IN THE SUPREME COURT OF FLORIDA

CASE NO. SC22-122

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

RESPONSE OF THE WORKGROUP ON IMPROVED RESOLUTION OF CIVIL CASES TO COMMENTS ON THE PROPOSED RULE AMENDMENTS

The Workgroup on Improved Resolution of Civil Cases (Workgroup), by and through its undersigned chair, the Honorable Robert Morris, Chief Judge of the Second District Court of Appeal, respectfully submits this response to the comments filed regarding the Workgroup's proposed rule amendments in its petition captioned *In re: Report and Recommendations of the Workgroup on Improved Resolution of Civil Cases*, Florida Supreme Court Case No. SC22-122 (Workgroup's Petition).

I. Introduction

Individuals and entities filed 68 comments in this case totaling 1,283 pages. Although some comments suggest that none of the Workgroup's proposed rule amendments should be adopted,[1] others

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[1] *See, e.g.,* comments by Attorney Benjamin Raslavich at 1; Williams, Leininger & Cosby, P.A., at 2; Attorney Michael Vitale at 2; Attorney Philip Bartlett at 5-6; Luks, Santaniello, Petrillo, Cohen & Peterfriend at 7; Attorney Kenneth Schurr at 3; Attorney David Alexander at 5; and Attorney Peter Webster at 18.

support many of the proposed reforms, while raising concerns with respect to a certain portion of the package.[2] Below the Workgroup responds to the concerns raised by multiple commenters. Due to the volume of discrete amendments offered by the 68 comments, this response addresses solely those suggestions that the Workgroup felt were well-taken and those issues generating the most disagreement. By submitting this response, the Workgroup intends is to build consensus on rule amendments that are necessary to reform Florida's civil justice system.

The 10-member Workgroup unanimously approved this response.

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[2] *See, e.g.,* comments by Attorney J.B. Grossman at 10; the Chief Judges of the Circuit and County Courts of Florida at 1-7; Wicker, Smith, O'Hara, McCoy & Ford, P.A. at 1; International Association of Defense Counsel at 2; Business Law Section of The Florida Bar at 3; judges with civil assignments in the Eighth Judicial Circuit at 1; Washington Legal Foundation at 3; Federation of Defense and Corporate Counsel at 2; Attorney Dan Cytryn at 12; Florida Defense Lawyers Association at 22; judges with civil assignments in the Fourth Judicial Circuit at 5; Florida Chapters of the American Board of Trial Advocates at 5; National Federation of Independent Business at 2; Florida Justice Association at 7-8, 12-15; Palm Beach County Bar Association at 25; judges with civil assignments in the Sixth Judicial Circuit at 2; Trial Lawyers Section of The Florida Bar at 11; Marshal Dennehey Warner Coleman & Goggin at 1; Office of the Attorney General at 1; Civil Procedure Rules Committee at 21; Hill Ward Henderson and Jones Day at 1; American Tort Reform Association at 1; Hawkins Parnell & Young LLP at 1; Gunster Yoakley & Stewart, P.A., at 1; Attorney Lee Haas at 2; Goldstein & Company at 1; King & Spalding, LLP, at 1; Attorney Matthew Conigliaro at 2; and The Gerald T. Bennett American Inn of Court at 1-5.

II. Workgroup's Responses to the Comments

The Workgroup's response to the comments is set forth below. Section II.A. addresses comments raising general concerns. Section II.B. addresses comments relating to a specific proposed rule amendment. In response to the comments, the Workgroup recommends modifications to the proposed rule amendments in the Workgroup's Petition. For ease of reference, a full-text, legislative version of the Workgroup's recommended modifications is set forth in Appendix A, with changes to the amendments proposed in the Workgroup's Petition shown by double strike-through, double underlines, and yellow highlight. These modifications are also set forth as a clean version in Appendix B, which complies with Fla. Admin. Order No. AOSC06-14,[3] and reflects rule amendments that will go in effect on October 1, 2022, at 12:01 a.m. pursuant to the order issued in SC21-990.[4]

For the sake of brevity, this response henceforth substitutes the phrase "the Workgroup's proposed rule amendments" or variations thereof with the term "proposed amendments" and refers to proposed amendments to specifically cited rules as "proposed rule [number]" or "proposed subdivision [number]."

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[3] *In re: Guidelines for Rules Submissions*, Fla. Admin. Order No. AOSC06-14 (June 14, 2006).

[4] *In re: Amendments to Florida Rules of Civil Procedure, Florida Rules of Gen. Practice & Judicial Admin., Florida Rules of Criminal Procedure, Florida Prob. Rules, Florida Rules of Traffic Court, Florida Small Claims Rules, & Florida Rules of Appellate Procedure*, SC21-990, 47 Fla. L. Weekly S187 (Fla. July 14, 2022).

A. Comments Raising General Concerns

1. Impact on a Resource-Limited System

Multiple comments collectively indicate that the new requirements added by the proposed amendments, although well intended, will add too much stress and strain to the already limited resources of the trial courts, attorneys, and litigants. More specifically, issues cited include the following:

- Implementation of the proposed amendments will overburden attorneys, causing them to work 100-hour weeks and suffer mental, physical, and emotional anguish and higher incidences of substance abuse and mental illness. Law firms are currently experiencing the "great resignation"; as such, they are struggling with hiring and retention issues and may not be able to have sufficient personnel to ensure quality representation.[5]

- The proposed amendments, which establish a case management system like that in the federal courts for the past 30 years, will necessitate significantly more trial court judges and court staff and could drive some of the most experienced and seasoned civil judges to request reassignment to another division.[6]

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[5] *See, e.g.,* comments by Attorney Raslavich at 1-3; Attorney Vitale at 3-4; and Luks, Santaniello, Petrillo, Cohen & Peterfriend at 3-4.
[6] *See, e.g.,* comments by the Honorable Thomas P. Barber, Judge, U.S. District Court, Middle District of Florida, at 1-2; Williams, Leininger & Cosby, P.A., at 2; and Attorney James Bowdish at 2, 4, and 5.

- Many attorneys avoid practicing in the federal court system because of the "often-perceived draconian rules regarding deadlines, and limitation of ability to conduct discovery."[7] Adopting similar rules in this state will present malpractice pitfalls. Already stressed Florida attorneys should not be subjected to greater malpractice risks.[8]

- The existing rules are sufficient, particularly when combined with the current, proactive civil case management requirements (CMRs) in each judicial circuit, most of which were recently adopted pursuant to the directive in Section II.E.(7) of Fla. Admin. Order No. AOSC21-17, Amendment 3.[9, 10]

The Workgroup acknowledges that the proposed amendments constitute a sea change in the culture of Florida's trial courts wherein attorneys and litigants have historically been the primary drivers of civil case resolution. The Workgroup understands that such proposed change causes skepticism, hesitation, and fear; however, it is the Workgroup's position that the proposed amendments will improve the speed of case resolution while affording all litigants due process of law.

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[7] *See, e.g.,* comment by Attorney Bartlett at 1, 3, and 4.
[8] *Id.*
[9] *See, In re: COVID-19 Health and Safety Protocols and Emergency Operational Measures for Florida Appellate and Trial Courts*, Fla. Admin. Order No. AOSC21-17, Amendment 3 (January 8, 2022), at 18-23 (prescribing the issuance of local administrative orders by each trial court chief judge to require each presiding judge in a civil case to implement specified CMRs).
[10] *See, e.g.,* comments by Attorney Raslavich at 2; Williams, Leininger & Cosby, P.A., at 2; Attorney Vitale at 2; and Attorney Bartlett at 5-6.

Many commenters[11] suggested that a pilot program should be established to determine the effectiveness of case management in certain circuits before the Court adopts the proposed amendments on a statewide basis. However, as properly noted by several other commenters,[12] all 20 judicial circuits are currently, and successfully, practicing case management under local administrative orders. Although the Workgroup acknowledges the concerns[13] suggesting that a phased implementation of the proposed amendments may be appropriate, the Workgroup nonetheless declines to recommend phased implementation due to the interlocking and interdependent nature of the proposed amendments. Stripping away portions of the proposed amendments will decrease the overall effectiveness of the package and may lead to unintended glitches in the case management framework.[14]

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[11] *See, e.g.,* comments by the Business Law Section of The Florida Bar at 4 and 8; Broward County Bar Association at 3 and 13-14; Civil Procedure Rules Committee at 12; Hill Ward Henderson and Jones Day at 2-3 and 29; American Tort Reform Association at 3, 5, and 24; and Gunster Yoakley & Stewart, P.A., at 3.

[12] *See, e.g.,* comments by Luks, Santaniello, Petrillo, Cohen & Peterfriend at 5; Attorney Paul Regensdorf at 6; Attorney Raslavich at 2; and Attorney Alexander at 2.

[13] *See, e.g.*, comments by the Florida Defense Lawyers Association at 18-19; Florida Chapters of the American Board of Trial Advocates at 12; Florida Justice Association at 8 and 13-15; Circuit and County Judges of the Thirteenth Judicial Circuit at 10 and 14; Broward County Bar Association at 12; Civil Procedure Rules Committee at 2, 12, and 14; Attorney Maegen Peek Luka at 5; and the Gunster Yoakley & Stewart, P.A., at 3.

[14] For example, if the Court desired to immediately implement only the uniform case management order under proposed rule 1.200(e), the following rules would be impacted: 1.190(b)(1)(A) (amending

The Workgroup is also mindful that the purposes of these proposed rules must be balanced with the reality that the problems litigants bring to court, and the lives of the litigants and lawyers who represent them, are subject to the vagaries of human existence. The proposed rules must be applied with humanity, and judges must recognize and resolve inherent conflicts such as rule 2.570 (parental leave continuance) with deadlines set early in the case in a manner that balances court deadlines with other valid concerns and priorities. The Workgroup provides guidance regarding parental leave continuances via commentary to proposed rule 1.460, *infra*.

The Workgroup believes that its proposed amendments for this state, like those adopted in the federal courts decades ago, will ultimately result in fairer and far more cost- and time-efficient resolution of civil cases. The Workgroup further acknowledges that additional resources and education may be necessary to successfully implement the proposed amendments. To this end, the Workgroup recommends that the Supreme Court consider the following next steps:

1) Make a referral to the Florida Courts Technology Commission (FCTC) to determine if additional technological functionality would facilitate trial court compliance with the proposed amendments. The use of technology to automate compliance can obviate or significantly mitigate the need for additional judges and court staff. The FCTC is working on modifications

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affirmative defenses involving comparative fault), 1.201(d) (additional case management conference), 1.271(d)(3) (proceedings in the pretrial coordination court), 1.440(a-c) (setting action for trial), 2.250(b)(2)(A)(iii) (annual report of pending civil cases), 2.546(d) (inactive case deadlines tolled), and 7.020(c) (small claims additional rules).

to the current case management solutions (i.e., the Court Application Processing Systems (CAPS) and clerk case maintenance systems (CMSs)) to facilitate circuit compliance with the local CMRs adopted pursuant to AOSC21-17.[15] Moreover, circuits, such as the Eleventh, Thirteenth, and Twentieth Judicial Circuits, have already implemented technology and processes to automate compliance with many of their local CMRs.

2) Make a referral to Trial Court Budget Commission (TCBC) for a determination of the costs and funding sources for needed technology resources that may be identified by the FCTC, as well as for staffing and other resource needs that may be identified by the trial courts for aspects of the requirements that may not be subject to automation.

3) Make referrals to the following entities for the development and provision of educational programming:

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[15] In a 2021 report by the FCTC's Civil Case Management Standards Workgroup, the workgroup made six recommendations to enhance the automation of circuit compliance with local CMRs that included the adoption of standard case types, docket codes, and other conventions, as well as new standards for the clerk CMSs and CAPS that would ensure the capture of necessary data elements and the association of the data with the applicable CMR for purposes of determining compliance with the CMR. Civil Case Management Standards Workgroup, *Technology Solutions to Support the Civil Case Management Requirements for Florida Courts* (Sept. 30, 2021) at 12. The Supreme Court directed the FCTC to incorporate these recommendations into its existing work. Letter from Chief Justice Canady, Florida Supreme Court, to Chief Judge Lisa T. Munyon, Chair, FCTC (Dec. 10, 2021).

a. The Florida Court Education Council to develop education for judges and court staff on the CMRs and best practices for the use of technology and other implementation issues. This will mitigate the potential for an increased workload. Additionally, continuing judicial education should be developed on topics relating to proactive case management.

b. The Florida Court Clerks & Comptrollers to develop training on the practical aspects of case management under the amended rules, including the use of technology.

c. The appropriate sections and committees of The Florida Bar to develop continuing legal education for attorneys that focuses on the new CMRs, particularly discovery practice; the case management timetable under the amended rules; motion practice; sanctions; dismissals for failure to prosecute; and technology best practices. Education on professionalism should also be emphasized.

2. Access to Courts

Some comments[16] generally indicate that the proposed amendments will interfere with a litigant's right to access courts because the amendments impose additional requirements and

[16] *See, e.g.*, comments by Attorney Vitale at 1-2; Florida Defense Lawyers Association at 10-11; Real Property, Probate and Trust Law Section of The Florida Bar at 7; staff attorneys of the Thirteenth Judicial Circuit at 8-9; The Florida Bar at 8-9; and Circuit and County Judges of the Thirteenth Judicial Circuit at 9.

limitations,[17] and may result in motions dispensed on the papers.[18] One commenter indicates that the right will be impeded because indigent litigants need time to assemble resources for their cases, such as documents, case costs, and fees to hire an attorney. It is argued that the stringent deadlines will cut off these litigants' access to justice.[19]

The Workgroup respectfully disagrees because it believes that the structured case management required by the proposed amendments will instead increase access to the courts. The proposed amendments will provide transparent and uniform notice to attorneys and litigants statewide of the procedures and deadlines they must satisfy throughout a civil case, rather than leaving such matters to be inconsistently addressed at the local or case-by-case level. Under the proposed amendments, hearings and trials will be scheduled and rulings will be entered by the court within specified periods, thereby, ensuring that cases do not languish due to reasons attributable to the courts. Moreover, the rules do not preclude hearings on motions; instead, proposed rule 1.160(c)(2)(a) expressly authorizes a party to request a hearing on a motion. Indeed, an evidentiary hearing is required when the court must decide issues of material fact under proposed rule 1.160(g). Finally, all litigants, including self-represented litigants, who need additional time in their cases can request a modification of the deadlines in the case management order (CMO) based on good cause under proposed rule 1.200(f)(1).

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[17] Comment by Williams, Leininger & Cosby, P.A., at 2.
[18] Comment by Luks, Santaniello, Petrillo, Cohen & Peterfriend at 6.
[19] Comment by Attorney Bartlett at 2-3.

