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October 1, 2021
Via Email: whitet@flcourts.org

Tina White
Office of the State Courts Administrator
Hon. Robert J. Morris
Chair, Workgroup on Improved Resolution of Civil Cases

Re: Comment by the Civil Procedure Rules Committee on draft report by Workgroup on Improved Resolution of Civil Cases

Dear Ms. White/ Judge Morris:

The Civil Procedure Rules Committee (CPRC) appreciates the opportunity to review and comment upon the Draft Final Report (Report) of the Workgroup on Improved Resolution of Civil Cases (Workgroup) prior to its finalization and submission to the Judicial Management Council on November 19, 2021. Similarly, the CPRC recognizes the excellent work and detailed research of the Workgroup and its staff that led to the comprehensive Draft Final Report. While not a party to all of the information available to the Workgroup, the Workgroup has identified a systemic problem of significant magnitude that it feels requires comprehensive changes to the civil justice system in Florida.

The CPRC is the rules committee of The Florida Bar whose sole purpose is to review on a continuing basis, consider amendments to, and present to the Florida Supreme Court proposed revisions to the Florida Rules of Civil Procedure. This rules set is the principal subject of the Workgroup's Report. The CPRC is comprised of a broad selection of attorneys and judges from all geographic areas of Florida and from all substantive areas of practice. Coming from

every sector of the Bar, the members of the CPRC have tried to focus this Comment on the system of civil justice in Florida, and not each member's personal practice. This Comment is submitted by the CPRC[1] to assist the Workgroup in drafting its final Report, and to offer its assistance going forward in any way that it can.

There are 3 sections to this Comment. **Section I** contains a broad view of the subject rules from a high level that includes observations, suggestions, and comments based on the CPRC's review of specific concepts and approaches employed by the Workgroup. *See infra.* at ¶¶ 1-31. **Section II** contains comments about several proposed rules covering broad substance but still discussed on a high level rather than a focused analysis on drafting. See infra. at ¶¶ 32-83. **Section III** contains the CPRC's best attempt to address the specific rules drafted in the Report, recognizing that the time allotted for review and comment did not lend itself to the deliberative process ordinarily employed by the CPRC members for this process. *See infra.* at ¶¶ 84-118.

I. Focused Comments and Reactions to the Report

1. The CPRC fully supports reasonable and balanced efforts to improve the administration of justice in our civil courts. The CPRC also supports rooting out delay, including delays caused by failure to prosecute cases, by discovery violations, and by asserting unsupported claims or defenses.

2. **The federal system:** The CPRC also concurs that many of the procedures and devices utilized in the federal court system

[1] The CPRC has also appended to its Comment a brief explanation of how it organized this review effort in the time allowed by Mr. Tomasino's letter of August 9, 2021, culminating in a review and approval of this Comment by the full Committee after multiple emails, and a formal meeting on September 24, 2021. *See infra.* at ¶¶ 119-124.

have helped reduce delays in those courts and should be considered for adoption into the Florida system of civil justice when appropriate. As discussed below, some federal practices do not mesh easily with the state system, but if a decision is made to adopt any specific practice, the CRPC would suggest that the Court allow only the fewest and smallest deviations from the wording of the federal rule, and only to address a specific substantive issue particular to Florida as the basis for deviating. This was the course followed by the Court in approving one of the two CPRC options for the recent amendment/rewrite of Rule 1.510.

3. **To what extent are the current rules the problem?:** The CPRC also points out that eliminating delay in the civil process does not necessarily require rewriting the civil rules. Many Courts in Florida administer their dockets efficiently using today's rules. Many lawyers avoid the delay-producing practices spelled out in the Report, and many judges do not tolerate those practices. Considering the disparity in how different courts are able to control their dockets, this Comment attempts to prioritize the various proposed new rules and rule amendments to allow sufficient time to gauge the consequences from implementing them.

4. **The role of CJE and CLE:** Whatever path the Court takes on implementing the Workgroup's proposals, the Report correctly identifies the important role that continuing education for judges and attorneys can play in either using today's rules better or in introducing tomorrow's rules. Due to funding constraints, other competing education requirements, or simply the lack of priority, neither CJE nor CLE on the major issues raised in the Report have received a sufficiently elevated status in the past. There has been no nuts-and-bolts emphasis on making our civil justice system work better within the rules context. No law school class prepares lawyers

or judges for this aspect of professional life. The CPRC feels that a confirmed, dedicated, well-funded, and comprehensive education effort by both Bench and Bar on how to effectively use the Civil Procedure Rules, as ultimately amended, is an important dual track to the adoption of any new rules.

5. **Repeating basic concepts in multiple rules adds little and can create unnecessary problems:** There are at least two concepts repeated throughout the Report and its rules proposals to which the CPRC does not take issue generally. However, as a body perhaps more sensitive to and involved in the overall system of rule-writing, a majority of CPRC members would prefer that each concept be stated once in any rules proposal, clearly and coherently, rather than scattered in multiple locations around rules, and sometimes stated in different ways. It is suggested that the "say it once" process is cleaner and simpler. It also avoids the argument about why a new particular procedure was not written into every rule in the set. Even if the Workgroup feels that these concepts need extra "power," the CPRC maintains that a single clear rule is preferable. The first issue is how sanctions should be addressed and the second is how should the "meet and confer" process be expanded in motion practice.

6. **Sanctions.** Although the CPRC has provided detailed thoughts regarding sanctions in the next section, the narrow question addressed here is whether it is preferable to address sanctions once and comprehensively, or repeat the general "availability" of sanctions in substantial numbers of different rules proposal.

7. The Report suggests the creation of a new omnibus sanctions rule [1.275], and that rule broadly and explicitly states that it may be used for both rule-based violations, as well as for order violations. It is the opinion of the majority of CPRC members

that a comprehensive rule may have become necessary to control case dockets. That said, repeating this new explicit power in several rules may be unnecessary. Some members of the CPRC favor the repetition[2], but the majority feels that repeating a rule concept risks it being applied differently in different places. While some on the CPRC feel this sanction emphasis sends an unfortunate message to the majority of lawyers who do not need it, the reality is that the simple clear message of Rule 1.275[3] should seldom negatively impact the bulk of Florida's attorneys

8. If the purpose behind the emphasis on sanctions is to empower the courts because the current rules have been inadequate, it further supports the CPRC position that a simple, single, direct, "empowerment" rule fits the bill. Give them the power they want or need and then teach them to use it wisely and teach lawyers how to avoid its use. This Comment addresses the broader issue of sanctions below.

9. **Meet and Confer Requirements:** The Report also endorses a meet and confer requirement for most routine motions before the parties can seek judicial assistance. The CPRC endorses mandating that attorneys meet and confer for most motions. However, like the sanctions power described above but to a much reduced extent, after stating the meet and confer requirement in the expanded new motion rule, 1.160, it reappears occasionally. When it occurs in the CMC context, its use is most appropriate because there is no corresponding

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[2]A minority of the full membership of the CPRC does feel, as the Workgroup does, that including the sanctions power into most rules communicates a better message.

[3] It is **not** the opinion of the CPRC that new Rule 1.275 supplant Rule1.380 dealing with sanctions in a pure discovery context. It is the CPRC's opinion that those two rules, and only those two, should contain the sanctions powers of the Court.

motion to trigger a meet and confer. In the continuance rule, however, it is unnecessary.

The CPRC favors a simple statement found in one place, that communicates a required procedure, without repeating the same concept, and especially without restating the concept in different ways.

10. In general, the rules tend to establish a procedural requirement once and then do not repeat the same requirement each time it may be applicable. All of the efiling and eservice rules are stated once, in the Rules of General Practice and Judicial Administration, but are not restated for emphasis or for any other reason throughout the rules sets.

11. **Should rule sets include behavior/professional conduct standards?** Beyond the new and amended rules of procedure contained in the Report, the Workgroup has also recommended, largely in Rule 1.279, the inclusion of various professional behavioral standards, oaths, "expectations", and "creeds", into the Civil Rules. Much more importantly the Report then elevates these expectations and creeds etc. and equates them with a procedural duty for attorneys to comply with. And if there is now a procedural duty prescribed in a rule, one also has under the Report's structure another potential field for the imposition of sanctions.

12. The CPRC supports and encourages professionalism in all its forms, in every court, by every lawyer and judge. But including these broad behavioral norms into a set of procedural requirements conflates two different types of guidance for attorneys. The CPRC would prefer to keep these aspirational standards, like oaths and pledges and creeds and expectations, apart from the day-to-day rules of procedure.

13. Trying to modify procedural norms into a sanctionable event further takes these aspirational values and penalizes a subjective conclusion that the actor has not lived up to the aspirations.

14. The Professional Expectations "require" an attorney to be committed to the public good and to provide equal justice to all. The CPRC heartily endorses these concepts, but doubts that a judge can or should sanction an attorney if he or she fails in that goal outside the courtroom.

15. Similarly, the Creed of Professionalism extends an attorney's professional responsibilities to the attorney's private life, but conduct in that sphere is simply not within the purview of judicial control.

16. If, notwithstanding the above, the Workgroup desires professionalism guidelines and expectations in the rules, it is suggested that all references to using these codes and expectations be limited to their being broad, professional goals, and not a specific procedural requirement that can constitute an independent basis for sanctions. Judges should not have to treat these general aspirational statements as specific procedural requirements.[4] Even if these guidelines and standards belong in the rules, the more appropriate rule set to contain them are the RGP&JA, because all attorneys in all courts must meet the same professional standards.

17. Similarly, the references to "judicial decisions" and to the "orders of the judge presiding over the case" seem misplaced in a rule addressed to professional goals. It is also unclear

[4] A court's power to sanction attorneys or parties is strictly construed and cautiously employed. There simply is no way to strictly construe the aspirational ideals announced in the cited materials for applying in a civil matter.

whether the "judge's orders" referred to are those in the subject case [in which case the reference is probably unnecessary] or are to the judge's orders in other cases [which are usually unknowable and not searchable]. Attorneys should not be held to a standard that they cannot reasonably know, nor to one that they have never had the chance to discuss and argue before a particular judge. A judge's ruling in a different case is not stare decisis and is not binding on either the judge or any subsequent litigant.

