IN THE SUPREME COURT OF FLORIDA

CASE NO. SC19-2104

IN RE: AMENDMENTS TO FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.140

COMMENT OF THE FLORIDA JUSTICE REFORM INSTITUTE REGARDING THE PROPOSED AMENDMENTS TO RULE 2.140

The Florida Justice Reform Institute (the "Institute") submits the following comment regarding the Court's proposal to amend Florida Rule of Judicial Administration 2.140 to streamline and improve the Court's rulemaking process.

I. Interest of Commenter

The Institute is a not-for-profit organization committed to reform of the state's civil justice system through the restoration of fairness, equality, predictability, and personal responsibility in that system. On behalf of its members, which include individuals, small business owners, business leaders, health care providers, and lawyers, the Institute regularly submits amicus curiae briefs in cases of significance to Florida's business community. In furtherance of its mission, the Institute is also dedicated to ensuring that Florida's litigation system is governed by fair, efficient, and effective procedural rules.

II. The Critical Need for a Streamlined and Timely Rulemaking Process

The Court's proposed amendments would provide much needed flexibility to

the existing Rule 2.140. Indeed, it is imperative to have a path to amend court rules that does not require the ponderous delays necessitated by the current procedure. Presently, most proposed rule changes are evaluated as part of a staggered, three-year cycle filing schedule by one or more Florida Bar committees as well as The Florida Bar's Board of Governors before being submitted to this Court for review. Although Rule 2.140(e) currently offers Florida Bar committees a way to submit an out-of-cycle rule proposal to the Court, including when it "is sufficiently necessary to the administration of justice that it should not wait until the next regular-cycle submission," these too often result in the delayed adoption of even the most common-sense rule changes. For instance, the simple change in rule to confirm that service of documents by email does not necessitate additional response time took more than two years to consider and adopt under the existing process.

In 2012, to incentivize the use of email as a faster means of exchanging documents in cases, the five extra days in time calculations allowed for delivery by postal service was extended to email service. *See In re Amendments to Fla. Rules of Judicial Admin.—Computation of Time*, 95 So. 3d 96, 99 (Fla. 2012). But once service by email became routine, providing an additional five days to respond to documents served via email made little sense.

In 2016, The Florida Bar's Rules of Judicial Administration Committee (the "RJAC") determined that the rules should not extend the time to respond for

documents served by email, and that service by email should be treated just like other instantaneous forms of service such as hand delivery. Proposed amendments making that change were first published for comment in *The Florida Bar News* on March 1, 2016. After review within The Florida Bar, the RJAC did not wait for the next three-year cycle report and, in conjunction with other rules committees, submitted an out-of-cycle report proposing the change more than a year later, on May 12, 2017. *See* Joint Out-of-Cycle Report of the Civil Procedure Rules Committee, the Rules of Judicial Administration Committee, the Criminal Procedure Rules Committee, and the Appellate Court Rules Committee, Case No. SC17-882. This Court adopted the rule change on October 25, 2018, observing that "[e]mail, unlike postal mail, is now nearly instantaneous and no additional time should be permitted for responses to documents served by email." *In re Amendments to Fla. Rules of Civil Procedure*, 257 So. 3d 66, 68 (Fla. 2018). But this common-sense change still necessitated a more than two-year evaluation process to adopt and implement, even under the "quicker" out-of-cycle rule proposal process.

