IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE (RULES 1.200, 1.201, 1.280, 1.440, AND 1.460)
______________________________/

CASE NO.:SC23-0962

COMMENT OF ATTORNEY MAEGEN PEEK LUKA

My name is Maegen Peek Luka. I serve on the Rules of Civil Procedure Committee (the "Civil Rules Committee") and chaired the subcommittees that drafted rules 1.440 and 1.460 and Track B for rules 1.200, 1.201 and 1.280.

I have reviewed the Court's proposal to synthesize Track A and Track B. I appreciate the Court giving the Civil Rules Committee and practitioners the opportunity to look over the synthesized version to make sure there are no "lumps in the mashed potatoes." Below, I highlight a few lumpy areas and propose how to smooth them.

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RULE 1.200(b)(1)
Needs editing to keep it from being circular with rule 1.201

Rule 1.200(b)(1) and rule 1.201(a)(3) are circular. They point to each other—and that does not make sense.

Rule 1.200(b)(1) says:

> (1) "*Complex*" cases are actions designated by court order as complex under rule 1.201(a). Complex cases must proceed as provided in rule 1.201.

Rule 1.201(a)(3) says:

> (a)(3) A case will be designated or redesignated as complex in accordance with rule 1.200.

I agree with the Civil Rules Committee that Rule 1.201(a)(3) adds nothing. I suggest deleting it.

But I would tweak 1.200(b)(1) just a bit. As you will see below, I suggest revising rule 1.201(a). That change would make rule 1.200(b)(1)'s cross-reference to rule 1.201(a) no longer accurate. I would change the cross-reference in rule 1.200(b)(1) to just name 1.201 generically, instead of including a specific subsection.

<u>Proposed change</u>

> (1) "*Complex*" cases are actions designated by court order as complex under rule 1.201~~(a)~~. Complex cases must proceed as provided in rule 1.201.

RULE 1.200(d)(3) and (e)(1)
Delete the potential conflict/redundancy

Subsection (d)(3) and subsection (e)(1) are meant to, convey the same message: that deadlines should be strictly enforced. In the Court's proposed rule, the two provisions are very close to each other and say nearly the same things ("Strict Enforcement of Deadlines" and "Deadlines are Strictly Enforced"):

> **(d) Case Management Order.**
>
> …
>
> (3) *Strict Enforcement of Deadlines.* The case management order must indicate that the deadlines established in the order will be strictly enforced by the court.
>
> (4) *Timing of Issuance.* The court must issue the case management order no later than 120 days after commencement of the action as provided in rule 1.050 or 30 days after service of the complaint on the last of all named defendants, whichever date comes first. No case management conference is required to be set by the court before issuance.
>
> **(e) Extensions of Time; Modification of Deadlines.**
>
> (1) *Deadlines are Strictly Enforced.* Deadlines in a case management order must be strictly enforced unless changed by court order.

Subsection (d)(3) came from the Track A proposal. It says that the "case management order must state" that deadlines will be strictly enforced.

Track B did not include that language because Track B believed it is not important what the order says, it is important what the judge actually does—and it should be clear that the judge has the discretion to move a deadline, even in the presence of a duty to strictly enforce deadlines. Hence, rather than making a passive requirement that the "case management order must indicate that the deadlines established in the order will be strictly enforced by the court," Track B proposed the more active language that "Deadlines in a case management order must be strictly enforced unless changed by court order." The latter imposes an active requirement (to enforce the deadlines) rather than the more passive requirement of having an order state that deadlines are enforced. The latter also makes it clear that deadlines are strictly enforced ***unless*** changed by court order.

Given the close proximity of the provisions, I do not believe both sections are necessary. And I worry about the fact that subsection (d)(3) does not contain the "safety" valve the deadlines are to be

strictly enforced "unless changed by court order." That inconsistency could cause unnecessary confusion. Thus, I would delete subsection (d)(3) altogether. Alternatively, if the Court is going to keep the redundancy, then it should be consistently redundant. To achieve that, subsection (d)(3) should be changed to say, "The case management order must indicate that the deadlines established in the order will be strictly enforced ~~by the court~~ unless changed by court order."

Proposed change

~~(3) *Strict Enforcement of Deadlines.* The case management order must indicate that the deadlines established in the order will be strictly enforced by the court.~~

(~~4~~ 3) *Timing of Issuance.* The court must issue the case management order no later than 120 days after commencement of the action as provided in rule 1.050 or 30 days after service of the complaint on the last of all named defendants, whichever date comes first. No case management conference is required to be set by the court before issuance.

(e) Extensions of Time; Modification of Deadlines.

(1) *Deadlines are Strictly Enforced.* Deadlines in a case management order must be strictly enforced unless changed by court order.

