

# Florida Supreme Court Amends the Florida Rules of Civil Procedure

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**Jeffrey A. Cohen**

## **Florida Supreme Court Amends the Florida Rules of Civil Procedure**

The Florida Supreme Court recently decided *In Re: Amendments to the Florida Rules of Civil Procedure*, SC10-148 (Fla. Sept. 8, 2010). Two new rules were added. Rule 1.071 addresses constitutional challenges to state statutes and county or municipal charters, ordinances, or franchises. Rule 1.285 addresses the procedures governing the assertion of inadvertent production of privileged materials and the methods for challenging this assertion. Form 1.975 was added for use in providing notice of a constitutional challenge as required by section 86.091, Florida Statutes, and to conform to new Rule 1.071. The Court also made a number of modifications to existing rules and forms, including, *inter alia*, the rules governing motions for directed verdict, proposals for settlement and jury instructions.

The following is a summary of those amendments. The two new rules are covered first followed by the amendments to existing rules and forms. Because this practice pointer was prepared to highlight amendments, the rules and forms discussed below are not set forth in their entirety in this summary. Please be sure to review the rules and forms in their entirety.

### **NEW RULES**

#### **RULE 1.071. CONSTITUTIONAL CHALLENGE TO STATE STATUTE OR COUNTY OR MUNICIPAL CHARTER, ORDINANCE, OR FRANCHISE; NOTICE BY PARTY**

This is a new rule governing the requirements applicable when a party challenges, by pleading, motion, or other paper, the constitutionality of a state statute or county or municipal charter, ordinance or franchise. The rule requires that a notice be filed served on the Attorney General or the State Attorney of the judicial circuit in which the action is pending by either certified or registered mail. The rule provides it is not necessary to join the Attorney General or the State Attorney as a party to the action, however the Committee Notes reflect the Attorney General or the state Attorney have discretion to participate and be heard on the question of the constitutionality of the statute or county or municipal charter, ordinance, or franchise.

#### **RULE 1.285. INADVERTENT DISCLOSURE OF PRIVILEGED MATERIALS**

This is a new rule governing the assertion of privilege in situations where there has been an inadvertent disclosure of privileged materials, either pursuant to formal demand or informal request, by either a party or a non-party.

##### **(a) Assertion of Privilege as to Inadvertently Disclosed Materials .**

Subdivision (a) provides that in order to assert the privilege, the party or non-party who made the disclosure must, "within 10 days of actually discovering the inadvertent disclosure, serve written notice of the assertion of privilege on the party to whom the materials were disclosed. The notice shall specify with particularity the materials as to which the privilege is asserted, the nature of the privilege asserted, and the date on which the inadvertent disclosure was actually discovered."

##### **(b) Duty of the Party Receiving Notice of an Assertion of Privilege .**

Subdivision (b) sets forth the duties of the party receiving notice of an assertion of privilege. That party:

(a) shall promptly return, sequester, or destroy the materials specified in the notice, as well as any copies of the material. The party receiving the notice shall also promptly notify any other party, person, or entity to whom it has disclosed the materials of the fact that the notice has been served and of the effect of this rule. That party shall also take reasonable steps to retrieve

the materials disclosed. Nothing herein affects any obligation pursuant to R. Regulating the Fla. Bar 4-4. (b).

### **(c) Right to Challenge Assertion of Privilege .**

Subdivision (c) provides that parties who receive notice pursuant to Rule 1.285(a) have the right to challenge the assertion of privilege. The rule provides a non-exhaustive list of the grounds for challenging the assertion of privilege:

The grounds for the challenge may include, but are not limited to, the following: (1) The materials in question are not privileged. (2) The disclosing party, person, or entity lacks standing to assert the privilege. (3) The disclosing party, person, or entity has failed to serve timely notice under this rule. (4) The circumstances surrounding the production or disclosure of the materials warrant a finding that the disclosing party, person, or entity has waived its assertion that the material is protected by a privilege.

Subdivision c further sets forth the method by which such challenge must be made. A party challenging the assertion of a privilege shall do so by serving its challenge on the party, person or entity asserting the privilege within 20 days of service of the original notice given by the disclosing party, person, or entity. The notice of the recipient's challenge shall specify the grounds for the challenge.

Importantly, the failure to serve timely notice of challenge is a waiver of the right to challenge.

### **(d) Effect of Determination that Privilege Applies .**

Subdivision (d) governs the effect of a determination that a privilege applies. Upon such a determination, either by virtue of a ruling that the materials are privileged or that the right to challenge the assertion of a privilege has been waived, the court "shall direct what shall be done with the materials and any copies so as to preserve all rights of appellate review."

