

IN THE SUPREME COURT OF FLORIDA

**IN RE: AMENDMENTS TO THE
FLORIDA RULES OF CIVIL
PROCEDURE**

**CASE NO: SC09-1460
SC09-1579**

**RESPONSE OF CIVIL PROCEDURE RULES COMMITTEE TO
COMMENTS FILED REGARDING ADOPTION
OF AMENDMENTS TO FORM 1.996**

Mark Romance, Chair, Civil Procedure Rules Committee, and John F. Harkness, Jr., Executive Director, The Florida Bar, file this Response to the Comments filed with the Court regarding the Court's adoption of amendments to Form 1.996. This response was approved by the Committee by a vote of ---.

I. Response to Comment by Terry Resk

With respect to the comments of Terry Resk, the Committee has been advised by Thomas D. Hall that the numbering problem identified in those comments is already in the process of being resolved. The form should be revised in accordance with Ms. Resk's comment.

II. Response to Comment by Deborah Marks

With regard to the comments of Deborah Marks, the Committee does not believe that the proposed form would result in foreclosure of any county tax certificates or liens, unless the county is named as a party in the action. The Committee does not believe that any changes to the proposed form are required for this issue.

III. Response to Comments by Ben-Ezra & Katz, P.A., Florida Default Law Group, and Smith, Hiatt, and Diaz with regard to flat-fee agreements

With respect to the comments filed by Ben-Ezra & Katz, P.A., Florida Default Law Group. P.L., and Smith, Hiatt & Diaz, all of whom were concerned about the form's effect on attorneys' fee recoveries under flat-fee arrangements, the Committee was concerned that the findings as to reasonable hours and rates may be required under *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985). If the Court believes that the form should allow for the possibility of a flat-fee arrangement in mortgage-foreclosure matters, the Committee suggests that a Note could be added to the form as follows: "If the client and the attorney have entered into a reasonable fixed-fee agreement, and the attorney seeks to recover attorney's fees based upon the fixed-fee agreement, the attorney should substitute the legal basis and findings that would support the fixed fee award in place of the blanks in the form that are provided for a statement of the reasonable hours and rates underlying the award of attorneys' fees."

IV. Response to Comments by Ben-Ezra & Katz, P.A., and Housing Umbrella Group of Florida Legal Services, Inc. with regard to writs of possession

Ben-Ezra & Katz, P.A., filed a comment suggesting that the amended form "fails to recognize affirmatively the foreclosure plaintiffs' right to obtain a writ of possession upon request to the clerk without requiring additional judicial

involvement.” The Housing Umbrella Group of Florida Legal Services, Inc. filed a comment suggesting that the amended form failed to adequately address the requirements of the federal Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22, §§ 701-704 (eff. May 20, 2009). According to the Housing Umbrella Group, “[a] writ of possession cannot issue automatically in a foreclosure action without potentially violating the PTFA.”

As adopted by the Court, the form included new language in paragraph 6 providing that “If any defendant remains in possession of the property, the clerk shall without further order of the court issue forthwith a writ of possession upon request of the person named on the certificate of title.” The Committee believes that the proposed form should be revised by deleting this provision so that a plaintiff cannot obtain a writ of possession without a hearing.

The Housing Umbrella Group suggested that the measures adopted by individual circuit courts to protect PTFA rights are inadequate, and that the form should therefore be amended to include additional notice provisions that specifically address the requirements of the PTFA. The Committee does not believe that the form should include these additional provisions. The Committee is not in a position to evaluate the success of compliance efforts undertaken by individual circuits. However, the Committee’s understanding is that the PTFA as

currently enacted will sunset in 2012, and that it is only applicable to federally-insured mortgages. In view of the limited scope of the PTFA and the potentially limited duration of the law, the Committee believes that the form should not be encumbered with additional provisions that would not be required in cases involving single-family non-rental properties or even rental properties that are not subject to federally-insured mortgages, and that may not be applicable in any event if the PTFA is allowed to sunset in 2012. The Committee believes that the better solution is to require a hearing before issuance of a writ of possession and to rely on individual courts to inquire into tenant-rights issues before granting the writ of possession.

V. Response to Comments by Ben-Ezra & Katz, P.A. regarding rights of homeowners associations and assignments of judgments

The Committee also does not believe any changes are needed with respect to the rights of homeowners associations. The applicable statutes clearly set forth the rights of the associations to recover past due assessments in certain circumstances, and the form does not eliminate those rights. Similarly, the form does not preclude the right to assign a judgment. Such an assignment is generally accomplished through an “assignment of judgment and bidding rights,” which is submitted to the clerk after the judgment is entered and before the foreclosure sale.

Respectfully submitted _____.

MARK ROMANCE

Chair

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I certify that this report was prepared in accordance with the font requirements of Fla. R. App. P. 9.210(a)(2).

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