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.:SC24-062

COMMENT OF ATTORNEY MAEGEN PEEK LUKA

My name is Maegen Peek Luka. I have reviewed the Court's proposed amendment to rule 1.510 and the Court's newly suggested rule 1.202. Below, I set forth my suggestions for improving the proposed rules.

TABLE OF CONTENTS

RULE 1.202

I will start with the positive: I think a universal conferral rule is a great idea. Almost every circuit has a rule and many judges within the circuits have even more specific rules. A single standard that is the "floor" seems like a good idea. And, if the rule actually worked—so that judges spent less time referring disputes that should have resolved and more time focused on weightier issues—it would be amazing.

The rule is too amorphous to achieve its intended purpose

As written, I am concerned that this rule has the potential to cause more annoyance than good. An article published in the July/August 2024 edition of the FJA Journal compiled the meet and confer rules for all 20 of Florida's circuits and for the three federal district courts. I am attaching that as Exhibit A to this comment. The Court will see a veritable smorgasbord of specifics. But almost all of them do have a degree of specificity absent from the Court's proposal.

It is the lack of specificity in what it means to "undertake efforts," and what happens if the rule is ignored that I worry will make this rule ineffective. I will address each concern separately:

1. What happens when the rule is ignored?

There has to be a consequence. And due process (let alone basic fairness) dictates that it has to be known in advance. I practice in the Ninth Circuit a lot. There, you can file a motion without conferring, but you cannot get hearing time until you confer. If your notice of hearing does not contain the conferral notice, judicial assistants will refuse to give you hearing times or judges will flat out deny motions. A requirement to confer is easily ignored if there is no consequence to the failure to comply.

The Workgroup proposed that a failure to confer would result in the motion being denied without prejudice. I support that. To the lawyer that complains it will only cause delay because they will now need to refile the motion, I have no sympathy. All you have to do is comply with the rule.

2. Which brings me to the next ambiguity, how do you comply with such a vague rule?

What does it mean to undertake "good faith" "efforts to confer?" I am of the opinion that if the rule does not spell it out, lawyers will fill in the blanks with whatever suits them. For the lazy lawyer, or the lawyer who did not plan ahead, that could mean one email sent

an hour before filing the motion. For the conscientious lawyer, that could mean three phone calls on three separate days with messages left with a human. Or it could mean anything in between.

To give the rule any chance of achieving its intended goal (that parties will resolve disputes short of judicial intervention), I fear that there has to be a consequence for failure to comply. But if the rule does not spell out a minimum standard for compliance, judges are going to be forced to decide a dispute over whether something was done in good faith. Which means a provision intended to end disputes, actually spawns a side dispute.

When the Civil Rules Committee was working to revise the Workgroup's proposals, we aimed to create "shorter, simpler" rules. I think it is an admirable goal. But on this one, I think a little detail goes a long way. I would suggest revising the rule to assimilate the strengths of the conferral rules in place across the state. I would also suggest making it clear that this rule is the floor, not the ceiling, lest we strip away procedures individual judges may have developed that they find work for them.

A word about sanctions

In my practice, I find that opposing counsel often does not return phone calls or emails. We are all busy practitioners, so I am certain that the failure is sometimes a function of a full calendar. But other times, after multiple calls and emails, it feels more like a choice. For that reason, I propose that a movant must try at least three times, on three different days, to reach counsel for the nonmoving party before an attorney can certify that opposing counsel did not respond to a request to confer. And, because emails are easy to accidentally miss, I propose that at least one of those attempts must be by telephone, with a message left if there is no connection. While emails are easy to miss, a voicemail left on a machine or with a person requesting a conferral under rule 1.202 should not be ignored. After two emails and a voicemail, the failure to respond looks a lot like a choice—an unprofessional, unacceptable choice.

And unprofessional behavior should not be tolerated by judges. I do not take lightly a suggestion for a mandatory sanction for refusal or unjustified failure to confer lightly. But I do think it will help ensure that lawyers who do not respond as a matter of choice change their habits or face the consequences. And I think consistent

enforcement of the rule by state court judges will help: (1) inoculate judges from the fear of lawyer lashout for imposing sanctions[1]; and (2) create clear precedent for litigators across the state that they have to confer. Period.

To be clear, it should be an "unjustified" failure to respond that garners a sanction. Whenever there is a mandatory sanction, I believe there has to be a pressure release valve for an attorney to explain their behavior. For example, a solo practitioner who is in trial for a week and forgot to set up and out-of-office message would have a good excuse for not seeing two emails and for not checking voicemail or answering the phone. It will be up to a judge to determine whether the justification, if any, merits the pardon.

I also want to be clear that the sanction, as written in the rule I propose, is against the lawyer or law firm that refused to confer. The

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[1] Unlike federal magistrates and district court judges, State court judges must run for re-election. It is a legitimate fear that imposing sanctions can result in lawyers "running a candidate" against them. Discovery violations are so subjective, it is hard to criticize judges for being hesitant to impose sanctions in anything but the most egregious case. But the failure to confer, to me, is much more black and white. And the requirements I suggest (three attempts, at least being a phone call), make it much easier for a judge to say that the failure to respond to all three attempts was "justified."

rule I propose requires that a written request to confer be sent to all counsel of record for the opposing party impacted by the motion. Sometimes, a case might have three lawyers per side. On any given day, they might be internally rotating who is in charge of what issue. An email sent to the wrong person might go ignored. (I suppose it is also possible that a less than honorable attorney might purposely select to email the lawyer who is least likely to respond.) But two emails sent to all of the folks on the case that is ignored by all of the folks on the case is difficult to justify. I do not propose that a phone call has to be made to all counsel for the opposing party. That feels like overkill. All I aim to do is make it so that the person with the duty to confer is required to engage in earnest efforts to reach opposing counsel and that the opposing counsel who is obligated to respond will have a hard time explaining a lack of response to a judge if the earnest efforts to confer are made.

