5-30-84

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
APR 26 1984
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN RE: AMENDMENTS TO RULES OF CIVIL PROCEDURE.) NO. 65,083

RESPONSE TO PETITION OF THE FLORIDA BAR CIVIL PROCEDURE RULES COMMITTEE

HENRY P. TRAWICK, JR. as a member of The Florida Bar and of the Civil Procedure Rules Committee responds to the petition as follows:

1. Respondent admits the allegations of the petition.

2. Respondent agrees with the recommendations of the Civil Procedure Rules Committee contained in the report attached to the petition, except the proposals concerning Rules 1.200(a), 1.340(a), 1.500(c) and 1.530(b) and the comment of the Committee that the use of interrogatories, if approved by the Supreme Court under Form 1.976, is necessarily dependent on the adoption of the proposal concerning Rule 1.340(a), as more fully discussed in succeeding paragraphs of this response.

3. The Supreme Court has approved a number of forms for use in connection with the Rules of Civil Procedure. The forms are not mandatory, but they are sufficient for their various purposes when used. The Court can approve forms of interrogatories under the same arrangement without making the use of the forms mandatory by the proposed rule changes. Language similar to that used for the standard jury instructions can be used. Respondent agrees that the forms proposed will be useful for the types of actions to which they apply and submits that they should be approved, regardless of the action of the court in connection with the proposal on Rule 1.340(a). The problem with attempting to cure discovery abuse by the use of mandatory approved forms is the time and effort that must be spent to write, consider and obtain approval of many sets of interrogatories for the system to be effective. Because of the

number of marriage dissolutions filed, adoption of interrogatories applicable to dissolutions of marriage is a substantial advance. However, approving forms merely for those types of actions that are more numerous is not only a symptomatic treatment, rather than a philosophical one, but also does not help those lawyers and litigants in other types of action who need relief just as much. It is an invidious discrimination that is being trumpeted as a substantial solution to the problems of discovery abuse. It is nothing of the sort.

4. Respondent submits that the Committee has been remiss in its duty to the Court, the Bar and the public in failing to make more substantial proposals to solve discovery abuse. The Committee has labored for over five years in an attempt to do so. This gestation period has given birth to three recommendations to solve the problems. They are:

(a) the use of telephone depositions under the proposal to adopt Rule 1.310(b)(7). The proposal itself is not objectionable, but it is not likely to be much used and thus will not give needed relief;

(b) the use of form interrogatories when adopted by the Court under the proposal concerning Rule 1.340(a), discussed in the preceding paragraph;

(c) the proposal to adopt Rule 1.200(a) purporting to give trial courts more managerial authority by the use of case management conferences. Subdivision (a)(4) is the only part of it that deals with discovery and it purports to give trial courts the authority to limit, schedule, order or expedite discovery. All of this authority is presently possessed by trial courts. Proponents of the rule delude themselves when they think that trial courts will have the time to devote to case management at the same time that trial courts decline (and have declined for 30 years) to adjudicate discovery problems for lack of time (as well as the lack of inclination and, perhaps, the ability).

The recommendations do not dent the problem. The problem is inherent in the philosophy that gave birth to the federal Rules of Civil Procedure. Those rules were intended to use discovery and pretrial conferences to give substance to skeletal pleadings and

ultimately use a pretrial conference order as the basis for a trial. The system has not worked. It has created a monstrous and expensive procedure that is out of control and is, perhaps, not controllable in its present form.

5. It is generally recognized that written interrogatories are the most troublesome discovery device. Interrogatories were intended to be an inexpensive method of discovery since they would not require the use of a court reporter and the preparation of transcript. Instead, interrogatories have become as expensive as depositions and perhaps more so. Sets of interrogatories have been devised with the cunning and compexity of demurrers at common law. Some have hundreds of questions. Some have three pages of definitions. Answers to them are no longer honest or complete. It has become a contest between lawyers. One lawyer seeks to extract infinite detail while the other lawyer is attempting to evade or to avoid answering. This contest results in a waste of judicial time to settle unseemly discovery disputes, as well as the time and money of the litigants. More than any other discovery tool, interrogatories are being used to harass an opponent and cause him unnecessary expense because of their "fishing" scope and duplication of other discovery. It is likely interrogatories have gotten so far beyond reasonable control that they must be abolished. Certainly, interrogatories must be severely limited if they are to survive as an effective procedural tool. The Committee might have recommended federal Rule 26(d)(1), second paragraph.