18. As will be noted below in the section of this Comment addressed to the specific language of each separate rule, the CPRC is also concerned with explicitly empowering a judge to impose sanctions under this rule if an attorney "frustrates the court's purpose". First the "court's purpose" is vague and undefined, and secondly there will be occasions when advancing the client's interests, to which an attorney must remain faithful, will not further the court's purpose. These portions of Rule 1.279 create the possibility of irreconcilable conflict in civil cases.

19. Finally, these standards require a variety of discussions with clients on certain topics, which redefine and add particularity to the obligations otherwise imposed in the Rules Regulating the Florida Bar. If the ultimate goal of the Workgroup's proposals is to mandate attorney client communications not presently required, their placement would better be in the Rules Regulating the Florida Bar or conceivably the Rules of General Practice and Judicial Administration.

20. **The CPRC does not want the Workgroup or the Court to lose sight of a different, but also valid, focus on our judicial system:** A significant if not principal focus of the Report is to change to rules to enhance judicial control over the case management process from start to finish. The CPRC

would add that each individual case at a micro level is much more the "property" and concern of the clients/parties and their legal representatives than it is of the judge to whom that case has been assigned. That view has, in part, informed the CPRC's response in this Comment.

21. **Interaction with the Florida Rules of Appellate Procedure:** In addition to trying to confer more authority on trial judges, the Workgroup has also injected heightened standards for reviewing those decisions on appeal. While these reactions might more appropriately come from appellate specialists, the CPRC [with a number of appellate specialist members] suggests that the following appellate considerations be reworked:
    a. The CPRC has a general question as to whether appellate standards of review should be properly placed in the civil rules. There is one such standard already in the civil rules [1.061(a)], but the CPRC questions that also.
    b. The appellate standard of review of "abuse of discretion" cannot, or should not, be imposed for all sanctions orders. [See proposed Rule 1.275(i)]. Any order based purely on a factual finding or on the judge's determination of culpability of the attorney being sanctioned may well carry that restricted standard of review. However, many sanctions orders raise in part an issue of law decided by the Court, and those orders should remain subject to a de novo standard, or a mixed standard based on the factual findings and legal conclusions of the judge.
    c. Similarly, proposed Rule 1.460(b)(11) directs that a "gross abuse of discretion" standard be used for the review of all continuance orders. While probably written to try and dissuade appellate or certiorari review, it appears that the Workgroup may have unintentionally elevated the "normal" abuse of discretion standard. There

is a very limited "gross abuse of discretion" standard recognized in Florida [although it is difficult to differentiate from the "abuse of discretion" standard]. Perhaps the Workgroup intended to elevate the review standard to that of the review of Rule 1.540 orders or orders vacating defaults; more likely it was a message-sending phrase rather than an attempt to change the present law.

Finally, Rule 1.460(b)(11) also states, accurately, that an order on a continuance motion benefits from the presumption of correctness. While a true statement, the same can be said of a majority of trial court orders. As discussed above, the CPRC, as a matter of rule-writing preference, generally tries not to repeat truisms in multiple rules, or unnecessarily in any single rule. And if there is no compelling reason for the presence of repetitive or unnecessary verbiage in one rule it is better left out.

22. **Interaction with other Florida rules sets:** The charge to this Workgroup was to improve the resolution of civil cases. In doing so, its Report focuses most heavily on the Rules of Civil Procedure. The CPRC wants to elevate two issues in that regard:

a. It does not appear that the Workgroup considered improving the resolution of family law cases, but it may be well advised to coordinate its final report with the Family Law Rules Committee to avoid creating unnecessary differences between the two very similar sets of rules.
b. Second, consistent with the general practice in the last ten years of putting rules that have general application across various court types into one place—the Rules of General Practice and Judicial Administration, the Workgroup may want to consider whether parts or all of "Rule 1.271. Pretrial Coordination Court" could or should

be better placed in the RGP&JA. From the perspective of practitioners, it would seem that the procedural portions of the new rule might be better suited in the Civil Rules. We cannot readily envisage cases in divisions other than Civil warranting the employment of the Pretrial Coordination Court, but it is possible. But the creation of a new division [or section?] of a Circuit Court could easily be a proper topic of the RGP&JA, particularly the rules in Part II of the RGP.

23. **Avoiding unintended consequences:** The CPRC has noted several language selections in rules that appear to have resulted in causing what, probably, are unintended consequences.[5]

a. The first is the proposed initial disclosures to be required by the amendment to Rule 1.280. In Subdivision 1.280(a)(1)(B), a party is required to disclose "documents...[that the party has that] ***may be relevant*** **to the subject matter....unless the use would be solely for impeachment.** The CPRC has four comments to this provision:

i. First, this provision is taken from, but **not quoted exactly from,** Federal Rule 26. The federal equivalent language requires a party to disclose "documents... [that the party has that] the disclosing party ***may use to support its claims or defenses,*** **unless the use would be solely for impeachment.**" The critical difference is that as drafted the proposed rule would require the disclosure of work product thought processes of the attorney, forcing not only the production of

[5] If either of the examples noted here was the result of a deliberate choice of the apparent effect and not inadvertent, the CPRC would suggest more time to address these, and possibly other changes that seem to have not been intended. At least there is no discussion of these changes in the Report.

documents the party may use, but all other documents, including relevant documents that the attorney thinks could be harmful. This is an overbroad statement of current Florida law which protects, as work product, the thought processes of counsel in identifying relevant but even harmful documents from discoverable materials. The test is whether they may be used at trial. See *Northup v. Acken*, 865 So. 2d 1267 (Fla. 2004). See also *Grinnell Corp. v. Palms 2100 Ocean Blvd., Ltd.*, 924 So. 2d 887, 889 (Fla. 4th DCA 2006); *Hargroves v. R.J. Reynolds Tobacco Co.*, 993 So. 2d 978 (Fla. 2d DCA 2007). The federal language most properly tracks Florida law on discovery of such documents and limits the disclosures to those documents that a party may use to support its claims or defenses.

ii. Second, this one subdivision highlights the importance, when appropriate, of using the federal courts' rule language as often and as precisely as possible. The CPRC does not think that there should be a wholesale adoption of the federal rules, because some of them simply "don't fit" into our current state court system. For any particular rule, once the Court decides to adopt some or all of a federal rule, it should in almost every case carefully consider adopting the exact federal language, so as to incorporate the many years of construction and application that the federal rules have accumulated. In this one application, the limitation of what must be disclosed to only those documents that a party may use to support its claims or defenses, is superior to that selected by the Workgroup and is consistent with Florida law. The Court took this path in its recent adoption of the bulk of Rule 56

when it approved the new Rule 1.510 in Florida on summary judgments.

iii. Third, in reviewing the adoption of the federal rule language on any specific provision, as noted above, there should be a preference for the proven federal language, but the Court must still carefully look for state court anomalies. One such anomaly exists later in the very same subdivision discussed above. Both the Workgroup's proposal and the federal rule exclude from disclosure documents if their use would be solely for impeachment. That may have been the Florida rule in days gone by, but the Supreme Court in *Northrup*, supra expressly ruled that impeachment materials would be governed by the exact same rules of disclosure as other documents. Consequently, some members of the CPRC believe that the last phrase of proposed 1.280(a)(1)(B) should be dropped. Although these disclosures come at the start of each case, it has to be remembered that the areas of impeachment at a much later trial may well not have been determined as of the date of the disclosure. With the obligation to update discovery responses and disclosures, documents used for impeachment would only have to be disclosed once their use at trial was expected.

iv. Fourth, as will be discussed in greater detail below, the CPRC has also been working on an extensive proposed change to Rule 1.280 dealing with disclosures and has approved the version attached on first reading. For the reasons addressed hereafter, it is suggested that the CPRC version of or approach to 1.280 may offer other benefits as well.

b. The second area of a possible unintended consequence is the notation in new Rule 1.335(a) that attorneys are to conduct themselves in a deposition "as if in front of a

judicial officer." The possible problem with the language, probably unintended, is that it could be construed to convert a deposition into a judicial proceeding, with all of the formality and rules that come with those proceedings "in front of a judicial officer." One obvious question is whether the Rule of Sequestration of Witnesses has now been imposed or implied with this language. Similarly, the professional practices that an attorney is governed by when a party or witness is on the stand in front of a judicial officer, and during breaks therefrom, differ from those in effect in a deposition. It is doubtful that the Workgroup intended to drag all of the trappings of a judicial proceeding down into every deposition, but the language could be construed in that fashion. The CPRC agrees that the professional demeanor of an attorney at a deposition should be the same as if there were a judicial officer monitoring the deposition, but the similarity stops there.

c. Should the final result of the Workgroup's work on this project, the JMC's review of same, and the Court's final decision be to delay implementation of any portion of the entire set of proposals, the CPRC will be happy to assist in any further study.

24. **The wording and phrasing choices of the various rules proposals:** The verbiage selected by the Workgroup in its rules proposals may have been selected to try and deliver a message of "earnestness". While perhaps effective in communicating that idea, some rules proposals are written with a conversational, or somewhat informal tone, employing a number of new "standards" to measure the conduct of lawyers and self-represented parties. Words and phrases such as "dire circumstances" and "extraordinary unforeseen circumstances", "cure", and "revisit" seem out of place in traditional procedural rules.

25. The members of the CPRC have developed over the years a decided facility in saying things in a precise, consistent manner to allow ease of understanding. The CPRC is available to assist in performing a more thorough final review of and/or "wordsmithing" of any language proposed by any other organization involved in this process. The strictly abbreviated time frame allowed for this Comment has not allowed that degree of granularity by the CPRC, and it may still be too early in the rules drafting process to perform that task since any final proposals may be markedly changed.

26. **Is the Workgroup-type process a better blueprint for a rule-amendment system?:** One 30,000-foot observation of the CPRC's is centered totally on process rather than substance. The way the Workgroup received this mission, the process by which it studied this project, and quite possibly the reception its proposals will have, all differed markedly from the way the CPRC [and the other rules committees] are normally able to function. The several rules committees have labored at the exact same task with the same goal in a largely unchanged manner over a substantial period of time. Based upon the current Court's increased use of sua sponte rule making, and the functioning of this Workgroup outside the traditional rule-making procedures, the CPRC asks whether it is time for a change and a "shake-up" in how we review and write rules in Florida, much as how the Workgroup was tasked with and has delivered a shake up to case management in Florida?

