

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA

RULE OF JUDICIAL ADMINISTRATION 2.540

CASE NO.

**OUT-OF-CYCLE REPORT OF
THE FLORIDA RULES OF
JUDICIAL ADMINISTRATION COMMITTEE**

The Honorable Lisa Davidson, Chair of the Florida Rules of Judicial Administration Committee (“the Committee”), and John F. Harkness, Jr., Executive Director of The Florida Bar, file this out-of-cycle report requesting amendments to *Fla. R. Jud. Admin. 2.540* under the procedure outlined in *Fla. R. Jud. Admin. 2.140*.

The Committee proposes amendments to rule 2.540 as shown in legislative format in Appendix A and in two-column format in Appendix B. On January 17, 2008, the Committee voted 32-0 in favor of the amendments, and to propose the amendments outside of the regular reporting cycle of the Committee. The Board of Governors of The Florida Bar reviewed the proposed amendments at its meeting on May 30, 2008. The Board voted 37-0 in favor of the amendments and in favor of presenting the matter to the Court out-of-cycle.

This proposal was published for comment in the July 1, 2008, issue of The Florida Bar *News* and simultaneously was noticed on The Florida Bar website. See Appendix D. One comment was received in response to the Notice. That comment, set forth in Appendix E, was submitted by The Honorable Kim A. Skievaski, Chair of the Judicial Administration Committee of the Conference of Circuit Judges, on behalf of the Chief Judges of the state.

The following attachments are included with this report:

Appendix A: Rule in legislative format.

Appendix B: Rule in two-column format.

Appendix C: Copies of relevant meeting minutes, letters, and e-mails relating to the promulgation of the proposed amendments to the rule.

Appendix D: Publication notice from Florida Bar *News*

Appendix E: Comments from Judge Kim Skievaski on behalf of the Chief Judges of the Florida Circuit Courts, and response to those

comments from Matthew Dietz, Chair of the Equal Opportunities Law Section.

This matter first came to the attention of the Committee in the form of a letter dated April 5, 2007 to the then-Chair of the Committee from Reginald Clyne, Matthew Dietz, and George Richards, members of the Equal Opportunities Law Section of The Florida Bar (“the Section”). (*See Appx C, pages 1–6.*) In that letter, the Section proposed extensive amendments to rule 2.540 because, in the opinion of the Section, “[t]he present rule does not provide sufficient guidance for courts and the public regarding their rights and remedies as required by Title II of the Americans with Disabilities Act, 42 U.S.C. 12131. This rule change will ensure uniformity with regard to accommodations provided to attorneys, parties, witnesses, and other participants in the court system.”

The then-Chair of the Committee assigned this matter to a subcommittee chaired by the Honorable Lisa Davidson (who is now Chair of the Committee) and composed of several members of the Committee and several members of the Section. The subcommittee solicited the views of the Office of the State Courts Administrator (“OSCA”) and, on August 6, 2007, a memorandum from Debbie Howells of OSCA was sent to the subcommittee, in which she expressed OSCA’s concerns regarding the language of the proposal. (*See Appx C, pages 7–20.*) Mr. Dietz (the 2008-2009 Chair of the Section) responded on behalf of the Section in a letter dated August 29, 2007 to the subcommittee chair. (*See Appx C, pages 21–29.*) The subcommittee met in Tampa on September 6, 2007 to review the proposal. In light of the discussions at that meeting and OSCA’s concerns, Mr. Dietz subsequently amended the Section’s original proposal and in an email dated September 20, 2007, forwarded a revised draft for the subcommittee to review. (*See Appx C, pages 30–34.*) Ms. Howells reviewed Mr. Dietz’s revised draft and sent a memorandum to Judge Davidson dated October 10, 2007, outlining OSCA’s views on each subdivision of the proposed rule. (*See Appx C, pages 35–41.*) The subcommittee reviewed Mr. Dietz’s revised draft and Ms. Howells’ memorandum in two telephone conferences held on November 6 and November 26, 2007. (Minutes of those conferences can be found in Appendix C at pages 42–45 and 46–48, respectively.) At the meeting on November 29, 2007, the subcommittee unanimously approved language to present to the full Committee for its consideration. (A subsequent suggestion from subcommittee member Elaine New to clarify language in subdivision (e)(3) was adopted by the subcommittee. *See Appx C, pages 49–50.*)

At its meeting on January 17, 2008, the Committee approved the rule as

proposed by the subcommittee, with the following changes:

- In subdivision (c)(1), the phrase “within 5 working days” was amended to read “within 7 days.”
- In subdivision (d)(3), the phrase “no fewer than 5 court days” was amended to read “no fewer than 7 days.”
- In subdivision (e)(3), the phrase “determines that a person is disabled” was amended to read “determines that a person is a qualified person with a disability.”

