March 14, 2003

The Florida Supreme Court
(Attn: Kathy Belton)
500 S. Duval Street
Tallahassee, FL 32399

Re: Proposed changes to Florida Rules of Civil Procedure

To whom it may concern:

I submit the following comments to proposed changes to the Florida Rules of Civil Procedure for consideration by the Court.

Concerning Rule 1.190(f):

The Committee proposes changing Rule 1.190(f) to require parties who move for leave to amend a complaint to assert a claim for punitive damages to "state with particularity any evidence in the record or any evidence to be proffered by the claimant" **in the motion for leave to amend** the complaint.

This proposed change fails to address serious issues involving motions for leave to amend the complaint to assert punitive damages and will create significant practical obstacles for attorneys who seek to amend a complaint to assert punitive damages. I will address these concerns individually.

(1) Proposed Rule 1.190(f) attempts to write procedures consistent with the opinion of the Second District Court of Appeals in Beverly Health & Rehabilitative Services, Inc. v. Meeks, 778 So. 2d 322 (Fla. 2d DCA 2000). The undersigned respectfully submits that the Second District opinion failed to decide much more important issues surrounding motions for leave to amend complaints to assert punitive damages. Perhaps these issues were not directed to the Second District, but they certainly exist.

The first issue is that of the standard by which trial courts should review motions for leave to amend the complaint to assert punitive damages. There is no Rule of Civil Procedure that addresses this standard of review. Rules of Civil Procedure define the standard by which courts will grant motions to dismiss for failure to state a claim, motions for summary judgment, and motions for directed verdict, but no rule prescribes the standard by which a court will grant a motion for leave to amend to assert punitive damages.

There is no procedure under the Florida Rules of Civil Procedure by which a trial court **weighs evidence** and reaches a decision. Nonetheless, motions for leave to amend the complaint to assert punitive damages place the courts in a position to weigh evidence. The courts must consider evidence in support of the motion because Florida Statutes §768.72 requires them to do so. But, what should courts do with contrary evidence?

The opinion in Meeks implies, and Proposed Rule 1.190(f) reinforces the implication, that defendants should present counter-proffers of evidence. What is the court to do with a counter-proffer of evidence if not weigh it against the plaintiff's proffer?

The only reported decision to address this issue is State of Wisconsin Investment Board v. Plantation Square Associates, 761 F. Supp. 1569 (S.D. Fla. 1991). In this case, the federal district court described what actually happens when a party moves for leave to amend the complaint to assert punitive damages.

> The Plaintiff's submission of exhibits to substantiate its claim has elicited a barrage of briefs and counter-proffers of evidence by the defendants seeking to disprove SWIB's claim largely by arguing their own evidence. The court seriously doubts that the statute intended such a fact-intensive investigation into the merits of Plaintiff's punitive claim.

761 F. Supp. at 1580.

The federal District Court resolved this problem by **disregarding** the counter-proffer of evidence submitted by the defendants.

> [T]he standard of proof required merely to assert Plaintiff's punitive claim must be lower than that needed to survive a summary adjudication on its merits. As the Florida courts have noted, a §768.72 challenge more closely resembles a motion to dismiss that additionally requires an evidentiary proffer and places the burden of persuasion on the plaintiff. . . . In considering a motion to dismiss, factual adjudication is inappropriate as all facts asserted – or here, reasonably established – by the plaintiff are to be taken as true. . . . As such, the court has given recognition only to those assertions of the defendants which would show Plaintiff's factual bases to be patently false or irrelevant, and has paid no heed whatsoever to the defendants' alternative evidentiary proffers.

761 F. Supp. at 180-81 (citations omitted). The undersigned respectfully submits that a Rule of Civil Procedure adopting the procedure set forth in Plantation Square Associates

is much more important and necessary than the Proposed Rule 1.190(f).

The stated purpose for Proposed Rule 1.190(f) is to comply with the decision in Meeks. The Meeks decision sought to ensure defendants ample time to "respond" to a motion for leave to amend to assert punitive damages. However, Meeks did not define what response is appropriate or what the trial court should do with the response. It seems inappropriate to promulgate a rule that affords defendants an opportunity to respond to motions for leave to amend to assert punitive damages without defining what response is appropriate or how the court should consider the response. To do so will simply add to the existing confusion over the standard by which trial courts should review motions for leave to amend the complaint to assert punitive damages.

(2) If this Court deems it necessary to promulgate a rule that affords defendants an opportunity to respond to motions for leave to amend the complaint to assert punitive damages, then it should promulgate a rule that achieves this purpose without creating an unfair burden on the moving parties and engendering unnecessary delay in litigation.