"Emergency" and "Expedited Treatment" motions should be exempt from a three-conferral requirement.

I think that motions requiring emergency or expedited treatment should be exempt from a three-conferral requirement. "Emergency" motions should be rare. But certainly, if a party is filing

a motion on an "emergency" basis, then they probably do not have three days to wait to confer. Along the same lines, if a motion is not necessarily an "emergency" but it might require expedited treatment, then the moving party might not have three days to wait before they can file a certificate stating that they were not able to confer.

In those cases, parties are always free to confer after the motion is filed. But the ability to seek emergency (or expedited) relief should not be blocked by a three-conferral requirement.

My disagreement with the Civil Procedure Rules Committee

Before I propose my revision to rule 1.202, I note that I disagree with a few suggestions made by the Civil Rules Committee; therefore, I do not incorporate the Committee's suggestions into my suggestion. The items with which I do not agree are:

- **Deleting the form for a certificate.** I think it is helpful to provide a specific format for the certificate of conferral rather than telling parties more generally what they should include in a certificate. Busy practitioners appreciate not having to create a wheel. *See* Civil Rules Committee Suggestion for 1.202(b)(1)(deleting the proposed form for a certificate);

- **Requiring conferral with nonparties.** I think it is unnecessary to require a movant to confer with "all parties ***or nonparties*** who may be affected by the relief sought." I imagine this would come up in a situation where one party seeks to compel a deposition or production of things from a non-party. If the non-party is objecting, then their counsel will enter an appearance

and conferral will be necessary. But if I desire to subpoena medical records and my opponent objects, I should not be required to call the doctor's office (and likely speak to someone who has no idea what to tell me, let alone authority to say it) before I file a motion to compel. I think requiring conferral with non-parties will overcomplicate situations. *See* Civil Rules Committee Suggestion for 1.202(b)(1));

- **Omitting any reference to a preference for conferral.** The Civil Rules Committee has a list of motions that do not require conferral. I agree with the list (and my one addition). But the prelude says, "The requirements of this rule do not apply to the following motions." I do not care for the way that is worded. I think the idea of conferral should apply to most motions. What the Committee was trying to say is that it is not necessary to confer filing the following motions. It is a nuanced difference. But as someone who makes arguments based on nuances, I am sensitive to it. In my opinion, the prelude to the list should be a little more encouraging of the idea of conferral. I propose: "Ongoing conferral is always preferred, but attempts to confer and a certificate of conferral are not required prior to filing the following motions."

- **Requiring the certificate of conferral to state the issues that were resolved.** I think it is unnecessary to have a certificate of conferral that states "the issues resolved and the issues that remain unresolved." *See* Civil Rules Committee Suggestion for 1.202(b)(1). If the parties conferred and resolved issues, then it seems like "busy work" to require them to detail what they have agreed upon. Practitioners should be rewarded for their ability to achieve at least a partial agreement by focusing the motion on what remains unresolved rather than adding length by stating the things that have been resolved. And busy judges likely appreciate that focus on what needs their attention. And trust me, if something that was resolved bears on something that remains unresolved, someone is going to bring it to the Court's attention.

- **Requiring the certificate of conferral to be redundant and state the issues that were resolved.** I think it is likewise unnecessary to have a certificate of conferral indicate "the issues that remain unresolved." Clearly, if the movant had three issues and two of them were resolved by conferral, then the motion will only address the unresolved issue. The certificate will be duplicate of the motion itself. The goal of the conferral requirement is not to add to the cost of litigation (through attorney time) by creating a rule of duplication. The goal of the conferral rule is to make people talk to each other.

The ripple effect

Creating rule 1.202 impacts, in my opinion, the conference requirements in rule 1.201(c)(4) and rule 1.460(d). Please see my comments on those rules for more details about revisions that I think need to take place.

Proposed change

Below, I set forth my suggestions. I agree with the Civil Procedure Committee that the format of breaking out the exceptions to the rule in a list is more readable, so I have adopted it in my suggestion. I also agree with the Civil Procedure Committee that it does not make sense to require conferral with pro se litigants. There is no prohibition if counsel wants to try, but pro se litigants are often distrustful of their opposing counsel and they typically want a ruling from a judge.

The "Court Commentary" after my proposed rule is language (or at least a concept) that appears in the conferral requirements of several circuits and individual judges. I could not decide whether to include it in the body of the rule or to put it in a comment. As a general rule, the Civil Rules Committee tries to avoid comments—the Committee feels the same way about comments as the Court feels about footnotes; use sparingly, preferably never. I think the language belongs somewhere, but a comment felt more appropriate than in the body of the rule. If the Court were inclined to move it into the body of the rule, I think it belongs in the list that is part of subsection (a)(2).

RULE 1.202. CONFERRAL PRIOR TO FILING MOTIONS

(a) Duty.

(1) Obligation to confer. Before filing a non-dispositive motion, ~~except for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, or to involuntarily dismiss an action, the movant must confer with the opposing party in a good-faith effort to resolve the issues raised in the motion~~ the attorney for the movant must confer with the nonmovant and any counsel that has filed a notice of appearance on

behalf of an affected non-party in a good faith effort to resolve by agreement the issues to be raised in the motion.

(2) *Minimum conferral efforts.* To comply with this rule, the parties must engage in a substantive conversation in person, by telephone, by video conference, or in writing.

(A) Any attempt by email must be sent to all counsel for the party or non-party affected by the motion who have filed a notice of appearance.

(B) At least three attempts, on three separate days, must be made before a certificate of conferral may be filed indicating that the opposing party did not respond.