Subdivision (d) further provides that the recipient of the materials "shall also give prompt notice of the court's determination to any other party, person, or entity to whom it had disclosed the materials."

## **AMENDMENTS TO CURRENT RULES**

### **RULE 1.080. SERVICE OF PLEADINGS AND PAPERS**

Rule 1.080(b) was modified to provide that service by delivery shall be deemed complete on the date of the delivery. The former provision in the rule providing that service after 5:00 p.m. shall be deemed to have been made the next day was omitted. The Court stated that "just as service by mail is complete upon mailing, service by hand delivery should be deemed complete on the day delivery is accomplished by one of the methods enumerated in rule 1.080(b). However, we do not agree that service by hand delivery should be equated to service by mail, such that it triggers the additional time for responsive pleadings after service by mail provided under rule 1.090(e)." Slip Opinion at 3.

Rule 1.080(d) was also modified with respect to filing requirements to clarify that "[a]ll original papers shall be filed with the court either before service or immediately thereafter, unless otherwise provided for by general law or other rules."

### **RULE 1.100. PLEADINGS AND MOTIONS**

Rule 1.100(c) has been modified to address separately the caption for *in rem* proceedings, including *in rem* forfeiture proceedings. The rule now contains a requirement that:

In any *in rem* proceeding, every pleading, motion, order, judgment, or other paper shall have a caption containing the name of the court, the file number, the style "In re" (followed by the name or general description of the property), and a designation of the person or entity filing it and its nature or the nature of the order, as the case may be. In an *in rem* forfeiture proceeding, the style shall be "In re forfeiture of" (followed by the name or general description of the property).

### **RULE 1.310. DEPOSITIONS UPON ORAL EXAMINATION**

Rule 1.310(b)(4)(A) **Notice** has been modified to further provide that any subpoena served on a person to be examined shall state the method or methods for recording the testimony.

Rule 1.310(b)(5), which permitted a notice to a party deponent to be accompanied by a request for production of documents under Rule 1.351, has been amended to also provide that "Rule 1.351 provides the exclusive procedure for obtaining documents or things by subpoena from nonparties without deposing the custodian or other person in possession of the documents."

The 2010 Committee Notes reflect that Subdivision (b)(5) was amended "to clarify that the procedure set forth in rule 1.351

must be followed when requesting or receiving documents or things without testimony, from nonparties pursuant to a subpoena," and was "intended to prevent the use of rules 1.310 and 1.410 to request documents from nonparties pursuant to a subpoena without giving the opposing party the opportunity to object to the subpoena before it is served on the nonparty as required by rule 1.351."

#### **RULE 1.340. INTERROGATORIES TO PARTIES**

Rule 1.340(a) was amended to clarify that if the Supreme Court has approved a form of interrogatories "for the type of action," the initial interrogatories on a subject included therein shall be from the form approved by the court. Subdivision (a) further clarifies that a party may serve fewer than all of the approved interrogatories within a form.

#### **RULE 1.351. PRODUCTION OF DOCUMENTS AND THINGS WITHOUT DEPOSITION**

Rule 1.351(a) was amended to include a statement that "[t]his rule provides the exclusive procedure for obtaining documents or things by subpoena from nonparties without deposing the custodian or other person in possession of the documents or things pursuant to rule 1.310."

The Committee Notes further explain that "Subdivision (a) is amended to clarify that the procedure set forth in rule 1.351, not rule 1.310, shall be followed when requesting or receiving documents or things, without testimony, from nonparties pursuant to a subpoena."

Rule 1.351(c) Subpoena was amended to include a statement that "[s]ervice within the state of Florida of a nonparty subpoena shall be deemed sufficient if it complies with rule 1.410(d) or if (1) service is accomplished by mail or hand delivery by a commercial delivery service, and (2) written confirmation of delivery, with the date of service and the name and signature of the person accepting the subpoena, is obtained and filed by the party seeking production."

#### **RULE 1.360. EXAMINATION OF PERSONS**

Rule 1.360(a)(1)(A) was amended to include a statement that "[i]f the examination is to be recorded or observed by others, the request or response shall also include the number of people attending, their role, and the method or methods of recording.

#### **RULE 1.410. SUPOENA**

Rule 1.410(d) was amended to clarify that proof of service of a subpoena shall be made by affidavit of the person making service "except as applicable under rule 1.351(c) for the production of documents and things by a nonparty without deposition," if not served by an officer authorized by law to do so.

Rule 1.410(e) was amended to add a provision that a subpoena for taking depositions "shall state the method for recording the testimony."

