court to reject the proposal to eliminate the requirement for show-cause orders as well as the willfulness requirement in some instances. Requiring show-cause orders and a finding of willfulness are essential to protecting the due-process rights of counsel and parties subject to potential sanctions.

## III. Before implementing the proposed amendments statewide, the Court should allow trial courts the opportunity to work through the pandemic-related backlog, while conducting an empirical study of the proposed amendments' likely effect.

Finally, the Court should take two important steps to guard against the risk that the costs of implementing the proposed rules does not overwhelm the hoped-for gains in efficiency.

*First*, the Court should pause its implementation of any of the Workgroup's recommendations until the Florida courts have had more opportunity to work through the pandemic-related backlog and fully implement the changes to Florida practice that were prompted by the pandemic. As Chief Justice Canady recently explained, Florida courts have made "a lot of progress . . . through aggressive case management," which has resulted in "a 50% reduction in the backlog . . . that far exceeds what we anticipated and it is only happening because a lot of judges and a lot of lawyers are working hard to move those cases forward to resolution."[3]

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[3] *See* Mark D. Killian, *Chief Justice Canady Says the Courts Are Making a Dent in the Backlog*, Fla. Bar News (Apr. 11, 2022), https://tinyurl.com/234kvhzr; *see also* Jim Ash, *Chief Justice Canady: Courts Are Making Headway in Clearing Case Backlog*, Fla. Bar News (Jan. 25. 2022) (quoting Chief Justice Canady concerning the progress made in working through backlog due to "some pretty aggressive case management"), https://tinyurl.com/2p8hjnyd.

The Court should allow trial courts to continue their admirable work. Attempting to implement the Workgroup's overhaul while the Florida court system is still working through the pandemic-related backlogs would only interrupt this progress as courts and lawyers would have to focus on implementing the Workgroup's proposed changes. Indeed, the changes the Court implemented during the pandemic are themselves bearing fruit, and the Court should allow the State's courts to further acclimate to those changes before considering anything like the massive changes the Workgroup proposes. *See In re: Comprehensive COVID-19 Emergency Measures for Florida Trial Courts*, Fla. Admin Order No. AOSC20-23, Amend. 12 at 16–22 (Fla. Apr. 13, 2021) (summarizing some of these changes).

*Second*, a pause is especially important to allow an empirical study of the Workgroup's proposals. Chief Judge Robert Morris, Chair of the Workgroup, has acknowledged that the proposals constitute "a major paradigm shift" in Florida practice.[4] Yet none of the Workgroup's changes is accompanied by any empirical evidence that

[4] Mark D. Killian, *Board Urges Members to Read and Comment on Proposed Rules to Reshape How Civil Cases Are Processed*, Fla. Bar News (Feb. 24, 2022), https://tinyurl.com/yjkvkpce.

Florida's current practice is inefficient or defective. Nor has the Workgroup conducted any empirical study on the cost of implementing its proposals. *Cf. Michigan v. E.P.A.*, 576 U.S. 743, 752–53 (2015) (Scalia, J.) ("Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions.").

The limited research that the Workgroup cites suggests that the Workgroup's approach of implementing "early case management" without taking steps to limit the costs of discovery may "significantly" *increase* the hours expended by attorneys and thus the cost to the parties.[5] The Workgroup's proposals should not be implemented without empirical research into the likely costs to courts, parties, and the judicial system—and a better understanding of who will bear those costs.

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[5] *See* Workgroup Final Report at 36 (Nov. 15, 2021) ("The RAND evaluation found that early case management on its own 'significantly reduced time to disposition' but also 'significantly increased lawyer work hours'—thus *increasing* costs to clients. However, 'when early judicial intervention is combined with shortened discovery, the increase in lawyer work hours is mitigated.'" (footnotes omitted)).

Therefore, before the Court implements anything this potentially disruptive statewide, the Court should commission an empirical study of the proposed changes it is planning to implement. The study should attempt to quantify the costs and benefits associated with implementing these sorts of changes statewide. The Proposed Rules borrow many aspects of active judicial management used in federal court, and the study could provide insight into whether and to what extent the federal model will work for state-court judges given the resources available to them. *See* Cmt. of the Judges Assigned to the Civil Divisions of the Fourth Jud. Cir. of Fla. at 3 (May 17, 2022) ("[S]tate courts are not federal courts. We do not enjoy the same staffing or financial resources as federal courts, despite civil caseloads many times that of our federal colleagues.").

Indeed, the disparity in resources available to judges in the federal system as compared to those available to those in the Florida system led U.S. District Court Judge Thomas P. Barber to suggest that the Workgroup's proposals "must also include appropriate administrative staff to support Florida's trial court judges in carrying out their new—and significantly more labor-intensive—case manage-

ment responsibilities." Ltr. from Judge Thomas P. Barber, U.S. District Court for the Middle District of Fla. at 1 (Mar. 25, 2022). As Judge Barber observed, "[m]any of the changes discussed in the Report would create a case management system similar to what has existed in the federal system for nearly 30 years"—but without "the administrative support necessary to effectively implement that kind of case management system." *Id.*

Given this, before implementing any of the Workgroup's proposals for reworking pretrial judicial management, the Court should conduct a feasibility study. *See* Cmt. of the Judges Assigned to the Civil Divisions of the Fourth Jud. Cir. of Fla. at 4 (May 17, 2022) ("Such sweeping changes should not be implemented before realistically determining what the cost of implementation will be."). This could take the form of pilot programs in select circuits for set durations so that the proposed changes can be pressure-tested in the real world before they are imposed statewide. The resulting data would provide valuable insight into the feasibility, advantages, and potential disadvantages of the proposed amendments before anything like the sort of paradigm-shifting procedural reforms the Workgroup envisions are rolled out statewide and on an indefinite basis.

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We thank the Court for the opportunity to comment on the proposed amendments. We request the opportunity to present oral argument concerning our comments.

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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