

077  
FILED

SID J. WHITE

OCT 19 1998

IN THE SUPREME COURT OF FLORIDA

IN RE AMENDMENT TO  
FLORIDA RULE OF CIVIL  
PROCEDURE 1.070(j)

CASE 93,367

CLERK, SUPREME COURT  
By \_\_\_\_\_  
Chief Deputy Clerk

COMMENT OF HENRY P. TRAWICK, JR.

Pursuant to this court's order of September 24, 1998 Henry P. Trawick, Jr. comments on the proposed amendment to Rule 1.070(j) as follows:

1. The rule was adopted in 1988 simply to conform to the then similar federal rule. The absence of the rule had not caused a problem in Florida. Rule 1.420(e) gave courts sufficient authority to expedite the disposition of actions when the actions were not prosecuted for one year or more. No need for the rule has ever been shown.

2. As the Court says in its order, the rule has caused a substantial amount of litigation, including appeals. It has had a harsh effect. No doubt it has been the basis for malpractice claims against lawyers for mere inadvertence rather than active negligence. There is still no need for the rule. I submit the better course for this Court to follow would be to repeal it.

3. If the rule as amended continues in effect, it may require the expenditure of valuable and scarce judicial time in entering orders directing service to be effected within a specified time or for the consideration of good cause shown or sought to be shown by plaintiffs. This may involve trial courts and the same problems of good cause as formerly occurred under Rule 1.420(e).

4. The proposal does not say whether the plaintiff must show good cause before dismissal or may show it after dismissal for reinstatement and an extension of time. If the rule is retained as amended, I submit that it should require the showing of good cause before dismissal or dropping.

5. Another problem that is unresolved by the rule is when one defendant is served and one or more other defendants are not served within the time provided. The nonserved defendants are dropped as parties. The nonserved parties are indispensable, or sometimes merely necessary, but the action cannot proceed as a practical matter without the nonserved defendants. Does this mean that the plaintiff must dismiss his action under Rule 1.420(a)(1) and refile with the joinder of the nonserved defendants in the new action and then attempt to serve them? Or can the plaintiff amend his initial pleading to join the dropped defendants again in the action and serve them again based on the amended pleading? If the plaintiff cannot do the latter, his dismissal of his initial pleading in order to refile and join the indispensable or necessary defendants again may count against him under Rule 1.420(a)(1), regardless of the language in the rule to the contrary. The exemption in the last sentence of the rule would not apply to the plaintiff's dismissal under these circumstances.

6. This rule is not necessary to give a trial court authority to require service of process within a specified time. The trial court has that authority under its control of its own process. This being so, the rule is unnecessary as a case

management tool. If anyone has doubt about the authority of the trial court to require service of process within a limited time, the court should amend Rule 1.200(a) instead of adopting this rule. I submit that Rule 1.200(a)(1) is broad enough to authorize the trial court to limit the time of service.

7. Summarizing, the rule is an unnecessary complicating factor in the administration of civil justice, does not solve an existing problem and, to the extent needed, is already authorized by another rule.

8. If the court insists on keeping the rule, the word period at the end of the next to the last sentence should be changed to "time" because that is the noun used to describe the limitation otherwise in the rule.

The undersigned certifies that a copy of the foregoing has been furnished to John F. Harkness, Jr., as Executive Director of The Florida Bar and Jesse S. Faerber, as Chairman of the Civil Procedure Rules Committee of The Florida Bar by mail on October 16, 1998.

HENRY P. TRAWICK, P.A.

By 

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CLERK, SUPREME COURT

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October 16, 1998

Mr. Sid J. White  
Clerk of the Supreme Court  
Supreme Court Building  
500 South Duval Street  
Tallahassee, Florida 32399-1927

Re: HPT - Rule 1.070(j)

Dear Sid:

I enclose the original and seven copies of my comments in connection with the designated matter pursuant to the Court's order of September 24, 1998.

Please file the original and deliver the copies in the usual manner.

Since this matter was handled by the Court without some person's predatory petition, I have served the appropriate Florida Bar persons only.

Best regards.

Yours very truly,

Henry P. Trawick, Jr.

HPT/jam  
enc.