27. The Workgroup had what the CPRC feels were three distinct and material "process" advantages over the Bar's rules committees, and the CPRC would urge the Bar and the Court to consider crafting a similar system going forward for all rules committees. It would largely scrap or significantly modify our current "adversary" system of Rules Cases at the Supreme

Court in favor of a more conversational, collaborative, and cooperative process.

a. First, the Workgroup had the benefit of a detailed roadmap, in writing, from the Court in the form of AOSC19-73 [and supporting documents] that assisted the Workgroup in tailoring its proposals into a format that more accurately met the Court's need. Bar rules committees have sporadic participation of a Justice at meetings, but seldom receive broad directions as to what the Court is looking for in directional change for the procedural rules. Individual rule directives (such as the recent 1.510 summary judgment rule and the proposal on Rule 1.442) come to the committees periodically, but not in the ordinary course.
b. Personal collaboration and cooperation with justices of the Court may be useful in the writing of our rules of procedure. CPRC feels the current system makes meaningful communication between the Court and its "rule-writers" virtually impossible. Sometimes broad and complex ideas are not meaningfully shared with the Court before briefing in a Rules Case and a 15-minute adversarial format, Oral Argument. That format is designed and structured more to resolve narrow factual or legal disputes between litigants than to resolve broader questions of how our court system should function going forward. The CPRC suggests it may be time for a change.
c. Third, the Workgroup is composed of busy lawyers and judges as rules committees are. Yet it was able to draw upon the deep resources of the Office of the State Court Administrator which provided staff to perform or assist in detailed research on the many topics discussed in the Report, and similarly to draft and finalize the detailed 168-page Report, with 41 pages of extensive endnote citations. The CPRC has no similar resource to draw

upon, and has not been able in the few weeks provided for comment to muster the type of comprehensive analysis of the Report and the many supplemental resources used by the Workgroup's staff it would prefer to have delivered to the Workgroup.

28. The CPRC is generally aware that there have been periodic discussions in the past between the Court, the Bar, and others about whether to revamp our age-old adversarial rules amendment process and to adopt a more collaborative and cooperative review process, much as was used with good results by the Workgroup. It is a model used by most business and professional organizations, and by some other states as well.

II. Broader and more complex comments on the Report

29. **Empowerment of judges vs. the absence of discretion:** One of the apparent motivations for some of the proposed rules is the feeling that some/many judges may not be adequately "empowered" to manage their dockets using the rules as they presently exist. But CPRC believes that true judicial empowerment comes through giving judges power—with discretion—rather than taking that power away—with non-discretionary mandates.

30. There are examples throughout the Workgroup's proposals, but perhaps it is no more starkly presented by the juxtaposition of the proposed Comment to Rule 1.440—Setting Action for Trial and the text of the very next amended rule, Rule 1.460—Continuances.

a. After spelling out a more robust rule addressing setting actions for trial [in conjunction with a similarly beefed-up Rule 1.200], the Comment strikes a softer and more conciliatory [and it is suggested professional] tone when

it recognizes the realities that lawyers and parties sometime face. It notes in part:

i. "By this amended rule, the failure of the parties to move diligently to have pleadings filed or amended will no longer thwart the ability of the court to move a case to trial. Instead, bona fide difficulties in getting pleadings filed or amended will be addressed by the court on motions to continue a trial date, which are addressed to the sound discretion of the court."

ii. The CPRC agrees with this Comment and it is the proper basis for judicial action. A judge is empowered to prevent or stop avoidable delays and is given the "ability" to do so; but just as importantly a judge should be empowered to judge [consider, evaluate, determine] when it is appropriate to grant or deny a continuance.

b. Unfortunately, it appears that the empowerment combination of giving judges the ability to act as well as the discretion not to, is virtually absent from the very next rule after the Comment, dealing with Continuances. After formalizing the procedures for requesting a continuance [see discussion of specifics below], the proposed rule then states in Rule 1.460(b)(7)&(8), that several of the most common causes for requested continuances [both the valid ones and those not] can never be granted by the trial judge, no matter what the explanation. The reason for many requested continuances will become largely irrelevant because a judge is precluded—stripped of all discretion—from granting a continuance of a trial set 12 or 18 months ago, regardless of what may have transpired in the intervening months or years.

c. This rule change may well stop some continuance motions, and that indeed provides certainty, but not always justice.
d. Under today's system and rules, **no** continuance happens without a judicial officer's granting that continuance. The Workgroup, the JMC, and/or the Court may disagree with some number of those continuances, but it is suggested that the proposed solution of largely prohibiting them, with no judicial discretion, neither empowers the judiciary nor enhances the administration of justice.

31. **The appropriate use of sanctions in our civil courts:** The CPRC does not speak unanimously on every aspect of the issue of sanctions. One thing that all members of the CPRC do subscribe to, however, is that the practice of law in all courts be civil, be appropriately managed and regulated, and demonstrate the highest levels of professionalism in a decidedly adversarial system.

32. It is appropriate to create a specific sanctions rule – new Rule 1.275 and apply it generally to civil practice [except for those areas traditionally managed under Rule 1.380].

33. This wisdom does not arise from any presumption that all attorneys are driven by improper motives all of the time, or even that that is true of some attorneys. The CPRC believes that the majority of attorneys practicing in civil courts practice professionally virtually all of the time and need little more than the presence of a sanction rule.

34. Because of that perception and belief, the CPRC generally disagrees with and finds counterproductive having any presumptive sanctions for any particular routine type of conduct. If a generally good lawyer crosses a line, that lawyer

may well deserve to be sanctioned in that setting, all as decided by the trial judge in the judge's fulsome discretion. The CPRC does not believe that our profession is enhanced by taking the judge out of the "whether to sanction" decision.

35. **The repetitive use of a sanction threat in many of the Workgroup's proposed rules changes:** A significant majority of the CPRC's members, but not all, feels that the frequent reference to sanctions presented throughout the report sends the wrong message. It may well encourage litigants to request sanctions frequently as a strategy, it denigrates the majority of attorneys who seldom if ever cross a sanctions line, and it doesn't meaningfully add more empowerment to those judges. Rule 1.275 already says it in clear, precise verbiage.

36. The CPRC does not feel, however, that Rule 1.380 regarding discovery sanctions is repetitive. The issues there are different enough [and the rule already exists] so its continuation is warranted.

37. When sanctions are mentioned in other rules as an available power of the court, often those rules add possible dismissal or default as available sanctions. See proposed Rule 2.251 and 1.279(c)(1). This specific reference to the ultimate sanction should be inappropriate except in the most extreme situations. It does not enhance the discretion of the court in those rules. For example, new Rule 2.251 is the most technical of rules, designed to make lawyers accurately report the active/inactive status of a case to allow a court to keep its active case counts down. The CPRC believes that is a valid obligation, but the proposed rule goes perhaps too far, stating that "A party that fails to timely inform the court that a case's "inactive" designation has become unnecessary shall be subject to sanctions, including dismissal of the action and the striking of pleadings." A court should certainly be told when a

case becomes active again, and possibly, in very extreme situations, an attorney who fails to do so might be due some sort of a sanction. But the CPRC has difficulty anticipating a realistic situation in which the simple failure to tell the court of a case's return to activity could be worthy of the ultimate sanction. The reference to ultimate sanctions where not appropriate demeans their legitimate use elsewhere, and in the court's broad discretion.

38. **"A court *shall*" sanction unless there is a reasonable excuse/substantially justified, vs. "A court *my*" sanction if the conduct substantially warrants:** The CPRC has not reached a definite consensus on whether the rules mandate that sanctions be employed in a particular fact situation unless the attorney/party can show substantial justification, or whether the rules should allow sanctions in that same fact situation unless the attorney can show that same degree of justification for the conduct.

39. In these times of increased concerns for and emphasis on professionalism, the CPRC urges the "may" selection is also consistent with its observation that most lawyers do not commit sanctionable conduct and a presumption of professional misconduct does little to enhance the Bar's standing. The "may" standard also vests the judges with compete discretion to sanction when appropriate.

40. One troubling sanction power is described in Rule 1.275(b)(7)— the reduction in the number of peremptory challenges available to a party. The CPRC has difficulty assessing when that might be an appropriate sanction against a party. Theoretically something could happen during the jury selection of a trial that might affect peremptory challenges, but short of those unusual facts, it is suggested that this "power"

to reduce peremptory challenges be removed from the list of available sanctions.

41. **Who is being sanctioned and what are the ramifications of the sanctions order?:** The CPRC is concerned, as the courts have been, with who is sanctioned. Some sanctionable conduct is wholly the fault of the attorney, such as the attorney who misbehaves at a deposition. Other such conduct may well be the fault of a recalcitrant or otherwise noncompliant client. Or some combination of both. For example, Rule 1.335(e) deals with "a party" causing a motion to be filed to terminate a deposition, and sanctions being "imposable" from such a motion. But against whom are those sanctions truly to be imposed? Rule 1.335(f) deals with "a party" failing to attend or serve a subpoena for a deposition. Against whom should those sanctions be imposed?

42. When a party fails to produce documents or fails to answer interrogatories, who picks up that sanctions freight? The answer is not clear, but it implicates attorney-client issues. No procedure is set forth allow a fair resolution of that issue, but the reference to "party" throughout the rules suggests an answer that may not be universally appropriate.

43. There may be no way to answer those questions in advance in a rule, but the courts should be sensitive to the resolution for the attorneys practicing before it. The Report mandates certain communications between an attorney and a client, and while some of these seem misplaced in a procedural rules set, they at least keep the client informed.