6. In addition to the failure of Rule 1.200(a) to help solve discovery abuse, respondent objects to its adoption for the following reasons:

(a) It does not give trial courts any authority that they do not have;

(b) The Committee's comment even says that the proposal "...merely emphasizes the court's authority and arranges an orderly method for the exercise of that authority..." This procedure has been adopted by federal district courts in Florida. It results in expensive conferences with the trial judge that seldom, if ever, result in any effective dimunition in time and expense for the clients. For example, attendance by respondent at a status of case conference in federal district court in Tampa inevitably costs a client $500 so that the trial judge can be told what should appear from the court file anyway and has never resulted in an order that effectively shortened an action.

(c) The case load for trial judges is already too heavy for them to effectively use the procedure;

(d) If the experience on pretrial conferences is any indication of effectiveness, the proposed procedure will not expedite litigation nor resolve issues. Most pretrial conferences in Florida consist of an exchange of witness and exhibit lists and little else. Some judges want a list of the pleadings on which the trial will be conducted and a statement of the issues as though the court file did not already disclose that. Be that as it may, respondent submits that it will simply be a waste of time and money.

7. Respondent opposes proposed Rule 1.500(c) because an attempt is being made to repair something that is not broken. The rule has worked satisfactorily for 16 years. When the Committee first considered the rule in 1967, the present proposal was also considered. It was rejected because of a fear that the clerks would forget to send the notice after docketing and filing the papers while it was unlikely that a clerk would file something that he was forbidden to file. The purpose of returning the papers is to give the defaulted party notice of the default. The present rule works well. It has not caused any procedural problem. A small group of lawyers, generally those representing defendants, erroneously believe that filing their papers after default will help in vacating the default. There is no indication in the decided cases that it will.

8. Respondent opposes Rule 1.530(b) because it is much ado about nothing. The problem it seeks to resolve was solved by this

Court in Casto v Casto, 388 So2d 1 (Fla. 1980). The present procedure does not cause a problem in the trial courts. The district courts of appeal believe a problem exists because a uniform time for filing a motion for a new trial or for rehearing does not exist nor is there a definite date of record on which they can depend in determining whether an appeal is timely. This proposal emanated from a district court of appeal. It merely adds 11 words to the rule in an attempt to make the date of filing of a motion for rehearing more definite. If the revised version of the Committee is used, it merely adds three words in an attempt to make the date for a motion for rehearing definite and changes "rendition" to "return" for a verdict. Respondent submits there is no difference between a verdict being rendered or returned. Judge Arnow would say we are tinkering. He would be right. The actual problem is the lack of a uniform procedure for the entry of judgment in jury and nonjury trials. Until that question is resolved, no improvement can be effected to the present rule. There is no problem about the entry of a nonjury judgment. The problem occurs in the entry of judgments based on a jury verdict. In some circuits the judgment is entered immediately. In other circuits a judgment is not entered until after the time has elapsed for filing a motion for new trial. If a motion for new trial is filed, entry of the judgment is deferred until the motion for new trial is determined. The Committee declined to take any action on proposals to make the practice on the entry of nonjury verdicts uniform throughout Florida. Respondent submits that a new rule should be adopted on the entry of judgments, specifying that judgments rendered on jury verdicts will be entered immediately. If the court grants a new trial subsequently, the rule should require the vacating of the judgment as well as the granting of the new trial. Rule 1.530(b) can then provide that both motions for new trial and for rehearing

shall be served not later than ten days after the judgment is filed with the clerk. The record time problem on appeals will then be resolved.

9. The Committee declined to recommend the following proposals:

(a) to eliminate the expensive and time-consuming predicate for obtaining discovery from experts and the conflict between Rule 1.310(b) and Rule 1.390;

(b) to abolish the plea of without knowledge by a defending party and substitute a denial;

(c) to strengthen the sanctions in Rule 1.380 so that parties cannot escape paying for the delay and expense they cause in disrupting the discovery procedure;

(d) to limit the number of initial interrogatories to not more than 25;

(e) to correct Form 1.907 to comply with the statutory requirement of § 77.031(2) Florida Statutes prescribed in notice to the defendant that he has a right to a hearing for dissolution in prejudgment garnishment;

(f) to change Form 1.961(a) to refer to garnishment after judgment, instead of simply garnishment, and to add a new subdivision (d) changing the condition of the bond to include attorney's fees in garnishment before judgment in accordance with § 77.031(3) Florida Statutes;

A form for each of these proposals is attached in the format required by this court and the reason for the proposal is discussed in the appropriate column for the proposal.