The rationale for the Section’s proposal to amend the rule can be better understood by a review of some of the documents cited above detailing the procedural history of the amendment process. The Court’s attention is particularly directed to the letter dated August 29, 2007 to subcommittee chair Judge Lisa Davidson from Mr. Dietz (*see* Appx C, pages 21–29), in which he defends the Section’s proposal in response to the OSCA memorandum of August 6, 2007, and to the “Explanation and legal justification” appended to Mr. Dietz’s September 20, 2007 e-mail (*see* Appx C, pages 32–34). The committee understands and appreciates that access to the courts for persons with disabilities is a priority, and that such access can only be accomplished by instituting procedures that ensure that persons with disabilities are afforded an equal opportunity to participate in courthouse activities. In order to accomplish that goal, adequate safeguards need to be in place, including a process by which to request accommodations, a process for providing notice if an accommodation is accepted or denied, and a procedure to review such denial, if requested. While some circuits have informal procedures to address requests for accommodations for persons with disabilities, such procedures and the subsequent level of accommodation, if any, are dependent upon the ad hoc decision-making in each circuit, with differing accommodations and results.

After the Committee voted unanimously at the January 2008 meeting to approve these rule amendments, the Chair received a letter from Lloyd Comiter, the then-Chair of the Small Claims Rules Committee (SCRC). In that letter, set forth in Appendix C at pages 51–52, Mr. Comiter advised that the SCRC suggested that a new subdivision be added immediately after the notice in subdivision (a) (renumbered as (c)(1) in the Committee’s proposal). The proposed new subdivision would provide that the notice “shall be in bold face and must be in Times Roman 14-point font or Courier 14-point font,” to promote uniformity and to make the notice easier to read by persons with disabilities. The Rules of Judicial

Administration Committee has not incorporated this suggestion into its proposal, but is not opposed to the SCRC's proposal.

As noted above, the Committee received one comment after the rule proposals were published in July 2008. In his letter on behalf of the Chief Judges, Judge Skievaski noted a number of concerns. At its meeting on September 11, 2008, the Committee solicited the views of Mr. Dietz in response to Judge Skievaski's concerns. First, Mr. Dietz stated that, contrary to Judge Skievaski's concerns, a full time ADA employee is unnecessary. Second, the number of days in which to make a request (ultimately determined to be seven) already had been thoroughly considered. Additionally, parties could waive the seven-day requirement in the event a hearing was scheduled before the seven days expired.

Third, Mr. Dietz responded to concerns that the grant or denial of an ADA request had to be in writing. Judge Skievaski felt this was too much of a burden for the court system. Mr. Dietz explained that he had conducted research regarding how many such requests were made, and believed that, based on that research, the proposal's requirement was not particularly burdensome. For instance, his research indicates that Miami-Dade County receives only about 50 requests per month that actually relate to the ADA. Mr. Dietz said the real concern was that the failure to put the grant or denial in writing meant that there was no record of the accommodation having been made, or, alternatively, meant that there was no record for appeal in the event that the accommodation was not made. One of the major issues noted by Mr. Dietz was the concern that the ADA coordinator could deny an accommodation in the belief that such accommodation was not covered by the statute, and that no record would be made of the denial of the accommodation, and that access would thereby be denied. For example, a person with a disability may not be able to go to the courthouse by virtue of his disability. An ADA coordinator may state that the court does not provide transportation, and that person needs to contact para-transit. Such action is a denial of an accommodation and, because there could be an accommodation, such as a telephonic appearance, and the person may not have the ability to travel, or may not be pre-qualified for para-transit, the denial may in effect constitute a denial of access to the courts.

Finally, Mr. Dietz discussed the concern that the rule was too broad, but he explained his own view that the rule was only broad enough to accomplish its purpose. He believes all concerns have been addressed.

The full text of Judge Skievaski's comments and Mr. Dietz's responses thereto can be found in Appendix E to this report.