44. One related issue regarding sanctions arises, especially with the increased number of sanctions orders that this Report seems to expect or possibly even require. The CPRC suggests that the Workgroup, or Court, consider creating two

levels of "sanctionable" or inappropriate conduct—one that is truly a "punishment" sanction for disobedience or misconduct, and one that merely seeks to level the playing field for unnecessarily incurred costs and fees. The first category—true sanctions – might have to be reported to certification committees or to others who periodically receive professional applications, or to malpractice carrier. The second category—the shifting of fees and costs, as for an unsuccessful motion—seems to be less professionally damning and might not require the wide disclosure that a true sanctions order does. The CPRC has not had the resources to explore this idea through nationwide research but considers it worth considering.

45. **The federal courts and their set of rules and procedures:** The Report and its proposals seem to have drawn extensively on the experience of the federal court system and on those other systems using an analogous federal court set of rules and procedures. To be sure, that civil system seems to function more efficiently than does the Florida system in certain respects.

46. Because of that proven efficiency, the CPRC also often looks to the Federal Rules of Civil Procedure for inspiration and ideas of ways that our state court procedures can be improved. One excellent example that will be discussed at length hereafter is the CPRC effort to incorporate the initial disclosures required by Rule 26 into our Rule 1.280. That template is presently under consideration by the CPRC and has passed first review. If finally approved by the Court, it would substitute or emphasize the disclosure process [which is lawyer/client centric] rather than the Report's approach which is to place the disclosures and their responsibility, as well as all other early case requirements on the shoulders of the judiciary through Rule 1.200.

47. Notwithstanding an apparently successful template from our sister federal courts, the CPRC has questions about incorporating some of the Workgroup's proposals as drafted. The differences between the state and federal systems contribute material variations in function. It is suggested that these differences be more thoroughly and seriously considered and understood before any adoption of the Workgroup's proposals. Knowing what the effect these proposed changes would have on our overall system of civil justice is impossible, which might caution a less-than-wholesale adoption.

48. The CPRC's concerns focus principally on what it sees as a possible overloading of our state courts' present ability to manage what they currently face, let alone the increased demands on their limited resources necessitated by the Workgroup's aggressive court-managed proposals.

49. It is no secret that Florida's Judicial Branch has been chronically underfunded for many years. As one of Florida's three co-equal branches of government, its funding has left the courts with inadequate resources to fulfill current needs. While some judges may well have expressed a need to receive "empowerment" by having the rules rewritten [and there is some place for that], it is suggested that the empowerment that could be delivered by funding civil case managers and law clerks for the state's trial judges would immediately improve the resolution of civil cases. We cannot comment on the political possibilities of this solution, but we can address how a "federal court" solution may not automatically be valuable in our courts.

50. The federal system has obvious marked differences to ours:

a. The number of cases assigned to each federal judge pales in comparison to the number of cases necessarily assigned to each state court trial civil division judge.
b. The mix of cases differs widely between the two systems. Florida trial courts (circuit and county) have many more, smaller, personal injury, collection, and related actions, whereas the typical federal court case tends to be fewer, larger, and more complex.
c. Because of this mix, the lawyers and law firms that appear in the federal courts tend to be more experienced and better staffed to handle complex cases and detailed procedural requirements.
d. As or more importantly, a federal judge, with a much smaller case load, has a large professional staff, including 2 or more law clerks as well as managers to assist in managing that smaller number of cases.
e. In addition, the federal courts have an extensive system of Magistrate Judges to further assist the federal judges, and each Magistrate Judge in turn has his or her own staff, also consisting of multiple law clerks to make up the federal system.
f. When this massively staffed and funded system with fewer cases is compared with the current state system, which frequently has no law clerk or staff attorney or civil case manager, it is small wonder that at least some judges fail to thrive from a case management perspective.
g. Finally, the federal judges tend to have had greater legal experience in complex legal matters before coming to the bench than their state court counterparts. Legal experience does not necessarily equate to managerial excellence, but the tools, staffing and procedures enhance the final product.
h. It also cannot be forgotten that our state court judges have no lifetime appointment but are instead subject to the vagaries of our elective system every six years. That

factor alone weighs heavy on the CPRC's analysis of these proposals, particularly the many proposals that seem to rely on the threat, or actual use, of permissive or mandatory sanctions to compel compliance with the requirements of the rules in at least some types of cases. While contested judicial elections were rare in times past, their prevalence today cannot help but weigh heavy on some judges who wish to continue to serve as their reelection campaign approaches.

51. The end result is a federal system in which many if not most motions are dispensed with on the papers, after detailed staff review and analysis. While there are many benefits to be reaped by taking those decisions off of our judges daily hearing schedule, we cannot assume that thoughtful and scholarly decisions will necessarily emerge if the balance of the state court civil system is not significantly adjusted.

52. **Concerns with the "Motions" and the "Scheduling of Hearing on Motions" rules:** The CPRC recognizes and agrees that one of the deficiencies in the current Civil Rules is the absence of a comprehensive system for making motions and scheduling them for hearing when appropriate. In creating these new rules, however, the CPRC is concerned that the procedures called for may result in clogging rather than freeing civil court dockets, and in certain respects denying basic procedural rights to some litigants.

53. Part of the goal for these proposed rules was to create a system to allow judges to rule "on the papers." That system works well in federal courts, with their extensive support and staff systems. But an "on the papers" system cannot be easily or automatically impressed on our state courts. By encouraging state court judges and their limited (if any) staff to rule "on papers", the CPRC feels that the expeditious

resolution of many motions might be delayed, or worse, rushed to meet the 60-day deadline created by the proposed rules. As has been discussed elsewhere in this letter, the present resources available to our state courts make the transition to a more significantly "on the papers" system very troublesome. The CPRC has no insight into whether additional funding could be obtained if coupled with an initiative such as this,

54. Further, as proposed, Rule 1.060(j) seems to give the court the power to rule on motions without hearing from the opponent. The sequence in the consideration of a motion starts with the "meet and confer" between the parties before the motion is filed [with which the CPRC concurs]. If the parties cannot agree on the need for a hearing, the movant [or opponent] can request a hearing, and the court is authorized to either direct memoranda to be filed, or rule without any briefing or additional submissions. Except of course only the movant has already explained its side of the issue. As drafted, a judge could deny or grant a motion before the opponent was heard from.

55. This sequence both unnecessarily stretches out the resolution time of a motion and risks a court ruling before the opponent can be heard if the court rejects any briefing. The federal courts compress that process by requiring a supporting memorandum to be included in or with the motion when filed [after a meet and confer]. The CPRC believes that a Florida state court rule should as well. And no ruling on papers should be authorized without explicitly allowing a written response, if the opponent wishes to do so. A response time could easily be scheduled within the time the court is allowed to consider the merits of the motion once it takes the matter under advisement.

56. These two important rules would benefit from greater coordination. Particularized suggestions are contained in the next section of this Comment.

57. **A concern of the CPRC – the system's ability to accommodate the number and management of hearings under the Report's Proposals; one possible alternative approach:** The CPRC has not had the full benefit of the research that the Workgroup has drawn upon, and cannot predict with any certainty the effects of some or all of these changes proposed in the Report. But the CPRC members collectively have had the benefit of hundreds of years of litigating in Florida's civil courts, and, perhaps more significantly, have been actively litigating in courts throughout the state in the several months since the Supreme Court's case management AO and since the 20 Circuits have issued their own implementing AO's.

58. That experience has led many members of the CPRC to worry about the capacity and elasticity of the system to be able to accept, process, and expand to handle the many changes called for in the Report while at the same time managing the day-to-day functioning of the of the civil justice system and the cases already filed and active. The Workgroup, from its perspective must have also evaluated these concerns.

59. As a result, the CPRC urges the Workgroup, the JMC, and eventually the Court, if these proposals reach the Court, to consider the following alternative in the anticipated implementation plan for the Report.

60. **The availability of sufficient judicial time to attend to all expected necessary judicial events – hearing and trials.** One of the most common complaints about the court system by many attorneys as it existed before the recent

changes in case management focused on the substantial delay in obtaining an adequate hearing time in the foreseeable future. It is not a new complaint, but recent procedural changes have exacerbated that problem.

61. From anecdotal reports, the increased difficulty in getting hearings recently is coincident with the recent case management emphasis. There is only so much time in a judge's day, and if that time is directed to be spent in trials and case management conferences, there must be a "trade off." At present, it appears to many CPRC members that the tradeoff has come on scheduling hearings.

62. Many on the CPRC worry that adding more up-front CMC obligations to our circuit courts' time obligations exacerbates this delay in obtaining meaningful hearings in time to allow new case management guidelines to be met.

63. The CPRC has no proposed solution to this problem. But the immediate confluence of all of these changes at one time may overwhelm the system, or at least some or many divisions in the various circuits. What many on the CPRC would therefore suggest is the Workgroup consider before its final report to the JMC the following adjustment, even temporarily, to the proposed broad scope of Rule 1.200 and its interplay with the proposed changes to Rule 1.280.

64. **A suggestion using the CPRC proposed changes to Rule 1.280.** The CPRC has been working on a significant rules proposal to amend Rule 1.280. Its proposal is similar to the Workgroup's with certain material differences.

65. This version of Rule 1.280 is modeled on and uses much of the exact wording from Federal Rule 26. It is a "lawyer-centric" rule, putting the onus—first— on the parties and their

counsel to initially address the primary and most immediate pressing problem in civil litigation—educating both/all sides on what the case is about, what the strengths and weaknesses of the opposition's case and their own case are, and what discovery will be needed to bring the case to a conclusion.

66. The CPRC-proposed Rule 1.280 adopts essentially Federal Rule 26(f) and calls for an initial discovery conference. The Court has a significant role in that conference, but the scope of that conference is smaller than that envisioned by Rule 1.200 in the Workgroup proposal.

67. It would be a relatively simple task to turn the CPRC proposed 1.280(g) conference into a tailored 1.200 conference as generally required by the proposed Rule 1.200.

68. Adoption of the CPRC's proposed rule 1.280(g) conference in conjunction with an initial scaled-down Rule 1.200 conference proposed would mean that the courts would not have to be involved in the granular details of the entire case from the beginning. Putting the first conference onus on the parties, rather that the judges, would alleviate what the CPRC fears is about to become a crushing burden on our trial court judges' time.