(C) Before certifying that the movant was unable to reach the nonmoving party, at least one of the three attempts must be by telephone. To constitute an attempt to confer, a telephone call must result in a message left with a human being or on voicemail, unless voicemail is full.

(D) Any written communication or oral message requesting to confer must set reasonable deadlines to respond. A deadline of less than 1 business day is presumptively unreasonable and does not constitute an attempt to confer under this rule.

(3) *Prompt responses are required.* All counsel are required to respond promptly to requests to confer.

(4) *Circuits and judges may impose additional requirements.* Circuits, by administrative order, or individual judges, by practice preferences, may set additional requirements for conferral that exceed the requirements in this rule.

(b) Certificate of Conferral. When conferral is required, at the end of the motion, and above the signature block, the movant must include a certificate of conferral in substantially the following form:

> "I certify that prior to filing this motion, I discussed the relief requested in this motion by [method of communication and date] with [name of counsel or unrepresented party] ~~the opposing party~~ and [name opposing party (agrees or disagrees)] on the resolution of all or part of the motion."
>
> OR
>
> [~~the opposing party did not respond.~~ "Undersigned attempted at least three times to confer with opposing counsel (and counsel for any affected non-party) with no response. The efforts to confer were made (describing with particularity the dates, methods of communication, and the way a message was left or if voicemail was full ~~all of the efforts undertaken to accomplish dialogue with the opposing party prior to filing the motion~~)]"
>
> OR
>
> [Conferral prior to filing is not required under rule 1.202(c).]

(c) Applicability; Exemptions. Ongoing conferral is always preferred, but attempts to confer are not required prior to filing the following motions:

(1) for time to extend service of initial process;

(2) for default;

(3) for injunctive relief;

(4) for judgment on the pleadings;

(5) for summary judgment;

(6) to dismiss for failure to state a claim upon which relief can be granted;

(7) to permit maintenance of a class action;

(8) to involuntarily dismiss an action;

(9) to dismiss for failure to prosecute;

(10) for directed verdict and motions filed under rule 1.530;

(11) for garnishment or other enforcement of a judgment under rule 1.570;

(12) for writ of possession under rule 1.580;

(13) to substitute counsel;

(14) filed in actions proceeding under section 51.011, Florida Statutes;

(15) filed when the moving party is unrepresented by counsel;

(16) that do not require notice to the other party under statute or rule; and

(17) that are being filed on an emergency or expedited treatment basis.

(d) **Sanctions.** Compliance with this rule is mandatory. Sanctions for violations of this rule may include denying without prejudice a motion that does not include a certification, imposing attorneys' fees related to the motion against any counsel or law firm that failed to confer in good faith or was unjustified in failing to respond

to requests to confer, or any other sanction the court determines in its discretion should apply.

Court Commentary

2024. To confer in good faith requires a substantive conversation with an exchange of ideas. An exchange of ultimatums by e-mail, text, or letter does not satisfy the requirements of this rule.

RULE 1.510

Currently, a party responding to a summary judgment motion must file the response at least 20 days before a summary judgment hearing. The deadline for filing a response is tied directly to the hearing date. Once the moving party files a summary judgment motion, if the parties cannot agree on a hearing date, the effect is that there is no deadline for a response to be filed. Judge Moe requested that the summary judgment rule be amended because she observed that she is sometimes alerted to the inability to agree on hearing time at a pretrial conference. If she wants to rule on a motion for summary judgment between a pre-trial conference and trial, she cannot do so because no response has been filed. Thus, Judge Moe requested an amendment that responses to motions for summary judgment be due within a certain number of days after the motion is filed. I am attaching the relevant part of Judge Moe's comment as Exhibit B.

This Court proposed a rule that requires responses be due within 60 days of the motion being filed. But the response deadline is completely untethered from a hearing deadline. I know I am not alone in stating that this is not a good idea.

A response deadline is fine,
but it still must be tethered to a hearing date

The easiest issue to spot is that, without some sort of tethering, there is nothing that prevents a party from setting a hearing on a motion for summary judgment BEFORE the deadline for the response. It would create trouble (the non-moving party would scramble to tell the judicial assistant it was unapproved, maybe file an emergency motion, etc.), but it would not violate the rule.

Alternatively, the parties might agree to a hearing on day 61. The parties may have no choice because that is the only hearing time available before trial. If that is the case, it is the judge who gets the short end of the stick—having little (maybe no) time to review materials before ruling on a dispositive issue.

These scenarios are unnecessary fire drills. Give a deadline for responding, but tether that deadline to a hearing—so that a response has to be filed within 40 days of the motion being served, but no hearing can be set until at least 50 days after the motion is served. This way, there is a deadline for filing a response, but the court has at least 10 days to digest materials before a hearing. To provide for situations like Judge Moe described in her comment, I offer that the

10-day waiting period can be waived by agreement of the parties or by the court. This way, no party can refuse to agree to have a motion heard on day 45 and preclude the judge from ruling. The parties can agree to a hearing at any time after the response is filed or, even if the parties disagree, the court can elect to hear it on less than 10 days' notice. The 10 days is a courtesy to the judge, not the parties.

The response time should be 40 days

As to the number of days, I think 40 days (the current envisioned amount) is sufficient.