RULE 1.200(j)(6)
Language consistency

Subsection (j) deals with case management conferences. Any time the term is used, it is always "case management conference," not just "conference." Fla. R. Civ. P. 1.200(j)(1) ("The court may set a case management conference…"); 1.200(j)(2) ("During a case management conference…"); 1.200(j)(3) ("Attorney and self-represented litigants who appear at a case management conference…"); 1.200(j)(4) ("Any scheduled hearing may be converted sua sponte to a case management conference…"); 1.200(j)(5) ("At the conclusion of a case management conference…").

The exception is in subsection (6). There, it just says, "On failure of a party to attend a conference…." My proposed change simply smooths a lump in the potatoes to achieve consistency.

<u>Proposed change</u>

> (6) *Failure to Appear.* On failure of a party to attend a <u>case management</u> conference, the court may dismiss the action, strike the pleadings, limit proof or witnesses, or take any other appropriate action against a party failing to attend.

RULE 1.200(k)
Consistent language

Rule 1.200(j) is about case management conferences. Rule 1.200(k) is about pretrial conferences. Given that subsection (j) consistently uses the term "case management conference," to maintain consistency, I suggest subsection (k) do the same.

Proposed change

> **(k) Pretrial Conference.** After the action has been set for an actual trial period, the court itself may, or must on the timely motion of any party, require the parties to appear for a pretrial conference to consider and determine:

RULE 1.201(a)
The name is not correct and the content should be moved

Subsection (a) is titled "Complex Litigation Defined." But nothing in that subsection defines what a complex case is. I think the subsection should be renamed "Moving to Designate a Case as Complex"—because that is the subject matter of the subsection. And I think it should be re-lettered as "(b)" (which would require re-lettering every subsection after it).

Subsection (a) should remain titled "Complex Litigation Defined" because it makes sense to start the rule by defining a complex case. The definition contained in subsection (a)(1)-(2) does the job just fine. It is just a matter of re-naming and re-ordering the content that is already there in rule 1.201 so that they make logical sense.

Finally, as indicated earlier in this comment, I agree with the Civil Rules Committee that the Court should delete subsection (a)(3) (which would be subsection (b)(3), if my proposal is accepted). That subsection is circular with rule 1.200(b)(1). Rule 1.200(b)(1) should simply refer to rule 1.201 for how cases are designated complex. (*See* my comment on rule 1.200(b)(1) for the proposed revision.)

Proposed Change

(~~a~~b) ~~Complex Litigation Defined~~ Moving to Designate a Case as Complex. At any time after all defendants have been served, and an appearance has been entered in response to the complaint by each party or a default entered, any party, or the court on its own motion, may move to declare an action complex. However, any party may move to designate an action complex before all defendants have been served subject to a showing to the court why service has not been made on all defendants. The court ~~shall~~ may convene a hearing to determine whether the action requires the use of complex litigation procedures ~~and enter an order within 10 days of the conclusion of the hearing~~.

(~~1~~a) Complex Litigation Defined. A "complex action" is one that is likely to involve complicated legal or case management issues and that may require extensive judicial management to expedite the action, keep costs reasonable, or promote judicial efficiency.**~~(2)~~** In deciding whether an action is complex, the court must consider whether the action is likely to involve:

(A) numerous pretrial motions raising difficult or novel legal issues or legal issues that are inextricably intertwined that will be time-consuming to resolve;

(B) management of a large number of separately represented parties;

(C) coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court;

(D) pretrial management of a large number of witnesses or a substantial amount of documentary evidence;

(E) substantial time required to complete the trial;

(F) management at trial of a large number of experts, witnesses, attorneys, or exhibits;

(G) substantial post-judgment judicial supervision; and

(H) any other analytical factors identified by the court or a party that tend to complicate comparable actions and which are likely to arise in the context of the instant action.

~~(3) A case will be designated or redesignated as complex in accordance with rule 1.200.~~

(~~b~~c) Initial Case Management Report and Conference....

I will be honest that I do not know the proper rules for showing underlines and strikethrough where I want to change the order, but not the language, of a rule. Because I feel strongly that the re-ordering and re-naming is important, I have created a "clean" version below so the Court can see clearly the changes I propose:

(a) Complex Litigation Defined. A "complex action" is one that is likely to involve complicated legal or case management issues and that may require extensive judicial management to expedite the action, keep costs reasonable, or promote judicial efficiency. In deciding whether an action is complex, the court must consider whether the action is likely to involve:

(A) numerous pretrial motions raising difficult or novel legal issues or legal issues that are inextricably intertwined that will be time-consuming to resolve;

(B) management of a large number of separately represented parties;

(C) coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court;

(D) pretrial management of a large number of witnesses or a substantial amount of documentary evidence;

(E) substantial time required to complete the trial;

(F) management at trial of a large number of experts, witnesses, attorneys, or exhibits;

(G) substantial post-judgment judicial supervision; and

(H) any other analytical factors identified by the court or a party that tend to complicate comparable actions and which are likely to arise in the context of the instant action.