69. The somewhat scaled back initial Rule 1.200/1.280(g) conference could then focus on those things that are essential, to get the case on track. It would in all likelihood have to include at least the following:
    a. the case track assignment.
    b. detailed considerations of the issues and scheduling concerns expressed by the parties in their Rule 1.280 disclosures and report.
    c. initial fact witnesses disclosures.
    d. documentary discovery.

e. the proposed trial period or a date for a case management conference to set a trial period.

70. These components of the Workgroup's proposed Rule 1.200 would establish judicial control over the two items most critical in the first days of a new case: how can the Court assist the parties in learning about the case through discovery and disclosures, and what is the projected end of the case.

71. The remaining control features anticipated in the Workgroup's Rule 1.200 can then be brought or phased in at a time when more is known about the case and the granular scheduling details called for in the Workgroup's 1.200 first conference.

72. The concerns of many on the CPRC is that the time needed for a judge to sort out all the many other intermediate issues that may or will eventually arise in the ensuing many months consumes substantial judicial time at a point in the case when the parties may not have decided when or if such matters may arise or what challenges they pose.

73. Such things as the identification of needed areas for expert testimony, the search for/identification of/and availability of experts in each such area, their ultimate disclosure, the discovery necessary from them, the possible need for Daubert-type challenges to them, and the scheduling thereof are beyond the available knowledge of the parties at this early date. Similarly, the type and number of inspections or the type and number of medical examinations, or even the possible length of the trial are usually murky at the early stage.

74. Each of these topics, and certainly others as well, is a ready topic for a CMC at some relatively early stage of a

proceeding, but to put all of these many and varied topics on the judge's plate at the very start of the case, will likely increase disputes among the counsel, the parties, and the judges. And increased disputes equal increased hearings.

75. As with each other aspect of this letter, the CPRC stands ready to assist the Workgroup, the JMC and ultimately the Court in any way that it can to help achieve an improved set of civil rules to govern and manage our civil courts more effectively. Members of the CPRC would gladly assist in the refinement of these issues if requested.

III. Observations and Comments on Specific Rules Proposals

76. As noted above, the CPRC's review of the lengthy Report of the Workgroup of necessity focused first on the very big picture that has been painted of possible changes to the Florida Rules of Civil Procedure. The foregoing constitutes the CPRC's responses to that very detailed big picture.

77. The following paragraphs focus not on the big picture, but rather on the details of the Workgroup's Report. The CPRC subcommittee leading this review and its subgroups conducted its assessment of the Report, and attempted, as much as possible, to consider each individual rule as a separate proposal. During that process, questions, issues regarding format, wording choices, and uncertainties surrounding the effect of each rule were collected separate from the big picture responses above. The pinpoint comments set forth below, by proposed rule, are the compilations of those observations. They are not as complete or as definitive as the committee normally delivers with the luxury of more time.

78. **Rule 1.090**

No Comments

79. **Rule 1.100**

a. With the deletion of the paragraph entitled "motions" from Rule 1.100, moving it to rule 1.160, the title of the rule should be changed to "Pleadings and other documents" or other "filings", so as not to misdirect attorneys and self-represented litigants to this rule by mistake. It never made much sense to have two rules with "Motion" generically in their titles.

80. **Rule 1.160**

a. The CPRC generally agrees with the concept of this rule.
b. Subdivision (a)—For the time being, this proposal should also exclude motions under Rule 1.535, Remittitur. The CPRC has proposed deleting that rule and merging its content into Rule 1.530, but that change has not been approved as of yet.
a. Subdivision (a)— It is unclear why motions in complex cases under Rule 1.201 are exempt from the new detailed rule. It would seem complex actions would be exactly the type of actions that would benefit from rule 1.160 and its procedures. There is no other provision of the proposed rules addressing in detail motion practice. In general, absent compelling need for a second rule on the same topic, one rule should apply to all. If the Workgroup expects these motions to be handled by local rules, administrative orders, or local practice, that dilution of the statewide effect of the same Civil Rules should not be encouraged. Also, it appears that rule 1.161 does not exclude complex cases from its applicability. This is inconsistent to have complex cases potentially subject to rule 1.161 where rule 1.161 refers back to rule 1.160 but rule 1.160 does not apply to complex cases.

c. Subdivision (b)—The placement and meaning of the phrase "in the court's discretion" is unclear. Did the Workgroup intend to give the trial court discretion to refuse to address oral motions at a hearing/trial? Or to give the court discretion to avoid the provisions of relevant rules and orders of the court. There seems to be no compelling need for the phrase, and it could easily be misconstrued.
d. Subdivision (b)—This subdivision contains no provision for a reply when appropriate. If the goal to push decision-making to "on the papers," a reply provision should be added here, as is currently in Rule 1.060(j)(1).
e. Subdivision (c)—subdivision 1.160(c)(2) has an internal conflict whereby it appears that the movant may file its motion after not being able to resolve the motion during the meet and confer. However, if the movant and nonmovant resolve the motion, then the movant shall provide a stipulated order to the Court within 5 days after the meet and confer. This misses a step because you cannot have an order entered on a motion that is not filed. The rule should state the motion and agreed order must be filed if there is agreement. Also, the time limit of 5 days in 1.161(c)(2)(A) inconsistent with the 3 days in Rule 1.161(b)(1).
f. Subdivision (c)(2)(B)—The time limit of 5 (or 3) days for setting a hearing, assumes that hearing times will be available from the court and will be accepted by the movant (ignoring scheduling conflicts with the opponent). The complex hearing date selection will often take more than 3 or even 5 days. Should the meet and confer include discussions of availability for a hearing?
g. Face-to-face or phone conferring is certainly preferable, but in the reality of today's world, excluding emails seems unwise. Is it actually in the best interests of the parties/court to prohibit meet and confers via email?

Such communications also have the advantage of recording what was said.

h. Subdivision (c)(5)—This provision seems to require a separate filing of a Certificate of Compliance. The certificate should be incorporated into the motion, saving another document.
i. Subdivision (e)—While the phrase "ex parte" has a general meaning that it is a motion served without notice to the opponent(s), it is an undefined term in the rules. Jacksonville (4th Circuit), and perhaps others, uses the same phrase for "simple motions", although we believe notice is given. The phrase should be defined.
j. Subdivision (f)—The categories of "emergency" seem too restrictive. They also leave no room to empower a judge by vesting a judge with any discretion. Also, repeating the sanctions threat here is unnecessary. Judges' reluctance to grant sanctions does not create a need to see a sanction power repeated. Can a judge sanction a party/attorney for a violation of other subdivisions? Repetition serves no valid rule purpose.
k. Subdivision (g)—This provision only permits the movant to request an evidentiary hearing by requiring the title of the motion to request it. It does not provide a nonmovant a mechanism for such a request. The ability to request should be reciprocal.
l. Subdivision (i)—This provision fails to contain any briefing schedule for motions set for hearing. There should be a briefing schedule for motions to be heard.
m. Subdivision (j)— Subdivision 1.160(j), which concerns motions decided without a hearing, permits the trial court to rule on a motion summarily without a hearing and without any responsive memoranda filed by the nonmovant. In fact, subdivision 1.160(j)(1) can be read as permitting a responsive memorandum only when the nonmovant is directed by the Court to do so. This can

lead to a situation where a motion is decided without affording the nonmovant an opportunity to preserve their appellate record. This is a significant violation of due process and contrary to basic principles of our civil justice system.

n. Subdivision (j)—Subdivision 1.160(j)'s briefing schedule also creates unnecessary delay in the briefing schedule. There is no reason why a movant should be provided with two opportunities to file moving papers—one with the motion and the other with the supporting memorandum. The movant should be required to include an incorporated memorandum of law with its motion as is done in federal court. This effectively removes a 20-day delay in the briefing schedule. Further, there is no provision permitting the non-movant to seek leave to file a sur-reply, and that should be provided. It may be a better solution to simply adopt verbatim the type of local rule seen in the Southern District of Florida. The briefing schedule rule also has no page or character limits for the filings, and some default size limit is appropriate, absent court-approved expansion.
o. Subdivision (j)—Subdivision 1.160(j) also seems to impose a 50-day briefing schedule while proposed rule 2.215 of the Rules of General Practice and Judicial Administration allows the trial court 60 days to rule upon the briefing being completed. In other words, it may take potentially 100–120 days to obtain a ruling on any motion based on permitted time frames under the rules. Is this promoting faster resolution of cases? Many motions merely clear the way for some further procedure (deposition, responses to discovery, property inspection). The total time frame seems extended.
p. Subdivision (j)— Subdivision 1.160(j) also seems to create unnecessary work and costs for the parties in allowing the trial court to decide whether to permit a hearing after

the parties have already scheduled the hearing. It does not make sense for the parties to go through the process of scheduling a hearing only to then be told they will not be provided a hearing. The triggering event for the Court's decision should be the request for the hearing.

q. Subdivision (k)—The CPRC understands the concerns that judges and the Workgroup have when motions are not promptly noticed. If systems are in place in all circuits and divisions to assure that lawyers can get hearings within the specified 5 (or 3) days, subdivision (k) is less troubling. In any event, however, the concept of treating the motions not set promptly as abandoned (and denied) raises potential issues regarding and appeal or review from that order. Similarly, "deeming" a motion abandoned or denied leaves no order to review nor an effective date or rendition. If such motions are to be treated as abandoned or denied, the rule should expressly say that the denial is without prejudice.
r. Subdivision (l)—We realize that this paragraph was taken verbatim directly from current Rule 1.100(b), but the current rule is unclear. The CPRC suggests eliminating the archaic language (mesne process means intermediate, but so what?) and get rid of "applications" for relief. The proposals have just made clear that all requests for relief are by motion.