I was out of town the day in mid-June when the Civil Rules Committee met to discuss their proposal on this rule. I disagree vehemently with its suggestion to ***reduce*** the number of days the non-moving party has to respond. But I could not turn the ship around once it had sailed. My concerns about reducing the number of days are that: (1) such a change will work the Bar into an unnecessary lather; and (2) the knee-jerk reaction will be for non-moving parties to ask for extensions of time under rule 1.1090(b). That only adds motion practice. Folks are used to 40 days. With 40 days and a cooperative opposing counsel, there is still time to take a deposition and not have to pay rush fees (which only increases the

cost of litigation) before the response is due. Thirty days makes that scenario darn near impossible. Please do not reduce the time period. The case I heard argued for 30 days is that it would allow motions for summary judgment closer to trial, when one side realizes the other side does not have what they need to prove a claim. (For example, no expert said an injury was permanent or there is no evidence to support an affirmative defense.) I have no empathy for that argument. Expert discovery is always closed long before trial. Fact discovery is usually closed by the pretrial conference. If you are 40 days from trial and just now realizing that your opponent does not have what they need, that is a failure in the movant's office. Shortening the deadline to accommodate people who fail to plan properly is not the answer.

There MUST be a tolling provision for motions filed under rule 1.510(d)

On the subject of extensions of time, I strongly encourage you to build in a tolling provision for motions filed under rule 1.510(d). That provision allows a party to seek to extend the time for responding to a motion for summary judgment when more discovery is needed.

Without a tolling provision, I envision a chaotic world of inconsistency and uncertainty. Envision this: the moving party files a motion for summary judgment 20 days after service of the complaint. The non-moving party confers with the movant under rule 1.202 and asks for more time to respond to the motion because no discovery has been conducted. The moving party says, "my client says no." That conferral process takes a total of five business days.

Currently, the non-moving party would file a motion under rule 1.510(d) explaining that no depositions have been taken yet and more time is needed to conduct that discovery before a response can be filed. That party would not agree to hearing time until the rule 1.510(d) motion was resolved, so there would be no deadline for filing a response.

But, under the new rule, there is a deadline running while waiting for the court to rule on a motion that seeks to change the deadline. That is a problem. Even in my hypothetical where the parties moved quickly, seven of the forty days for filing a response have passed. Now, the court only has 33 days to get rule 1.510(d) motion heard. In some jurisdictions, there is a snowball's chance in Hades that you can get even 10 minutes of hearing time that fast.

So, what happens to the deadline to respond? What is the non-moving party supposed to do? Maybe one court says the non-moving party should have filed a response, even if it just said, "I cannot respond due to lack of discovery"—and failure to file any response means everything in the motion is admitted. Maybe another judge says there is no need to respond until the court rules on the rule 1.510(d) motion. Rule 1.510's silence on this point is a problem.

To prevent unnecessary uncertainty for parties and inconsistent rulings by judges, I propose that rule 1.510(d) say that any motion filed under that subsection automatically tolls the deadline for filing a response until an order is entered on the rule 1.510(d) motion. If the judge grants the motion, pursuant to what is already in rule 1.510(d), the judge can "defer considering the [summary judgment] motion," "allow time" for affidavits or discovery, or "issue any other appropriate order." Fla. R. Civ. P. 1.510(d). Alternatively, if the judge denies the motion, then the non-moving party will not have "lost time" to draft a response while waiting for the ruling. The time spent waiting for the ruling on the rule 1.510(d) motion is tolled and the clock for filing a response to the motion for summary judgment restarts upon entry of the order denying the

motion. This is the same process in place in the District Courts of Appeal. *See* Fla. R. App. P. 9.300(b).

Please give direction for motions filed in December 2024

I conclude by asking, in the interest of judicial economy, that you please include direction in your opinion finalizing the changes what needs to happen to motions for summary judgment filed prior to December 31, 2024. For example, if a party files a motion for summary judgment on December 15, 2024, the "old" rule will be in effect on that date and the response will be due 20 days before the hearing. But the "new" rule will go into effect on January 1, 2025. Assume the Court picks 40 days for a response time. Does the respondent have 40 days from the January 1 effective date to respond? Because the motion was filed before the effective date, is the response still due 20 days before the hearing? Does the respondent get 40 days from December 15? Picture the most tortured interpretations of what should happen and that is what creative minds will argue (with each other and to judges).

Judicial economy begs for clarity in advance. You will spare litigators unnecessary battles and judges everywhere will be relieved

not to clog their dockets with motion practice asking them to interpret wildly different arguments on this issue.

Proposed change

Court changes in single underline; my additions in double underline

RULE 1.510. SUMMARY JUDGMENT

(a) [No Change]

(b) Time to File a Motion. A party may move for summary judgment at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. The movant must serve the motion for summary judgment ~~at least 40 days before the time fixed for the hearing~~ consistent with the deadlines specified in the case management order.

(c) Procedures.

(1)-(4) [No Change]

(5) *Timing for Supporting Factual Positions*. At the time of filing a motion for summary judgment, the movant must also serve the movant's supporting factual position as provided in subdivision (1) above. ~~At least 20 days before the time fixed for the hearing.~~ No later than ~~60~~ 40 days after service of the motion for summary judgment, the nonmovant must serve a response that includes the nonmovant's supporting factual position as provided in subdivision (1) above.

(6) *Timing for hearing*. A hearing on a motion for summary judgment must be set for a date at least 10 days after the deadline for filing a response unless the parties

have agreed to shorten the time and the court has consented to the shortening or the court directs a hearing to take place less than 10 days from the deadline for filing a response. Unless consented to by the non-moving party, no hearing can on a motion for summary judgment can take place prior to the deadline for filing a response.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

Any motion filed under this subsection automatically tolls the deadline for filing a response to a motion for summary judgment until an order on the motion filed under this section is entered.

(e)-(h) [No Change]

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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EXHIBIT
A

'MEET AND CONFERS' IN FLORIDA MOTION PRACTICE

by Peter Spillis and Jeffrey Popoviz

Few terms engender such frustration as "meet and confer." Nearly every plaintiff's attorney knows what it's like to try to convince an insurance defense lawyer that their client's boilerplate objections are meritless. Nonetheless, trying to resolve issues without judicial intervention is an integral part of pretrial motion practice — and, in nearly every judicial circuit, a required one, too.