(b) Moving to Designate a Case as Complex. At any time after all defendants have been served, and an appearance has been entered in response to the complaint by each party or a default entered, any party, or the court on its own motion, may move to declare an action complex. However, any party may move to designate an action complex before all defendants have been served subject to a showing to the court why service has not been made on all defendants. The court ~~shall~~ may convene a hearing to determine whether the action requires the use of complex litigation procedures ~~and enter an order within 10 days of the conclusion of the hearing~~.

~~(3) A case will be designated or redesignated as complex in accordance with rule 1.200.~~

RULE 1.201(c)(4)
The conferral requirement, as written, is unnecessary in light of rule 1.202

Rule 1.201(c)(4) requires that "attorneys for the parties as well as any parties appearing pro se must confer no later than 15 days prior to each case management conference or hearing" and notify the court "immediately if a case management conference or hearing time becomes unnecessary." The requirement to meet 15 days prior to a hearing or case management conference predates this Court's new rule 1.202, which requires the parties to confer before filing any non-dispositive motion. So, the requirement to confer 15 days before a hearing, as written, is no longer necessary.

But the idea behind the rule—that the parties should get together to make sure they still can't agree and let the court know if they have figured out a resolution—is still worthwhile.

So, I propose two alternatives. The first option is to tweak the rule a little so that it requires the parties to "revisit" their pre-filing conference at least 15 days before the hearing to see if they can come to an agreement. That way, there is no confusion that, in complex cases, you have to talk before you file the motion and then again just before the hearing. The second option is to delete the conferral

requirement altogether (because the parties will have been required to confer before they filed the motion) but leave the requirement to notify the court if the parties have resolved their need for a case management conference or hearing.

Proposed change

Suggestion 1:

> (4) The court must schedule periodic case management conferences and hearings on lengthy motions at reasonable intervals based on the particular needs of the action. The attorneys for the parties as well as any parties appearing pro se must reconvene for a good faith conference no later than 15 days prior to each case management conference or hearing to discuss whether hearing time on pending motions is still necessary. The parties must notify the court immediately if a case management conference or hearing time becomes unnecessary. Failure to timely notify the court that a case management conference or hearing time is unnecessary may result in sanctions.

Suggestion 2:

> (4) The court must schedule periodic case management conferences and hearings on lengthy motions at reasonable intervals based on the particular needs of the action. ~~The attorneys for the parties as well as any parties appearing pro se must confer no later than 15 days prior to each case management conference or hearing.~~ The parties must notify the court immediately if a case management conference or hearing time becomes unnecessary. Failure to timely notify the court that a case management conference or hearing time is unnecessary may result in sanctions.

RULE 1.280(k)
Fix the typographical error

Rule 1.280(k)(1) is missing words. It says, "Every discovery under section (a) of this rule and every discovery request, response, or objection made by a party" must be signed. The title of subsection (a) is "Initial Discovery Disclosure." The opening clause should read "Every initial discovery disclosure under subsection (a)...."

Proposed change

> **(k) Signing Disclosures and Discovery Requests; Responses; and Objections.** Every initial discovery disclosure under subdivision (a) of this rule and every discovery request, response, or objection made by a party represented by an attorney must be signed by at least 1 attorney of record and must include the attorney's address, e-mail address, and telephone number. A self-represented litigant must sign the request, response, or objection and must include the self-represented litigant's address, e-mail address, and telephone number. By signing, an attorney or self-represented litigant certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

RULE 1.440(c)
"Fixing" versus "setting"

I agree with the Civil Rules Committee that "setting" is better than "fixing" in rule 1.440(c).

Proposed change

(c) ~~Fixing~~ Setting Trial Period.

(1) On a party's motion or upon the court's own initiative, if the court finds the action ready to be set for a trial period earlier than the projected or actual trial period specified in the case management order entered under rule 1.200 or rule 1.201, the court may enter an order ~~fixing~~ setting an earlier trial period.

(2) For any case subject to rule 1.200 with a projected trial period in the case management order, not later than 45 days before the projected trial period set forth in the case management order, the court must enter an order ~~fixing~~ setting the trial period.

(3) For any case not subject to rule 1.200 or 1.201, on a party's motion or upon the court's own initiative, if the court finds the action ready to be set for trial, the court must enter an order ~~fixing~~ setting the trial period.

(4) Any order setting a trial period must set the trial period to begin at least 30 days after the date of the court's service of the order, unless all parties agree otherwise.

RULE 1.460(d)
Need to synthesize rule 1.202 into this subsection

When the subcommittee drafted the conference requirement in rule 1.460(d), rule 1.202 did not exist. Now that there will be a conference requirement for all rules, not just motions for continuance, the conference requirement in the continuance rule needs to be revised, if not deleted.