81. **Rule 1.161**

a. Subdivision (b)(1)—1.161(b)(1) is inconsistent with 1.160(c)(2) as 1.161 states that the movant shall schedule the hearing within 3 business days but 1.160 states the hearing should be scheduled within 5 days. Which time frame is applicable?
b. Subdivision (b)(3)— 1.161(b)(3) removes the ability of the parties to agree to a time to schedule a hearing where the agreed-upon date falls outside the delineated "reasonable

time" deadlines set forth in the rule. In such event, the rule then imposes the burden on the Court to schedule the hearing. This is not efficient and needlessly burdens the Court where the parties can otherwise agree to a hearing date. Also, the unilateral scheduling of hearings by the Court is likely to cause more motion practice and further delay due to scheduling conflicts.

c. Subdivision (b)(3)—this subdivision or proposed Rule 1.161 encourages, or certainly allows local deviations from the reasonable time for hearings of certain durations. If limited to emergencies, it may be harmless, but empowering different circuits to alter or deviate from statewide practices set up in a Supreme Court approved rules set should not be encouraged and may not be allowed under Rule 2.215(e).
d. Subdivision (c)—the rule should explicitly provide that any communications to a court in an emergency setting must be delivered to all opposing counsel or self-represented parties by the same means. If hand delivery is used, it must be used for all.
e. Subdivision (d)— The CPRC noticed that this rule does not expressly mention sanctions. Since the availability or wisdom of scheduling another hearing on an attempt to reschedule a specially set hearing may be difficult, and since many specially set hearings have to be cancelled and rescheduled for compelling conflicts [other cases or personal] over which an attorney has no control, the appearance at the scheduled time to "show cause" is not realistic. There may be no time to give the Court more notice, the Court may not "rule" on an agreed order before the date, and due to illness or other judges insisting on trials, etc., the appearance at the scheduled time may be physically impossible.

82. **Rule 1.190**

a. Comment Numbering Convention—the proposed rule would insert (b) and renumber (b) through (f) to (c) through (g), respectively. To avoid confusion regarding any decisions or analysis for the original version of Rule 1.190(a)–1.190(f), it would be preferable to insert proposed subdivision (b) as subdivision (g) to leave the prior rule numbering sequence undisturbed.

b. Subdivision 1.190(b)(1)–(i) the common standard for stating "discovery" rules is "knew or should have known" to encompass those situations when the party who is going to seek leave to add a *Fabre* defendant possessed actual knowledge the defendant existed or should have known the defendant existed by exercising reasonable diligence and is an appropriate party. Because there are many cases analyzing the should have known standard, it makes sense to use the same phrase rather than should or have known as proposed, and (ii) if the standard remains should or could have known, the 15-day period is short because the identity needs to be established that a particular *Fabre* defendant belongs in the case should allow enough time to avoid prejudice associated with moving to amend after learning facts that another defendant exists.

83. **Rule 1.200**

a. The CPRC recognizes the important role this rule plays in the overall package of rule changes, and generally accepts the quality of the proposal.
b. The CPRC has concerns about front-loading as many of the requirements that need to be addressed and resolved as this rule incorporates.
c. The CPRC anticipates that there will be an increase in motion practice as parties have difficulty meeting deadlines that are set at the outset of a case. We have

concern for the typical trial division's ability to absorb this much change all at once.

d. As a result, the CPRC has suggested above that the Workgroup consider adopting the attached amendment to Rule 1.280, which front-loads those case issues—discovery—that are generally known early in the case. Then, under court guidance and subsequent case management conferences, the additional topics can be added in later case management orders. This would obviously require that proposed Rule 1.200 be scaled back, but many of the "take charge" concepts could still be implemented.
e. If this scaled back initial plan finds any support at the Workgroup, the CPRC will be happy to work on a slightly different Rule 1.200, delaying some aspects of the court's management until a more appropriate time in the development of a case.
f. The CPRC feels that this approach would reduce the initial shock to the civil justice system the present package of rules might very well have.
g. Subdivision (h)(5)—As above, the word "revisiting" is not normally recognized in these rules. Reconsider or reconsideration would be more consistent.
h. Subdivision (h)(6)—The issue of repeating the sanction power of the Court has been dealt with extensively above. The CPRC urges that it be said once.
i. Subdivision (e)(3)(D)(i)(16)— The phrase "dispositive motions" is used in this rule as meaning one coming at the end of the case, such as a motion for summary judgment. The phrase, however can also include initial rule 1.140 motions. When the phrase is used in this rule at the very start of the case, before initial motions to dismiss may have been resolved, confusion in practice can result. Normally when trial orders calling for deadlines in filing "dispositive motions" are issued under

current practice, all motions to dismiss have been resolved and by that time the phrase clearly means essentially summary judgment-type motions. Rule 1.140 motions cannot simply be excluded from this provision because motions for judgment on the pleadings can be employed late in a case, as a dispositive motion. Delaying this procedure until later in the case management regimen would solve any confusion.

j. Subdivision (e)(3)(F)— This provision empowers circuit and chief judges to vary from the statewide procedures for certain kinds of cases, to apply uniformly, but only uniformly within that circuit. This empowerment seems unwise, and possibly in violation of Rule 2.215(e). Because of the pandemic-induced case management crisis, circuits were directed to create administrative orders immediately to handle the emergency situation. Now that the Court will be given a comprehensive new rule applicable to all circuits, local courts should no longer be able to vary statewide practices. The days when lawyers practiced almost exclusively in one or two counties are long past. We have statewide rules to insure the uniformity of practice across all twenty circuits.

k. Subdivision (f)(2)—Individual deadlines can be extended by agreement, but only by complying with Rule 1.460(a). The CPRC feels the client consent in writing in Rule 1.460(a) is unnecessary, and is even more unnecessary here, where any possible extension of time is even lower on the importance scale.

84. **Rule 1.201**

a. The CPRC continues to support the use of Rule 1.201, largely unchanged here. The CPRC has discussed above its uncertainty as to why the motions rules, or at least Rule 1.160, do not apply here.

85. **Rule 1.271**

a. The CPRC feels that the creation of a Pretrial Coordination Court (PCC) is a worthwhile exercise. It is unknown how often the PCC would be used in a single county or circuit. It might be a test or trial run for a statewide multi-district litigation-type rule.

b. Subdivision (c)(1)(A)(v)—a meet and confer, or "consultation" may be challenging when there are multiple cases and the non-moving parties (*i.e.*, other defendants who remain unserved) are not aware a case exists.

c. Subdivision (c)(10)(B)—The severance motion is vague. It seems like the proposal is that a party who opposes a transfer order may move to sever the case from the PCC process. But the severance procedure is confusing. It appears as though the intent is to have a motion to sever deemed granted if the administrative judge does not rule on it. Denying the motion results in leaving the transfer order undisturbed. An alternative could be to have the administrative judge enters an order of transfer, the case is transferred as of that date unless the trial court grants a motion to sever or a motion to sever remains pending for 14 days after an order of transfer in which case the motion to sever shall be deemed granted.

d. Subdivision (f)(2)—This proposed rule eliminates the trial court's discretion to evaluate the circumstances it faces with a particular trial between parties who the PCC has remanded to the trial court for the trial. For evidentiary rulings only, they are subject to change, but the trial court must state the reasons on the record citing to specific findings and conclusions. The alternative is to leave all PCC orders subject to change provided the trial court supports the decision with specific fact findings and the legal authority (*see* 1.271(f)(3).]

86. **Rule 1.275**

a. The Sanctions Rule has been discussed in detail above.
b. Subdivision (b)(7)—Reducing the number or peremptory challenges seems an extreme, unfair, and illogical punishment for pretrial conduct. The CPRC suggests that it be removed from the list of possible sanctions.
c. As discussed above CPRC suggests consideration of the concept of creating two levels of judicial response to noncompliance—the lower level which seeks only to level the playing field by shifting costs, and the most significant level— true sanctions—for misconduct.
d. Subdivisions (b) vs. (d)—standard to avoid costs or sanctions. If "good cause" is the same as "substantial justification," then one phrase should be used consistently. If the phrases have different meanings, then they should be defined so their difference is apparent.
e. Subdivision (i)—as discussed above, it is inappropriate to apply an "abuse of discretion" standard for matters of law. As stated, the provision is legally too broad.
f. The rule gives no guidance to a judge on when to sanction the attorney, when to sanction the party, and when to sanction both. Because of the serious effect that hearings on the matter can have on the attorney-client relationship, some clarity on this distinction should be provided in a construct that anticipates an increase in the use of sanctions.

87. **Rule 1.279**

a. This Rule was discussed extensively above. As hortatory, it is fine; in a rule of procedure where precision and clarity are the goals, expectations and creeds have little place. If the potential to use the vague expectations "etc." as a basis for sanctions were removed, their inclusion is less inappropriate. See especially the second sentence of subdivision (b)(2)(B).

b. Subdivision (c)—the potential penalties for "frustrating the Court's purpose" seem especially vague and inappropriate.

88. **Rule 1.280**

a. The use of an amended Rule 1.280 for initial disclosures and for the supplementation of discovery responses is applauded. This rule, as revised by the CPRC on first reading and as attached hereto and discussed above, forms the basis for CPRC's suggested revision to the scope of this package of rules and Rule 1.200 especially. This suggested approach would phase in the court's control and implement it first on the parts of the pretrial work that must be done first.

b. Subdivision (a)(1)(E)—If the Workgroup continues to prefer its version of a revision to Rule 1.280 over that of the proposed CPRC revision, the text of subdivision (a)(1)(E) might need to be clarified. No form interrogatories are proposed in the Report although there are form interrogatories in the existing rules, in Appendix I. Assuming those are the forms referred to, one question is whether this provision will require the use of a form set. The current rules only require that the form questions be used if interrogatories are sent, but they need not be sent. And a party need not incorporate all of the form questions.

89. **Rule 1.310**

No comments

90. **Rule 1.320**

No comments

91. **Rule 1.335**

a. Subdivision (a)—As discussed above, the general decorum expected in court is a proper standard for conduct in a deposition. As stated, however, it can easily be construed to change the proper level of conduct by attorneys in dealing with the witness being deposed, and with other witnesses. It is not believed that was an intended change.
b. The repeated references to sanctions in subdivisions (e), (f), and (g) are unnecessary and perhaps counterproductive.

92. **Rule 1.340**
a. The CPRC agrees with the change proposed in subdivision (a) regarding responses to unobjected to interrogatories and has no other comments.

93. **Rule 1.350**
a. The CPRC agrees with the change proposed in subdivision (b) regarding responses to unobjected to requests to produce and has no other comments.

94. **Rule 1.351**
a. The CPRC agrees with the change proposed in subdivision (b) regarding responses to unobjected to requests to produce and has no other comments.

