IN THE SUPREME COURT OF FLORIDA

IN RE: Amendments to the Florida Rules of Civil Procedure

CASE NO.: SC05-179

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COMMENT OPPOSING AMENDMENT TO SUBSECTION (e) OF THE FLORIDA RULES OF CIVIL PROCEDURE 1.420

The Circuit and County judges of the Tenth Judicial Circuit file this Comment in unanimous opposition to amendment of Florida Rule of Civil Procedure 1.420(e), *Failure to Prosecute*, as proposed by the Rules Committee, for the following reasons:

1. The proposed changes would destroy the effectiveness of Rule 1.420(e) as a device enforcing diligent prosecution of cases, and the negative impacts far outweigh the perceived benefit of amendment.
2. The proposed changes will cause more cases to be out of time standards, which would create an unnecessary additional burden on an already stressed court system and civil clerk personnel.
3. The proposed changes reflect a change in the law of "failure to prosecute" that is inconsistent with the Rules of Judicial Administration and current policies, guidelines, and case time standards.

Background and Recent History: Rule 1.420(e), *Failure to Prosecute*, was amended in 1968 to permit the claimant to assert "good cause" as a defense to a motion for dismissal in writing at least 5 days before the hearing. *In re Florida Rules of Civil Procedure*, 211 So. 2d 206 (Fla. 1968). The Rule was adjusted again in 1976 when the Supreme Court added the last sentence to clarify that "[m]ere inaction for a period less than one year shall not be sufficient cause for dismissal for failure to prosecute. *In re Florida Rules of Civil Procedure*, 339 So. 2d 626, 629 (Fla. 1976). After the 1976 amendment, the current Rule remained unaltered and operational for nearly thirty years in its important function of clearing the dockets of cases wherein progress is unacceptable.[1] The past changes to the Rule effectively addressed concerns of fairness to the claimant. The current proposed amendments go too far and would destroy the Rule's effectiveness.

The proposed rule change reads as follows:

> **(e) Failure to Prosecute.** In all actions in which it appears on the face of the record that no activity by filing of pleadings, order of court, or otherwise has occurred for a period of 10 months, and no order staying the action has been issued nor stipulation for stay approved by the court, any interested person, whether a party to the action or not, the court, or the clerk of the court may serve notice to all

[1] Rule 1.420(e) was even stricter prior to 1976. Conversely, since 1976 our case numbers have burgeoned; and the Supreme Court adopted time standards for completion of cases and required case reporting and other measures to keep judges moving their cases. *See, e.g.*, Rule 2.085, Fla. R. Jud. Admin.

> parties that no such activity has occurred. If no such record activity has occurred within the 10 months immediately preceding the service of such notice, and no record activity occurs within the 60 days immediately following the service of such notice, and if no stay was issued or approved prior to the expiration of such 60-day period, the action shall be dismissed by the court on its own motion or on the motion of any interested person, whether a party to the action or not, after reasonable notice to the parties, unless a party shows good cause in writing at least 5 days before the hearing on the motion why the action should remain pending. Mere inaction for a period of less than 1 year shall not be sufficient cause for dismissal for failure to prosecute.
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> Committee Notes
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> **2005 Amendment.** Subdivision (e) has been amended to provide that an action may not be dismissed for lack of prosecution without prior notice to the claimant and adequate opportunity for the claimant to re-commence prosecution of the action to avert dismissal.

Rule 1.420(e) should not be changed. The proposed changes would allow a claimant an extra 60 days to re-commence prosecution of an action after receiving notice of failure to prosecute, *even if the period of inactivity exceeds a year and regardless of the reasons for inactivity*. It is our understanding from the Rules Committee that the amendments are to protect a claimant from dismissal as a result of inexcusable neglect of the attorney in the prosecution of the case. The Judges of the Tenth Judicial Circuit respectfully submit that the well-intentioned efforts of the Rules Committee in this case would unfortunately cause untoward, far-reaching changes that far outweigh the intended benefits for the few parties adversely impacted by attorney inaction.

The proposed changes would destroy the effectiveness of Rule 1.420(e) as a device enforcing diligent prosecution of cases, and the negative impacts would far outweigh the perceived benefit of amendment.