3. Inconsistent Standards

Several commenters[20] suggested that the Workgroup used similar, but not identical, terms to describe the same conduct. Many of these comments are well-taken. To this end, the Workgroup modifies the proposed amendments by defining the terms "substantially justified"[21] and "due diligence"[22] in proposed rule 1.275(b).[23] The usage of these terms is conformed throughout the proposed amendments to promote consistency. Proposed rule 1.275 is also modified by striking each reference to the term "misconduct" and replacing it with the term "noncompliance," as explained, *infra*. To the extent the comments[24] suggest that "good cause" should be the standard for an award of sanctions, the Workgroup respectfully disagrees. The "good cause" standard has been abused and must be abandoned in favor of a more meaningful standard.

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[20] *See, e.g.*, comments by the Florida Defense Lawyers Association at 7-8; Real Property, Probate and Trust Law Section of The Florida Bar at 6; staff attorneys of the Thirteenth Judicial Circuit at 7-8; Attorney Luka at 45-46; and Civil Procedure Rules Committee at A45-A46.

[21] "Substantially justified" means having a reasonable basis in fact and law.

[22] "Due diligence" means the care a reasonable attorney ordinarily exercises to satisfy a legal requirement or discharge an obligation.

[23] The commentary clarifies that the "due diligence standard" examines the reasonableness of conduct under the circumstances. When prompt action is required to avoid an adverse impact on other parties or the proper progress of the case, then the court may also require prompt action to avoid sanctions.

[24] *See, e.g.*, comments by the Florida Chapters of the American Board of Trial Advocates at 16-17; and Real Property, Probate and Trust Law Section of The Florida Bar at 6.

The Workgroup also respectfully disagrees with the comments[25] directed to perceived inconsistencies in rule 1.200, which variously utilizes the terms "imminent,"[26] "as soon as practicable,"[27] "extraordinary unforeseen circumstances,"[28] "good faith effort,"[29] and "significant change of circumstances."[30] Each of these standards relates to different conduct warranting disparate treatment.

Notwithstanding this disagreement, the Workgroup strikes the word "unforeseen" from the phrase "a significant unforeseen change of circumstances" in rule 1.200(h)(4)(C)(i), which governs revisiting case management deadlines. This change is necessary because a *foreseeable* significant change in circumstances may indeed necessitate modification of a case management deadline.

4. Sanctions

i. Right to a hearing

Several commenters[31] noted that the proposed amendments' failure to provide the right to a hearing on all sanctions is a violation of due process. The Workgroup notes that proposed rules

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[25] *See, e.g.*, comments by the Florida Justice Association at 16-17; staff attorneys of the Thirteenth Judicial Circuit at 7-8; and Attorney Luka at 26-27.
[26] Proposed Fla. R. Civ. P. 1.200(e)(4)(F).
[27] Proposed Fla. R. Civ. P. 1.200(e)(3)(E).
[28] Proposed Fla. R. Civ. P. 1.200(f)(2).
[29] Proposed Fla. R. Civ. P. 1.200(h)(4)(C)(i).
[30] Proposed Fla. R. Civ. P. 1.200(h)(5).
[31] *See, e.g.*, comments by the Florida Defense Lawyers Association at 3; Cole, Scott & Kissane, P.A., at 4-5; Civil Procedure Rules Committee at 22; and Attorney Luka at 54-55.

1.380(a)(5), (b)(1) already require a hearing on sanctions. To the extent these concerns are well-taken, the Workgroup amends the sanctions provisions in the proposed amendments to expressly require a hearing. These modifications affect proposed rules 1.160(f)(1), 1.275(a), (b), and (f).[32]

ii. Fees and costs

Several commenters[33] noted that certain of the proposed amendments authorize the imposition of attorneys' fees and costs, while other provisions merely authorize an award of attorneys' fees. The Workgroup thanks the commenters for noting this discrepancy and amends these sanctions provisions to expressly authorize the impositions of attorneys' fees and costs. The modifications affect proposed rules 1.271(d)(2)(E), 1.275(f),[34] 1.335(f), (g), 1.370(c), and 1.380(a)(5)(B) and (D).

iii. Mandatory sanctions under rule 1.380

Perhaps the most commonly expressed concern[35] relates to mandatory sanctions under proposed rule 1.380 for failure to make

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[32] With respect to rule 1.275, the Workgroup renumbered subdivisions (b) and (f) to subdivisions (c) and (g), respectively in appendices A and B.

[33] *See, e.g.*, comments by the Florida Defense Lawyers Association at 6; Attorney Luka at 49-53; and Florida Justice Association at 30 and 53-57.

[34] The Workgroup renumbered this subdivision to (g) in appendices A and B.

[35] *See, e.g.*, comments by the Florida Defense Lawyers Association at 23-24; Civil Procedure Rules Committee at 22; Attorney Luka at 48-51; and judges with civil assignments in the Fourth Judicial Circuit at 21.

discovery. Although the Workgroup understands the proposed amendments will present a significant learning curve to practitioners, costs and delay will continue unless sanctions are a real threat to deter misconduct. Failure to make discovery presents a cascading effect of delay and increased costs in individual cases and reduces the availability of hearing time for other cases. Because a culture change is necessary to deter longstanding abuses of the discovery process, the Workgroup maintains that proposed rule 1.380 must continue to mandate sanctions for failure to make discovery.

iv. Willfulness Standard

Another common objection[36] arises from the proposed amendments' removal of the requirement for the court to make a finding of "willfulness" before awarding sanctions. The Workgroup stands by its recommendation that the trial courts should be permitted to depart from the "willfulness standard" in situations in which the conduct is commensurate with an imposed sanction. Certainly, there are situations in which an appellate court may find willfulness should be required. The proposed rule does not completely eliminate the standard. For instance, dismissal of a case with prejudice may well still require a finding of willfulness or bad faith. However, as discussed by Fourth District Court of Appeal Judges Jonathan Gerber and Dorian Damoorgian,[37] and as

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[36] *See, e.g.*, comments by Attorney Grossman at 2-3 and 10-12; Florida Defense Lawyers Association at 3 and 8; and Hill Ward Henderson and Jones Day at 24.

[37] *See, Rivero v. Meister*, 46 So. 3d 1161, 1162-64 (Fla. 4th DCA 2010) (where Judge Damoorgian suggests a negligence standard should be in place rather than a willful standard for certain attorney misconduct issues); *Infinity Auto Ins. Co. v. Metric Diagnostic Testing, Inc.*, 343 So. 3d 98, 104 n.1 (Fla. 4th DCA 2022).

expressed by trial court judges statewide,[38] trial courts are frequently hamstrung from attempting to correct improper conduct by the almost insurmountable task of having to make a finding of willfulness or bad faith. Indeed much, if not most, attorney misconduct goes unpunished because of the inability of the trial court to make the required findings. By recommending these rules, the Workgroup intends to make it easier to hold attorneys and parties accountable for their improper conduct.

v. Peremptory challenges

Several comments[39] object to the sanction of reducing the number of a party's peremptory challenges under proposed rule 1.275(b)(7).[40] However, the Workgroup continues to be of the view that a judge should be able, as a sanction, to strike a peremptory challenge in a civil case. As noted recently by First District Court of Appeal Judge Adam Tanenbaum, peremptory challenges in civil cases are not of constitutional dimension and do not amount to a

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[38] *See, e.g.,* Kathryn Ender, Fla. Civil Practice Before Trial, Motions and Orders, sec. 13.3(C)(3)(b) (Fla. Bar 14th ed. 2022) ("only a handful of [appellate] courts have upheld sanctions" for bad faith conduct); *Coffey v. Boyle*, 22 Fla. L. Weekly Supp. 11 (5th Cir. App. Ct. 2014) ("although we appreciate the trial court's attempt to reach a fair result, the offsetting award of money sanctions [. . .] cannot stand").

[39] *See, e.g.*, comments by Cole, Scott & Kissane, P.A., at 6; Florida Justice Association at 30; Palm Beach County Bar Association at 18; judges with civil assignments in the Eighth Judicial Circuit at 7; Civil Procedure Rules Committee at 9 and A46; Florida Chapters of the American Board of Trial Advocates at 16; and Attorney Luka at 56.

[40] The Workgroup renumbered this provision to subdivision (c)(7) in appendices A and B.

substantive right.[41] In civil cases, peremptory challenges are provided by the Florida Supreme Court procedurally as a matter of grace.[42] As is clear to the Workgroup, monetary sanctions alone have proven insufficient to deter improper attorney conduct in many instances. For many attorneys, the threat of being sanctioned with fees and costs is no threat at all, particularly in light of the fact that the prevailing party frequently will be awarded attorneys' fees in any instance. The proposed rule provides that any sanction imposed must be commensurate with the misconduct. The ability to strike a peremptory challenge should be added to the judge's sanction toolbox to be exercised in the judge's measured discretion.

vi. Ultimate Sanctions

Many commenters[43] object to proposed rule 1.275's inclusion of ultimate sanctions, such as dismissing the action, prohibiting a party from introducing designated matters in evidence, refusing to allow a party to support or oppose designated matters, and entering a default judgment. Judges will necessarily exercise their discretion when considering the imposition of these ultimate sanctions. These tools should be available for the courts to deter the most egregious conduct. As discussed in section II.A.4.iii-iv., *supra*, prevailing party attorneys' fees have failed to deter abuses of the litigation process.

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[41] *Seadler v. Marina Bay Resort Cond'o. Ass'n, Inc.*, 341 So. 3d 1146 (Fla. 1st DCA 2021), reh'g denied (June 29, 2022) (Tanenbaum, J., concurring).

[42] *Id.* at 1162.

[43] *See, e.g.*, comments by the judges with civil assignments in the Eighth Judicial Circuit at 6-7 and 10; Business Law Section of The Florida Bar at 23-24; Florida Defense Lawyers Association at 3-4; Real Property, Probate and Trust Law Section of The Florida Bar at 6; Hill Ward Henderson and Jones Day at 24; and Trial Lawyers Section of The Florida Bar at 21-22.

vii. One Rule Should Govern Sanctions

Many commenters[44] argue that a single rule governing sanctions would simplify enforcement. Several of these commenters[45] further note that the proposed amendments' 62 independent references to sanctions may cause confusion. The Workgroup respectfully disagrees. Proposed rule 1.275(a) expressly provides "[t]o the extent any rule of civil procedure specifies options for sanctioning misconduct, the sanctions set forth in this rule [1.275] *shall be deemed supplemental* to such other rule, as appropriate." (Emphasis supplied).

The adoption of proposed rule 1.275, a general sanctions rule, does not create conflict with rule 1.380, which authorizes sanctions for failure to make discovery. As described *supra*, discovery abuses impact the speed to resolution, increase costs, and must be sanctioned. Sanctions for misconduct unrelated to the discovery process remain within the judge's discretion under proposed rule 1.380. The Workgroup respectfully suggests that these concerns are misplaced due to the widely recognized canon of construction that a specific rule prevails over a general rule.[46]

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[44] *See, e.g.*, comments by the Business Law Section of The Florida Bar at 9-10; Florida Chapters of the American Board of Trial Advocates at 10, 18-20, and 23; Florida Justice Association at 29; Civil Procedure Rules Committee at 7; Attorney Luka at 44; and Attorney Haas at 2.

[45] *See, e.g.*, comments by the Florida Chapters of the American Board of Trial Advocates at 10; and Florida Justice Association at 28-29.

[46] *See generally*, *McKendry v. State*, 641 So. 2d 45 (Fla. 1994) ("We begin our analysis of the issue by applying accepted rules of statutory construction to the statutes in question. First, a specific

5. Proportional Discovery

Several commenters[47] urged the Court to adopt "proportionality" standards for the scope of discovery per the federal rules.[48] The Workgroup did not recommend changing rule 1.280(b) relating to the scope of discovery. This decision was made for several reasons. They include:

- The trial courts and the litigation bar are dealing with the COVID-19 workload, the implementation of the case management requirements of AOSC21-17,[49] and the continuing effect of jurisdictional changes between circuit and county courts;

- The implementation of enhanced case management standards caused courts to take an active role in progressing cases, some of which have been passively proceeding for years, resulting in a surge of demands, particularly for hearing time, on the courts during the

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statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms.") (Citations omitted).

[47] *See, e.g.*, comments by the International Association of Defense Counsel at 4-5 and 8-11; Business Law Section of The Florida Bar at 29-35; Federation of Defense and Corporate Counsel at 2-4 and 6-7; National Federation of Independent Business at 3; Florida Justice Reform Institute at 16-18; Office of the Attorney General at 7-9; Gunster Yoakley & Stewart, P.A., at 2, 14-18; and American Property Casualty Insurance Association at 2.

[48] *Compare* Fed. R. Civ. P. 26(b)(1) *with* Fla. R. Civ. P 1.280(b).

[49] *In re: COVID-19 Health and Safety Protocols and Emergency Operational Measures for Florida Appellate and Trial Courts*, Fla. Admin. Order No. AOSC21-17, Amendment 3 (January 8, 2022).

transition period while enhanced case management becomes institutionalized as routine procedure;

- The trial courts and the litigation bar are dealing with new standards and more hearings relating to *Daubert*; as well as a new rule changing standards, hearing procedures, and order requirements for summary judgment;[50]

- Other proposed amendments by the Workgroup will create significant changes in the trial court system including new rules, standards, and demands on trial courts and the litigation bar;

- New technology requirements are under development in connection with the Court Application Processing System (i.e., the judicial viewer) and case management standards to assist in ameliorating the impact on courts and staff which need to be implemented to deal with demands and changes associated with the above items; and

- There are fundamental resource disparities between the federal bench and the state bench that create a meaningful potential that proportional discovery will result in additional delay in the resolution of civil cases, rather than improving the speed of resolution.

[50] *See, In re Amendments to Florida Rule of Civil Procedure 1.510*, 317 So. 3d 72 (Fla. 2021).

The last item addressed bears additional comment. As properly noted by many commenters,[51] the Florida state courts do not have the resources and support to deal with discovery disputes as quickly and efficiently as the federal courts.[52] [53]

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[51] *See, e.g.*, comments by Luks, Santaniello, Petrillo, Cohen & Peterfriend at 6; Attorney Raslavich at 1; Chief Judges of the Circuit and County Courts of Florida at 3-4; judges with civil assignments in the Eighth Judicial Circuit at 1-2 and 6-8; Florida Defense Lawyers Association at 19-20; judges with civil assignments in the Fourth Judicial Circuit at 3-5; Florida Chapters of the American Board of Trial Advocates at 12; Rules of General Practice and Judicial Administration Committee at 5; Attorney Webster at 13; staff attorneys of the Thirteenth Judicial Circuit at 2; The Florida Bar at 3-4; Palm Beach County Board Association at 2 and 6-7; Circuit and County Judges of the Thirteenth Judicial Circuit at 2-8; Trial Layers Section of the Florida Bar at 3, 17-18, and 20; Broward County Bar Association at 7-8, 12, Civil Procedure Rules Committee at 3-4; Attorney Thomas D. Hall at 5-6; Hill Ward Henderson and Jones Day at 28; American Tort Reform Association at 8-9; Gunster Yoakley & Stewart, P.A., at 3; and King & Spalding, LLP, at 2.