95. **Rule 1.370**
a. The CPRC generally agrees with the changes to Rule 1.370, but questions whether the continuation of the three criteria for a mandatory award of fees for a failure to admit properly recognizes the current law that fees are not to be awarded for denials of admissions that go to contested key issues in the case.

96. **Rule 1.380**

a. Subdivision (a)(2)(F)—The final phrase of (F) is questionable because a party requesting an examination is under no obligation to pursue a request after a proper objection. After a proper objection, the party pursuing a compulsory medical examination ("CME") might elect not to pursue the CME. Instead of allowing that kind of reasonable response, subdivision (F) appears to require the requesting party to continue pursuing the CME.
b. Subdivision (a)(5) and (6)—These provisions turn every discovery motion into an automatic sanctions hearing against the losing party, although it is not clear if that conduct requires a second hearing, or if the sanctions hearing automatically becomes a part of the initial hearing, without further notice. It presumes an inappropriate position taken by the losing party on any discovery motion and requires all losing parties to provide contradictory evidence. That should not be an automatic result for any motion. This is largely continued from the current rule, but is contrary to professional practice. The issue of whether a separate hearing is required also implicates notice and proof problems for the amount of any "sanction" or the need for expert testimony.
c. Like Rule 1.275, no guidance is given as to how sanctions should be split among the attorney and the client. As stated above, this threatens the attorney-client relationship.
d. **Former** Subdivision (b)(2)—this important subdivision has been deleted and not replaced. The CPRC considers the failure of a corporate or other organizational entity to designate a representative to respond to a proper notice or subpoena, to designate sufficient individuals, or to present individuals adequately prepared to fulfill the obligations set forth in Rule 1.310(b)(6) a serious discovery violation, and one that plagues many civil cases

with corporate/organizational parties. In light of the Supreme Court's recent amendment to civil rules relating to the Apex Doctrine, it is especially important that corporate representations and other organizations designate proper deponents and present them for depositions with the required knowledge. The CPRC urges that the language is not deleted.

97. **Rule 1.410**
No comments

98. **Rule 1.420**
a. The proposed change shortens the required period of inactivity from 10 months to 6. The CPRC has no objection to that shortening so long as there is an appropriate ability to remedy the delay.
b. It must be remembered that there are sometimes significant repercussions of this type of dismissal, even if "without prejudice". If a statute of limitations has run, the dismissal is effectively with prejudice.
c. As discussed above, in an attempt to make the avoidance of dismissal more difficult, the rule starts with trying to establish a standard of proof beyond good cause, to "extraordinary cause." This is defined in (e)(1)(A) as when the lack of activity is caused by something unforeseen and explicitly excludes "good cause" or "excusable neglect." This unnecessarily eliminates the trial court's discretion to determine whether there is justification for the case to remain pending.
d. The conduct allowed in (e)(1)(B) to keep a case alive is substantially limited because, as a practical matter, many/most of the actions recognized will not be available in practice after 1.200 is amended. They will already have been done. The trial will have already been set. The court will have already set pretrial deadlines. Consequently,

there is almost no approved action to continue or reactivate a case.

e. If the case is one where no fully dispositive motion is legally available (as where a summary judgment on all issues—the entire action—cannot be properly or ethically requested), the passage of 6 months is the unavoidable death knell for that case. Why would a significant partial summary judgment not be sufficient? Or other significant action moving the case forward? This appears to be a harsh result, especially if a statute of limitations has run.
f. Subdivision (e)(4) requires the parties to "serve" the motion and any response "on the presiding judge pursuant to rule 1.080." Judges are not routinely served under rule 1.080. The parties perhaps should be required to "provide" the motion and response to the presiding judge. Additionally, while the sending of these documents to judges makes sense, it will create a substantial difference in the practice in most chambers; emails will not put the Court on formal notice of actions, some requiring timed responses.
g. Subdivision (e)(5) is confusing and contradictory in light of the proposed amendments, because "mere inaction" would not be a sufficient reason to dismiss a case if the court is asked. If the rule is adopted as written, CPRC suggests deleting subdivision (5), or modifying it to say that mere inaction is not sufficient for the court to dismiss a case sua sponte.
h. Inactivity for 6 months is not to be encouraged, but it should not in most cases be fatal.
i. If this rule is approved as drafted, Form 1.989 will need to be revised as well.

99. **Rule 1.440**

a. No comments to the text of the rule. As discussed above, however, the Workgroup's proposed Comment to this

Rule gets the issue of court discretion in granting continuances just about perfectly. The contrast with propose new Rule 1.460, however, is jarring.

100. **Rule 1.460 Continuances**

a. The proposed Comment to Rule 1.440, describing the trial court's broad discretion under proposed new Rule 1.460 in addressing scheduling problems, is in the CRPC's view, a much more appropriate tone to empowering judges to act within their discretion than the somewhat harsh limitations on any discretion placed in this rule.
b. The CPRC's position is that a request for a continuance should not be disfavored [*i.e.*, negative inference], so much as it should simply not receive a preference. Continuances are occasionally needed, and should not be automatically denied. They should be met with a discerning evaluation of the need for a continuance.
c. Some of the language selected (extraordinary unforeseen circumstances, extraordinary cause, cure, dire circumstances) could be edited to be consistent with terminology that has been defined in other rules.
d. The meet and confer requirement does not need to be repeated in either (a) or (b).
e. Subdivision (a)(1)—The CPRC feels that the requirement of a client's signed written agreement to "continue" a scheduled hearing on a non-final matter is unnecessary, and perhaps counterproductive. That degree of "client control or communication" is not required by the Rules Regulating the Florida Bar.
f. Subdivision (b)(2)—The CPRC feels that the requirement of a client's signed written agreement to "continue" a scheduled hearing on a non-final matter is unnecessary, and perhaps counterproductive. That degree of "client

control or communication" is not required by the Rules Regulating the Florida Bar.

g. Subdivision (b)(6)—The categories of reasons in Rule 1.460(b)(6) that a judge is absolutely precluded from using as a basis for a continuance destroy any meaningful judicial discretion or empowerment. These proscribed categories can, in a proper case, fully support a continuance, but the proposed rule forbids trial courts from recognizing these as proper bases for a continuance in a proper case. For example, if there was "extraordinary cause" for why discovery could not be completed, then it would be manifestly unjust to deny a continuance of the trial for failure to complete discovery. If the mediator died the day before a mediation that was set just before the mediation deadline, that would obviously be a unique situation that could justify a continuance (especially where the parties believed settlement was possible). There are a myriad of other potential examples. The point is that stripping the trial court of the ability to make any discretionary calls on what will or will not justify a continuance will have unintended, and sometimes unjust, outcomes.

h. Subdivision (b)(7)— The discussion in Rule 1.460(b)(7) and the times for amendments might be better placed in Rule 1.190.

i. Subdivision (b)(9)—The requirement of a detailed factual order for granting a continuance should apply to orders denying a continuance as well. Each party should have a detailed order for review.

j. Subdivision (b)(11)—The rule (1.460(b)(11)) states that continuance orders "shall benefit from the presumption of correctness." This is true but is also true of all judicial orders. The phrase is unnecessary and therefore suggests a greater "correctness" to these orders compared to all

the others that do not get a stated presumption of correctness in their rule.

k. Subdivision (b)(11)—The standard of review for orders with factual findings is "abuse of discretion" or clearly erroneous, not "gross abuse of discretion." There is such a standard in very limited cases (Rule 1.540), but this does not seem appropriate for the continuance type of motion. Moreover, the CPRC questions whether a civil rule of procedure is the appropriate place for an appellate standard of review to exist. There is one in Rule 1.061, but that seems an outlier.

101. **Rule 1.650**
No Comments

102. **Rule 1.820**
No Comments

103. ***Form* 1.989**

a. The form Notice of Lack of Prosecution states that the case will be dismissed "if no stay is issued or approved during such 60-day period[.]" But, proposed Rule 1.420(e)(1)(b) only requires the motion to be filed and set for hearing. This inconstancy needs be addressed.

b. The form Order Dismissing Case for Lack of Prosecution says "there was no record activity during the 60 days" before the notice. It should use the new term "post-notice record activity."

104. **Rule 2.215**
No Comments

105. **Rule 2.250**
No Comments

106. **Rule 2.251**

a. The rule is misnumbered and needs to be placed in Part IV or V, which relate to attorneys.

b. The sanction reference is both unnecessary and excessive. This innocuous administrative rule could not possibly rise to a *Kozel* level of misconduct. There is neither a need to repetitively mention sanctions nor to invoke the threat of ultimate sanction in a situation that could not authorize it.

107. **Rule 2.550**
No Comments

108. **Rule 7.020**
No Comments

109. **Rule 7.070**
No Comments

110. **Rule 10.420**
No Comments

The Methodology Utilized by the CPRC in Reviewing the Report and Compiling This Comment

111. On August 9, 2021, the Clerk of the Supreme Court, John Tomasino, notified Jason Stearns, Chair of the CPRC, of the request for CPRC comment on the Workgroup Report, with a deadline of October 1, 2021

112. A committee of 15 CPRC members was selected, and, following preliminary emails concerning the scope of the project, the time it would take, and an identification of certain broad issues, the initial meeting of the subcommittee was held on August 19, 2021. (All meetings were held by Zoom.)

113. At that meeting the subcommittee broke down into 6 smaller working groups, with each group assigned from 2 to 4 of the 41 rules and forms for which the Workgroup had made recommendations. Each group then proceeded to perform a deeper analysis into their rules, reporting back to the subcommittee at various subsequent meetings.

114. The full subcommittee has met eight (8) times over the ensuing 3 weeks to receive and discuss the reports of the various groups and to further collectively attempt to reach consensus on as many observations about the theory, the thrust, and the specific proposals contained in the Report. In addition to the meetings of the full subcommittee, the six groups met at least an additional 15 times over the three weeks.

115. The subcommittee had the benefit of two judicial members on the CPRC but had no access to any member of the Supreme Court, nor did the subcommittee have any research staff or other technical support.

116. The above work of the subcommittee led to the creation of a draft CPRC Comment which, following several drafts being circulates and review and discussion by the subcommittee, was forwarded to the full CPRC for its review and input. The full Committee met and approved this Comment by a vote of 29-0, with three abstentions.