After hearing from Mr. Dietz at its meeting on September 11, 2008, the Committee discussed whether to amend the rule proposals in response to the comments received from the Chief Judges, and also heard concerns of several members of the Committee regarding specific provisions of the proposal. While the minority supports the general concepts embodied in the rule, concerns of this minority are included below to note an objection to those aspects of the proposed rule requiring accommodation grants to be in writing:

- Proposed rule 2.540(g) requires the court to respond to a request for accommodation in writing, whether the request is granted or denied. The requirement to provide written documentation to the requestor that his or her request was granted is ill-advised, especially in this time of limited resources. Indeed, the proposed rule specifically authorizes the requestor to make the request orally, yet requires the court to provide a written notice that the request is granted or denied. When there is no dispute regarding a request for an accommodation and the court is providing the accommodation, imposing a requirement that the court provide the requestor with written notification that the accommodation has been granted is unnecessary. Oral notification should be sufficient.
- While the proposed rule states that “the court” must respond, in practical terms this is an activity that is performed by court administration staff. The staff who are assigned to handle ADA request also have multiple other assignments. Typically, the human resources manager or other court manager is also assigned to handle ADA requests. Personnel in court administration have been reduced through a Reduction in Force in June 2008. In addition, a hiring freeze that has been in place since 2008 has prevented hiring replacements for persons who have resigned. Imposing new requirements that do not serve a useful purpose should never be done, but especially should not be done in a time of limited resources.
- The costs associated with this requirement may include: staff time to generate the record, paper to print the record, costs in transmitting the written record to the requestor, and cost to maintain the record once it was created. All of these costs are unnecessary. The requirement to provide the requestor with written documentation that the request was granted should be deleted from the rule.

In response to the minority report, other members of the Committee, as well as Mr. Dietz, felt that the slight burden of providing notice was outweighed by the benefit of ensuring access to the court for persons with disabilities. After discussion, the Committee voted 21-6 in favor of the Rule as it appears in Appendix A, which is the same version approved earlier by the Bar's Board of Governors.¹

WHEREFORE, the Florida Rules of Judicial Administration Committee requests that the Court amend Rule of Judicial Administration 2.540 as outlined in this report.

Respectfully submitted on August 18, 2009.

/s/ Lisa Davidson
Hon. Lisa Davidson, Chair
Florida Rules of Judicial
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¹Subdivision (c) of the amended rule incorporates the text of the former rule that addresses notice requirements, adopted verbatim except for the extension of the contact period from 2 days to 7 days. If the Court adopts the proposal advocated by the Committee, language in the following other forms (requiring contact within 2 days) would be inconsistent with the new standard: *Fla. R. Civ. P. Forms* 1.910(a), 1.910(b), 1.911(a), 1.911(b), 1.912(a), 1.912(b), 1.913(a), 1.913(b), 1.922(a)–(d); *Fla. R. Juv. P. Forms* 8.908, 8.959, 8.960, 8.979; and *Fla. Fam. L. R. P. Forms* 12.920(c), 12.921, 12.923, 12.931(b), 12.941(b), (e), 12.944(b), 12.961.

CERTIFICATIONS

CERTIFICATION OF FONT COMPLIANCE

I certify that this report was prepared in 14-point, Times New Roman font.

CERTIFICATION THAT RULE HAS BEEN READ AGAINST WEST'S RULES OF COURT

I certify that the rule that is the subject of this report was read against *West's Florida Rules of Court — State* (2009).

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished by United States mail to Reginald Clyne, 2600 South Douglas Road, Suite 1100, Coral Gables, FL 33134-6143; Matthew Dietz, 2990 Southwest 35th Avenue, Miami, FL 33133; George Richards, 2075 West 1st Street, Suite 203, Fort Myers, FL 33901-3100; Lloyd A. Comiter, PMB 152, 9858 Glades Road, Boca Raton, FL 33434; The Honorable Kim A. Skievaski, M.C. Blanchard Judicial Building, 190 Governmental Center, Pensacola, FL 32502-5795; and Laura Rush, General Counsel, Office of the State Courts Administrator, 500 S. Duval Street, Tallahassee, FL 32399-1900, on August 18, 2009.

/s/ J. Craig Shaw

J. Craig Shaw

Bar Staff Liaison, Florida Rules of Judicial Administration Committee
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