[52] *See, e.g.*, comment by U.S. Dist. Court Judge Thomas Barber; *Vaigasi v. Solow Mgmt. Corp.*, 11CIV5088RMBHBP, 2016 WL 616386 (S.D.N.Y. Feb. 16, 2016) (observing a significant increase in "proportionality" objections and motions following the rule change relating to "scope", many of which were viewed as unwarranted and "The [proportionality] amendments, however, did not establish a new limit on discovery; rather they merely relocated the limitation[s] [found elsewhere in the rules.]").

[53] In the old federal rules and in the current Florida rules, and common law, upon a proper motion the trial judge may balance the relevance and need for information against the undue burden and expense of the proposed discovery. The court may limit, deny, or

In federal district courts, a magistrate with law clerks and staff is normally devoted to most or all discovery disputes. The trial judge is focused on case management and other matters. Most discovery disputes are dealt with quickly and efficiently, some without a hearing, by magistrates and support staff that are not available to state trial judges. As a result, under the federal system, there normally are not process delays that impact case management deadlines.

In contrast, the discovery hearings in state court are normally handled by the trial judge through the hearing process. Although the proposed rules offer new alternatives which will take time to implement, there must be available coordinated hearing time to adjudicate the matter. When there are delays in the process, substantive discovery can come to a standstill. This delay will frequently have a cascading adverse impact on the CMO.

The Workgroup found that there are existing discovery rules, including cost-shifting and protective orders, that can effectuate the larger purpose of proportionality with prompt and effective judicial enforcement and implementation. The existing rules provide for consideration of "proportionality" factors (see footnote 52, *supra*). In addition, the Workgroup addressed "proportionality" in its proposal as follows: proposed rule 1.200(a) establishes ten "objectives" for case management, and subdivision (a)(4) includes certain "proportionality" criteria consistent with the federal standards – and existing Florida law.

Because the Workgroup did not recommend changing the scope of discovery for the above reasons, no comments were submitted in this case to counter the suggestions to amend the

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otherwise control the discovery process. *See* Fla. R. Civ. P. 1.280(c) and (d).

scope of discovery to expressly include "proportionality." It is likely that trial judges and other segments of the bar will have important input on practical impacts of this potential rule change on the court system and the impact on the speed with which cases move.

Accordingly, the Workgroup recommends the Court:

- Delay wholesale adoption of the federal "proportionality" standards until the effect of the other changes on the state courts system are implemented and evaluated; or

- Refer this matter to the Civil Rules Procedure Committee for analysis.

6. Limited discretion

Many commenters[54] oppose the limitations placed on judicial discretion in the proposed amendments. Specifically, the comments

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[54] *See, e.g.*, comments by Luks, Santaniello, Petrillo, Cohen & Peterfriend at 6; Wicker, Smith, O'Hara, McCoy & Ford, P.A., at 2-3, Business Law Section of The Florida Bar at 42 and 44-45; Chief Judges of the Circuit and County Courts of Florida at 3-5; judges with civil assignments in the Eighth Judicial Circuit at 2, 5, and 9; Attorney Alexander at 3; Attorney Cytryn at 12; Florida Defense Lawyers Association at 11, 14, 21, and 23; judges with civil assignments in the Fourth Judicial Circuit at 15-17 and 21-22; Florida Chapters of the American Board of Trial Advocates at 5-8; Attorney Craig Greene at 1; Cole, Scott & Kissane, P.A., at 2 and 9; Florida Justice Association at 8; Attorney Schurr at 2; Attorney Webster at 13; The Florida Bar at 7; Attorney Steven Dell at 4; Trial Lawyers Section of The Florida Bar at 2-4, 17, and 19-20; Broward County Board Association at 5 and 10-11; Civil Procedure Rules

are directed to the perceived lack of discretion in proposed rules 1.160, 1.161, 1.200. 1.271, 1.275, 1.335, 1.380, 1.420, 1.440, 1.460, and 2.570. The Workgroup notes that none of these rules entirely remove a judge's discretion. Under the proposed amendments, judges retain the discretion to grant or deny myriad motions, including those seeking continuances, extensions of time, and amendment of case management deadlines; determine whether to conduct certain hearings; deviate from orders of the pretrial coordination court (PCC); and select among a variety of sanctions depending on the severity of the violation as determined by the judge after hearing.[55]

Although the Workgroup is sympathetic to the concerns raised regarding the independence of duly elected constitutional officers, the limitations placed on judicial discretion were necessary in each instance to ensure the speedy and inexpensive determination of every proceeding.[56] The existing rules-based case management and sanctions provisions have not sufficiently deterred misconduct, as explained *supra*. Additionally, many trial court judges are reluctant to award sanctions for dilatory tactics, and the appellate courts

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Committee at 5-6, 7, and 19; Hill Ward Henderson and Jones Day at 12 and 16-17; American Tort Reform Association at 1-2, 7, 21, and 22-23; Attorney Luka at 48 and 67; Hawkins Parnell & Young, LLP, at 12; King & Spalding, LLP, at 3 and 4-5; and Attorney Conigliaro at 14.

[55] *See,* section II.A.4.i., *supra*, wherein the workgroup modifies the proposed amendments to require a hearing before awarding sanctions.

[56] As required by Fla. R. Civ. P. 1.010 and Fla. R. Gen. Prac. & Jud. Admin. 2.110.

tend to excuse all but the most egregious behavior.[57] The proposed amendments are designed to require trial judges to advance the actions on their dockets and affirmatively sanction abuses of the litigation process to reduce delays and costs for all litigants.

7. Available Hearing Time

Many commenters[58] expressed skepticism that the proposed amendments will be successfully implemented given the limited availability of hearing time in the state courts system. The Workgroup acknowledges that this is a real impediment to successful implementation of case management on a statewide basis. Workgroup members note that establishing enhanced case management within a circuit is a significant task for the judiciary. However, once up and running, case management increases hearing availability and reduces delays to resolution. Because all 20 judicial circuits are already engaging in case management via local administrative order, the initial influx of case management issues is expected to be somewhat diminished due to these existing practices.

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[57] *See, Infinity Auto Ins. Co. v. Metric Diagnostic Testing, Inc.*, 343 So. 3d 98, 104 (Fla. 4th DCA 2022) (reversing an award of sanctions because the trial court did not make an express finding of bad faith, despite acknowledging that the failure to withdraw a mistaken affirmative defense until after discovery was complete "probably cost [opposing counsel] quite a bit of time and money").

[58] *See, e.g.*, comments by Attorney Bowdish at 2-4; Florida Defense Lawyers Association at 13 and 16; Palm Beach County Bar Association at 21; Office of the Attorney General at 2; and Civil Procedure Rules Committee at 12-13.

Moreover, the Workgroup on Judicial Practices in the Trial Courts (WJPTC) is actively reviewing this issue. AOSC21-57[59] directed the WJPTC to, *inter alia*, "[r]eview processes for scheduling hearings and to determine whether the processes are user-friendly and facilitate the scheduling of hearings within a reasonable amount of time." The WJPTC's final report is due to the Court no later than February 10, 2023. The findings and recommendations of the WJPTC, combined with the educational, technology, and funding referrals recommended by the Workgroup in section II.A.1., *supra*, may indeed result in increased hearing availability, which will be essential to successfully implement the proposed amendments.

8. Appellate Standards

The Appellate Court Rules Committee,[60] Appellate Section of The Florida Bar,[61] the Civil Procedure Rules Committee (CPRC),[62] and Attorney Thomas D. Hall[63] disagree with the proposed amendments' inclusion of appellate standards and directives to appellate courts within the Florida Rules of Civil Procedure. These comments recommend that the Court decline to adopt proposed rule 1.460(b)(10) because it includes an appellate standard of review and an express presumption of correctness. The comments further recommend the Court decline to adopt proposed rule 1.271(g) because it contains a requirement that appellate courts expedite review of an order or judgment in a case pending in a PCC.

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[59] *In re: Workgroup on Judicial Practices in the Trial Courts*, Fla. Admin. Order No. AOSC21-57 (Nov. 9, 2021).
[60] Comment by the Appellate Court Rules Committee at 1-2, 5, 9, and 12-14.
[61] Comment by the Appellate Section of The Florida Bar at 2.
[62] Comment by the CPRC at 15 and A76.
[63] Comment by Attorney Hall at 10-12.

The Workgroup concurs with the comments directed to proposed rule 1.271(g) and amends the language to suggest, rather than require, expedited appellate review of an order or judgment in a case pending in the PCC. The Workgroup concedes that the presumption of correctness in proposed rule 1.460(b)(10) is unnecessary and strikes that language.

Although the Workgroup acknowledges that its approach to appellate review of continuance orders is unorthodox, the proposed case management framework will be difficult to implement if appellate courts continue to enforce a stringent standard of review for these orders. Accordingly, the Workgroup maintains that "gross abuse of discretion" should be retained in proposed rule 1.460(b)(10), with a slight modification to encourage, rather than require, this standard of review.

9. Standards of Conduct

The Business Law Section of The Florida Bar (BLS),[64] CPRC,[65] Florida Defense Lawyers Association (FDLA),[66] Florida Chapters of the American Board of Trial Advocates (FLABOTA),[67] Florida Justice Association (FJA),[68] Real Property, Probate, and Trust Law Section of The Florida Bar (RPPTL),[69] Maegen Peek Luka,[70] [71] and Cole, Scott & Kissane, P.A.,[72] believe that all or part of proposed rule

[64] Comment by the BLS at 21-24.
[65] Comment by the CPRC at 22.
[66] Comment by the FDLA at 23.
[67] Comment by the FLABOTA at 18.
[68] Comment by the FJA at 30.
[69] Comment by the RPPTL at 9.
[70] On behalf of 1,138 attorneys.
[71] Comment by Attorney Luka at 63-66.
[72] Comment by Cole, Scott & Kissane, P.A., at 7.

1.279 should not be adopted. Cole, Scott & Kissane, P.A. and Attorney Luka argue that subdivisions (a)(1)-(3) should be deleted because aspirations do not belong in procedural rules, and a duty already exists for parties to timely comply with discovery rules; therefore, it is unnecessary to write this duty into the Florida Rules of Civil Procedure. The FJA also believes that standards of conduct for discovery do not belong in a procedural rule. The FDLA argues that this type of rule is more appropriate for the Rules Regulating The Florida Bar, not the Florida Rules of Civil Procedure. The BLS also believes that standards of professionalism do not belong in the civil rules. RPPTL asserts that proposed rule 1.279 should be deleted in its entirety because it codifies ethical obligations as a rule of civil procedure, which could invite abuse and allow attorneys to weaponize the rule.

The Workgroup recognizes that proposed 1.279 rule is controversial and the approach taken by the Workgroup is unorthodox. However, the existing rules of professionalism have not sufficiently deterred abuses of the discovery process. By elevating these standards to a procedural rule with enforcement mechanisms, the Workgroup intends to encourage ethical behavior while creating a real threat of sanctions to deter improper discovery tactics, which significantly delay the timely resolution of cases. In response to some of these concerns, the Workgroup amends rules 1.200(e)(2), (e)(3)(E), and 1.201(c) to require that rule 1.279 is attached to the CMO. This modification will provide notice of the standards of conduct to all parties, including self-represented litigants who may be unaware of the rules of professionalism, and assist judges when enforcing the standards.

10. Exclusion of Juvenile; Probate, Guardianship, and Trust; and Eminent Domain Proceedings

i. Juvenile Proceedings

The Florida Statewide Guardian Ad Litem Office (GAL)[73] recommends that Florida Rule of Civil Procedure 1.010 should be amended to expressly exclude proceedings in the juvenile division of the circuit courts from the requirements of the Florida Rules of Civil Procedure. The GAL argues this amendment is necessary because the district courts are inconsistent regarding whether the civil rules can be invoked in juvenile proceedings, and the civil rules are often invoked to circumvent certain limitations in the juvenile rules. The Workgroup notes that section 39.013(1), Florida Statutes, provides "[a]ll procedures, including petitions, pleadings, subpoenas, summonses, and hearings, in this chapter [39] shall be conducted according to the Florida Rules of Juvenile Procedure unless otherwise provided by law."

The Workgroup agrees with the GAL's recommendation and amends rule 1.010 to exclude "proceedings in the juvenile division of the circuit court to which the Florida Rules of Juvenile Procedure apply."

ii. Probate, Guardianship, and Trust Proceedings

The Probate Rules Committee (PRC),[74] RPPTL,[75] and Laird Lile, a Florida attorney,[76] recommend that probate, guardianship, and trust (PGT) proceedings should be excluded from the proposed

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[73] Comment by the GAL at 1, 16, and 19-20.
[74] Comment by the PRC at 2, 5-6, and 7.
[75] Comment by the RPPTL at 24.
[76] Comment by Attorney Laird Lile at 2.

amendments. The commenters believe the proposed amendments will likely result in delays and increased costs in PGT proceedings. They further argue that if a complete exclusion is not possible, then the following exclusions should be added to the proposed amendments: (i) rule 1.200(b) should exempt PGT proceedings from the case management requirements; (ii) PGT proceedings should fall within the definition of "streamlined" cases under proposed rule 1.200(c)(2); (iii) PGT proceedings should be excluded from initial disclosure requirements of proposed rule 1.280; and (iv) PGT proceedings should be excluded from the "meet and confer" requirements of proposed rules 1.160 and 1.161.

The Workgroup agrees with these comments in principle, but notes that existing rule 1.010 already excludes PGT proceedings from the requirements of the Florida Rules of Civil Procedure. In response to these concerns, the Workgroup amends rule 1.200(b) to exclude PGT proceedings "unless agreed to by the parties, accepted by the court, or authorized by another rule of procedure." The Workgroup further concedes that it lacks the expertise to fully address the PGT-related issues raised by these comments. Accordingly, the Workgroup recommends the Court refer these matters to the PRC, in consultation with the RPPTL and Mr. Lile, to promulgate case management rules for PGT cases.

iii. Eminent Domain Proceedings

The business litigation practice group of Gunster Yoakley & Stewart P.A.,[77] and Charles S. Stratton on behalf of himself, Joshua S. Stratton, and Sidney C. Bigham III,[78] suggest that the Workgroup's case management requirements are not appropriate

[77] Comment by the Gunster Yoakley & Stewart, P.A., at 2 and 18-22.