In practice, the circuit courts require parties to file motions at the time they schedule the motions for hearing. The courts will not clear a specific date and time for motions unless the parties have filed the motions themselves. This practice appropriately avoids ambush tactics and minimizes the number of hearings that are scheduled and later cancelled. However, if applied to a motion for leave to amend the complaint to assert punitive damages, it will engender significant delay in the litigation.

As a practical matter, court dockets are busy and it often takes several months before a party can schedule a hearing for the amount of time necessary to consider a motion for leave to amend to assert punitive damages. These hearings usually require at least one hour of the court's time and often more. Thus, substantial time usually intervenes between filing the motion for leave to amend the complaint and the date of the hearing.

During this intervening time, the parties frequently continue to engage in discovery and the moving party frequently continues to gather evidence in support of the motion. Requiring the moving party to include all proffered evidence in the motion for leave to amend the complaint to assert a claim for punitive damages will require the moving party to complete virtually all discovery and gather all evidence before scheduling a hearing on this motion. This party will then be required to sit idle for months waiting for the actual hearing.

If the court then grants the motion for leave to amend, the plaintiff must amend the complaint. In practice, defendants take this opportunity to insist that the case is no longer at issue under Rule 1.440(a) and any scheduled trial must now be continued. This, of course, engenders delay in the litigation.

(3) Apparently, the issue is not when the moving party files his or her motion for leave to amend the complaint to assert punitive damages, it is when the moving party discloses evidence in support of the motion. It is not necessary to require the moving party to proffer all evidence at the time he or she files the motion for leave to amend the complaint. Current case law requires the moving party to disclose evidence "a reasonable time" in advance of the hearing on the motion. Beverly Health & Rehabilitative Services, Inc. v. Meeks, 778 So. 2d 322 (Fla. 2d DCA 2000). It does not require the moving party to disclose evidence months in advance of the hearing. Indeed, the comparable rule governing motions for summary judgment requires the

moving party to provide evidence 20 days in advance of the hearing. Fla. R. Civ. P. 1.510(c).

I submit that 20 days constitutes a "reasonable time" in advance of a hearing on a motion for leave to amend a complaint to assert punitive damages. This Court could promulgate Rule 1.190(f) to require simply that the moving party disclose at least 20 days before the time fixed for the hearing any evidence in the record or any evidence to be proffered by the claimant that provides a reasonable basis for recovery of punitive damages. Such a rule would require the moving party to disclose evidence a reasonable time in advance of the hearing without requiring the moving party to do so months before the hearing. It would achieve the asserted purpose for promulgating Rule 1.190(f) without creating unnecessary delay.

(4) Proposed Rule 1.190(f) is confusing and will create appellate litigation over its meaning. Proposed Rule 1.190(f) states that the moving party must "state with particularity any evidence." One could interpret this language to require the moving party to describe in the motion for leave to amend every nuance of evidence and every argument that counsel intends to make at the hearing. This would impose a substantial burden on the moving party and preclude counsel from deviating in any way from the written motion. No doubt, defending parties will interpret proposed Rule 1.190(f) in this manner.

Such an interpretation would be unfair. Most of the evidence proffered in support of punitive damages is evidence gathered during discovery. It is usually deposition testimony, answers to interrogatories, or documents obtained from the defendant via requests for production of documents. It is the defendant's own evidence and well-known to the defendant. Indeed, the court in Meeks acknowledged that the evidence was indeed known to the defendant. 778 So. 2d at 324. The undersigned is not aware of any instance in which a defending party complained that a moving party attempted to use evidence that the defendant had never seen.

The purpose of the proposed rule is to ensure fairness and avoid surprise. It is not to create unnecessary obstacles for the moving party or a tactical advantage for the defendant. The legitimate purposes of the proposed rule are served if the moving party is required to "disclose" the evidence he or she intends to rely upon at the hearing. Using the phrase "state with particularity" is confusing and likely to impose an unfair burden on the moving party. It may preclude the moving party from making appropriate arguments or responding to arguments made by the defendant. This is not the stated purpose of Proposed Rule 1.190(f), and this Court should avoid language that would confuse rather than clarify the current state of the law.

Summary:

The undersigned respectfully submits that Proposed Rule 1.190(f) is incomplete because it fails to address the standard by which trial courts should review a proffer of evidence in support of punitive damages. It implies that courts should weigh evidence which is contrary to every other rule of civil procedure. If the Supreme Court deems it necessary to define a time by which moving parties should disclose their proffers of evidence, the rule should do this without imposing additional burdens or engendering delay in litigation.

Respectfully submitted,

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