The Current Rule

The current Rule 1.420(e) works. Claimants have the burden and obligation to diligently pursue the case. Their lawyers are ethically obligated to expedite litigation. Rule 4-3.2, Rules Regulating the Fla. Bar. If a party fails for a period of one year to conduct record activity that affirmatively moves a case toward resolution, the case is subject to dismissal only upon proper notice and hearing. *Reyes v. Reeves Southeastern Corp*., 30 FLW D721 (Fla. 2d DCA 2005). If there is excusable neglect, the case can continue. The purpose of the Rule is "to encourage prompt and efficient prosecution of cases and to clear court dockets of cases that have essentially been abandoned," to expedite litigation, and to keep the court dockets as current as possible. *Toney v. Freeman*, 600 So. 2d 1099, 1100 (Fla. 1992); *American E. Corp. v. Henry Blanton, Inc*., 382 So. 2d 863, 866 (Fla. 2d DCA 1980). The current Rule is a significant case management tool for trial judges in enforcing time standards and moving their dockets, and it requires parties to promptly and efficiently prosecute their cases and act affirmatively and "do…something of substance." *Toney, supra,* at 1100. Rule 1.420(e)

makes "litigants, particularly plaintiffs, more vigilant about hastening suits to their just conclusion." *Elegele v. Halbert*, 30 FLW D245 (Fla. 5th DCA 2005).

Rule 1.420(e) is well known. It is not a trap for the unwary. It is hard to imagine that any lawyer trying cases is unaware of the requirements of the Rule (and the corresponding ethical requirements to diligently prosecute cases); but a lawyer who does not know the Rules should not be trying cases. It is not up to the courts to make rules to protect lawyers or their clients from inadvertence or lack of diligence. Instead, Judges should be provided tools to enforce diligence and case progress, like the current Rule.

One year is an incredibly generous period of inactivity. The law of "failure to prosecute" evolved to its current state because a case with a full year without activity toward prosecution should be cleared from the docket as "abandoned." *Freeman*, *supra*, at 1100. Failure to diligently pursue cases impacts the entire system. "Dilatory practices bring the system of justice into disrepute." Comment, Rule 4-3.2, Rules Regulating the Fla. Bar.

The current Rule is fair even if a party needs a hiatus in the case. If a party has a valid reason for inactivity beyond a year (absence of a witness, illness of a party or attorney, need for service of another party, etc.), a Motion to Abate or Motion to Stay may be requested, tolling the

enforcement of Rule 1.420(e). *See Bowman v. Peele*, 413 So. 2d 90 (Fla. 2d DCA 1982), *dismissed,* 419 So. 2d 1199 (Fla. 1982). Absent a valid need for stay or abatement, there is no good reason to permit a litigant to clog the court system, allow evidence to go stale and witnesses to become unavailable, and otherwise disadvantage other parties and thwart justice by failing to pursue the case through diligent and consistent activity. *See* Comment, Rule 4-3.2, Rules Regulating the Fla. Bar.

Problems with the Proposed Changes

The current Rule is fair to both sides of a case; the proposed changes are not. The proposed Rule alters the law by (i) shifting the burden of advancing the case to the other parties or the judge, and then (ii) allowing a claimant to "re-commence" a case after inactivity of 10 months, 12 months, 18 months, or more, regardless of the reason for inactivity. Under the proposal, the burden to identify the requisite lack of activity and to give notice would fall upon the other parties or the judge. If and when at least 10 months of inactivity is discerned and notice is sent, the claimant would always have 60 days from Notice of Failure to Prosecute to "re-commence" the case, no matter how long the claimant's case has remained inactive and without the requirement to justify the hiatus.

Cases that are not pursued diligently hurt the claimant as much as anyone. Clients are often frustrated about lack of progress, and they are sometimes left in the dark about the status of the case. Removing all the bite from Rule 1.420(e) hurts everyone in the process by allowing less than diligent lawyers, or lawyers who have lost interest or incentive to pursue a case, the opportunity to remain idle, sit back, and do nothing to the disadvantage of all parties, including the claimant. Under the proposal, lawyers could compound the delay even after receiving notice by engaging in minimal activity sufficient to meet the requirements of the proposed Rule and then do nothing while waiting for the next notice of inactivity.