[78] Comment by Attorneys Charles S. Stratton, Joshua S. Stratton, and Sidney C. Bigham III at 5.

for eminent domain actions. Most eminent domain cases in Florida are "quick take" cases that are essentially three cases in one: (i) request for an entry of an order of taking, (ii) determination of full compensation, and (iii) apportionment, if needed. Each phase of the case is very distinct and has its own discovery process.

The Workgroup agrees with these suggestions and modifies proposed rule 1.200(b) to exclude eminent domain actions under article X, section 6 of the Florida Constitution and/or chapter 73, Florida Statutes. Eminent domain actions proceeding under chapter 74, Florida Statutes, are excluded until 20 days after the order granting quick take.

11. Alternative Dispute Resolution (ADR)

The Workgroup reviewed the comments[79] opposing the amendment to Florida Rules for Certified and Court-Appointed Mediators 10.420(a). The Workgroup, however, continues to believe that proposed rule 10.420(a) is warranted to expedite small claims proceedings, and as a result continues to recommend amendment of rule 10.420(a) with one revision that the Workgroup trusts will ameliorate the concerns of the respondents.

The Workgroup notes that the rule amendment as proposed addresses one situation only – that in which small claims cases are before the court for pretrial conferences, and at which mediation is offered as part of that appearance. In such instances, formal written court orders are routinely not issued. Rather, mediators are present, and if both parties are also present, they will be directed to

[79] Comments by the Committee on Alternative Dispute Resolution Rule and Policy at 4; and Alternative Dispute Resolution Section of The Florida Bar at 18-20.

a mediator as permitted by Florida Small Claims Rule 7.090(f)[80] and Form 7.322.[81] The proposed amendment does not change situations in which a court may by written order refer a small claims case to mediation outside of the small claims pretrial conference. That possibility is not addressed by the rules governing small claims pretrial conferences; nor is it addressed by the Workgroup's proposal.

Moreover, the "group" setting directive envisioned by the Workgroup occurs at the inception of the pretrial conference docket, with all cases present, and before any individual case is assigned to a mediator. This process is similar to the widespread permissible practice of courts providing an opening speech to all defendants present for arraignment on misdemeanor cases, situations in which much more is at stake than in a small claims case. As a result, the concern that the "mediation privilege" has attached is simply not present, as in no case will mediation have "commenced" under the proposed amendments.

The Workgroup notes that the requirement of an opening statement by mediators is one required by rule, and not by statute.[82] Certainly, this Court has the authority to amend that rule, and the Workgroup respectfully requests that it do so. The burden on the courts conducting small claims pretrial conferences is real. For instance, suppose that only 20% of small claims cases have both parties appear at a pretrial conference docket (a very conservative estimate). In the larger circuits where cases are set 100 or more at a time for pretrial conference, more than one additional hour is added to the docket simply waiting for mediation to occur, assuming the opening statement is only five minutes per

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[80] "Mediation may take place at the pretrial conference."
[81] "Mediation may take place at the pretrial conference."
[82] Fla. R. Med. 10.420(a).

case. This has caused many courts to dispense with mediation in many small claims cases. For instance, the Workgroup understands that in Miami-Dade County mediators are no longer used for thousands of credit card cases, with the court asking the plaintiff's attorney to in essence act as mediator in these cases "out in the hall" while other cases proceed. In many other counties, the judge acts as a *de facto* mediator, trying to get the parties to a resolution before setting the case for trial.

Nevertheless, as noted, to ameliorate the concerns of the respondents, the Workgroup recommends the following modification to proposed rule 10.420(a) to more clearly indicate that this orientation session is to occur before mediation has commenced:

> For mediations that may be conducted in conjunction with pretrial conferences ~~pursuant to~~under Florida Small Claims Rule 7.090(f), and before any individual case is referred to a mediator by court order or otherwise, a mediator may present the orientation session in multiple cases as a group, either in person or ~~by remote or virtual appearance~~ through audio-video communication technology, or by means of a prerecorded video presentation.

Attorney Michael S. Vitale[83] and Attorney Leah Rothman Tell[84] indicate that the Workgroup's motivation for the proposed amendments appears to be a desire to retain cases for judicial resolution due to the downward trend in filings, rather than encouraging the cases to be resolved by arbitrators and mediators.

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[83] Comment by Attorney Vitale at 2-3.
[84] Comment by Attorney Tell at 2.

Mr. Vitale states, "The rules of Florida's civil courts should … encourage [ADR] and not compete with them."[85]

The Workgroup respectfully disagrees. In proposed rule 1.200(a), the amendment text expressly requires courts to manage a civil action with the objective of facilitating the appropriate use of ADR. Further, the amendment text requires the parties in a general case to specify whether any form of ADR is anticipated in their joint case management report (JCMR) and the use and timing of ADR in their proposed CMO.[86] Contrary to the comments, these provisions support and encourage ADR.

The Alternative Dispute Resolution Section of The Florida Bar[87] and Attorney Tell[88] argue that the civil rules governing mediation and non-binding arbitration contain specific language regarding the filing of motions or seeking court orders. However, they argue that the Workgroup's approach to motions under proposed rule 1.160 is not feasible for motions related to mediation and arbitration. Therefore, the ADR Section recommends amending rule 1.160(a) to exclude motions based on rules 1.700, 1.710, 1.720, 1.730, 1.750, 1.810, and 1.820.

The Workgroup respectfully disagrees. In the trial courts, the only motions that are solely applicable to mediation and arbitration are motions for referral to, and motions to be excused from, ADR.

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[85] Comment by Attorney Vitale at 2-3.
[86] Proposed Fla. R. Civ. P. 1.200(e)(3)(C)(xvi) and (e)(3)(D)(i)(14); s*ee also* proposed Fla. R. Civ. P. 1.201(c) (requiring the CMO in a complex case to address the same contents as the proposed CMO in a general case).
[87] Comment by the Alternative Dispute Resolution Section of The Florida Bar at 15.
[88] Comment by Attorney Tell at 11.

Motion practice under proposed rule 1.160, particularly the "meet and confer" requirement, is not overly burdensome for referral to, and excusals from, ADR.

12. Guidelines for Rules Submissions

The Rules of General Practice and Judicial Administration Committee (RGPJAC)[89] and CPRC[90] both note that the proposed amendments do not comply with the requirements of Fla. Admin. Order No. AOSC06-14,[91] which provide guidelines for judicial branch committees to ensure uniform drafting throughout the Florida rules of procedure. The Workgroup accepts this criticism and modifies the proposed amendments to conform to the requirements of AOSC06-14.[92] For example, *inter alia*, under these modifications the word "shall" is generally replaced by the word "must," except where syntax requires another term, the word "utilize" is replaced by the word "use," the phrase "pursuant to" is replaced by the word "under," and lists are reformatted with appropriate indentation.

13. Other General Concerns Affecting the Proposed Amendments

i. Filing Deadlines

The RGPJAC[93] correctly notes that deadlines measured "within 5 days after" an event under the proposed amendments may cause confusion about the actual deadline because of the computation of

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[89] Comment by the RGPJAC at 5-7.
[90] Comment by the CPRC at A56, A58, A60-65, 71-72, and 74-75.
[91] *In re: Guidelines for Rules Submissions*, Fla. Admin. Order No. AOSC21-17, (June 14, 2022).
[92] *Id.*
[93] Comment by the RGPJAC at 2.

time rule,[94] which provides that "[w]hen the period stated in days is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded from computation." The Workgroup concurs with the RGPJAC's recommendation and amends all deadlines that are currently stated as five days to seven days.

The CPRC[95] correctly notes that deadlines under the proposed amendments which are currently measured "after filing" should instead be measured "after commencement of the action." The Workgroup agrees with a slight modification. All deadlines in the proposed amendments that are measured from the "filing of the complaint" are instead amended to "after commencement of the action as provided in rule 1.050."

ii. Service on the Court

The staff attorneys of the Thirteenth Judicial Circuit[96] argue that the proposed amendments should contain one mechanism for directly notifying a judge when a motion or notice is filed so that time sensitive matters are addressed as the proposed amendments require. Currently, some of the proposed rules require that a motion or request be "submit[ted] to the court,"[97] while other rules require that the motion be submitted "to the judicial office,"[98] that the motion "be brought to the court's attention,"[99] or that the request be filed and "served" on all parties "and the court."[100]

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[94] Fla. R. Civ. P. 2.514(a)(3).
[95] Comment by the CPRC at A26-A27 and A30.
[96] Comment by the staff attorneys of the Thirteenth Judicial Circuit at 5-7.
[97] Proposed Fla. R. Civ. P. 1.160(c)(2), (d).
[98] Proposed Fla. R. Civ. P. 1.160(c)(2)(B).
[99] Proposed Fla. R. Civ. P. 1.160(f).
[100] Proposed Fla. R. Civ. P. 1.160(j)(2).

The Workgroup agrees with these concerns and modifies all such references to specify that the motion or notice must be "served on the court official in accordance with Rule of General Practice and Judicial Administration 2.516 or as otherwise provided by the chief judge on a circuit-wide basis." This language is borrowed from rule 2.330(d) with a slight modification. Because rule 2.330(d) relates to service of a motion for disqualification on the "subject judge," the language from rule 2.330(d) is modified to require service on "the court official."[101] Given the practice in many circuits which designate a division-wide e-mail address for service on the court, the modification recognizes that local processes may govern service of documents on court officials.

Although rule 2.516 does not expressly identify the proper method of service on judges, the Second District Court of Appeal has clarified that judges should be served in accordance with Rule of General Practice and Judicial Administration 2.516, which is generally accomplished electronically by e-mail.[102] Moreover,

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[101] This term is borrowed from Fla. R. Gen. Prac. & Jud. Admin. 2.530(a)(4), effective October 1, 2022. *In re: Amendments to Florida Rules of Civil Procedure, Florida Rules of Gen. Practice & Judicial Admin., Florida Rules of Criminal Procedure, Florida Prob. Rules, Florida Rules of Traffic Court, Florida Small Claims Rules, & Florida Rules of Appellate Procedure*, SC21-990, 47 Fla. L. Weekly S187 (Fla. July 14, 2022).

[102] *Leila Corp. of St. Pete v. Ossi*, 144 So. 3d 644, 647-648 (Fla. 2d DCA 2014) ("because they [judges] are required to be served in accordance with these rules, judges should probably be considered to be parties to the proceedings on motions to disqualify, particularly since the service rules speak basically only to service on attorneys, and parties not represented by attorneys . . . our view is that these [methods of service] are all reasonable alternatives and

effective October 1, 2022, rule 2.516 will require all parties to provide an e-mail address for service unless excused by the court or if the party is in custody and without counsel.[103] This pending amendment will provide further clarity regarding electronic service on judges.

Based on these modifications, the Workgroup finds it necessary to ensure that court officials are timely served with documents that must be brought to the court's attention. Although existing rules govern filings during holidays[104] and court closures,[105] individual circuits should establish practices to ensure timely service of documents on court officials who are out of the office for other reasons. Accordingly, guidance is provided as commentary to rule 1.080 stating "each circuit should adopt an administrative order governing service on court officials during a leave of absence."

Despite these modifications, the Workgroup is concerned that service accomplished through the Florida Courts E-Filing Portal (the Portal) may overwhelm judges with unnecessary notifications. This issue is likely to arise because the Portal automatically serves copies of court filings by e-mail to all addresses on the service list.[106] In practice, Workgroup members note that it is difficult to be

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that e-mail service on a judge in this context should probably be required. . .").

[103] *In re: Amendments to Florida Rules of Civil Procedure, Florida Rules of Gen. Practice & Judicial Admin., Florida Rules of Criminal Procedure, Florida Prob. Rules, Florida Rules of Traffic Court, Florida Small Claims Rules, & Florida Rules of Appellate Procedure*, SC21-990, 47 Fla. L. Weekly S187 (Fla. July 14, 2022).

[104] Fla. R. Gen. Prac. & Jud. Admin. 2.514(a)(1)(A).

[105] Fla. R. Gen. Prac. & Jud. Admin. 2.205(a)(2)(B)(iv-v).

[106] *See,* Fla. R. Gen. Prac. & Jud. Admin. 2.516(b)(1).

removed from the service list once added through the Portal. To reduce the risk that judges receive a flood of unnecessary notifications, the Workgroup recommends the Court make a referral to the Florida Courts E-Filing Authority to implement upgrades to the Portal to (1) facilitate service of specifically authorized documents on court officials without adding the court official to the service list, and (2) allow court officials to remove themselves from the service list.

iii. Rule Commentary

The Workgroup amends the title of all proposed rule commentary from "2021 Commentary" to "Workgroup on Improved Resolution of Civil Cases Note."

B. Modifications and Comments Relating to Specific Proposed Rule Amendments

This section of the Workgroup's response omits rules for which no comments were received. This section also does not address modifications made solely in response to the general concerns addressed in section II.A., *supra*.

RULE 1.010. SCOPE AND TITLE OF RULES

Although rule 1.010 does not appear in the proposed amendments, the Workgroup nonetheless amends rule 1.010 in response to concerns expressed by the GAL as detailed in section II.A.10.i., *supra*. Under this amendment, proceedings in the circuit and county courts governed by the Florida Rules of Juvenile Procedure are expressly excluded from the scope of the Florida Rules of Civil Procedure.

RULE 1.160. MOTIONS

The Workgroup agrees with the staff attorneys of the Thirteenth Judicial Circuit[107] who suggest that the appellate court term "oral argument" is inappropriate when referring to "hearings" in the trial courts. The Workgroup strikes each instance of the phrase "oral argument" and replaces it with the word "hearing."

Subdivision (a) – Application

The CPRC,[108] FJA,[109] and Attorney Luka[110] recommend stylistic changes to subdivision (a). The Workgroup agrees with these suggestions and modifies proposed subdivision (a) by replacing the word "contradiction" with "conflict" and by replacing the phrase "the latter shall prevail" with the phrase "the rule governing the specific motion applies."

Subdivision (b) – Relief and grounds

Affected nonparties

The Workgroup agrees with the concerns[111] expressed that affected nonparties should be authorized to file a response to a motion. Proposed subdivision (b) is modified by clarifying that affected nonparties may file a response to a motion.

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[107] Comment by the staff attorneys of the Thirteenth Judicial Circuit at 7.
[108] Comment by the CPRC at A2.
[109] Comment by the FJA at 31.
[110] Comment by Attorney Luka at 14.
[111] Comments by the FJA at 35; and Attorney Luka at 17.

Deadlines

Concerns[112] were expressed regarding the deadline to respond to a motion that is served with a summons and complaint. In light of these concerns, the Workgroup modifies proposed subdivision (b)(1) to provide that the deadline for responding to a motion served with the summons and complaint falls on the same day the response to the complaint is due.