The undersigned certifies that a copy of the foregoing has been furnished to William O. E. Henry as president of The Florida Bar, Gerald F. Richmond as president elect of The Florida Bar, John F. Harkness, Jr. as executive director of The Florida Bar and Wilfred C. Varn as chairman of the Civil Procedure Rules Committee of The Florida Bar by mail on April 24, 1984.

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PRESENT RULE

RULE 1.110. GENERAL RULES OF PLEADING.

(a) (NO CHANGE RECOMMENDED)

(b) (NO CHANGE RECOMMENDED)

(c) The Answer. In his answer a pleader shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments on which the adverse party relies. If the defendant is without knowledge, he shall so state and such statement shall operate as a denial. Denial shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part of an averment, he shall specify so much of it as is true and shall deny the remainder. Unless the pleader intends in good faith to controvert all of the averments of the preceding pleading, he may make his denials as specific denials of designated averments or he may generally deny all of the averments except such designated averments as he expressly admits, but when he does so intend to controvert all of his averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial.

(d) (NO CHANGE RECOMMENDED)

(e) (NO CHANGE RECOMMENDED)

(f) (NO CHANGE RECOMMENDED)

PROPOSED RULE

RULE 1.110. GENERAL RULES OF PLEADING.

(a) (NO CHANGE RECOMMENDED)

(b) (NO CHANGE RECOMMENDED)

(c) ~~The~~ Answer. In his answer a pleader shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments on which the adverse party relies. If the defendant is without knowledge, he shall ~~so state and such statements shall operate as a denial.~~ deny the averment. Denial shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part of an averment, he shall specify so much of it as is true and shall deny the remainder. Unless the pleader intends in good faith to controvert all of the averments of the preceding pleading, he may make his denials as specific denials of designated averments or he may generally deny all of the averments except certain designated averments as he ~~expressly~~ admits, but when he does ~~so~~ intend to controvert all of ~~its~~ the averments, including averments of the grounds ~~upon~~ which the court's jurisdiction depends, he may do so by general denial.

(d) (NO CHANGE RECOMMENDED)

(e) (NO CHANGE RECOMMENDED)

(f) (NO CHANGE RECOMMENDED)

REASON FOR PROPOSED AMENDMENT

RULE 1.110. GENERAL RULES OF PLEADING.

The plea of without knowledge acts as a denial. It creates a third possible response to a pleading seeking affirmative relief. It is not necessary since it effects a denial.

Members of the Committee believed there was an ethical problem involved in eliminating the plea of without knowledge. They could not understand that if this Court approves the change, no ethical consideration could arise.

The proposal is merely a housekeeping change. It is intended to make pleading simpler.

PRESENT RULE	PROPOSED RULE	REASON FOR PROPOSED AMENDMENT
(g) (NO CHANGE RECOMMENDED)	(g) (NO CHANGE RECOMMENDED)	
(h) (NO CHANGE RECOMMENDED)	(h) (NO CHANGE RECOMMENDED)	

PRESENT RULE

RULE 1.280. GENERAL PROVISIONS GOVERNING DISCOVERY.

(a) (NO CHANGE RECOMMENDED)

(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 parties 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 grounds 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) Trial Preparation: Materials Subject to the provisions of subdivision (b)(3) of this rule, a party may obtain discovery of documents and other 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 his

PROPOSED RULE

RULE 1.280. GENERAL PROVISIONS GOVERNING DISCOVERY.

(a) (NO CHANGE RECOMMENDED)

(b) Scope Generally. Unless limited by court order ~~of the court~~ in accordance with these rules and except as provided in subdivision (c), ~~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, except as provided in Rule 1.340(b). Subject to Rule 1.340(b), ~~It~~ it is not grounds for objections that information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) Scope Trial Preparation ~~Materials~~.

(1) ~~Subject to the provisions of subdivision (b)(3) of,~~ a A party may ~~obtain discovery of~~ discover 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 his attorney,

REASON FOR PROPOSED AMENDMENT

RULE 1.280. GENERAL PROVISIONS GOVERNING DISCOVERY.

The proposed revision of this rule eliminates the time consuming and unnecessary predicate for taking the deposition of an expert witness who will be used at trial Generally the time consuming predicate is eliminated by stipulation at the present time. It might as well be since Rule 1.390 permits an expert's deposition without following the time consuming predicate in Rule 1.280(b). Certainly, this will eliminate unnecessary interrogatories and permit obtaining discovery from an expert in the least harassing manner. It also permits a more complete examination of the expert so that the parties can more adequately prepare for trial. It is a rare occasion when the deposition of an expert is not taken and there is no valid reason why the Rules of Civil Procedure should not accord with existing practice. The change will tend to eliminate one area of evasive tactics about discovery commented on in the American Bar Foundation pilot project on discovery abuse in Chicago. The very few comments made at the discussion in the committee on the proposal showed an inclination to preserve the ability to use evasive tactics in discovery.