The number of presumably aggrieved litigants that would benefit from the amendments is negligible. As a rule, attorneys do not let good cases languish. The vast majority of cases noticed for dismissal under the current Rule are abandoned. A small percentage of cases are reinstated because of excusable neglect. A minute amount of cases fall into the category of inexcusable neglect or error. Of those that get dismissed, some are still within the statute of limitations and may be re-filed. The negative impacts of amending Rule 1.420(e) far exceed the need for relief for the few claimants whose attorney failed to pursue a case and cannot demonstrate excusable neglect.

The proposed changes will cause more cases to be out of time standards, which would create an unnecessary additional burden on an already stressed court system and civil clerk personnel.

A case with 18-month time standards (jury-civil) or 12-month time standards (bench-civil) can be effectively out of standard with one 12-month period of inactivity. Under the proposed Rule, there would no longer be incentive for lawyers to maintain tickler systems or reminders to keep activity going in their cases. More cases will stay on the docket without meaningful activity. Ironically, the proposed change comes at a time when we need more than ever the strongest tools available to move cases and keep the court dockets as clear as possible. Allowing cases to languish on the dockets is frustrating to participants on all sides and it is costly to the system and to litigants.[2]

The proposed rule changes present a significant potential workload issue for judges, court staff, and the clerk of courts. Currently our judges and their court staff review the docket to determine which cases should be dismissed. Inevitably, this cannot be done every month if it is done

[2] As bluntly expressed by the second district court in a case that was ultimately reinstated: "[P]laintiff's counsel took a significant risk by allowing this case to languish until the last minute…the plaintiff's inaction has cost the parties both time and money." *Jain v. Green Clinic, Inc*., 830 So. 2d 836 (Fla. 2d DCA 2002).

thoroughly and correctly.[3] Involving the clerk has a myriad of potential problems, not to mention the workload issue of diverting clerk staff from other responsibilities, including the formidable effort to keep up with timely entering and indexing all paper filed in our cases. Suffice it to say, in our circuit, doing the job of clearing out inactive cases will be significantly impacted, not to mention increased numbers of languishing cases that are expected if the current dismissal rule is altered.

Caseloads are increasing statewide. As for the Tenth Judicial Circuit, the Supreme Court has certified us for seven new circuit judges, only a portion of which we can hope to be funded.[4] *In re Certification of Need for Additional Judges*, 889 So. 2d 734, 740 (Fla. 2004). The current Rule supports and aids the trial judge in managing the docket and eliminating cases that have been abandoned or unreasonably delayed without "good

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[3] Review can be done superficially by getting a list of cases with no activity for the prescribed period. However, the computer (and most clerk personnel) cannot discern proper record activity by claimant moving a case along from any other piece of paper filed (or mis-filed) in the court file. For good reason, most of our judges do not choose to handle our reviews in that fashion.

[4] "Despite a well-documented process for assessing workload, ever increasing caseloads, and repeated certification requests, the Legislature has failed to fund an adequate number of judges for this state…In many instances, their workload is beyond capacity." 889 So. 2d 740. The Tenth Circuit is not the only circuit without enough judges to handle the workload. Two other circuits were also certified for seven additional circuit judges, and sixty-seven were certified state-wide. *Id.*

cause." Enacting a new Rule that takes away the judge's ability to dismiss cases that have not been active for a year and eliminates incentive for lawyers to keep track of the progress of their cases will add to caseloads and increase the complexity of clearing cases that deserve to be dismissed.

The proposed changes would clog our dockets, abide dilatory and unprofessional behavior, and further erode confidence of the public in the court system. The current Rule 1.420(e) is an essential tool that helps keep dockets manageable through dismissal of cases that are not prosecuted. Instead of changing the Rule for the benefit of a few, we should keep a Rule that is important and fair to all participants and to the system itself.

The proposed changes reflect a change in the law of "failure to prosecute" that is inconsistent with the Rules of Judicial Administration, and current policies, guidelines, and case time standards.