To the extent the CPRC[113] recommends establishing deadlines for filing responses and replies generally, the Workgroup agrees. Clear deadlines will facilitate the timely resolution of cases and streamline the scheduling of hearings. Proposed subdivision (b)(1) is modified to provide a 15-day response deadline from the service date of the underlying motion. Contrary to several recommendations,[114] the modification to proposed subdivision (b)(1) *does not require* the filing of a response to a motion. Proposed subdivision (b)(2) is further modified to authorize the movant to file a reply within 7 days after service of the response. The reply is also optional but must be strictly limited to rebuttal of matters raised in the response.

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[112] *See, e.g.*, comments by the CPRC at A3-A4; and Attorney Luka at 17.

[113] Comment by the CPRC at A2-A4.

[114] *See, e.g.*, comments by the FJA at 35; CPRC at A3; and Attorney Luka at 17.

Page Limits

Many commenters[115] object to the Workgroup's proposed page limits for motions, responses, and replies. Some of these concerns are well-taken. For example, under the Workgroup's proposed amendments, page limits apply only to the memorandum accompanying the motion, and not to the motion itself. The Workgroup thanks the CPRC,[116] FJA,[117] and Attorney Luka[118] for noting this discrepancy. The proposed amendments are modified by providing collective page limits to both the motion and attached memorandum. In response to the comments suggesting that the page limits in the proposed amendments are too strict, the Workgroup modifies the page limits in proposed subdivision (b)(3) as follows: 20 pages for the motion and attached memorandum; 20 pages for the response and attached memorandum; and 10 pages for the reply and attached memorandum.

The Workgroup agrees with the commenters[119] suggesting that the proposed page limits should exclude any page containing only the certificate of service and/or certificate of compliance. Subdivision (b)(3) is modified to this end. The Workgroup offers proposed commentary as guidance to address the impact on the page limits of "notices of filing" submitted to support a motion, as detailed *infra*.

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[115] *See, e.g.*, comments by Williams, Leininger & Cosby, P.A., at 3; FDLA at 22; Palm Beach County Bar Association at 24; Cole, Scott & Kissane, P.A., at 2; and Attorney Luka at 17.
[116] Comment by the CPRC at A4.
[117] Comment by the FJA at 35.
[118] Comment by Attorney Luka at 17.
[119] *See, e.g.*, comments by the FJA at 25; Attorney Luka at 17; and Palm Beach County Bar Association at 24.

The Workgroup, however, respectfully disagrees with the comments[120] recommending no page limits at all. Page limits have served the appellate courts well for decades and will encourage litigants to set forth their positions cogently and concisely, which in turn will save time for opposing counsel and judges. Moreover, it is anticipated that judges will be able to rule on motions to exceed page limits without a hearing in most circumstances.

FJA[121] and Attorney Luka[122] recommend the creation of a new subdivision governing extensions of time. The Workgroup concurs and creates a new proposed subdivision (b)(4), which authorizes parties and affected non-parties to request an enlargement of time to file a response or reply prior to the deadline. The motion must state the reason an enlargement is necessary and must propose a deadline by which the response or reply will be filed. If a hearing has been set, then the requested extension must take into account the date of the hearing and be tailored so that all filings can be completed at least 2 business days before the hearing. If the party seeking an extension requested an extension of 10 days or less, and the court has not ruled upon the motion by the time the deadline proposed in the motion has passed, any response or reply filed by the proposed deadline in the motion will be considered timely filed.

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[120] *See, e.g.*, comments by Williams, Leininger & Cosby, P.A., at 3; FDLA at 22; and Cole, Scott & Kissane, P.A., at 2.
[121] Comment by the FJA at 35.
[122] Comment by Attorney Luka at 17-18.

Subdivision (c) – Obligation to Meet and Confer

Many commenters[123] recommend that motions for summary judgment and motions for disqualification should be excluded from the "meet and confer" requirement of the proposed rule. The Workgroup notes that proposed subdivision (a) already excludes summary judgment motions from the provisions of proposed rule 1.160. To the extent these comments address motions for disqualification, the Workgroup agrees and modifies proposed subdivision (c) to exclude motions for disqualification from the "meet and confer" requirement.

The word "promptly" is added to the "meet and confer" requirement to allay concerns expressed by the Florida Justice Reform Institute[124] that affected parties may "drag their feet" and intentionally delay the conference to create an argument that the motion has been abandoned under proposed subdivision (k).

Subdivision (c)(1) – Substance of Conference

The CPRC,[125] FJA,[126] and Attorney Luka[127] recommend that the parties should coordinate the scheduling of any requested hearing during the "meet and confer" conference. This requirement will streamline the scheduling of hearings by reducing the volume of communications among participants. The Workgroup concurs with these recommendations and modifies proposed subdivision (c)(1) to

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[123] *See, e.g.*, comments by the Palm Beach County Bar Association at 20; Florida Justice Reform Institute at 10; American Tort Reform Association at 17; and Hill Ward Henderson and Jones Day at 22.
[124] Comment by the Florida Justice Reform Institute at 10-11.
[125] Comment by the CPRC at A4-A5.
[126] Comment by the FJA at 33.
[127] Comment by Attorney Luka at 15.

require the parties to use their best efforts to coordinate scheduling of any requested hearing during the conference.

Subdivision (c)(3) – Nature of Conference

Many commenters[128] recommend that the parties should be permitted to "meet and confer" via e-mail. The Workgroup stands by its recommendation that a meaningful conversation must take place during the conference and e-mail communication alone is insufficient. Given the widespread proliferation of audio-video communication technology to accomplish nearly every aspect of trial practice, the Workgroup submits that a "meet and confer" conference conducted through Zoom is not an extraordinary burden. Accordingly, the Workgroup does not recommend any modification to this proposed subdivision.

Subdivision (c)(4) – Scheduling of Conference

The Workgroup agrees with the concerns expressed by the CPRC[129] that the three good-faith attempts to schedule the "meet and confer" conference should not be satisfied by three e-mails sent in rapid succession. Accordingly, proposed subdivision (c)(4) is modified to require "[a]t least 1 good-faith attempt to schedule the conference must be by telephone call during normal business hours, and if the party with whom the movant is attempting to confer is unavailable, the movant must attempt to leave a message." Additional guidance is offered by the Workgroup as commentary to

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[128] *See, e.g.*, comments by the BLS at 8; Cole, Scott & Kisane, P.A., at 3; FJA at 33-34; staff attorneys of the Thirteenth Judicial Circuit at 17; Attorney Luka at 16; Hawkins, Parnell & Young, LLP, at 3; King & Spalding, LLP, at 6; CPRC at A4; RPPTL at 17-18; and PRC at 6-7.

[129] Comment by the CPRC at A12-A13.

this proposed rule, as detailed *infra*, regarding the term "normal business hours."

Subdivision (c)(5) – Certificate of Compliance

The Workgroup agrees with the concerns expressed by the FJA[130] and Attorney Luka[131] that oral motions should be excluded from the certificate of compliance requirement. Accordingly, proposed subdivision (c)(5) is modified to clarify that a certificate of compliance is required only for written motions.

The Workgroup also agrees with the recommendation from the staff attorneys of the Thirteen Judicial Circuit[132] to create a standard format for the "meet and confer" certificate of compliance. Accordingly, proposed subdivision (c)(5) is modified by creating two new subdivisions setting forth the format required of the certificate of compliance, depending on whether the conference was successfully held or not.

Subdivision (d) – Stipulated Motions

The Workgroup thanks the CPRC,[133] FJA,[134] and Attorney Luka[135] for noting a discrepancy in this proposed subdivision, which inadvertently precludes nonparties from filing stipulated motions. The Workgroup modifies proposed subdivision (d) by authorizing any movant to file a stipulated motion.

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[130] Comment by the FJA at 32.
[131] Comment by Attorney Luka at 18-19.
[132] Comment by the staff attorneys of the Thirteenth Judicial Circuit at 17-18.
[133] Comment by the CPRC at A8.
[134] Comment by the FJA at 34.
[135] Comment by Attorney Luka at 16.

Subdivision (f) – Motions Requiring Expedited Resolution

The Workgroup concurs with the suggestions of the CPRC,[136] FJA,[137] and Attorney Luka[138] to require, at the time of filing, service on the court of a motion seeking expedited resolution. Proposed subdivision (f) is modified to require service of the motion on the court as described in section II.A.13.ii., *supra*.

The Workgroup agrees in principle with the suggestions of the CPRC,[139] FJA,[140] and Attorney Luka[141] to establish a deadline for the court to either schedule an expedited hearing or decline to do so. Accordingly, the Workgroup creates a new proposed subdivision (f)(2) requiring the court to notify the parties within two business days from service on the court that the matter does not require expedited treatment. The notice may be sent by e-mail or other non-record activity.

Subdivision (j) – Motions Decided Without Hearing

Several commenters[142] suggested alternatives to the Workgroup's proposed briefing schedule for motions decided without a hearing. Although the Workgroup appreciates the thoughtful recommendations, the Workgroup is concerned that these proposals may delay the determination of motions decided without a hearing. For example, under the CPRC's proposal, a

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[136] Comment by the CPRC at A11.
[137] Comment by the FJA at 41.
[138] Comment by Attorney Luka at 23.
[139] Comment by the CPRC at A11.
[140] Comment by the FJA at 41.
[141] Comment by Attorney Luka at 23-24.
[142] Comments by the CPRC at A7-9; FJA at 41; Attorney Luka at 23; and staff attorneys of the Thirteenth Judicial Circuit at 19-22.

"request for decision" must be filed before the court may rule on a motion without a hearing. The CPRC's "request for hearing" must be filed no later than the time for filing any reply, which may occur up to 22 days[143] after the underlying motion was filed. The Workgroup's proposed amendments, on the other hand, authorize the court to advise the parties that a hearing will not be held within five days after the hearing was scheduled or requested. The Workgroup respectfully submits that its proposed amendments will resolve matters that do not require a hearing more expeditiously than the CPRC's proposed language.

In response to the concerns[144] expressed regarding the cancellation of hearings for which the court determines a hearing is unnecessary, the Workgroup modifies proposed subdivision (j) by requiring the court's order dispensing with a hearing to issue "within five days after the hearing was scheduled or five days after the conclusion of the briefing schedule, <u>if any,</u> whichever occurs last."

Subdivision (k) – Abandonment of Motions

The CPRC,[145] FJA,[146] and Attorney Luka[147] argue that the proposed rule should clarify whether an abandoned motion may be refiled. The Workgroup agrees with this concern in principle. The

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[143] Under the CPRC's proposed language, a response may be filed 15 days after service of the motion, and a replay may be filed seven days after the response is served.
[144] Comments by the Florida Justice Reform Institute at 10-12; FJA at 12-13, 23-24; American Tort Reform Association at 19-20; and staff attorneys of the Thirteenth Judicial Circuit at 22.
[145] Comment by the CPRC at A11-A12.
[146] Comment by the FJA at 41.
[147] Comment by Attorney Luka at 24.

Workgroup, however, disagrees with these comments to the extent they recommend a blanket authorization to refile an abandoned motion. Accordingly, the Workgroup creates a new proposed subdivision (k)(2) authorizing the refiling of an abandoned motion that was denied without prejudice. The refiled motion must contain an explanation setting forth a good faith reason why the motion was initially abandoned.

Commentary

Many commenters[148] suggested that some litigants may frustrate the "meet and confer" process by engaging in dilatory tactics for strategic gain. In response to these concerns, guidance is offered as proposed commentary specifying that parties must be diligent in making themselves available for the necessary conversations. The proposed guidance makes it clear that delay in the "meet and confer" process is unacceptable and may result in sanctions.

As additional commentary, the Workgroup provides guidance regarding the three good-faith attempts to schedule the "meet and confer" conference. This guidance clarifies that the required telephone call is intended to provide a variety of contact methods so that practitioners who accidentally overlook an email might answer the phone or at least be less likely to overlook a phone message. If voicemail is full or there is no message option, then it would be best practice to send a written communication indicating that the movant was unable to leave a message.

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[148] Comments by the Florida Justice Reform Institute at 11; Hill Ward Henderson and Jones Day at 20; FDLA at 15; Palm Beach County Bar Association at 23; and King & Spalding, LLP, at 6.

Additional guidance is offered as commentary regarding the term "normal business hours" under proposed subdivision (c)(4). The proposed commentary provides that normal business hours are Monday through Friday, 8:00 a.m. to 5:00 p.m., in the time zone where the action was filed.

In response to the concerns[149] regarding whether supporting documents count toward the page limits, the following guidance is offered as commentary: "[w]hen filing a document in support of a motion, the Notice of Filing must be filed separately from the motion and must identify the supporting document in the title of the notice." This guidance will promote compliance with the page limits in document-intensive cases and will assist the court reviewing supporting documentation.

RULE 1.161. SCHEDULING OF HEARINGS ON MOTIONS

Subdivision (b) – Procedure

Commenters raised many concerns[150] regarding the scheduling of hearings through the judicial office under proposed

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[149] *See, e.g,* comment by the Palm Beach County Bar Association at 24.

[150] Comments by Attorney Katz at 1; Chief Judges of the Circuit and County Courts at 5-6; judges with civil assignments in the Eighth Judicial Circuit at 3, 6; FDLA at 22; judges with civil assignments in the Fourth Judicial Circuit at 15-18; Florida Justice Reform Institute at 10-12; FJA at 42-44; staff attorneys of the Thirteenth Judicial Circuit at 22-23; Broward County Bar Association at 5-6; CPRC at 20-21; Hill Ward Henderson and Jones Day at 12; American Tort Reform Association at 19; Attorney Luka at 12-13, 25; Hawkins Parnell & Young, LLP, at 3-4; Attorney Conigliaro at 14-15; and The Gerald T. Bennett American Inn of Court at 2.

subdivision (b)(2). Some of these concerns are well-taken. The Workgroup agrees with the suggestion of Attorney Victoria Katz[151] and modifies proposed subdivision (b)(2) by clarifying that the parties must accept or reject dates within 2 business days "after receipt of the dates from the judicial office," and if rejected, must obtain three alternative dates and times within two "business days after the date the party rejects the initial dates offered by the judicial office."

A typographical error is corrected in the flush-left paragraph at the end of proposed subdivision (b) by adding the article "an" to the phrase "with [an] email copy to all parties."

The FJA[152] and CPRC[153] recommend amendments to the reasonable times in which a hearing should be scheduled. The Workgroup agrees with these comments to the extent they recommend 35 days as the reasonable time to conduct a hearing time of less than 15 minutes. Proposed subdivision (b)(3)(A) is modified in accordance with these suggestions.

