IN THE SUPREME COURT OF THE STATE OF FLORIDA

IN RE: AMENDMENTS TO THE RULES OF CIVIL PROCEDURE (TWO YEAR CYCLE)) CASE NO.: SC05-179

RESPONSE AND COMMENT OF BRUCE J. BERMAN ON PROPOSED AMENDMENTS OF TWO-YEAR-CYCLE OF THE CIVIL PROCEDURE RULES COMMITTEE

The undersigned member of The Florida Bar submits the following response and comment on that portion of the biennial report of the Civil Procedure Rules Committee (the ACommittee@) and the Executive Director of The Florida Bar proposing to amend (A) Rule 1.380 (Failure to Make Discovery: Sanctions) and (B) Rule 1.510 (Summary Judgment) of the Florida Rules of Civil Procedure.

A. B Proposed Amendment to Rule 1.380

The undersigned agrees with the proposal to add, to motions under subdivisions (a)(2) and (d) of the Florida rule, a certification requirement for movant, comparable to the certification requirement in subdivisions (a)(2)(B) and (d) of Rule 37 of the Federal Rules of Civil Procedure, for the reasons set forth in the Committee=s Petition. ***However, the proposed change in subdivision (a)(4) of the Florida rule is not the same as its federal counterpart, and, in its different form, would not achieve the Committee=s purpose***.

The Committee=s proposal would prohibit any sanction, i.e., any award of expenses under subdivision (a)(4) on a motion to compel discovery, if, *after the motion is granted*, the court finds that the movant failed to provide the certification required to make the motion in the first place, under the new requirement of subdivision (a)(2). Respectfully, such

provision would make little sense, inasmuch as the sanctions provision is, by its terms, applicable only where the motion is granted, and, presumably, the motion would be denied if one of its requirements (here, certification) had not been met in the first place. At the very least, then, if the Committee=s proposal to add the certification requirement for the motion is granted, then it would be redundant, at the very least, to say that there could be no sanctions absent such certification.

Interestingly, the federal rule contains a subtle, but substantively critical difference in its sanctions provision, prohibiting the sanction for award of costs Aunless the court finds that the motion was filed without the movant=s first making a good faith effort to obtain the disclosure of discovery without court action . . .A Rule 37 (a)(4)(A), Fed.R.Civ.P.

Under the federal rule, it is not the failure to *certify* the good faith effort in the motion which precludes sanctions, but the failure to actually *make* that effort; that is, sanctions become unavailable under the federal rule if, notwithstanding certification, such good faith effort was not, in fact, made. The Committee=s proposal adds nothing to the sanctions provision, as set forth above, and fails to do what the federal rule does in this provision. In effect, the federal rule addresses substance, not form, as the Florida rule, if amended, should likewise do. Under the Committee=s proposal, a false certification in a motion would not prohibit sanctions B or at least not by direct provision of the rule. That is what the federal rule=s differing language does accomplish.

Accordingly, if a certification requirement is to be added to the motion requirements of Florida Rule 1.380, as the Committee proposes and as the undersigned agrees, comparable to that under the corresponding Federal Rule 37, then the change to the sanctions provision in subdivision

(a)(4) of the Florida rule should also incorporate the corresponding language from Rule 37(a)(4)(A) of the federal rule by inserting, in place of the Committee=s proposed language, the following:

> [. . . unless the court finds that the] motion was filed without the movant=s first making a good faith effort to obtain the disclosure of discovery without court action, that the [opposition to the motion was justified, or that . . .]

[Underscored language proposed to be added in place of the underscored language in the Committee=s proposal.]

B. B Proposed Amendment to Rule 1.510

The Committee proposes a substantial re-writing of the critical procedural provision of Florida=s summary judgment rule B a rule that comes directly from its federal counterpart (Rule 56, Fed.R.Civ.P.), and one which has remained substantially untouched over the more than 50 years since its adoption.[1] The Florida rule has, over these many years, been the subject of countless court decisions, here and in the District Courts of Appeal. There is no demonstrated problem suggesting a need for clarification or revision.

While the purpose of the Committee=s proposal is certainly laudable, such an extensive change appears to the undersigned to present comparatively far greater risk of creating new issues than it will cure any supposed problems.

Among other things, by requiring that both moving and responding parties each specifically identify every item in the record on which they rely for their respective positions (affidavits, discovery responses and other materials), the proposed change suggests that the court might be limited to consideration of such items in making its determination. The same subdivision of the rule, however, explicitly states otherwise: that summary judgment shall be granted if all record evidence (i.e., all of Athe pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any@) demonstrates the absence of any genuine issue of material fact. *See* Rule 1.510(c).

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[1] Federal Rule 56 was substantially adopted by Florida=s 1950 Common Law Rule 43 and 1950 Equity Rule 40, the two of which were merged into 1954 RCP 1.36 prior to adoption in the current rule 1.510. *See* 30A West=s F.S.A. at 384 (1985) (Historical Note); *In re Florida Rules of Civil Procedure 1967 Revision*, 187 So.2d 598, 630 (Fla. 1966) (Committee Note).

Further, the provisions of the proposed amendment place an entirely new burden on parties responding to summary judgment that has never before existed under Florida=s rule. In its current form, the rule merely requires that Athe adverse party *may serve* opposing affidavits@ (emphasis added). There is no obligation placed on that party by the rule to point to evidence on file.

By requiring, as does the proposed amendment, that the adverse party Ashall identify . . . any summary judgment evidence on which the adverse party relies,@ a burden is placed upon parties opposing summary judgment which Florida law has never imposed. In the face of such a requirement, a trial judge might consider himself or herself somehow affected, in rendering a determination, by the failure to meet this requirement, in a setting where the summary judgment respondent, by law, has no burden whatsoever, unless and until the moving party has satisfied its own burden. *See, e.g., Holl v. Talcott,* 191 So.2d 40, 43-44 (Fla. 1966).

This Court has historically been appropriately reticent to tinker with its rules of procedure absent very compelling reason. The rules already provide ample protection for, and trial court judges possess ample discretionary power to protect, parties who complain of insufficient notice or require additional time to respond to arguments. Indeed, such protection is expressly built into Rule 1.510 in subdivision (f), which provides that the court Amay order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.@ *Id.*

Conclusion

The Committee=s proposal to amend Rule 1.380, Fla. R. Civ. P., should be granted, except that subdivision (a)(4) should be amended to add the language Amotion was filed without the movant=s first making a good faith effort to obtain the disclosure of discovery without court action, that the@ in place of that language proposed by the Committee.

The Committee=s proposal to amend Rule 1.510, Fla. R. Civ. P., should be denied.

Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing was served by mail this 1st day of April, 2005, upon Robert N. Clarke, Jr., Chair of the Civil Procedure Rules Committee of The Florida Bar, c/o Ausley & McMullen, P.A., P.O. Box 391, Tallahassee, Florida 32302-0391, and John F. Harkness, Jr., Executive Director of The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300.

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