PRESENT RULE	PROPOSED RULE	REASON FOR PROPOSED AMENDMENT
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 his case and that he 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 and 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.	consultant, surety, indemnitor, insurer or agent, only ~~u~~pon a showing that the party seeking discovery has need of the material in the preparation of his case and that he 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 or a person not a party may obtain a copy of a statement concerning the action or its subject matter previously made by that party or person. ~~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 party or person may move for an order to obtain a copy. ~~The provisions of~~ Rule 1.380(a)(4) ~~apply~~ applies to the award of expenses incurred ~~as a result of~~ for 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 made by any means that is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.	

PRESENT RULE	PROPOSED RULE	REASON FOR PROPOSED AMENDMENT
(3) 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 as follows: (A) 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. Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions pursuant to subdivision (b)(3)(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.	(2) ~~Trial-Preparation:-Experts:~~ (substantial rewording of subsection) The depositions of persons expected to be called by any party as an expert witness at trial may be taken in the same manner as other depositions. The identity and subject matter on which the expert is expected to testify may be obtained by interrogatory before taking the deposition. Discovery of an expert who has been retained or specially employed by a party in anticipation of litigation or preparation of trial and who is not expected to be a witness at trial may by obtained only as provided in Rule 1.360(b) or on 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. The court shall require the party seeking discovery to pay the expert witness a reasonable fee for time spent in responding to discovery and a fair part of the fees and expenses reasonably incurred by the party retaining the expert witness in obtaining facts and opinions from the expert.	

PRESENT RULE	PROPOSED RULE	REASON FOR PROPOSED AMENDMENT
(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 subdivision (b)(3)(A) and (b)(3)(B) of this rule; and obtaining discovery from an expert obtained under subdivision (b)(3)(A) of this rule may require, and concerning discovery obtained under subdivision (b)(3)(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.		
(c) (NO CHANGE RECOMMENDED)	(d) (FORMER SUBDIVISION (c) WITH NO RECOMMENDED CHANGE EXCEPT RELETTERING)	
(d) (NO CHANGE RECOMMENDED)	(e) (FORMER SUBDIVISION (d) WITH NO RECOMMENDED CHANGE EXCEPT RELETTERING)	
(e) (NO CHANGE RECOMMENDED)	(f) (FORMER SUBDIVISION (e) WITH NO RECOMMENDED CHANGE EXCEPT RELETTERING)	

PRESENT RULE

RULE 1.340. INTERROGATORIES TO PARTIES.

(a) Availability; Procedure for Use. Any party may serve upon any other party written interrogatories to be answered by the party to whom the interrogatories are directed or, if that party is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish the information available to that party. Interrogatories may be served on the plaintiff after commencement of the action and on any other party with or after service of the process and initial pleading upon that party. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to in which event the reasons for objection shall be stated instead of an answer. The answers shall be signed by the person making them and the objections signed by the attorney making them. The party to whom the interrogatories were directed shall serve a copy of the answers and any objections within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the process and initial pleading upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 1.380(a) with respect to any objection to or other failure to answer an interrogatory.

PROPOSED RULE

RULE 1.340. INTERROGATORIES TO PARTIES.

(a) Availability; Procedure. ~~For Use~~ Any party may serve upon any other party written interrogatories to be answered (1) by the party to whom the interrogatories are directed or, (2) if that party is a public or private corporation or a partnership or association or governmental agency, by any officer or agent~~,~~ who shall furnish the information available to that party. Interrogatories may be served on the plaintiff after commencement of the action and on any other party with or after service of the process and initial pleading ~~u~~pon that party. Initial interrogatories shall not exceed 25, including all subparts, unless the court permits a larger number on motion and notice and on good cause. Subsequent sets of interrogatories shall not exceed ten, including subparts, unless the court similarly orders otherwise. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to in which event the reasons for objection shall be stated instead of an answer. The answers shall be signed by the person making them and the objections signed by the attorney making them. The party to whom the interrogatories were directed shall serve ~~a copy of~~ the answers and any objections within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the process and initial pleading ~~u~~pon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 1.380(a) ~~with respect to~~ on any objection

REASON FOR PROPOSED AMENDMENT

RULE 1.340. INTERROGATORIES TO PARTIES.

This is a first step toward limiting the abusive effect of interrogatories. A lengthy discussion of the problems of and distaste for interrogatories would repeat what has been said in paragraph 5 of the response and what is well known among members of the bench and bar.