Subdivision (c) – Motions Requiring Expedited Resolution

The Workgroup agrees with the FJA[154] that the court should rule on an emergency motion as soon as practicable "and in no less than 7 days" under proposed subdivision (b), which is modified in accordance with this suggestion.

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[151] Comment by Attorney Katz at 1.
[152] Comment by the FJA at 44.
[153] Comment by the CPRC at A7.
[154] Comment by the FJA at 44.

Subdivision (d) – Cancellation of Hearings

The Workgroup agrees with Attorney Luka[155] that the scheduling party should be responsible for notifying the court of hearing cancellation. Proposed subdivision (d) is modified in accordance with this suggestion.

Commentary

Based on the comments received,[156] the Workgroup finds it necessary to provide additional guidance through commentary. The proposed commentary clarifies that the reasonable times for scheduling a hearing are intended as a guideline for the court, not as a limitation on the parties' ability to be heard. The proposed commentary further suggests that this rule should not serve as grounds to punish lawyers or litigants for noncompliance attributable to the nonavailability of hearing time.

The Workgroup's proposed guidance encourages judges to engage in time and docket management practices to ensure there is sufficient hearing time, which is essential to achieving the goal of reducing delays to case resolution. Judges and their staff should monitor hearing time availability on an ongoing basis and expand hearing availability if backlogs of unheard motions accrue. The state courts system will need to provide education on time and docket management for judges and explore technology supported business practices to assist judges in providing adequate hearing

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[155] Comment by Attorney Luka at 22-23.
[156] *See, e.g.*, comments by the BLS at 10; judges with civil assignments in the Eighth Judicial Circuit of Florida at 6 and 9; FDLA at 22; Trial Lawyers Section of The Florida Bar at 20-21; Broward County Bar Association at 6; and The Gerald T. Bennett American Inn of Court at 2.

availability. Attorneys are encouraged to advise the judge's chambers when the nonavailability of hearings frustrates the ability to comply with case management deadlines.

RULE 1.190. AMENDED AND SUPPLEMENTAL PLEADINGS

The FDLA[157] and Cole, Scott & Kissane, P.A.,[158] argue that 15 days is insufficient time for a defendant to amend its answer to add a *Fabre* defendant.

The Workgroup respectfully disagrees. Proposed subdivision (b)(1)(B) provides an exception to the 15-day *Fabre* defendant deadline when the party seeking to amend "knew or reasonably should have known with the exercise of due diligence, of the party's or nonparty's alleged fault." This Workgroup submits this exception provides an adequate safeguard against surprises that arise during the course of litigation.

RULE 1.200. CASE MANAGEMENT; PRETRIAL PROCEDURE

Subdivision (a) – Objectives

The objectives of case management under proposed subdivision (a) generated significant controversy.[159] As detailed in section II.A.9., *supra*, the Workgroup stands by its recommendation to incorporate standards of conduct into the rules of procedure.

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[157] Comment by the FDLA at 18.
[158] Comment by Cole, Scott & Kissane, P.A., at 3.
[159] *Id.* at 3-4.

Subdivision (b) – Applicability; Exemptions

As explained in section II.A.10.ii., *supra*, proposed subdivision (b) is modified by excluding from the case management requirements "actions initiated under chapters 415, 731-735, 738, and 744, and sections 393.12 and 825.1035, Florida Statutes, unless otherwise agreed to by the parties, accepted by the court, or authorized by another rule of procedure."

As explained in section II.A.10.iii., *supra*, proposed subdivision (b) is modified by excluding eminent domain actions under article X, section 6 of the Florida Constitution and/or chapter 73, Florida Statutes. Likewise, eminent domain actions proceeding under chapter 74, Florida Statutes, are excluded until 20 days after the order granting quick take.

The staff attorneys of the Thirteenth Judicial Circuit[160] recommend that proposed subdivision (b) should be amended by adding an exception for "actions seeking appellate review of code enforcement or other matters expressly provided by general law." The Workgroup notes that proposed subdivision (b)(4) already addresses these circumstances. However, proposed subdivision (b)(4) is modified to provide greater clarity by striking the phrase "of an administrative record" and replacing it with the phrase "of an administrative proceeding."

Subdivision (d) – Changes in Track Assignment

Attorney Victoria Katz[161] indicates that the presence of page limits in proposed subdivision (d)(1)(A) but not in subdivision

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[160] Comment by the staff attorneys of the Thirteenth Judicial Circuit at 24.
[161] Comment by Attorney Katz at 1.

(d)(1)(B-C) creates ambiguity. The Workgroup agrees and modifies proposed subdivision (d) by striking the page limits from proposed subdivision (d)(1)(A) and creating a new flush-left paragraph in proposed subdivision (d) that applies the page limits to all motions filed under proposed subdivision (d). Conforming amendments are made to subdivision (d)(1)(A) to apply the page limits discussed *supra*.

Subdivision (e)(2) – Case Management Order (Streamlined Cases)

Conforming modifications are made to proposed subdivision (e)(2) to clarify that the CMO issued in streamlined cases must address each matter specified in subdivision (e)(3)(D), which governs the content of the CMO in a general case. In response to the concerns[162] expressed *supra* relating to the standards of conduct for discovery in proposed rule 1.279, proposed subdivision (e)(2) is modified to require that a copy of proposed rule 1.279 is attached to each CMO.

Subdivision (e)(3) – Case Management Order (General Cases)

The RPPTL[163] correctly notes that proposed subdivision (e)(3) does not expressly require self-represented litigants (SRLs) to participate in the "meet and confer" required to develop a JCMR. The Workgroup appreciates this concern and modifies proposed subdivision (e)(3)(A) by striking the word "parties" and replacing it with the phrase "counsel and self-represented parties." In response to the concerns[164] expressed that SRLs may be disinclined to

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[162] *See*, footnotes 64-72, *supra*.
[163] *See,* comment by the RPPTL at 17, 22-24.
[164] *See, e.g.*, comments by the Palm Beach County Bar Association at 10-11; and Circuit and County Judges of the Thirteenth Judicial Circuit of Florida at 4.

participate in the "meet and confer" process, proposed subdivision (e)(3)(A) is modified to clarify that self-represented parties must be included in the "meet and confer" process unless they fail to participate.

The Workgroup agrees with the RPPTL's suggestion[165] that the deadline for filing a JCMR and proposed CMO under proposed subdivision(e)(3)(B)(iii) should be amended to "within 30 days after responsive pleadings have been filed by each non-defaulted defendant served." Proposed subdivision (e)(3)(B)(iii) is modified in accordance with this suggestion.

Subdivision (e)(3)(D) – Content of Proposed Case Management Order

The Workgroup adds "submission of jury instructions" to the list of deadlines that must be specified in a proposed CMO. The proposed subdivision is further amended by reordering the list of deadlines.

Subdivision (e)(3)(E) – Case Management Order

In response to the concerns[166] expressed *supra* relating to the standards of conduct for discovery under proposed rule 1.279, proposed subdivision (e)(3)(E) is modified to require that a copy of proposed rule 1.279 is attached to each CMO.

Subdivision (f)(2) – Extensions of Time; Modification of Deadlines

The business litigation practice of Gunster Yoakley & Stewart, P.A.,[167] recommends a revised subdivision (f)(2) which allows parties

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[165] Comment by the RPPTL at 11.
[166] *See*, footnotes 64-72, *supra*.
[167] Comment by Gunster Yoakley & Stewart, P.A., at 25.

by mutual agreement to modify any individual deadline that is not provided in the case management order, will not affect a subsequent deadline in the case management order, and is not governed by rule 1.460. The Workgroup accepts this language in part, and modifies proposed subdivision (f)(2) by striking the requirement to comply with rule 1.460. The language in the Workgroup's proposed subdivision (f)(2) regarding subsequent deadlines is struck and replaced with "[i]f extending an individual case management deadline may affect a subsequent deadline in the case management order, parties must seek an amendment of the case management order, rather than submitting an individual motion for extension."

Subdivision (f)(3) – Periodic Updates

Many comments suggested that hearing availability[168] and delay tactics[169] may frustrate implementation of the Workgroup's case management framework. In response to these concerns, the following language is added to the periodic updates required of the parties to advise the court of the progress of the case: "[i]f the case cannot move forward due to availability of hearings or the dilatory behavior of a party or attorney, the moving party must immediately serve an update on the court as set forth in Florida Rule of General

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[168] *See, e.g.*, comments by Williams, Leininger & Cosby, P.A., at 3-4; Attorney Bowdish at 2-4; Attorney Alexander at 3; FDLA at 13; Cole, Scott & Kisane, P.A., at 9; Trial Lawyers Section of The Florida Bar at 4; and Hawkins, Parnell & Young, LLP, at 3-4.

[169] *See, e.g.*, comments by Williams Leininger & Cosby, P.A., at 3-4, 7; Attorney Bowdish at 2-4; Attorney Alexander at 3; FDLA at 13; judges with civil assignments in the Fourth Judicial Circuit at 25; Cole Scott & Kissane PA at 9; Trial Lawyers Section of The Florida Bar at 4; and Hawkins Parnell & Young, LLP, at 3-4.

Practice and Judicial Administration 2.516 or as otherwise provided by the chief judge on a circuit-wide basis."

Subdivision (f)(5) – When Trial Does not Timely Occur

Many commenters[170] suggest that the phrase "next immediately available trial period" is ambiguous and will create confusion when trials must be reset. The Workgroup accepts this criticism and amends proposed subdivision (f)(5) by striking the word "immediately" from the phrase "next immediately available trial period." The Workgroup provides further guidance as proposed commentary, *infra*. It is the Workgroup's intent that circuit-level roll-over practices will resolve the concerns relating to resetting trials.

Subdivision (h)(4)(C)(i) – Case Management Conference (Issues that may be Addressed)

As detailed in section II.A.3., *supra*, many comments[171] suggested the Workgroup used inconsistent standards for similar conduct. To the extent these comments are directed to proposed subdivision (h)(4)(C)(i), the Workgroup agrees. A significant "foreseen" change of circumstances may indeed justify amending certain case management dates or deadlines. Accordingly, the word "unforeseen" is struck from proposed subdivision (h)(4)(C)(i).

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[170] *See, e.g.*, comments by Attorney Cytryn at 3; FJA at 17-18; staff attorneys of the Thirteenth Judicial Circuit at 7-8; Attorney Luka at 28; and King & Spalding, LLP, at 5.
[171] *See*, footnote 20, *supra*.

Subdivision (h)(8) – Case Management Conference (Proposed Orders)

The FJA,[172] Palm Beach County Bar Association (PBCBA),[173] Broward County Bar Association (BCBA),[174] judges with civil assignments in the Eighth Judicial Circuit,[175] and Attorney Luka[176] raised concerns about the requirement in proposed subdivision (h)(8) that parties provide a transcript of any case management conference within seven days of the conference if the parties cannot agree on a proposed order. The commenters argue that additional time is needed to obtain a transcript and confer after receipt of the transcript. One commenter[177] recommends that the parties should split the cost of the transcript. The Workgroup agrees with these concerns and modifies proposed subdivision (h)(8) by amending the deadline to deliver the transcript from 7 to 12 days; and by requiring the parties to split the cost of the transcript unless stipulated by the parties or otherwise ordered by the court.

Commentary

Several commenters[178] expressed concerns relating to roll-over practices for cases that are set for trial but do not move forward during the scheduled trial period. The Workgroup is sympathetic to these concerns and adds the following language to the proposed commentary "[n]othing in this rule prevents a circuit court from

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[172] Comment by the FJA at 18-19.
[173] Comment by the PBCBA at 9.
[174] Comment by the BCBA at 9.
[175] Comment by the judges with civil assignments in the Eighth Judicial Circuit at 4.
[176] Comment by Attorney Luka at 31-33.
[177] Comment by the FJA at 19.
[178] *See, e.g.*, comments by King & Spalding, LLP, at 5; and Attorney Luka at 28.

establishing its own rollover practices for situations where a trial is not reached during the trial period scheduled by the case management order."

RULE 1.201. COMPLEX LITIGATION

The Workgroup modifies proposed subdivision (c) as detailed in section II.A.9, *supra*, to require that rule 1.279 is attached to each CMO. A cross-reference to the objectives of case management under rule 1.200(a) is also added to proposed subdivision (c) to ensure that the objectives of case management are fulfilled in complex litigation.

RULE 1.271. PRETRIAL COORDINATION COURT

The RPPTL[179] suggests that proposed subdivision (a) should be amended to clarify whether the PCC rule applies only to cases in a single county or circuit, or whether it may also apply in multiple counties or circuits. The Workgroup finds this suggestion to be well-taken and modifies proposed subdivision (a) by clarifying that the rule applies to "civil actions in a given circuit."

Attorney Luka[180] argues that the proposed PCC rule should be amended to require the "stipulation and agreement of all parties in each related case" to try a bellwether case or to consolidate common issues for trial under proposed subdivision (e)(1). The Workgroup agrees with this suggestion and modifies proposed subdivision (e)(1)(A-C) to require the "stipulation and agreement of all parties in each related case" to try a bellwether case or to consolidate common issues for trial at the PCC.

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[179] Comment by the RPPTL at 8.
[180] Comment by Attorney Luka at 34.

RULE 1.275. SANCTIONS

This proposed rule is modified as detailed in sections II.A.4., *supra*, by providing an opportunity for a hearing on any award of sanctions and authorizing the imposition of costs whenever attorneys' fees are authorized as a sanction. Proposed subdivisions (b-h) are renumbered to (c-i) due to the creation of a new proposed subdivision (b), which provides definitions of the terms "substantially justified" and "due diligence" for use throughout the proposed rules.

The CPRC[181] suggests that proposed rule 1.275 inconsistently uses the terms "misconduct" and "noncompliance" to describe the same behavior. The CPRC recommends striking each reference to the term "noncompliance" and replacing it with the term "misconduct." The Workgroup agrees in part and modifies proposed rule 1.275 by striking each reference to the term "misconduct" and replacing it with the term "noncompliance." The Workgroup believes "noncompliance" is the more appropriate term, given that proposed subdivision (a) authorizes sanctions when "a party or attorneys *fails to comply* with these rules. *To the extent any rule of civil procedure specifies options for sanctioning misconduct, the sanctions set forth in this rule shall be deemed supplemental* to such other rule, as appropriate." (Emphasis supplied).

Subdivision (a) – Generally

In response to the concerns[182] perceiving conflict between rules 1.275 and 1.380, the Workgroup modifies proposed subdivision (a) by adding a sentence clarifying "This is a rule of general application."

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[181] Comment by the CPRC at A49.
[182] Comments by the FDLA at 5-8; and Attorney Luka at 44-51.

Subdivision (b) – Definitions

As explained in section II.A.3., *supra*, a new proposed subdivision (b) is created to provide definitions for the terms "substantially justified" and "due diligence."

