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 rules 1.200, 1.201 and 1.280 in Track B.

I have reviewed the Court's proposal to synthesize Track A and Track B. I appreciate the Court giving the Rules of 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 would delete it.

But I would tweak 1.200(b)(1) just a bit. As you will see below, I suggest revising rule 1.200(a). That change would make the reference in rule 1.200(b)(1) no longer accurate. I would change the 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, but do not actually, 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"):

> (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 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. So, Track B proposed the 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 are necessary. 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…." I think consistency is best.

Proposed change

> (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
The name is not correct

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. As written, proposed rule 1.201 has no definition of a "complex" case. I think the definition should be very close to what the Workgroup proposed. (I have double underlined what I think should be added to the Workgroup's suggested language. For ease of reference, I have attached the relevant port of the Workgroup's amended proposal, filed on 9/19/2022, as Exhibit A.)

Finally, 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) Complex Litigation Defined. A "complex action" is one that is likely to involve complicated legal or case management issues and that may require more extensive judicial management than a "general" case in order to expedite the action, keep costs reasonable, or promote judicial efficiency. Indicia of a complex case may include: numerous pretrial motions raising difficult or novel legal issues, management of a large number of separately represented parties, coordination of related actions pending in other courts, pretrial management of a large number of witnesses, a substantial amount of documentary evidence, or complex issues associated with electronically stored information, substantial time required to complete trial, management of a large numbers of experts, witnesses, attorneys or exhibits, or any other factors identified by the court or a party that tend to complicate the 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 may convene a hearing to determine whether the action requires the use of complex litigation procedures.

(1) – (2) [No change]

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

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

RULE 1.201(c)(4)
The conferral requirement, as written, is unnecessary in light of rule 1.220

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 1.220, 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 antiquated.

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 is to tweak the rule a little so that it requires the parties to "revisit" their pre-filing conference 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 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 1.440(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 1.220 into this subsection

When the subcommittee drafted the conference requirement in rule 1.460(d), rule 1.220 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.

The first sentence and last sentence of rule 1.460 is no longer required. Rule 1.220 (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 1.220 also encompasses the idea that, if a conference did not occur, the movant has to detail the efforts to confer.

If the Court is not going to adopt my suggestion for rule 1.220, 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 1.220. Just leave the last sentence of rule 1.460(d) (the provision that calls for sanctions if someone evades the duty to confer).

Proposed change

(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, legal term to describe the person who is not represented by counsel and unlikely to be familiar with what the term means.

"Old rules" use "pro se"

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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EXHIBIT
A

Appendix A: Proposed Rule Amendments

RULE 1.010. SCOPE AND TITLE OF RULES

These rules apply to all actions of a civil nature and all special statutory proceedings in the circuit courts and county courts except those to which the Florida Probate Rules, the Florida Family Law Rules of Procedure, the Florida Rules of Juvenile Procedure, or the Small Claims Rules apply. The form, content, procedure, and time for pleading in all special statutory proceedings shall be as prescribed by the statutes governing the proceeding unless these rules specifically provide to the contrary. These rules shall be construed to secure the just, speedy, and inexpensive determination of every action. These rules shall be known as the Florida Rules of Civil Procedure and abbreviated as Fla.R.Civ.P.

RULE 1.090. TIME

(a) Computation. [NO CHANGE]

(b) Enlargement. [NO CHANGE]

(c) Unaffected by Expiration of Term. [NO CHANGE]

~~**(d) For Motions.** A copy of any written motion which may not be heard ex parte and a copy of the notice of the hearing thereof shall be served a reasonable time before the time specified for the hearing.~~

RULE 1.100. PLEADINGS ~~AND MOTIONS~~

(a) Pleadings. [NO CHANGE]

~~**(b) Motions.** An application to the court for an order must be by motion which must be made in writing unless made during a hearing or trial, must state with particularity the grounds for it, and must set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. All notices of hearing must specify each motion or other matter to be heard.~~

(~~c~~b) Caption. [NO CHANGE]

(~~d~~c) Civil Cover Sheet. [NO CHANGE]

(e~~d~~) Motion in Lieu of Scire Facias. [NO CHANGE]

RULE 1.160. MOTIONS

(a) Application. This rule ~~shall apply~~applies to all motions other than motions made ~~pursuant to~~under rules 1.480, 1.500, 1.510, 1.525, 1.530, 1.535, and 1.540. In the event of ~~contradictiona~~ conflict between this rule and a rule governing a specific type of motion, the ~~latter shall prevail~~rule governing the specific motion applies.

(b) Relief and Grounds. A request for an order must be made by motion. The motion must state with particularity the grounds upon which it is based and the substantial

(1) ~~the simplification~~ a statement of the issues to be tried;

~~(2) the necessity or desirability of amendments to the pleadings;~~

(~~3~~2) the possibility of obtaining ~~admissions of fact and of documents~~ evidentiary and other stipulations that will avoid unnecessary proof;

(~~4~~3) the ~~limitation of the number of expert~~ witnesses who will testify, evidence to be proffered, and any associated logistical or scheduling issues;

(~~5~~4) the ~~potential use of juror notebooks; and~~ use of technology and other means to facilitate the presentation of evidence and demonstrative aids at trial;

(5) the order of proof at trial, time to complete the trial, and reasonable time estimates for voir dire, opening statements, closing arguments, and any other part of the trial;

(6) the numbers of prospective jurors required for a venire, alternate jurors, and peremptory challenges for each party;

(7) finalization of jury instructions and verdict forms; and

(~~6~~8) any matters permitted under subdivision (~~a~~h)(4) ~~of this rule~~.

The court must enter an order reciting the action taken at the pretrial conference and any stipulations made. The order entered by the court ~~shall~~will control the course of the trial.

~~2021 Commentary~~ Workgroup on Improved Resolution of Civil Cases Note

2022 Amendment. Rule 1.200 as amended is intended to supersede any case management rules issued by circuit courts and administrative orders on case management to the extent of contradiction. The rule is not intended to preclude the possibility of local administrative orders that refine and supplement the procedures delineated in the rule, particularly circuit or county-wide 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

(a) Complex Litigation Defined. ~~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 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 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, or complex issues associated with electronically stored information;

(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) ~~If all of the parties, pro se or through counsel, sign and file with the clerk of the court a written stipulation to the fact that an action is complex and identifying the factors in (2)(A) through (2)(H) above that apply, the court shall enter an order designating the action as complex without a hearing.~~ A case ~~shall~~will be designated or redesignated as complex in accordance with rule 1.200.

(b) Initial Case Management Report and Conference. The court ~~shall~~must hold an initial case management conference within 60 days from the date of the order declaring the action complex.

(1) [NO CHANGE]

(2) [NO CHANGE]

(3) Notwithstanding rule 1.440, at the initial case management conference, the court ~~will~~ ~~shall~~must set the trial date or dates no sooner than 6 months and no later than 24 months from the date of the conference unless good cause is shown for an earlier or later setting. The trial date or dates shall be on a docket having sufficient time within which to try the action and, when feasible, for a date or dates certain. The trial date shall be set after consultation with counsel and in the presence of all clients or authorized client representatives. The court shall, no later than 2 months prior to the date scheduled for jury selection, arrange for a sufficient number of available jurors. Continuance of the trial of a complex action should rarely be granted and then only upon good cause shown.