The proposal limits initial interrogatories to 25 and subsequent sets to ten unless the court orders otherwise.

This system has been used in federal district courts, but respondent does not know what success has resulted. The forms of interrogatories being submitted for approval in connection with the Committee's proposal show what can be done by combining an thus limiting the number of interrogatories. Certainly, there will be cases in which the limitation to 25 or ten cannot be comfortably applied, but the court is given authority to modify the limitation in those instances.

PRESENT RULE	PROPOSED RULE	REASON FOR PROPOSED AMENDMENT
	to or other failure to answer an interrogatory.	
(b) (NO CHANGE RECOMMENDED)	(b) (NO CHANGE RECOMMENDED)	
(c) (NO CHANGE RECOMMENDED)	(c) (NO CHANGE RECOMMENDED)	
(d) (NO CHANGE RECOMMENDED)	(d) (NO CHANGE RECOMMENDED)	
(e) (NO CHANGE RECOMMENDED)	(e) (NO CHANGE RECOMMENDED)	
(f) (REPEAL IS RECOMMENDED)	(f) (REPEAL IS RECOMMENDED)	

PRESENT RULE

RULE 1.380. FAILURE TO MAKE DISCOVERY; SANCTIONS.

(a)(1) (NO CHANGE RECOMMENDED)

(2) (NO CHANGE RECOMMENDED)

(3) (NO CHANGE RECOMMENDED)

(4) **Award of Expenses of Motion.** If the motion is granted and after opportunity for hearing, the court shall require the party or deponent whose conduct necessitated the motion or the party advising the conduct to pay to the moving party the reasonable expenses incurred in obtaining the order that may include attorney's fees, unless the court finds that the opposition to the motion was justified or that other circumstances make an award of expenses unjust. If the motion is denied and after opportunity for hearing, the court shall require the moving party to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion that may include attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust. If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred as a result of making the motion among the parties and persons.

PROPOSED RULE

RULE 1.380. FAILURE TO MAKE DISCOVERY; SANCTIONS.

(a)(1) (NO CHANGE RECOMMENDED)

(2) (NO CHANGE RECOMMENDED)

(3) (NO CHANGE RECOMMENDED)

(4) Award of Expenses ~~of Motion.~~ (Substantial rewording of section) The court shall award the reasonable expenses incurred, including attorney's fees, to the prevailing party on the motion. If the motion is partly granted and partly denied, the court may apportion the expenses and fees.

REASON FOR PROPOSED AMENDMENT

RULE 1.380. FAILURE TO MAKE DISCOVERY; SANCTIONS

Perhaps the most compelling reason for adoption of this proposal is that the sanctions rule does not work at present. Enormous amounts of trial court and appellate court time are taken up with these matters. For example, see Sunstream Jet Center, Inc. v Liza Leasing Corporation, 423 So2d 1005 (4 DCA 1982). Mr. Edward Siegel, a member of The Florida Bar, wrote a short article in The Florida Bar News, a copy of which is reproduced and attached, that accurately portrays the problem. Ordinarily, when a person transgresses the rules of society, he is punished. That is where Rule 1.380 fails in its purpose. Appellate courts have consistently diluted the provisions and the only way to exact compliance from the bar at large is to tighten the rule on sanctions.

The proposal eliminates possible excuses for noncompliance with discovery in a number of instances. After all, lawyers are supposed to know whether the response to discovery is appropriate. There is ample case law if the matter is not settled by the plain language of the rule.

The change to subdivision (a)(4) makes the award of attorney's fees mandatory as does the change to subdivision