This article is a practical resource. The authors have reviewed the administrative orders and local rules of every Judicial Circuit to compile the various meet and confer requirements, which are often overlooked in the heat of motion practice.

Before we jump to specifics, some overarching principles.

First, some meet and confers are mandatory. Under the Florida Rules of Civil Procedure, a party who wants to file a motion to compel discovery "must" meet and confer with the opposing side and certify that such occurred.[1] This aligns with Federal Rule of Civil Procedure 37.[2]

Second, courts differ as to what a proper "meet and confer" entails. Some, like the Northern District of Florida, take the position that "simply corresponding with opposing counsel is not considered a good-faith attempt to confer or have a conference to resolve discovery disputes."[3] ("[C]onfer means 'to have a conference; compare and exchange ideas; meet for discussion; converse.'"[4]) Others, like the Seventeenth Judicial Circuit, expressly contemplate that such an exchange may occur over "email" or "text message."

Third, this guide is intended to be a practical guide, not an exhaustive one. Accordingly, it provides those local *court-wide* administrative orders or rules which require litigants to meet and confer prior to filing a motion *in the personal injury context*. Because judicial preferences vary, be sure to check your judge's policies and procedures before filing any motion.

Onto the specifics.

First Judicial Circuit. No apparent meet and confer requirement pursuant to local rule or administrative order.

Second Judicial Circuit. No apparent meet and confer requirement pursuant to local rule or administrative order.

Third Judicial Circuit. "Prior to filing any motion, counsel have a duty to confer with each other directly in good faith, *not through law firm staff*, to attempt to narrow or resolve issues."[5] "'In good faith' means you are professional and temperate in your communications, you return phone calls and emails in a timely manner, and you do not set unreasonable deadlines for responses."[6] There is no apparent certification requirement.

Fourth Judicial Circuit. Litigants have an obligation to "seek to resolve discovery issues without court intervention whenever possible."[7] But a specific meet and confer requirement exists only for motions to compel and for a protective order.[8] The same for certification, which must include language that counsel "is aware of the provisions in First Amended Administrative Order No. 88-2 that" include, among other things, the meet and confer requirement and the mandate that "the hearing noticed may not be cancelled by agreement of the parties or counsel."[9]

Fifth Judicial Circuit. Litigants have an obligation to seek to resolve pretrial issues without court intervention whenever possible.[10] But a specific meet and confer requirement apparently exists only for cases filed in Marion County — and only for motions to compel or for a protective order.[11] In those cases, counsel must "attach" to the motion "a copy of the correspondence with opposing counsel of the good faith effort to resolve the discovery dispute."[12]

Sixth Judicial Circuit. Litigants have an obligation to "make every reasonable effort to resolve [an] issue before setting a motion for hearing."[13] But a specific meet and confer requirement apparently exists only for motions to compel or for a protective order.[14] The same for certification, which must be titled "Certificate of Good-Faith."[15]

Seventh Judicial Circuit. Excluding "summary judgment or other case dispositive motions," "[b]efore any motion is filed, the moving party shall contact the opposing party and attempt, in good faith, to amicably resolve the issues raised by the motion(s)."[16] In the context of motions to compel discovery, "the moving party must notify the opposing party, in writing, of the specific deficiencies of his/her discovery response and the specific actions necessary to cure said asserted deficiencies," and such "[w]ritten notice must provide 10 days for the opposing party to cure the asserted deficiencies" before any motion may be filed.[17] Note that, if the opposing party requests a reasonable extension, the movant may not file his or her motion.[18]

Any motion encompassed by these requirements "shall contain a certificate of the movant's attorney if represented (or the moving party if unrepresented) certifying his/her compliance" therewith.[19]

Eighth Judicial Circuit. "Prior to filing ANY motion, counsel filing the motion shall confer with opposing counsel by telephone or in person in a good faith attempt to resolve the motion."[20] "The motion shall contain a good faith statement reflecting the date and time of the conference with opposing counsel."[21] "A statement that counsel attempted to confer with opposing counsel is insufficient unless the good faith statement details the date and time of at least three attempts to confer that occurred within the one-month period immediately prior to the filing of the motion."[22]

Ninth Judicial Circuit. Excluding motions for judgment on the pleadings, for summary judgment, and for the maintenance of a class action, "[p]arties shall meet in person or by telephone and confer on the subject at issue before requesting hearing time."[23] "The term 'confer' requires a substantive conversation in person or by telephone in a good faith effort to resolve the motion without the need to schedule a hearing, and does not envision an exchange of ultimatums by fax, e-mail or letter."[24]

"Counsel who merely attempt to confer have not conferred …."[25] But [i]f counsel who notices the hearing is unable to reach opposing counsel to conduct the conference after three (3) good faith attempts," that suffices.[26] In such circumstance, "counsel who notices the hearing must identify in the [pertinent] Certificate of Compliance the dates and times of the efforts made to contact opposing counsel."[27]

Regardless, "[c]ounsel shall include in the Notice of Hearing [a] … Certificate of Compliance certifying that the meet and confer occurred (or did not occur and setting out the good faith attempts to schedule the conference) and identifying the date of the conference, the names of the participating attorneys, and the specific results obtained."[28] It must also note that "a lawyer in my firm with full authority to resolve this matter had a substantive conversation in person, by telephone or by video conference with opposing counsel in a good faith effort to resolve this motion before the motion was noticed for hearing but the parties were unable to reach an agreement."[29]

Tenth Judicial Circuit. As a matter of professionalism, "[a]ttorneys should, whenever possible, prior to filing or upon receiving a motion, contact opposing counsel to determine if the matter can be resolved in whole or in part."[30] Against that backdrop, any "party or … attorney noticing a motion to be heard on the Uniform Motion Calendar shall contact opposing counsel and make a good faith attempt to resolve the matter without judicial involvement" and certify the same.[31]

Eleventh Judicial Circuit. "Counsel and self-represented litigants must meet and confer sufficiently in advance of hearings in order to accurately reflect the amount of time required, by eliminating those issues upon which agreement can be reached."[32] There is no apparent certification requirement.