We appreciate the opportunity to review and comment on the Workgroup's draft. If we can provide any additional assistance, we are prepared to do so.

Sincerely,

/s/ Jason Stearns

Jason Stearns, Chair
Civil Procedure Rules Committee

cc: Justice Ricky Polston, Liaison
Judge Robert Morris, Chair, Workgroup
John Tomasino, Clerk of Court
Michael Tanner, President, The Florida Bar
Joshua Doyle, Executive Director, The Florida Bar
Lisa Kiel, State Courts Administrator
Ali Sacket, State Courts Administrator
Diane West, Director of Central Staff, Florida Supreme Court

RULE 1.280. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Initial Discovery and Discovery Methods.

(1) Initial Disclosure

(A) In General. Except as exempted by rule 1.280(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation for each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 1.350 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 1.350, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a state statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the state;

(vii) a proceeding ancillary to a proceeding in another court;

(viii) an action to enforce an arbitration award; and

(ix) an action utilizing Florida Small Claims Rules.

(A) Time for Initial Disclosures—In General. A party must make the initial disclosures at or within 14 days after the parties' Rule 1.280(f) conference, or within 30 days after filing an Answer in a case, whichever is later, unless a different time is set by stipulation or court order, or unless a party objects timely that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(B) Time for Initial Disclosures—For Parties Served or Joined Later. A party that is first served or otherwise joined after the Rule 1.280(f) conference must make the initial

disclosures within 30 days after filing an Answer in a case, unless a different time is set by stipulation or court order.

(C) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise and under subdivision (c) of this rule, the frequency of use of these methods is not limited, except as provided in rule 1.200, 1.340, and 1.370.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Indemnity Agreements. A party may obtain discovery of the existence and contents of any agreement under which any person may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or to reimburse a

party for payments made to satisfy the judgment. Information concerning the agreement is not admissible in evidence at trial by reason of disclosure.

(3) Electronically Stored Information. A party may obtain discovery of electronically stored information in accordance with these rules.

(4) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative, including that party's attorney, consultant, surety, indemnitor, insurer, or agent, only upon a showing that the party seeking discovery has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. Without the required showing a party may obtain a copy of a statement concerning the action or its subject matter previously made by that party. Upon request without the required showing a person not a party may obtain a copy of a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for an order to obtain a copy. The provisions of rule 1.380(a)(4) apply to the award of expenses incurred as a result of making the motion. For purposes of this paragraph, a statement previously made is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording or transcription of it that is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(5) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under

the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) By interrogatories a party may require any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) Any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial may be deposed in accordance with rule 1.390 without motion or order of court.

(iii) A party may obtain the following discovery regarding any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial:

1. The scope of employment in the pending case and the compensation for such service.

2. The expert's general litigation experience, including the percentage of work performed for plaintiffs and defendants.

3. The identity of other cases, within a reasonable time period, in which the expert has testified by deposition or at trial.

4. An approximation of the portion of the expert's involvement as an expert witness, which may be based on the number of hours, percentage of hours, or percentage of earned income derived from serving as an expert witness; however, the expert shall not be required to disclose his or her earnings as an expert witness or income derived from other services.

An expert may be required to produce financial and business records only under the most un-usual or compelling circumstances and may not be compelled to compile or produce nonexistent documents. Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and other provisions pursuant to subdivision (b)(5)(C) of this rule concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in rule 1.360(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(5)(A) and (b)(5)(B) of this rule; and concerning discovery from an expert obtained under subdivision (b)(5)(A) of this rule the court may require, and concerning discovery obtained under subdivision (b)(5)(B) of this rule shall require, the party seeking discovery to pay the other party a fair part of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(D) As used in these rules an expert shall be an expert witness as defined in rule 1.390(a).

(6) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 1.380(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Limitations on Discovery of Electronically Stored Information.

(1) A person may object to discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of burden or cost. On motion to compel discovery or for a protective order, the person from whom discovery is sought must show that the information sought or the format requested is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order the discovery from such sources or in such formats if the requesting party shows good cause. The court may specify conditions of the discovery, including ordering that some or all of the expenses incurred by the person from whom discovery is sought be paid by the party seeking the discovery.

(2) In determining any motion involving discovery of electronically stored information, the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from another source or in another manner that is more convenient, less burdensome, or less expensive; or (ii) the burden or expense of the discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(e) Supplementing Disclosures and Responses. A party who has made a disclosure under Rule 1.280 – or who has responded to an interrogatory, request for production, or request for admission (requests for admission are subject to the provisions of Rule 1.370.) – must supplement or correct its disclosure or response:

(1) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery proves or in writing; or

(2) as ordered by the court.

(ef) Sequence and Timing of Discovery. ~~Except as provided in subdivision (b)(5) or unless the court upon motion for the convenience of parties and witnesses and in the interest of justice orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not delay any other party's discovery.~~

(1) Timing. A party may not seek discovery from any source before the parties have conferred as required by Rule 1.280(f), except in a proceeding exempted from initial disclosure under Rule 1.280(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) Early Rule 1.350 Requests.

(A) Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 1.350 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) When Considered Served. The request is considered to have been served at the first Rule 1.280(f) conference.

(3) Sequence. Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(g) Conference of the Parties; Planning for Discovery.

(1) Conference Timing. Except in a proceeding exempted from initial disclosure under Rule 1.280(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event no more than 60 days after the first defendant is served.

(2) Conference Content; Parties' Responsibilities. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 1.280(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for

attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) Discovery Plan. A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 1.280(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include any agreement regarding privilege;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 1.280(c).

(~~f~~h) Supplementing of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired.

(gi) Court Filing of Documents and Discovery. Information obtained during discovery shall not be filed with the court until such time as it is filed for good cause. The requirement of good cause is satisfied only where the filing of the information is allowed or required by another applicable rule of procedure or by court order. All filings of discovery documents shall comply with Florida Rule of Judicial Administration 2.425. The court shall have authority to impose sanctions for violation of this rule.

(hj) Apex Doctrine. A current or former high-level government or corporate officer may seek an order preventing the officer from being subject to a deposition. The motion, whether by a party or by the person of whom the deposition is sought, must be accompanied by an affidavit or declaration of the officer explaining that the officer lacks unique, personal knowledge of the issues being litigated. If the officer meets this burden of production, the court shall issue an order preventing the deposition, unless the party seeking the deposition demonstrates that it has exhausted other discovery, that such discovery is inadequate, and that the officer has unique, personal knowledge of discoverable information. The court may vacate or modify the order if, after additional discovery, the party seeking the deposition can meet its burden of persuasion under this rule. The burden to persuade the court that the officer is high-level for purposes of this rule lies with the person or party opposing the deposition.

Committee Notes

1972 Amendment. The rule is derived from Federal Rule of Civil Procedure 26 as amended in 1970. Subdivisions (a), (b)(2), and (b)(3) are new. Subdivision (c) contains material from former rule 1.310(b). Subdivisions (d) and (e) are new, but the latter is similar to former rule 1.340(d). Significant changes are made in discovery from experts. The general rearrangement of the discovery rule is more logical and is the result of 35 years of experience under the federal rules.

1988 Amendment. Subdivision (b)(2) has been added to enable discovery of the existence and contents of indemnity agreements and is the result of the enactment of sections 627.7262

and 627.7264, Florida Statutes, proscribing the joinder of insurers but providing for disclosure. This rule is derived from Federal Rule of Civil Procedure 26(b)(2). Subdivisions (b)(2) and (b)(3) have been redesignated as (b)(3) and (b)(4) respectively.

The purpose of the amendment to subdivision (b)(3)(A) (renumbered (b)(4)(A)) is to allow, without leave of court, the depositions of experts who have been disclosed as expected to be used at trial. The purpose of subdivision (b)(4)(D) is to define the term "expert" as used in these rules.

1996 Amendment. The amendments to subdivision (b)(4)(A) are derived from the Supreme Court's decision in *Elkins v. Syken*, 672 So. 2d 517 (Fla. 1996). They are intended to avoid annoyance, embarrassment, and undue expense while still permitting the adverse party to obtain relevant information regarding the potential bias or interest of the expert witness.

Subdivision (b)(5) is added and is derived from Federal Rule of Civil Procedure 26(b)(5) (1993).

2011 Amendment. Subdivision (f) is added to ensure that information obtained during discovery is not filed with the court unless there is good cause for the documents to be filed, and that information obtained during discovery that includes certain private information shall not be filed with the court unless the private information is redacted as required by Florida Rule of Judicial Administration 2.425.

2012 Amendment. Subdivisions (b)(3) and (d) are added to address discovery of electronically stored information.

The parties should consider conferring with one another at the earliest practical opportunity to discuss the reasonable scope of preservation and production of electronically stored information. These issues may also be addressed by means of a rule 1.200 or rule 1.201 case management conference.

Under the good cause test in subdivision (d)(1), the court should balance the costs and burden of the requested discovery,

including the potential for disruption of operations or corruption of the electronic devices or systems from which discovery is sought, against the relevance of the information and the requesting party's need for that information. Under the proportionality and reasonableness factors set out in subdivision (d)(2), the court must limit the frequency or extent of discovery if it determines that the discovery sought is excessive in relation to the factors listed.

In evaluating the good cause or proportionality tests, the court may find its task complicated if the parties know little about what information the sources at issue contain, whether the information sought is relevant, or how valuable it may be to the litigation. If appropriate, the court may direct the parties to develop the record further by engaging in focused discovery, including sampling of the sources, to learn more about what electronically stored information may be contained in those sources, what costs and burdens are involved in retrieving, reviewing, and producing the information, and how valuable the information sought may be to the litigation in light of the availability of information from other sources or methods of discovery, and in light of the parties' resources and the issues at stake in the litigation.

Court Commentary

2000 Amendment. *Allstate Insurance Co. v. Boecher*, 733 So. 2d 993, 999 (Fla. 1999), clarifies that subdivision (b)(4)(A)(iii) is not intended "to place a blanket bar on discovery from parties about information they have in their possession about an expert, including the party's financial relationship with the expert."