PRESENT RULE	PROPOSED RULE	REASON FOR PROPOSED AMENDMENT
(b)(1) (NO CHANGE RECOMMENDED)	(b)(1) (NO CHANGE RECOMMENDED)	(b)(2)(F). Respondent submits that there is simply no reason under subdivisions (a) and (b) for failure to properly respond to discovery. In subdivision (c) the last two excuses for a failure to comply are loopholes and should be eliminated. In subdivision (d) the "other circumstances" exemption is likewise a loophole and should be abolished. In subdivision (d) the failure to attend or to serve discovery responses could be caused by circumstances beyond the party's or lawyer's control so the excuses on these grounds are still retained. There is a different factual situation from that in subdivisions (a) and (b). This is particularly true in subdivision (b) when there has been a hearing and an order compelling discovery has been entered. If there is some legitimate inability to comply, the burden should be on the person against whom the order was entered to apply to the court for some relief.
(2)(A) (NO CHANGE RECOMMENDED)	(2)(A) (NO CHANGE RECOMMENDED)	
(B) (NO CHANGE RECOMMENDED)	(B) (NO CHANGE RECOMMENDED)	
(C) (NO CHANGE RECOMMENDED)	(C) (NO CHANGE RECOMMENDED)	
(D) (NO CHANGE RECOMMENDED)	(D) (NO CHANGE RECOMMENDED)	
(E) (NO CHANGE RECOMMENDED)	(E) (NO CHANGE RECOMMENDED)	
(F) Instead of any of the foregoing orders or in addition to them, the court shall require the party failing to obey the order to pay the reasonable expenses caused by the failure that may include attorney's fees, unless the court finds that the failure was justified or that other circumstances make an award of expenses unjust.	(F) (Substantial rewording of section) The court shall award the reasonable expenses incurred, including attorney's fees, to the prevailing party under this subdivision.	
(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 1.370 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof that may include attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 1.370 (a), or (2) the admission sought was of no	(c) Expenses on Failure to Admit. If a party fails to admit ~~the genuineness of~~ that any document is genuine or the truth of any matter as requested under Rule 1.370 and another ~~if the~~ party ~~requesting the admission~~ thereafter proves ~~the genuineness of~~ that the document is genuine or the truth of the matter, ~~he may apply to~~ the court ~~for an order requiring~~ shall require the ~~other~~ party failing to admit to pay ~~him~~ the reasonable expenses incurred in making that proof ~~that may include~~, including reasonable attorney's fees. ~~the court shall make the order~~, unless ~~it~~ the court finds that ~~(1)~~ the requests were ~~held~~	Subdivision (e) makes an award on the application of sanctions hurt now. Many times trial judges leave the assessment of discovery cost to the final award of costs in the action. When this is done, no award is made in those cases that are settled and many times the award is forgotten or "lost in the shuffle" after final judgment. The end result is that an award of expenses must be made as soon as the misconduct is adjudicated or it will not be effective.

PRESENT RULE	PROPOSED RULE	REASON FOR PROPOSED AMENDMENT
substantial importance or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter or (4) there was other good reason for the failure to admit.	objectionable ~~pursuant to Rule 1.370(a),~~ or ~~(2)~~ the admission sought was of no substantial importance~~, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter or (4) there was other good reason for the failure to admit~~.	
(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director or managing agent of a party or a person designated under Rule 1.310(b)(6) or Rule 1.380 (a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition after being served with the proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 1.340 after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 1.350 after proper service of the request, the court in which the action is pending may take any action authorized under paragraphs (A), (B) and (C) of subdivision (b)(2) of this rule. Instead of any order or in addition to it, the court shall require the party failing to act to pay the reasonable expenses caused by the failure that may include attorney's fees unless the court finds that the failure was justified or that other circumstances make an award of expenses unjust. The failure to act described in this subdivision may not be excused on the grounds that the discovery sought is objectionable unless	(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or officer, director, or managing agent of a party or a person designated under Rule 1.310(b)(6) or Rule 1.320(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 1.340 after proper service of the interrogatories, or (3) to serve a written response to a request for inspection ~~submitted~~ under Rule 1.350 after proper service of the request, the court in which the action was pending may take any action authorized under paragraphs (A), (B) and (C) of subdivision (b)(2) of this rule. ~~Instead of any order or in addition to it,~~ The court shall require the party failing to act to pay the reasonable expenses caused by the failure ~~that may include~~, including reasonable attorney's fees, unless the court finds that the failure was justified. ~~or that other circumstances make an award of expenses unjust.~~ The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has	

PRESENT RULE	PROPOSED RULE	REASON FOR PROPOSED AMENDMENT
the party failing to act has applied for a protective order as provided by Rule 1.280(c).	applied for a protective order as provided by Rule 1.280(c).	
	(e) Time for Payment. Any order for the payment of expenses and fees under this rule shall require payment forthwith. The court shall not defer payment until after the trial or until the award of costs for the action.	

In my opinion

A distressing ailment

A few years ago, a book called *The Trouble With Lawyers* catalogued an alarming list of accusations against the legal profession.

Norman Dacey and others have consistently repeated those indictments against attorneys.

Many articles before and since have dealt with our public image, seeking to analyze why we're portrayed in television and movies as shysters, mouthpieces and hired guns.

Obviously, a change will not come overnight. The solutions proposed—better communication with clients, keeping them advised of the status of their legal matters—will no doubt help.

But I think there's something else wrong with many lawyers. It's an overlooked malady, not often discussed, but one that causes unfair delays in justice, wrongfully increases fees paid by clients, and can lead to an intolerable logjam in the courts.