Twelfth Judicial Circuit. "Attorneys should, whenever possible, prior to filing or upon receiving a motion, contact the opposing attorney to determine if the matter can be resolved in whole or in part."[33] In the context of "discovery-related motion[s]," "[b]efore filing," "the attorney for the moving party shall confer or make a reasonable good faith effort to confer with the attorney for the opposing party in a good faith effort to resolve the issues raised."[34] "When a [discovery-related] motion is filed, a statement certifying that the attorney has conferred with the opposing attorney and that they have been unable to resolve the dispute shall also be filed."[35]

Thirteenth Judicial Circuit. There is no meet and confer requirement for "motion[s] for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, or to involuntarily dismiss an action."[36] "[B]efore the moving party or moving party's counsel files any other motion, the party or counsel should confer with the opposing party or opposing counsel in a good faith effort to resolve the issues raised by the motion."[37] "The moving party or moving party's counsel should file with the motion a statement certifying that the moving party or moving party's counsel has conferred with the opposing party or opposing party's counsel — either in person, by telephone, or by video conferencing device — and stating whether the party or counsel agree on the resolution of the motion."[38] That certification "should describe, with particularity, all of the efforts undertaken to accomplish dialogue with the opposing party or opposing party's counsel prior to filing the subject motion."[39]

Fourteenth Judicial Circuit. No apparent meet and confer requirement pursuant to local rule or administrative order.

Fifteenth Judicial Circuit. "Prior to filing and serving a Notice of Hearing for a Uniform Motion Calendar hearing or a specially set hearing, the attorney noticing the motion for hearing shall attempt to resolve the matter and shall certify the good faith attempt to resolve."[40] Counsel must certify the same by way of a prescribed form.[41]

Sixteenth Judicial Circuit. "Counsel shall meet and confer regarding all disputed issues before setting a hearing to resolve those issues on motion," such that "[f]ailure to comply with this requirement may result in removal of motions from the docket, rescheduling of motions by the [c]ourt, denial of motions, or sanctions, as appropriate."[42] There is no apparent certification requirement.

Seventeenth Judicial Circuit. Before "setting any matter" for hearing, the "party or parties noticing the motion shall attempt to resolve the matter by direct communication with all parties, and shall also certify a good faith attempt to resolve or narrow the issues contained in the motion."[43] "Direct communication means by oral or written communication, including by telephone, in person, email, or

text messaging."[44] There are distinct certification requirements for uniform motion calendar motions and special set motions.[45]

Eighteenth Judicial Circuit. Although there is no apparent prefiling meet and confer requirement, "counsel and unrepresented parties shall seek to resolve discovery issues without court intervention whenever possible."[46] To that end, in Brevard County, "[w]ithin sixty (60) days from the date of filing of a [m]otion, the movant must coordinate with opposing counsel and either submit a proposed [a]greed [o]rder on the [m]otion or schedule a hearing and file a [n]otice of [h]earing; otherwise, the [m]otion/objection is deemed abandoned and denied."[47]

Nineteenth Judicial Circuit. "Attorneys should, whenever possible, prior to filing or upon receiving a motion, contact opposing counsel to determine if the matter can be resolved in whole or in part."[48] There is no apparent certification requirement.

Twentieth Judicial Circuit. There is no meet and confer requirement for motions for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a cause of action, to dismiss for lack of prosecution, or to otherwise involuntarily dismiss an action.[49] For all other motions, the movant "shall confer with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion, and shall file with the motion a statement certifying that the moving counsel has conferred with opposing counsel and that counsel have been unable to agree on the resolution of the motion."[50]

Northern District of Florida. A meet and confer is "not required for a motion that would determine the outcome of a case or a claim, for a motion for leave to proceed in forma pauperis, or for a motion that properly may be submitted *ex parte*."[51] But for all other motions, prior to filing, "an attorney for the moving party must attempt in good faith to resolve the issue through a meaningful conference with an attorney for the adverse party."[52] "The conference may be conducted in person, by telephone, in writing, or electronically, but … [a]n email or other writing sent at or near the time of filing the motion is not a meaningful conference."[53] "A motion or supporting memorandum must include a certificate — under a separate heading — confirming that the moving party complied with the attorney-conference requirement … and setting out the results."[54]

Middle District of Florida. "Before filing a motion in a civil action, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, or to certify a class, the movant must confer with the opposing party in a good faith effort to resolve the motion."[55] "At the end of the motion and under the heading 'Local Rule 3.01(g) Certification,' the movant: (A) must certify that the movant has conferred with the opposing party, (B) must state whether the parties agree on the resolution of all or part of the motion, and (C) if the motion is opposed, must explain the means by which the conference occurred."[56]

A party may file his or her motion even if the opposing party is unavailable.[57] In such instance, "the movant after filing must try diligently for three days to contact the opposing party."[58] "Promptly after either contact or expiration of the three days, the movant must supplement the motion with a statement certifying whether the parties have resolved all or part of the motion."[59]

Southern District of Florida. There is no meet and confer requirement for "motion[s] for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, for pro hac vice admission, or to involuntarily dismiss an action, for garnishment or other relief under Federal Rule of Civil Procedure 64, or … or a petition to enforce or vacate an arbitration award."[60] For all other motions, "counsel for the movant shall confer (orally or in writing), or make reasonable effort to confer (orally or in writing), with all parties or non-parties who may be affected by the relief sought in the motion in a good faith effort to resolve by agreement the issues to be raised in the motion."[61]