Subdivision (c) – Available Sanctions

In response to the concerns[183] relating to inconsistent standards addressed in section II.A.3., *supra*, the term "good cause" is struck from proposed subdivision (c) and replaced with the term "substantially justified."

Subdivision (e) – Reasonable Expenses

The RPPTL[184] objects to the financial loss sanctions under proposed subdivision (e) because the sanctions are not limited to fees and reasonable costs but also include travel expenses and "any other financial loss reasonably arising as a result of the sanctioned conduct." The RPPTL notes that trying to determine what "any other financial loss" means could lead to unnecessary, additional hearings which could detract from the ultimate progress of the case. In response to this concern, the Workgroup modifies proposed subdivision (e) by striking the phrase "reasonably arising as a result of the sanctioned conduct" and replacing it with the phrase "directly related to the sanctioned noncompliance." The Workgroup submits that this modification will limit the scope of disputes identified by the RPPTL.

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[183] *See, e.g.*, comments by the RPPTL at 6; staff attorneys of the Thirteenth Judicial Circuit at 7-8; Attorney Luka at 45; FDLA at 5-7; and CPRC at A62 and A64-A65.
[184] Comment by the RPPTL at 5.

Subdivision (f) – Limitations

Many commenters[185] suggested that parties should not be sanctioned due to the misconduct of an opposing party or the unavailability of hearing time. The Workgroup agrees with these concerns and modifies proposed subdivision (f) by adding a new sentence providing that "[n]either a party nor an attorney may be sanctioned if the reason for noncompliance is due to availability of hearings or the dilatory behavior of an opposing party or attorney."

Subdivision (g) – Dismissal with Prejudice or Default

In response to the concerns[186] regarding inconsistent standards addressed in section II.A.3., *supra*, the Workgroup deletes the phrase "offered reasonable justification" from subdivision (g)(5) and substitutes it with the phrase "substantially justified."

Subdivision (g) is amended to clarify that a written order is required when the sanction awarded is dismissal with prejudice or default. Factual findings in such an order are not required unless requested by the sanctioned party within 15 days after the date of filing the order.

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[185] *See, e.g.*, comments by the FDLA at 15-16; Florida Justice Reform Institute at 10-11; PBCBA at 24; Hill Ward Henderson and Jones Day at 20; and Attorney Haas at 4.
[186] *See, e.g.*, comments by the FDLA at 7-8; staff attorneys of the Thirteenth Judicial Circuit at 7-8; and CPRC at A49.

Subdivision (h) – Level of Conduct

The phrase "or bad faith" is added to proposed subdivision (i) in response to the concerns regarding the "willfulness standard" detailed in section II.A.4.iv., *supra*.

Subdivision (i) – Client to be Notified

The judges with civil assignments in the Eighth Judicial Circuit[187] recommend that attorneys should be required to file a notice with the court that they have complied with the requirement to notify the client of a sanction. The Workgroup agrees with the suggestion and adds the following phrase to the end of the last sentence of proposed subdivision (i): "and file a notice of imposition of sanctions with the court."

Commentary

The Workgroup offers the following commentary to assist in the interpretation of the proposed rule: "Rule 1.275, 'Sanctions,' is a new rule of general application. Trial courts have frequently been hamstrung from attempting to correct improper conduct by the almost insurmountable task of having to make a finding of willfulness or bad faith before imposing a sanction, creating a widespread culture of noncompliance with rules and court orders. This new rule eliminates in most instances a requirement that trial courts make a finding of willfulness or bad faith to impose sanctions. This rule is also intended to eliminate confusion and to ameliorate the requirements of *Kozel v. Ostendorf*, 629 So. 3d 817 (Fla. 1994) so that the *Kozel* requirements are now clearly set forth in this rule and do not apply to dismissals without prejudice.

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[187] Comment by the judges with civil assignments in the Eighth Judicial Circuit at 10.

Certainly, there are situations in which willfulness should be required. The rule does not completely eliminate the standard. However, the new rule aligns itself with the concurring decision in *Rivero v. Meister*, 46 So. 3d 1161 (Fla. 4th DCA 2010) and the suggestion in *Infinity Auto Ins. Co. v. Metric Diagnostic Testing, Inc.*, 343 So. 3d 98, 104 n.1 (Fla. 4th DCA 2022), which urged that a negligence standard should be in place, rather than a willful or bad faith standard, for most attorney misconduct issues. Indeed much, if not most, attorney misconduct goes without remedy because of the inability of the trial court to make the required findings. The adoption of this rule is intended to make it easier to hold attorneys and parties accountable for their improper conduct."

RULE 1.279. STANDARDS OF CONDUCT FOR DISCOVERY

The comments[188] directed to this proposed rule are addressed in section II.A.9., *supra*.

The Workgroup corrects an oversight in proposed rule 1.279. The prohibition against discovery activities undertaken by attorneys for an improper purpose[189] is extended to self-represented litigants. Accordingly, the Workgroup strikes proposed subdivision (b)(2)(B) and creates a new subdivision (b)(4), which prohibits both attorneys and self-represented litigants from engaging in discovery for an improper purpose.

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[188] *See*, footnotes 64-72, *supra*.

[189] An improper purpose is one undertaken to harass, cause unnecessary delay, or needlessly increase the cost of litigation.

RULE 1.280. GENERAL PROVISIONS GOVERNING DISCOVERY

Subdivision (a) – Initial Discovery Disclosure

Many comments[190] recommend that proposed subdivision (a) should conform to Fed. R. Civ. P. 26(a). The Workgroup concurs with a slight modification. Proposed subdivision (a)(1) is modified to conform to the federal rule by requiring disclosure of individuals likely to have discoverable information "if known" to the party; authorizing parties to provide a description by category and location of documents in lieu of producing copies of the documents; requiring the disclosure of the identity of any expert witness that a party may use at trial; and amending the scope of initial disclosures from "relevant to the subject matter of the action" to "may use to support its claims or defenses." The exemptions from initial disclosure in proposed subdivision (a)(2), which vary from the federal rules, are retained.

The International Association of Defense Counsel (IADC),[191] Federation of Defense and Corporate Counsel (FDCC),[192] and Florida Justice Reform Institute (FJRI)[193] recommend that third party litigation financing agreements, wherein a nonparty funds a party's representation in exchange for obtaining a contractual right to a portion of any litigation proceeds, should be added to the initial disclosures required by proposed rule 1.280(a).

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[190] *See, e.g.*, comments by the FJA at 22; BLS at 25-28; CPRC at 17-19; Hill Ward Henderson and Jones Day at 3-4; American Tort Reform Association at 11-13; Attorney Luka at 36-42; Gunster Yoakley & Stewart, P.A., at 11-12 and 23; Attorney Haas at 2-3; Attorney Conigliaro at 12-13; and Attorney Regensdorf at 7.
[191] Comment by the IADC at 12-13.
[192] Comment by the FDCC at 5-7.
[193] Comment by the FJRI at 2.

The Workgroup respectfully disagrees. In the experience of Workgroup members, such agreements do not meaningfully impact the speed to resolution of cases. The agreements rarely, if ever, become admitted into evidence. The Workgroup suggests that this proposal is beyond the scope of its charges and declines to adopt the suggestion.

Subdivision (b) – Discovery Methods

To ensure that the objectives of case management are applied during the discovery phase of litigation, the Workgroup adds the following sentence to the end of proposed subdivision (b): "[d]iscovery must be conducted in accordance with the case management objectives outlined in rule 1.200(a)."

Subdivision (c) – Scope of Discovery (Trial Preparation: Experts)

The Workgroup intends for the disclosure of the identity of expert witnesses to occur as a matter of course, as reflected in the modification to proposed subdivision (a)(1), *supra*. To this end, proposed subdivision (c)(5) is modified by requiring the initial disclosure of the identity of any expert witness that a party may use at trial.

Subdivision (d) – Protective Orders

Many commenters[194] argue that protectives orders should allocate expenses in the same manner as Fed. R. Civ. P. 26. The Workgroup concurs and amends proposed subdivision (d) by

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[194] *See, e.g.*, comments by the IADC at 16-17; Washington Legal Foundation at 2; and National Federation of Independent Business at 3-4.

authorizing the court to order "the allocation of expenses" when issuing a protective order.

Subdivision (f) – Sequence and Timing of Discovery

Several commenters[195] recommend that parties should be able to stipulate to a shorter sequence of discovery than required by the CMO. The Workgroup concurs and amends proposed subdivision (f) by striking the phrase "upon motion for the convenience of parties and witnesses and in the interest of justice" and adding the phrase "the parties stipulate or." This modification authorizes parties to stipulate to a shorter sequence of discovery without leave of court.

RULE 1.310. DEPOSITIONS UPON WRITTEN QUESTIONS

The IADC[196] recommends that the proposed rule should incorporate language from Fed. R. Civ. P. 30(b)(6), which requires parties to "meet and confer" promptly regarding the matters for examination of a corporation, partnership, association, or governmental agency and to designate each person who will testify in advance. The Workgroup agrees with this recommendation and modifies proposed subdivision (b)(6) by incorporating the relevant language from Fed. R. Civ. P. 30(b)(6).

RULE 1.335. STANDARDS FOR CONDUCT IN DEPOSITIONS; OBJECTIONS

The Workgroup thanks the BLS[197] for pointing out a typographical error in proposed subdivision (e), which is corrected

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[195] *See, e.g.*, comments by the IADC at 20; and CPRC at B9.
[196] Comment by the IADC at 20-21.
[197] Comment by the BLS at 37.

by replacing the word “or” with the word “and” in the phrase “an objection or an instruction.” In response to the BLS’s concern regarding the proposed rule’s characterization of depositions as court proceedings, the Workgroup strikes the phrase “depositions are court proceedings” from proposed subdivision (a).

RULE 1.340. INTERROGATORIES TO PARTIES

The BLS[198] recommends amending proposed rule 1.340 so that it conforms with Fed. R. Civ. P. 33(b)(4) by requiring that objections to interrogatories state the grounds with specificity and that untimely objections are waived unless the court excuses the failure for good cause. The Workgroup agrees with this recommendation and modifies proposed subdivision (a) to conform with the relevant language in Fed. R. Civ. P. 33(b)(4).

RULE 1.350. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

The Workgroup agrees with the recommendation of the BLS[199] to amend proposed rule 1.350 by adopting the language of Fed. R. Civ. P. 34(b)(2), which requires that objections are stated with specificity and authorizes copies of documents to be produced in lieu of originals. Additionally, under the federal rule, an objection must specify whether any documents are being withheld pursuant to the objection. Accordingly, proposed subdivision (b) is amended to incorporate the language from Fed. R. Civ. P. 34(b)(2)(B-E) relating to objections to requests for production.

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[198] Comment by the BLS at 38.
[199] *Id.* at 38-39.

RULE 1.380. FAILURE TO MAKE DISCOVERY; SANCTIONS

Subdivision (a)(5) – Motion for Order Compelling Discovery (Award of Expenses of Motion)

In response to the concerns[200] expressed regarding the "willfulness standard" in section II.A.4.iv., *supra*, the Workgroup modifies proposed subdivisions (a)(5)(A-B) to provide "[e]xcept as stated in this rule or elsewhere in these rules, a finding of willfulness is not necessary to impose a sanction provided in this rule. The sanction, however, must be commensurate with the conduct."

Subdivision (b) – Discovery Violation Interfering with Adjudication of the Case

In response to the concerns[201] relating to inconsistent standards addressed in section II.A.3., *supra*, subdivision (b)(1) is amended by adding the following phrase to the end of the last sentence: "unless the court finds that the conduct was substantially justified." To this end, the phrase "a reasonable justification" is deleted and replaced with the term "substantially justified" in subdivision (b)(2)(A) and the phrase "offered reasonable justification" is deleted and replaced with "was substantially justified" in subdivision (b)(3)(B)(v).

The CPRC[202] recommends that sanctions for discovery abuses should be authorized against a party and the party's counsel. The Workgroup agrees and modifies proposed subdivision (b)(2) by

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[200] *See*, footnote 36, *supra*.
[201] *See*, footnote 20, *supra*.
[202] Comment by the CPRC at A64.

authorizing an award of sanctions against a party's counsel for discovery abuse.

Subdivision (b)(3)(A) is modified to address the concerns regarding the "willfulness standard" detailed in section II.A.4.iv., *supra*. The modification provides that a finding of "willfulness" is not required to award sanctions, but the sanction must be commensurate with the conduct. This modification is designed to clarify that although a finding of "willfulness" is not required to award monetary sanctions, such a finding may be a necessary if the sanction includes dismissal with prejudice or default.

Commentary

The Workgroup offers proposed commentary to this rule to provide guidance regarding sanctions. The commentary states: "Trial courts have frequently been hamstrung from attempting to correct improper conduct by the almost insurmountable task of having to make a finding of willfulness or bad faith before imposing a sanction, creating a widespread culture of noncompliance with rules and court orders. These amendments eliminate in most instances a requirement that trial courts make a finding of willfulness or bad faith to impose sanctions. This rule is also intended to eliminate confusion and to ameliorate the requirements of *Kozel v. Ostendorf*, 629 So. 3d 817 (Fla. 1994) so that the *Kozel* requirements are now clearly set forth in this rule and do not apply to dismissals without prejudice. Certainly, there are situations in which willfulness should be required. The rule does not completely eliminate the standard. However, the new rule aligns itself with the concurring decision in *Rivero v. Meister*, 46 So. 3d 1161 (Fla. 4th DCA 2010) and the suggestion in *Infinity Auto Ins. Co. v. Metric Diagnostic Testing, Inc.*, 343 So. 3d 98, 104 n.1 (Fla. 4th DCA 2022), which urged that a negligence standard should be in place, rather than a willful or bad faith standard, for most attorney misconduct

issues. Indeed much, if not most, attorney misconduct goes without remedy because of the inability of the trial court to make the required findings. The amendments to this rule are intended to make it easier to hold attorneys and parties accountable for their improper conduct."

RULE 1.420. DISMISSAL OF ACTIONS

The Workgroup agrees with the suggestion of the CPRC[203] to modify proposed subdivision (e)(2) by replacing the word "paper" with the word "document."

RULE 1.440. SETTING ACTION FOR TRIAL

Attorney Luka[204] asserts that the limited discretion afforded for granting continuances under proposed rule 1.460 renders the commentary to proposed rule 1.440 invalid. In response to this concern, the Workgroup amends the commentary to proposed rule 1.440 by adding the phrase "under rule 1.460" at the end of the last sentence.

RULE 1.460. CONTINUANCES

Subdivision (a) – Motions to Continue Nontrial Events

[203] Comment by the CPRC at A69.
[204] Comment by Attorney Luka at 87.