What is this ailment? It's the all too-common tendency of attorneys to clog the system with tons of protracted, boilerplate interrogatories, requests for production of unimportant or unneeded documents, unnecessary motions to dismiss or strike, and time-consuming arguments or memoranda.

For example, in a routine dissolution, is it really necessary to submit ten pages of printed interrogatories? In a garden-variety suit for breach of an automobile warranty, with the complaint adopting the specimen language approved by the Supreme Court, is it fair to file a motion to dismiss?

The noted humorist Art Buchwald once wrote a satiric column in response to Chief Justice Warren Burger's charge that almost half of the trial lawyers were incompetent, and that their conduct was the reason the courts were congested. Buchwald facetiously suggested that only the good lawyers really tie up the court dockets, since the incompetent ones don't even know what kinds of motions to file.

Unfortunately, too many of us—whether competent or incompetent—file motions and pleadings that are unproductive at best, and frivolous, at worst.

Your client has received a complaint for damages? Quickly, file a routine motion to dismiss; send out the pages of printed interrogatories; whip off a request to produce; and schedule the depositions.

Obviously, we need the tools of discovery, the motions to attack improper pleadings and the other remedies available to us. But to abuse the rules, to constantly cause delays, to burden the process with wasteful, meaningless proceedings, makes a mockery of our procedure and demeans our positon as officers of the court.

It's not too late to change.

EDWARD SIEGEL
Member of the Editorial Board
of The Florida Bar Journal and News, Jacksonville

Editor's Note: The News invites members of the Bar to respond to issues raised in this column. Letters to the editor should not exceed 200 words and must be signed

PRESENT RULE

RULE 1.390. DEPOSITIONS OF EXPERT WITNESSES.

(a) Definition. The term "expert witness" as used herein applies exclusively to a person duly and regularly engaged in the practice of his profession who holds a professional degree from a university or college and has had special professional training and experience or one possessed of special knowledge or skill about the subject upon which he is called to testify.

(b) Procedure. The testimony of an expert or skilled witness may be taken at any time before the trial in accordance with the rules for taking depositions and may be used at trial, regardless of the place of residence of the witness or whether he is within the distance prescribed by Rule 1.330(a)(3). No special form of notice need be given that the deposition will be used for trial.

(c) Fee. An expert or skilled witness whose deposition is taken shall be allowed a witness fee in such reasonable amount as the court may determine and it shall be taxed as costs.

(d) Applicability. Nothing in this rule shall prevent the taking of any deposition as otherwise provided by law.

PROPOSED RULE

RULE 1.390. DEPOSITIONS OF EXPERT WITNESSES.

(Substantial rewording of rule) The deposition of an expert or skilled witness may be used at trial, regardless of the place of residence of the witness or whether he is within the distance prescribed by Rule 1.330(a)(3). No special form of notice need be given that the deposition will be used at trial.

REASON FOR PROPOSED AMENDMENT

RULE 1.390. DEPOSITIONS OF EXPERT WITNESSES.

If respondent's proposal on the taking of experts' depositions under Rule 1.280 is adopted, the need for Rule 1.390 is eliminated, except for the right to use the deposition at trial regardless of the residence or location of the witness. The original intent of this rule as a statute, former § 90.23 Florida Statutes, was to save expense by permitting the use of depositions of experts at trial. It has largely failed in its purpose because most attorneys prefer live testimony to deposition testimony, particularly at jury trials. However, it is still occasionally used for that purpose and may still serve a useful purpose. The change repeals all of the rule except that provision and the last sentence of subdivision (b) and to eliminate the confusion caused by a number of cases before the 1972 amendment. The cases are cited in the committee note.

PRESENT RULE

RULE 1.525. ENTRY OF JUDGMENT.

(NEW RULE)

PROPOSED RULE

RULE 1.525. ENTRY OF JUDGMENT.

(a) Jury Action. Final judgment after rendition of a jury verdict shall be entered by the court immediately. If a motion for new trial is subsequently served and is granted, the order granting the new trial shall also vacate the final judgment and shall be recorded.

(b) Non-jury Actions. Final judgments in non-jury actions shall be entered by the court as soon as practicable after the close of testimony and submission of any briefs.

REASON FOR PROPOSED AMENDMENT

RULE 1.525. ENTRY OF JUDGMENT.

The proposed rule will make the procedure for the entry of judgments uniform throughout the state. It is connected to the subject matter of Rule 1.530 and is intended to provide a basis for the proposed change to subdivision (b) of that rule.