"[A]bove the signature block [of the motion], counsel for the moving party shall certify either: (A) that counsel for the movant has conferred with all parties or non-parties who may be affected by the relief sought in the motion in a good faith effort to resolve the issues raised in the motion and has been unable to do so; or (B) that counsel for the movant has made reasonable efforts to confer with all parties or non-parties who may be affected by the relief sought in the motion, which efforts shall be identified with specificity in the statement (including the date, time, and manner of each effort), but has been unable to do so."[62] "If certain of the issues have been resolved by agreement, the certification shall specify the issues so resolved and the issues remaining unresolved."[63]

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1 *See* Fla. R. Civ. P. 1.380(a)(2) (mandating that any motion to compel "include a certification that the movant, in good faith, has conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action").

2 *See* Fed. R. Civ. P. 37(a)(1).

3 *See Haugdahl v. Fla. Dep't of Agriculture and Consumer Servs.*, No. 4:19-cv-87, 2019 WL 6271267, at *1 (N.D. Fla. Oct. 17, 2019) (Walker, J.) (cleaned up).

4 *Id.*

5 *C.f.* Third Jud. Cir. Form Order 2-5, Ex. B, at ¶ 1 (emphasis in original); *see generally* Third Jud. Cir. Admin. Order 2021-004, at ¶ 10 (Apr. 29, 2021) (requiring the use of a case management order that is "substantially in the same form" as "Form Order 2-5, with exhibits").

6 *See* Third Jud. Cir. Form Order 2-5, Ex. B, at ¶ 1.

7 *See* Fourth Jud. Cir. Second Am. Admin. Order 2023-17, Attachment A, at ¶ 5 (Aug. 15, 2023).

8 *See* Fourth Jud. Cir. First Am. Admin. Order 88-2, at ¶ 1 (July 17, 2020).

9 *See id.* ¶¶ 1, 4 (setting forth specific language for the certification).

10 *See* Fifth Jud. Cir. Admin. Order A-2021-58, at ¶ VI(10) (Dec. 1, 2021) ("A lawyer should attempt to resolve disagreements before requesting a court hearing or filing a motion to compel or for sanctions.").

11 *See* Fifth Jud. Cir. Admin. Order M-2022-35, Attachment 2, at ¶ 5 (June 29, 2022).

12 *See id.*

13 *See* Sixth Jud. Cir. Admin. Order 2015-052, Attachment A, ¶ G(1), *rescinded on other grounds by* Sixth Jud. Cir. Admin. Order 2024-010 (Feb. 28, 2024).

14 *See* Sixth Jud. Cir. R. 5(C)(1); Sixth Jud. Cir. Admin. Order. PI-CIR-98-30 (May 4, 1998).

15 *See* Sixth Jud. Cir. R. 5(C)(1) (requiring "a statement certifying that he or she has … conferred with opposing counsel and that counsel have been unable to resolve the dispute."); Sixth Jud. Cir. Admin. Order. PI-CIR-98-30 (May 4, 1998) (mandating that counsel file "with his/her motion a Certificate of Good-Faith," and do so "before scheduling a hearing on the motion").

16 *See* Seventh Jud. Cir. Uniform Pretrial Procedures in Civ. Actions, at ¶ 6(c) (Jan. 2023).

17 *See* Seventh Jud. Cir. Admin. Order 2022-004 (Sept. 27, 2022) (emphasis in original).

18 *See id.*

19 *See* Seventh Jud. Cir. Uniform Pretrial Procedures in Civ. Actions, at ¶ 6(c).

20 *See* Eighth Jud. Cir. Admin. Order 03-09, Appendix A, at ¶ 5 (Apr. 23, 2021) (standing case management order applicable to all civil cases).

21 *See id.*

22 *See id.*

23 *See* Uniform Admin. Policies and Procedures of the Civ. Div. of the Ninth Jud. Cir., at § 11(c)(1) (May 2020); *see also* Ninth Jud. Cir. Am. Admin. Order 2012-03-01, ¶ 6 (Sept. 24, 2020) (requiring, prior to noticing a hearing, "a substantive conversation in person or by telephone or video conference in a good faith effort to resolve the motion").

24 *See* Ninth Jud. Cir. Admin. Order 2012-03-01, ¶ 6 (Sept. 24, 2020).

25 *See id.*

26 *See id.*

27 *See id.*

28 *See id.*; *see also* Uniform Admin. Policies and Procedures of the Civ. Div. of the Ninth Jud. Cir., at § 11(c)(1) (May 2020) ("All notices of hearing must reflect that the parties met, in person, and conferred on the subject being brought before the Court for resolution.").

29 *See* Ninth Jud. Cir. Admin. Order 2012-03-01, at Ex. A (Sept. 24, 2020).

30 *See* Tenth Jud. Cir. Admin. Order 7-6.0, Ex. A, at ¶ (V)(2) (Apr. 12, 1993).

31 *See* Tenth Jud. Cir. Admin. Order 3-22.1, at ¶ 1 (June 27, 1995).

32 *See* Eleventh Jud. Cir. Admin. Mem. 23-C 24 AF CA 01 (Nov. 8, 2023); *see also* Eleventh Jud. Cir. Admin. Order 22-05, Ex. 1, at V(2) (Oct. 24, 2022) ("Attorneys should, whenever possible, prior to filing or upon receiving a motion, contact opposing counsel to determine if the matter can be resolved in whole or in part.").

33 *See* Twelfth Jud. Cir. Admin. Order 2010-22.2, Ex. 1, at ¶ (F)(1) (Oct. 20, 2010).