As demonstrated above, the proposed changes represent a significant departure from the current law of "failure to prosecute" that threatens to increase caseloads and impede efficiency. Weakening the dismissal mechanism for inactive litigation is not only damaging to court efficiency, it runs counter to announced policies and written priorities for the judicial

system. The proposed Rule simply does not encourage speedy resolution of cases, which is inconsistent with current policies and rules on the subject.

There are many good reasons to enforce the policy, rule, and ethical emphasis on diligently prosecuting and clearing cases. The confidence of clients and the public depends on our ability to efficiently and effectively manage our dockets. Dilatory practices must be addressed directly in order to protect the system from overload and disrepute. *See* Comment, Rule 4-3.2, Rules Regulating the Fla. Bar. The rules of procedure should encourage diligence rather than condoning the lack of professionalism. The current Rule encourages the lawyer to keep a case moving and, if the case stalls, to talk to the client early on about consequences if the case is not diligently pursued. Under the proposed Rule, there are no consequences.

Lawyers and judges are under increased scrutiny and criticism from the public due to lack of professionalism. Lack of diligence and failure to advance a case on the docket is one of the common complaints of *claimants* about their lawyer and the court system. Rules and policies address these needs. Judges are told to take charge of their dockets and control "the pace" of litigation. "Lawyers and judges have a professional obligation to conclude litigation as soon as it is reasonably and justly possible to do so." Fla. R. Jud. Admin. 2.085. Most lawyers do their job professionally. The

proposed changes protect and condone the inactivity of the few who do not meet minimal requirements for a case-moving effort. The current Rule is one of the few tools available to the judge to meet time standards and to force case moving effort upon the minority of lawyers who fail to uphold their end of the professionalism equation.

The proposed amendment removes an important case management tool from judges and is inconsistent with significant codified rules and policies for lawyers and judges.

For all the foregoing reasons, the judges of the Tenth Judicial Circuit (listed in Attachment A) respectfully request that Rule 1.420(e) not be changed from its current form.

Respectfully submitted,

The County and Circuit Judges
of the Tenth Judicial Circuit

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by US Mail to the following this _____ day of March, 2005, to committee Chair Robert N. Clarke, Jr., Ausley & McMullen, P.A., P.O. Box 391, Tallahassee, FL 32302-0391 and John F. Harkness, Jr., Executive Director, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

_____
Ralph Artigliere, Circuit Judge
Florida Bar No. 0236128

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that the font used in this brief is Times New Roman 14 point and in compliance with Rule 9.210, Florida Rules of Appellate Procedure.

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Ralph Artigliere, Circuit Judge
Florida Bar No. 0236128

Attachment "A"

Honorable Ronald A. Herring, Chief Judge
Honorable Roger A. Alcott, Circuit Judge
Honorable Ralph Artigliere, Circuit Judge
Honorable Charles Lee Brown, Circuit Judge
Honorable Mark Carpanini, County Judge
Honorable Timothy Coon, County Judge
Honorable Angela Cowden, County Judge
Honorable Charles B. Curry, Circuit Judge
Honorable Robert Doyel, Circuit Judge
Honorable J. Dale Durrance, Circuit Judge
Honorable Peter F. Estrada, County Judge
Honorable Marcus Ezelle, County Judge
Honorable Judith J. Flanders, Circuit Judge
Honorable Mary Catherine Green, County Judge
Honorable J. Michael Hunter, Circuit Judge
Honorable Donald G. Jacobsen, Circuit Judge
Honorable Anne Kaylor, County Judge
Honorable Harvey A. Kornstein, Circuit Judge
Honorable J. David Langford, Circuit Judge
Honorable John F. Laurent, Circuit Judge
Honorable Dennis P. Maloney, Circuit Judge
Honorable Ellen S. Masters, Circuit Judge
Honorable J. Michael McCarthy, Circuit Judge
Honorable Randall McDonald, Circuit Judge
Honorable Dick Prince, Circuit Judge
Honorable Michael Raiden, County Judge
Honorable Susan W. Roberts, Circuit Judge
Honorable Steven L. Selph, County Judge
Honorable Olin W. Shinholser, Circuit Judge
Honorable Wm. Bruce Smith, Circuit Judge
Honorable Keith Spoto, County Judge
Honorable Karla F. Wright, County Judge
Honorable James A. Yancey, Circuit Judge