#### **RULE 1.420. DISMISSAL OF ACTIONS**

Rule 1.420(a), governing voluntary dismissal, was amended to clarify that except in actions in which property has been seized or is in the custody of the court, an action, "a claim, or any part of an action or claim" may be dismissed by plaintiff without court order providing the procedure set forth is complied with.

Rule 1.420(d), governing costs, has been amended to clarify that costs shall be assessed and judgment for costs shall be entered once the action is concluded as to the party seeking taxation of costs. The subdivision was also amended to clarify that where claims remain pending following the dismissal of one or more other claims, "taxable costs attributable solely to the dismissed claim may be assessed and judgment for costs in that claim entered in the action, but only when all claims are resolved at the trial court level as to the party seeking taxation of costs."

#### **RULE 1.442. PROPOSALS FOR SETTLEMENT**

Rule 1.442(c) was amended and a new subdivision (4) was added to address situations where a party is alleged to be solely vicariously, constructively, derivatively, or technically liable, either by operation of law or by contract. The rule provides that in such circumstances, a joint proposal for settlement made by or served on such a party need not state the apportionment or contribution as to that party. The rule also provides that acceptance by any party shall be without prejudice to rights of contribution or indemnity.

This new subdivision, by its terms, only applies to parties who are "**solely**" alleged to be vicariously, constructively,

derivatively or technically liable. Accordingly, if there is **any** allegation of active fault on the part of the party, a failure to apportion a proposal for settlement may invalidate the proposal.

#### **RULE 1.470. EXCEPTIONS UNNECESSARY; JURY INSTRUCTIONS**

Rule 1.470(b) was amended in light of the adoption of the new Florida Standard Jury Instructions. The Committee Notes explain that portions of Form 1.985 (now eliminated) were modified to account for the new Standard Instructions, and moved to subdivision (b). The rule provides that Standard Instructions shall be used to the extent that they are applicable, and unless the judge determines that an applicable Standard Instruction is erroneous or inadequate.

The rule provides that if a judge modifies a Standard Instruction or gives a different instruction, upon timely objection, the judge shall state on the record or in a separate order the legal basis for varying from the Standard Instructions. The rule provides that in circumstances where the notes accompanying the Standard Instructions recommend that a certain type of instruction not be given, judges shall follow that recommendation unless the judge determines the instruction is necessary to accurately and sufficiently instruct the jury. Under such circumstances, upon timely objection, the judge shall state on the record or in a separate order the legal basis of the determination that such instruction is necessary.

#### **RULE 1.480. MOTION FOR A DIRECTED VERDICT**

Rule 1.480(b) was amended to delete the requirement that a party renew a motion for directed verdict at the close of all of the evidence. As the Committee Notes explain, the rule is intended to conform to Federal Rule of Civil Procedure 50(b), which eliminated the requirement for renewing at the close of all the evidence a motion for directed verdict already made at the close of an adverse party's case.

Although the rule now provides a motion for directed verdict need not be renewed so long as a motion was made at the close of the opposing party's case (which may well be the close of the evidence anyway), the safest course to follow would be to renew a previously made motion for directed verdict notwithstanding the amendment, at least until such time as all of the contours of the application of the amendment have been sorted out in the appellate courts.

#### **RULE 1.510. SUMMARY JUDGMENT**

Rule 1.510(c) contains a number of grammatical corrections.

#### **RULE 1.525. MOTIONS FOR COSTS AND ATTORNEYS' FEES**

Rule 1.525 was amended to clarify that a party seeking attorneys' fees or costs must file a motion within 30 days of a judgment that concludes the action as to that party.

#### **FORM 1.901. CAPTION**

New form captions for *in rem* proceedings and forfeiture proceedings were added.

#### **FORM 1.923. EVICTION SUMMONS/ RESIDENTIAL**

Subdivision (5) of the form has been slightly modified. The modifications were made to the three languages contained in the form. FORM 1.975.

#### **FORM 1.975. NOTICE OF COMPLIANCE WHEN CONSTITUTIONAL CHALLENGE IS BROUGHT**

This is a new form to be used to provide notice of a constitutional challenge as required by section 86.091, Florida Statutes and is intended to conform to the requirements of Rule 1.071, discussed above. The form is to be used when the Attorney General or the State Attorney is not a named party to the action, but must be served solely in order to comply with the notice requirements set forth in section 86.091 and Rule 1.071.

#### **FORM 1.985. STANDARD JURY INSTRUCTIONS**

This form has been deleted. Its text has been substantially included in Rule 1.470, discussed above.

#### **FORM 1.986. VERDICTS**

The form verdict has been deleted. The form now provides that in all civil actions tried to a jury, the parties should refer to the model verdict forms contained in the Florida Standard Jury Instructions, as applicable.

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