Many commenters[205] object to the proposed amendments' requirement for the client to sign a motion for continuance. In response to these concerns, the Workgroup modifies proposed subdivision (a)(1) by limiting the client signature requirement to hearings scheduled for 30 minutes or greater. This modification is designed to retain the Workgroup's intent to require that attorneys inform their clients of major case events, while limiting the burden on counsel by excluding less consequential events from the requirement.

The Workgroup agrees with the stylistic changes recommended of the CPRC[206] and modifies proposed subdivision (a)(2) by striking the phrase "factual basis of the need" and replacing it with the word "grounds." Similarly, proposed subdivision (a)(3) is modified by striking the word "potential."

Subdivision (b) – Motions to Continue Trial

The Workgroup is sympathetic to the concerns[207] raised relating to continuances that are necessitated by the misconduct of another party. In response to these concerns, the Workgroup modifies proposed subdivision (b)(1) to provide that "[i]n the event one party needs a continuance due to the dilatory conduct of another party, the court will grant a continuance upon reasonable cause and will simultaneously set a sanctions hearing."

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[205] *See, e.g.*, comments by Wicker, Smith, O'Hara, McCoy & Ford, P.A., at 1-2; Attorney Luka at 76-77; BLS at 45; and judges with civil assignments in the Fourth Judicial Circuit at 22.
[206] Comment by the CPRC at A71.
[207] *See,* footnote 184, *supra*.

The Workgroup agrees with the stylistic changes recommended of the CPRC[208] and modifies proposed subdivision (b)(4)(A) by striking the phrase "factual basis of" and replacing it with the phrase "grounds for." The Workgroup also agrees to modify proposed subdivision (b)(3) by replacing the word "any" with the article "a" and by replacing the word "within" with the phrase "no later than."

FLABOTA[209] argues that the word "new" in proposed subdivision (b)(5)(D), relating to circumstances beyond an attorney's control, creates ambiguity and should be deleted. The Workgroup concurs and modifies this proposed subdivision by striking the word "new" and replacing it with word "unanticipated." The Workgroup submits this modification provides greater clarity than the ambiguous term "new."

FLABOTA[210] and the judges with civil assignments in the Fourth Judicial Circuit[211] argue that proposed subdivision (b)(5)(E) should be struck in its entirety because the proposed language could result in an unrepresented party going to trial because he or she had an "irreconcilable difference" with his or her attorney at the last minute. The commenters suggest the proposed rule does nothing to prevent a lawyer from withdrawing but shifts the consequences of the withdrawal to the client. In recognition of this concern, the Workgroup strikes proposed subdivision (b)(5)(E).

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[208] Comment by the CPRC at A72-A73.
[209] Comment by the FLABOTA at 22.
[210] *Id.*.
[211] Comment by the judges with civil assignments in the Fourth Judicial Circuit at 23.

Proposed subdivision (b)(6) is modified in response to the concerns expressed by Attorney Luka[212] that the subdivision should be rewritten for the sake of clarity. Proposed subdivision (b)(6) is modified by deleting the sentence "[i]f additional discovery is required, continuance shall not be granted except where cure is impossible." The phrase "except where cure is impossible" is added to the end of the first sentence.

The BLS[213] notes that while the proposed amendments require the judge to state the grounds for granting a continuance of trial, the same requirement does not exist for orders denying a continuance. The BLS suggests that the standard should be the same for both types of orders and recommends that orders denying a trial continuance should include the factual basis for the denial. The Workgroup respectfully disagrees. Continuances of the trial are disfavored under the proposed amendments.[214] The requirement for the court to state the grounds for granting a trial continuance is intended to emphasize the Workgroup's goal of reducing trial continuances. However, in response to this concern, the Workgroup modifies proposed subdivision (b)(8) by authorizing the court to state the factual basis for granting a trial continuance "on the record." The Workgroup believes that a *written* order should not be required to grant a continuance of trial.

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[212] Comment by Attorney Luka at 89.
[213] Comment by the BLS at 45-46.
[214] *See,* proposed Fla. R. Civ. P. 1.460(b)(1).

Commentary

In response to the comments[215] criticizing the limitations placed on a judge's discretion to grant a continuance, as detailed in section II.A.6., *supra*, the Workgroup adds the following language to the proposed commentary: "[w]hile motions to continue have been significantly limited by the amendments to this rule, the court retains the ability to reset a trial."

The FDLA[216] noted that the proposed amendments' strict requirements for continuances may conflict with rule 2.570, which governs continuances based on parental leave. The Florida Bar also noted the potential for conflict with rule 2.570. To allay these concerns, the proposed commentary to rule 1.460 is modified to state: "[n]othing contained in this rule is intended to override rule 2.570." As explained in section II.A.1., *supra*, the proposed amendments must be applied humanely, and judges must recognize and resolve inherent conflicts

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[215] *See, e.g.*, comments by Williams, Leininger & Cosby, P.A., at 6; Luks, Santaniello, Petrillo, Cohen & Peterfriend at 6; Wicker, Smith, O'Hara, McCoy & Ford, P.A., at 2-3; Attorney Vitale at 5; BLS at 44-45; Chief Judges of the Circuit and County Courts of Florida at 5; judges with civil assignments in the Eighth Judicial Circuit at 9; FDCC at 2; Attorney Cytryn at 12; FDLA at 11-12; judges with civil assignments in the Fourth Judicial Circuit at 22-23; FLABOTA at 5-9; Cole, Scott & Kisane, P.A., at 9; FJRI at 14-15; Attorney Valezquez at 1; The Florida Bar at 7; PBCBA at 13-14; Trial Lawyers Section of The Florida Bar at 19; BCBA at 5; CPRC at 6-7; Hill Ward Henderson and Jones Day at 12; American Tort Reform Association at 21; Attorney Luka at 84 and 86-87; Hawkins, Parnell & Young, LLP, at 12; King & Spalding, LLP, at 4-5; and Attorney Conigliaro at 14-15.

[216] Comment by the FDLA at 14.

RULE 2.215. TRIAL COURT ADMINISTRATION

Attorney Luka[217] and the staff attorneys from the Thirteenth Judicial Circuit[218] believe the time frames for judges to rule upon pretrial motions should be adjusted. The Workgroup respectfully disagrees. Sixty days is not an overly burdensome requirement for trial judges to issue orders. Moreover, litigants should not bear the burden of notifying the presiding judge that an order is untimely. Because the Workgroup's proposed 60-day requirement will increase the speed to case resolution, the Workgroup declines to amend the 60-day deadline for the court to issue an order.

To conform with the modifications made to proposed rule 1.160, proposed rule 2.215 is amended by replacing the phrase "oral argument" with the word "hearing."

RULE 2.250. TIME STANDARDS FOR TRIAL AND APPELLATE COURTS

The Workgroup thanks the RGPJAC[219] for noting a typographical error in the second sentence of proposed subdivision (a), which is modified by replacing the phrase "shall be" with the word "are."

RULE 2.546. ACTIVE AND INACTIVE CASE STATUS

The RGPJAC[220] suggests that the standard for placing a case on inactive status for "other reasons" should be clarified. The

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[217] Comment by Attorney Luka at 96.
[218] Comment by the staff attorneys of the Thirteenth Judicial Circuit at 25.
[219] Comment by the RGPJAC at A3.
[220] Comment by the RGPJAC at 8.

Workgroup appreciates this concern and modifies proposed subdivision (a) by striking the word "other" from the second sentence and replacing it with the word "bona fide." Although "bona fide" is undefined under the proposed amendments, this term provides greater clarity than the expansive term "other."

The RGPJAC[221] further asserts that the Workgroup's commentary to this proposed rule should include the phrase "or a subsequent administrative order" to ensure that any future amendments to the referenced administrative order do not alter or affect the application of the rule. The Workgroup agrees with this concern and modifies the proposed commentary by adding the phrase "or a subsequent administrative order" to the reference in the first sentence to Fla. Admin. Order No. AOSC14-20.

Attorney Luka[222] suggests that proposed subdivision (b) is ambiguous regarding which party is responsible for moving for a change in case status. In response to this concern, the Workgroup modifies proposed subdivision (b) by deleting the last sentence and replacing it with "[a] failure to timely inform the court that a case's 'inactive' status has become unnecessary may result in sanctions, including dismissal of the action or the striking of pleadings." This language will grant judges the discretion to apportion fault and impose the appropriate sanction for a violation of this rule.

RULE 10.420. CONDUCT OF MEDIATION

Proposed subdivision (a) is modified as set forth in section II.A.11., *supra*.

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[221] Comment by the RGPJAC at 9.
[222] Comment by Attorney Luka at 100-101.

III. Conclusion

The Workgroup again expresses its sincere appreciation for the thoroughly researched comments submitted in this case. The concerns expressed by the commenters led to positive changes that significantly improved the Workgroup's proposed amendments. The Workgroup recommends the Court adopt the modifications to the proposed amendments as explained *supra* and reflected in the appendices to this response. For convenience, the Workgroup reiterates the following recommendations:

- Make a referral to the Florida Courts Technology Commission (FCTC) to determine if additional technological functionality would facilitate trial court compliance with the proposed amendments.

- Make a referral to Trial Court Budget Commission for a determination of the costs and funding sources for needed technology resources that may be identified by the FCTC as well as for staffing and other resource needs that may be identified by the trial courts for aspects of the requirements that may not be subject to automation.

- Make referrals to the following entities for the development and provision of educational programming:

    - The Florida Court Education Council to develop education for judges and court staff on the CMRs and best practices for the use of technology and other implementation issues. Additionally, continuing judicial education should be developed on topics relating to proactive case management.

- The Florida Court Clerks & Comptrollers to develop training on the practical aspects of case management, including the use of technology.

- The appropriate sections and committees of The Florida Bar to develop continuing legal education for attorneys that focuses on the new CMRs, particularly discovery practice; the case management timetable under the amended rules; motion practice; sanctions; dismissals for failure to prosecute; and technology best practices. Education on professionalism should also be emphasized.

Delay wholesale adoption of the federal "proportionality" standards until the effect of the other changes on the state courts system are implemented and evaluated.

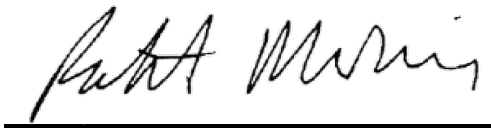
- Make a referral to the Civil Rules Procedure Committee for analysis of the "proportionality standard."

- Make a referral to the Probate Rules Committee, in consultation with Laird Lile and the Real Property, Probate, and Trust Law Section of The Florida Bar, to promulgate case management rules for probate, guardianship, and trust proceedings.

- Make a referral to the Florida Courts E-Filing Authority to implement upgrades to the Florida Courts E-filing Portal to (1) facilitate service of specifically authorized documents on court officials without adding the court official to the service list, and (2) allow court officials to remove themselves from the service list.

Wherefore, the Workgroup respectfully requests this court to adopt the proposed amendments in the Workgroup's Petition, as recommended to be modified in this response to comments, to the Florida Rules of Civil Procedure, Florida Rules of General Practice and Judicial Administration, Florida Small Claims Rules, and Florida Rules for Certified and Court-Appointed Mediators.

Respectfully submitted on this 19th day of September, 2022.



Robert Morris, Chief Judge
Second District Court of Appeal
Florida Bar No. 308439
Chair, Workgroup on Improved
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CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished via the Florida Courts E-filing Portal (the "Portal"), and served by electronic means to the e-mail addresses registered with the Portal on September 19, 2022 to: GEORGE N. MEROS JR.; HON. THOMAS PATRICK BARBER, JUDGE; RICHARDS H. FORD RICHARD E. RAMSEY; HERMAN J. RUSSOMANNO; NICHOLE J. SEGAL; LEWIS W. MURPHY JR.; HON. CAROLINE TESCHE ARKIN, JUDGE; HON. CATHERINE M. CATLIN, JUDGE; HON. WENDY JOY DEPAUL, JUDGE; JOHN W. LITTLE III; SARAH S. BUTTERS; KARLA D. ELLIS; HON. ROBERT W. LEE, JUDGE; W. RANDALL BASSETT; JASON GOLDSTEIN; HON. CHERYL KENDRICK THOMAS, JUDGE; TINA WHITE; ASGHAR A. SYED; DENNIS W. MOORE; DANIEL J. SANTANIELLO; KIMBERLY K. BERMAN; FRANCISCO RAMOS JR.; HON. DONALD ALVIN MYERS JR., JUDGE; HON. DIANA LEE MORELAND, JUDGE; DANIEL W. BELL; HON. JAMES MANLY BARTON II, JUDGE; KENNETH B. BELL; HON. JENNIFER D. BAILEY, JUDGE; ROBERT L. CHRISTIE; KANSAS R. GOODEN; HON. EMILY A. PEACOCK, JUDGE; HON. LINDSAY M. ALVAREZ; ELIZABETH CLARK TARBERT; CORY L. ANDREWS; SCOTT A. COLE; COLLEEN REPPEN SHIEL; HON. ROBERT J. MORRIS, CHIEF JUDGE; HOWARD C. COKER; MATTHEW N. POSGAY; DORIS N. LAING; JULIA WYDA; HON. PATRICIA ANN MUSCARELLA, JUDGE HON. CLAUDIA RICKERT ISOM, JUDGE; HON. WESLEY D. TIBBALS, JUDGE; HON. LYANN GOUDIE, JUDGE; HON. VIVIAN TERESA CORVO; HON. SUSAN SHORTER LOPEZ, JUDGE; CRISTEN HEATHER MARTINEZ; ASHLEY WITHERS; JOSEPH J. KALBAC JR.; TARA R. PRICE; HON. GINA BEOVIDES, JUDGE; HON. MONIQUE MARIE SCOTT; THOMASINA MOORE; HENRY C. WHITAKER; THOMAS S. EDWARDS JR.; WILLIAM T. COTTERALL; BARD D. ROCKENBACH; HON. KATHERINE G. ESSRIG; FRED W. BAGGETT; M. HOPE KEATING; SARA E. GOLDFARB; HENRY LAWRENCE PERRY;

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Robert Morris, Chief Judge
Second District Court of Appeal
Chair, Workgroup on Improved
Resolution of Civil Cases

CERTIFICATE OF COMPLIANCE

I certify that the rules in Appendices A and B have been read against, and reflect the amendments adopted in *In re: Amendments to Florida Rules of Civil Procedure, Florida Rules of Gen. Practice & Judicial Admin., Florida Rules of Criminal Procedure, Florida Prob.*

Rules, Florida Rules of Traffic Court, Florida Small Claims Rules, & Florida Rules of Appellate Procedure, SC21-990, 47 Fla. L. Weekly S187 (Fla. July 14, 2022). I certify that this report was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.045(b).

/s/ Dustin W. Metz
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