The additional factor suggesting the need for the rule is the question in tort cases of when interest should begin to run. In those circuits in which judgment is not entered until after the time for serving a motion for new trial, interest is deferred on tort judgments until the final judgment is entered. If the motion for new trial is denied, this is unfair to the plaintiff.

PRESENT RULE

RULE 1.530. MOTIONS FOR NEW TRIAL AND REHEARING; AMENDMENTS OF JUDGMENT.

(a) (NO CHANGE RECOMMENDED)

(b) Time for Motion. A motion for a new trial or for rehearing shall be served not later than 10 days after the rendition of verdict in a jury action or the entry of judgment in a non-jury action. A timely motion may be amended to state new grounds in the discretion of the court at any time before the motion is determined.

(c) (NO CHANGE RECOMMENDED)

(d) (NO CHANGE RECOMMENDED)

(e) (NO CHANGE RECOMMENDED)

(f) (NO CHANGE RECOMMENDED)

(g) (NO CHANGE RECOMMENDED)

PROPOSED RULE

RULE 1.530. MOTIONS FOR NEW TRIAL AND REHEARING; AMENDMENTS OF JUDGMENT.

(a) (NO CHANGE RECOMMENDED)

(b) Time for Motion. A motion for a new trial or for rehearing shall be served not later than 10 days after the ~~rendition of verdict in a jury action or the entry of judgment in a non-jury action.~~ entry of judgment. A timely motion may be amended to state new grounds in the discretion of the court at any time before the motion is determined.

(c) (NO CHANGE RECOMMENDED)

(d) (NO CHANGE RECOMMENDED)

(e) (NO CHANGE RECOMMENDED)

(f) (NO CHANGE RECOMMENDED)

(g) (NO CHANGE RECOMMENDED)

REASON FOR PROPOSED AMENDMENT

RULE 1.530. MOTIONS FOR NEW TRIAL AND REHEARING; AMENDMENTS OF JUDGMENT.

This is a correlative change to conform with the proposed Rule 1.525. The reasons for this have been fully discussed in paragraph 8 of the response and are merely summarized here.

The change will afford a uniform time for serving motions for new trial in jury and non-jury actions. It may eliminate problems on the time limits of appeals since the verdict is not recorded. There is no "face of the record" showing whether a motion for new trial is timely served as a result.

PRESENT RULE

FORM 1.907. GARNISHMENT.

(NO CHANGE IN THE FORM OF WRIT OF GARNISHMENT IS RECOMMENDED.)

PROPOSED RULE

FORM 1.907. GARNISHMENT.

A note should be added below the form as follows:

NOTE: If the writ is issued before judgment, the following language should be added at the end:

> The defendant has the right to an immediate hearing for dissolution of the writ pursuant to § 77.07 Florida Statutes.

REASON FOR PROPOSED AMENDMENT

FORM 1.907. GARNISHMENT.

In 1983 the legislature attempted to re-establish garnishment before judgment after the prior statute had been held unconstitutional. Among other things, the legislature prescribed a requirement of notice of the right to an immediate hearing for dissolution by § 77.031(2) Florida Statutes. Accordingly, the note is suggested to alert the persons using the form to the needed addition if it is a writ issued before judgment.

PRESENT RULE

FORM 1.961. VARIOUS BOND CONDITIONS.

(a) Attachment, Garnishment and Distress.
...pay all costs and damages that defendant sustains in consequence of plaintiff improperly suing out (type of writ) in this action...

(b) (NO CHANGE RECOMMENDED)

(c) (NO CHANGE RECOMMENDED)

(d) Garnishment Before Judgment.

(NEW RULE)

PROPOSED RULE

FORM 1.961. VARIOUS BOND CONDITIONS.

(a) Attachment, Garnishment <u>After Judgment</u> and Distress.
...pay all costs and damages that defendant sustains in consequence of plaintiff improperly suing out (type of writ) in this action...

(b) (NO CHANGE RECOMMENDED)

(c) (NO CHANGE RECOMMENDED)

<u>(d) Garnishment Before Judgment.
...pay all costs, damages and attorney's fees that the defendant sustains in consequence of the plaintiff's improperly suing out the writ of garnishment.</u>

REASON FOR PROPOSED AMENDMENT

FORM 1.961. VARIOUS BOND CONDITIONS

The change in subdivision (a) is to limit that form, in so far as garnishment is concerned, to garnishment after judgment since the 1983 legislature reinstated garnishment before judgment and this form is no longer correct.

Subdivision (d) is the condition now prescribed by Section 77.031(3) Florida Statutes.