In my opinion, the first sentence and last sentence of rule 1.460 is no longer required. Rule 1.202 (at least the version I propose) encompasses the requirements in these sentences—all parties have to engage in good faith efforts to confer and parties found guilty of purposely evading the conferral duty will be sanctioned. Rule 1.202 also encompasses the idea that, if a conference did not occur, the movant has to detail the efforts to confer.

Even if the Court is not going to adopt my suggestion for rule 1.202, then I think you can still delete the first sentence and second to last sentence of rule 1.460(d). Those requirements (good faith effort and explaining methods to confer) exist in all proposed versions of rule 1.202. Just leave the last sentence of rule 1.460(d) (the

provision that calls for sanctions if someone evades the duty to confer).

<u>Proposed change</u>

> **(d) Motion; Contents.** ~~The moving party or counsel must make reasonable efforts to confer with the non-moving party or opposing counsel about the need for a continuance, and the non-moving party or opposing counsel must cooperate in responding and holding a conference.~~ All motions for continuance, even if agreed, must state with specificity:
>
> (1) the basis of the need for the continuance, including when the basis became known to the movant;
>
> (2) whether the motion is opposed;
>
> (3) the action and specific dates for the action that will enable the movant to be ready for trial by the proposed date, including, but not limited to, confirming the specific date any required participants such as third-party witnesses or experts are available; and
>
> (4) the proposed date by which the case will be ready for trial and whether that date is agreed by all parties.
>
> ~~If the required conference did not occur, the motion must explain the dates and methods of the efforts to confer. Failure to confer by any party or attorney under this rule may result in sanctions.~~

GENERAL COMMENT
"Pro se" vs "self-represented litigant"—they are used inconsistently

I noticed that the rules are inconsistent in the phrase used to describe someone who is acting as their own counsel. The "old rules" (rules not touched by the Workgroup) use "pro se." With the exception of rule 1.201 (the complex litigation rule), the "new rules" use "self-represented litigant." Even though it is part of the "new rules," rule 1.201 uses "pro se."

I do not have strong feelings about which phrase is used. I just urge the Court to pick consistency. I used "ctrl + F" to find the places where the terms are used. Below is the list. For what it is worth, I prefer "self-represented litigant" only because I think it is easier for someone who is self-represented to understand. It seems cruel to use a Latin term to describe the person who is not represented by counsel and unlikely to be familiar with what the Latin term means.

<u>"Old rules" use "pro se"</u>

Rule 1.100((d)
"The clerk must complete the civil cover sheet for a party appearing ***pro se***."

Rule 1.545
"The clerk must complete the final disposition form for a party appearing ***pro se***, or when the action is dismissed by court order for lack of prosecution pursuant to rule 1.420(e)."

Form 1.983
(Prospective Juror Questionnaire) – "DIRECTIONS TO ATTORNEYS AND ***PRO SE LITIGANTS***: Before you file a copy of this form, redact the month and date of the prospective juror's birth in question #3, but retain the year of birth."

Rule 1.201(b)(1) (NOTE: This is an "old" and a "new" rule)
"At least 20 days prior to the date of the initial case management conference, attorneys for the parties as well as any parties appearing ***pro se*** must confer and prepare a joint statement…"

1.201(b)(4) (NOTE: same as above)
"The attorneys for the parties as well as any parties appearing ***pro se*** must confer no later than 15 days prior to each case management conference or hearing.

"New Rules" use "self-represented litigant"

RULE 1.200(j)(3)
"Attorneys and ***self-represented litigants*** who appear at a case management conference must be prepared on the pending matters in the case, be prepared to make decisions about future progress and conduct of the case, and have authority to make representations to the court and enter into binding agreements concerning motions, issues, and scheduling."

1.280(k)
"Every discovery under subdivision (a) of this rule and every discovery request, response, or objection made by a party represented by an attorney must be signed by at least 1 attorney of record and must include the attorney's address, e-mail address, and telephone number. A ***self-represented litigant*** must sign the request, response, or objection and must include the self-represented litigant's address, e-mail address, and telephone number. By signing, an attorney or ***self-represented litigant*** certifies that to the best of the person's knowledge, information and belief formed after a reasonable inquiry…

1.460(f)
When possible, continued trial dates must be set in collaboration with attorneys and ***self-represented litigants*** as opposed to the issuance of unilateral dates by the court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August ___, 2024, a copy of the foregoing has been filed with the Florida Courts E-Filing Portal and served on the Committee Chair, Cosme Caballero, 100 Biscayne Boulevard, Suite 2802, Miami, FL 33132, ccaballero@deutschblumberg.com, and on the Bar Staff Liaison to the Committee, Heather Telfer, 651 E. Jefferson Street, Tallahassee, Florida 32399, htelfer@floridabar.org.

Respectfully submitted,

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