IN THE SUPREME COURT OF FLORIDA

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

NO. SC22-122

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COMMENTS OF KING & SPALDING LLP

King & Spalding LLP submits these comments to the November 15, 2021 Final Report on the Judicial Management Council's Workgroup on Improved Resolution of Civil Cases (the "Report"). As a global law firm with offices in Miami, we routinely represent parties in state and federal courts in Florida, and our lawyers have been particularly involved in the trials and appeals of *Engle* progeny and other tobacco cases in Florida for more than a decade.

In light of the numerous and detailed comments filed to date, and the volume of the Workgroup's proposals as set forth in the Report, we limit our comments to general observations regarding aspects of the proposals that we find particularly concerning.

1. Federal-style case management without federal resources

While we applaud the recommendations to adopt some elements of federal pretrial discovery and procedure—such as initial disclosures and a duty to supplement discovery responses—the

wholesale implementation of a federal-style case management system runs counter to Florida's history of incrementally refining and updating rules to address specific deficiencies.

But even if the current system were failing and required replacement, adopting the federal system wholesale without a commensurate increase in resources, funding, and administrative support staff seems an invitation for failure. As several commenters have pointed out, federal judges have multiple full-time law clerks and share their civil case management duties with experienced magistrate judges. Florida state court judges, on the other hand, have substantially higher caseloads, do not have full-time dedicated law clerks, and lack the resources required to implement a federal-style case management system. *See, e.g.*, Cmts. of Fla. Bar 3-4 (May 31, 2022); Ltr. from Judge Thomas P. Barber, U.S. District Court for the Middle District of Fla. at 1 (Mar. 25, 2022); Cmts. of Bruce J. Berman and Peter D. Webster at 11 (May 26, 2022); Cmts. of the Hon. Christopher N. Patterson on Behalf of the Chief Judges of the Circuit and County Courts of Florida at 3-4 (May 26, 2022); Cmts. of the Judges Assigned to the Fourth Judicial Circuit of Florida at 3 (May 17, 2022).

2. Loss of trial court flexibility

Trial courts in Florida currently have considerable flexibility to efficiently and fairly manage their dockets in light of the circumstances that prevail in their jurisdictions. This flexibility includes the ability of each jurisdiction to use its own case management tools, including coordinated proceedings, to meet the needs of litigants.

The proposed rules would largely replace existing case management rules with more detailed and extensive requirements that would increase complexity and decrease efficiencies, in part by stripping trial courts of the flexibility they need to manage the cases on their dockets. In particular, we are concerned that proposed Rule 1.271, which creates a Pretrial Coordination Court ("PCC"), would in some instances require the trial judge to obtain written permission from the PCC to depart from the PCC's pretrial rulings on a particular issue. *See* Proposed R. 1.271(f)(2). This would be an unwelcome departure from the flexibility trial judges generally enjoy to revisit their orders as circumstances require and in the interests of justice.

We agree with the Comments of the Judges Assigned to the Civil Divisions of the Fourth Judicial Circuit that "the mandatory and overly complex nature of the PCC process would slow down the

pretrial system, not expedite it." Cmts. of the Judges Assigned to the Civil Divisions of the Fourth Jud. Cir. of Fla. at 20 (May 17, 2022); *see also* Cmts. from Judges of Eighth Jud. Cir. at A2 (Apr. 26, 2022) ("Pretrial Coordinating Court requirements are complicated and will decrease efficiencies.").

3. Loss of trial court discretion in granting continuances and resetting trials

Proposed Rule 1.460 severely limits the discretion of trial judges to manage their dockets and corresponding resources such as jury pools and trial time. In particular, it prohibits trial judges from granting continuances other than for "extraordinary unforeseen circumstances"—excluding from consideration, among other grounds, trial conflicts and outstanding dispositive motions—and limits any continuance to six months in most cases regardless of available court resources. *See* Proposed R. 1.460(b)(5). As others have commented, the proposed rule puts trial judges in the position of having to deny a motion to continue even though the case has no reasonable likelihood of being tried on the date set for trial. *See, e.g.*, Cmts. of the Hon. Christopher N. Patterson on Behalf of the Chief Judges of the Circuit and County Courts of Florida at 5 (May 26, 2022). This is contrary to the general recognition that trial judges

are in the best position to grant continuances based on their knowledge of the unique circumstances of the case.

We also are concerned that proposed Rule 1.200(f)(5) requires that a case not tried as scheduled by the case management order "shall be reset to the next immediately available trial period"—even if that next trial period already has numerous cases already set for trial. Again, this rigidity displaces the flexibility usually afforded trial courts and puts parties and their counsel and witnesses in the untenable position of having to be ready to try the rolled-over case on the next trial docket without any real expectation that the court actually will reach it on that docket, or on the next docket if it rolls over again, and so on. We agree with Chief Judge Patterson that "[r]epetitive rolling of trials from one docket to another will significantly increase the cost of litigation to the parties and increase the frustration of their lawyers." Cmts. of the Hon. Christopher N. Patterson on Behalf of the Chief Judges of the Circuit and County Courts of Florida at 5 (May 26, 2022).

4. Civil motions practice

In our view, proposed Rules 1.160 and 1.161 unnecessarily micro-manage lawyers and judges in ways that are likely to hinder the efficient disposition of motions. For example, proposed Rule

1.160(c)(3) would require a moving party to meet and confer with the opposing party "in person or by telephone or videoconference" before filing its motion and specifically states that "[a]n exchange of correspondence between the parties does not satisfy the requirement to meet and confer." This strikes us as highly likely to lead to delay by requiring the moving party to try to schedule a live, substantive call before filing a motion. A requirement that counsel speak in person before filing a motion also would be vulnerable to gamesmanship by the opposing party's counsel. An exchange of emails should be sufficient to accomplish the otherwise worthwhile goal of requiring counsel to meet and confer. For this and other reasons, we agree with the Judges of the Fourth Judicial Circuit, who "strongly recommend that proposed Rules 1.160 and 1.161 not be enacted." See Cmts. of the Judges Assigned to the Civil Divisions of the Fourth Jud. Cir. of Fla. at 20 (May 17, 2022) (emphasis in original).

5. Conclusion

We acknowledge the extraordinary effort by the Workgroup and thank its members for their dedication to improving the resolution of civil cases in Florida state courts. We appreciate the opportunity to offer our comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been filed and electronically served via Florida ePortal this 1st day of June, 2022, with a copy served via U.S. Mail to Chief Judge Robert Morris, Workgroup Chair, Second District Court of Appeal, P.O. Box 327, Lakeland, FL 33802, and via electronic mail to Tina White, OSCA Staff Liaison to the Workgroup, 500 South Duval Street, Tallahassee, Florida 32399, whitet@flcourts.org.

/s/ William L. Durham II
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing was prepared in compliance with the requirements of Florida Rule of Appellate Procedure 9.045(b).

/s/ William L. Durham II
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