34 *See id.* ¶ (E)(1)(c).

35 *See id.*

36 *See* Thirteenth Jud. Cir. Admin. Order 2024-021, at ¶ 11(A) (Feb. 19, 2024) (cleaned up).

37 *See id.*

38 *See id.*

39 *See id.*

40 Fifteenth Jud. Cir. R. 4, at ¶ 2; *see also* Fifteenth Jud. Cir. Admin. Order 3.202-10/2023, at ¶ 1 (Oct. 4, 2023) (independently imposing a requirement that, prior to hearing a "motion to compel discovery or for protection from discovery," counsel "confer[]" in an attempt to "resolve the discovery dispute without a hearing").

41 *See* Fifteenth Jud. Cir. R. 4, at ¶ 2 (setting forth a form certification requirement).

42 *C.f.* Sixteenth Jud. Cir. Admin. Order 2.072/21-1 (Apr. 30, 2021) (emphasis in original) (setting forth a model case management order).

43 *See* Seventeenth Jud. Cir. R. 10A.

44 *See* Seventeenth Jud. Cir. R. 10A.

45 *C.f.* Seventeenth Jud. Cir. R. 10A (mandating, for uniform motion calendar motions, that counsel certify: "I hereby certify that A) the movant has conferred or attempted to confer with all parties or self-represented parties who may be affected by the relief sought in the motion in a good faith effort to resolve the issues raised in the motion; and B) the issues in the motion may be heard and resolved by the court within five (5) minutes."), *with id.* (mandating, for special set motions, that counsel certify: "I hereby certify that I have made a good faith attempt to resolve this matter by having direct communication about the matter with all parties, prior to my noticing this motion for hearing.").

46 *See* Seventeenth Jud. Cir. Admin. Order 24-06, Ex. B & Ex. D (Apr. 16, 2024).

47 *See id.*

48 *See* Nineteenth Jud. Cir. Am. Admin. Order 2015-06, Ex. A, at V(2) (Sept. 22, 2017).

49 *See* Twentieth Jud. Cir. Admin. Order 2.20, Attachment A, at ¶ I.

50 *See id.*

51 *See* N.D. Fla. R. 7.1(D).

52 *See* N.D. Fla. R. 7.1(B).

53 *See* N.D. Fla. R. 7.1(B); *see also id.* ("When a conference is conducted in writing or electronically, an attorney ordinarily should be afforded at least 24 hours — as calculated under Federal Rule of Civil Procedure 6 — to respond to a communication.").

54 *See* N.D. Fla. R. 7.1(C).

55 *See* M.D. Fla. R. 3.01(g)(1).

56 *See* M.D. Fla. R. 3.01(g)(2).

57 *See id.*

58 *See* M.D. Fla. R. 3.01(g)(3).

59 *See id.*

60 *See* S.D. Fla. R. 7.1(a)(3).

61 *See id.*

62 *See id.*

63 *See id.*

EXHIBIT
B

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE

CASE NO.:SC23-0962

_____/

Comment of Circuit Judge Anne-Leigh Gaylord Moe

My name is Anne-Leigh Gaylord Moe. I am a Circuit Judge assigned to the General Civil Division in the Thirteenth Judicial Circuit. I have reviewed the proposed amendments to rules 1.200, 1.201, 1.280, 1.440 and 1.460. I submit the following comment based on experience gained through working with my colleagues on the Thirteenth Circuit to design and implement case management processes, including our Differentiated Case Management ("DCM") process in 2021 and our Division HT process in 2023.

I. Rule 1.200 (Case Management)

A. Overview

I encourage the Court to reject any version of Rule 1.200 that (1) is excessively complex; (2) is incompatible with generation of initial case management orders by the court at an early stage of the case utilizing a deadline formula and a projected trial month, if a circuit has found it prudent and possible to adopt such a process; or

E. Revision to Rule 1.510 Would Increase Efficacy of Rule 1.200

A significant impediment to effective case management is contained in Rule 1.510. Specifically, the deadline to respond to motions for summary judgment is tied to the date of the hearing. It would be better to have that deadline tied to the date the motion was filed. Despite (1) the timely filing of a motion for summary judgment and (2) a trial judge's efforts to actively manage the case, it is still possible for a motion for summary judgment to remain undisposed late in the case without malfeasance on anyone's part. The non-movant may have been waiting 18 months for a trial that is just a few weeks away, so a continuance is undesirable. Yet saying "you lost your chance to have it heard" on a timely-filed motion is also undesirable. The result of that approach could be that six to eight members of the public spend a week of their lives sitting through a trial at the end of which they cannot reasonably return a verdict for the non-movant.

The most typical reason why a timely summary judgment remains pending at such a late stage is that counsel could not agree to available hearing time prior to the pretrial conference (or there just

wasn't any). When the problem hits my radar at the pretrial conference under the current rule, I have a Hobson's Choice: (1) continue the case to hear the timely summary judgment motion, or (2) proceed to trial on a claim in which summary judgment was timely sought and may be meritorious. I conduct pretrials about 30 days before trial and if all has gone as it should, motions for summary judgment are ruled on well before then. But when for some reason that did not occur despite a timely-filed motion, it is often true that I could give the case hearing time my chambers sets aside for motions in limine to be heard between pretrial and trial. But the motion cannot be heard in that interim period because there is no response on file; Rule 1.510 requires no response until the hearing is set. Whether by trial or otherwise, prompt final disposition seems to be the whole point of Rule 1.200. Rule 1.510 exists for a similar purpose. It is not necessary for Rule 1.510 to impede Rule 1.200 as it presently does.

F. Other Considerations

1. Making Do With What We Have

The sky is blue and Florida's trial courts do not have enough resources. But we live in the greatest country the world has ever