As another example, it was not until 2017 that a stand-alone set of procedural rules applicable to family law cases was adopted. *See In re Amendments to Fla. Family Law Rules of Procedure*, 214 So. 3d 400 (Fla. 2017). Before 1995, family law cases were governed by the rules of procedure applicable to all civil cases. *See id.* at 400. In 1995, the Court adopted a separate set of Family Law Rules of

Procedure, but many of the rules made specific reference to and incorporated the Florida Rules of Civil Procedure. *Id.* This made it challenging and confusing for pro se litigants as well as attorneys, who were forced to "consult multiple sets of rules for guidance" to navigate their way through family law proceedings. *Id.* at 401. Family law practitioners also grew increasingly dissatisfied with the rules, finding that the civil rules of procedure applicable to family law cases were "often inadequate for the unique needs of family law proceedings." Out-of-Cycle Report of the Family Law Rules Committee at 4, Case No. SC16-978. Yet, it was not until 2012 that the Family Law Rules Committee (the "FLRC") established a subcommittee to study converting the family law rules to a stand-alone set of rules, entirely separate from the civil procedure rules. *Id.* Three years later, on August 1, 2015, *The Florida Bar News* published a proposal that would make the Florida Family Law Rules of Procedure stand alone. *Id.* at 5. After multiple rounds of comments and revisions, the FLRC filed an out-of-cycle report recommending these rules changes to the Court on June 6, 2016. *See id*. This Court adopted the proposed amendments, with some revisions, on March 16, 2017—many years after the issues associated with applying the Florida Rules of Civil Procedure in family law cases had first come to light. *See In re Amendments to Fla. Family Law Rules of Procedure*, 214 So. 3d at 401-02. Fortunately, the Court's proposed revisions to Florida Rule of Judicial Administration 2.140 will allow for more responsive and

timely rulemaking.

It is hard to discuss the proposed amendments to Rule 2.140 without acknowledging the current COVID-19 crisis, which will undoubtedly change the legal system forever. In response to that crisis, this Court has been forced to make numerous emergency changes to the way court proceedings are handled to mitigate the effects of the current public health emergency upon the judicial branch and its participants. Many of the emergency changes authorized by this Court may prove useful even after the crisis ends. For instance, the fact that Florida's legal system is operating without major incident using videoconferencing and teleconferencing for hearings demonstrates that many or even most proceedings, particularly civil proceedings, may be more efficiently and cost-effectively handled this way. The Court may consider whether some of the changes implemented during the crisis are worth making permanent. There will be little need for further review and debate by The Florida Bar, as by the time the crisis abates it will be clear what changes worked and what did not.

In short, the Institute supports the streamlined process proposed by the Court, as this process would afford the Court the flexibility to act promptly to modernize court rules with The Florida Bar's input when needed but also without unnecessary delay.

III. The Court Should Make Clear that It May Act on Rules Suggestions Submitted to the Clerk without Reference to The Florida Bar

FJRI respectfully asks that the Court consider clarifying, however, that under Rule 2.140(a)(2), the Court, not the clerk, shall decide whether a rules suggestion sent to the clerk should be forwarded to the appropriate committee of The Florida Bar.

Pursuant to article V, section 2(a) of the Florida Constitution, the Court has comprehensive constitutional authority to "adopt rules for the practice and procedure in all courts," subject to only the potential repeal by a two-thirds vote of the membership of each legislative chamber. *See In re Amendments to Fla. Evidence Code*, 278 So. 3d 551, 554 (Fla. 2019); Supreme Court of Florida Manual of Internal Operating Procedures § II.G.1. Under the proposed amendments, however, it is not clear that a worthy rules suggestion made by the public and submitted to the clerk of the supreme court will be considered first by the Court. Instead, under Rule 2.140(a)(2), rules suggestions submitted to the clerk of the supreme court are referred to the appropriate committee of The Florida Bar. FJRI invites the Court to further amend this section to clarify that the Court may take action on rules suggestions submitted to the clerk without reference to The Florida Bar where the Bar's input is not required. This also makes Rule 2.140(a)(2) consistent with the amended Rule 2.140(d), which confirms that the Court may change court rules on its own motion without reference to The Florida Bar for recommendations. The

Court still retains the authority, however, to refer a rules suggestion to the appropriate committee of The Florida Bar for consideration when warranted.

Specifically, FJRI asks the Court to consider the following additional amendments to Rule 2.140(a)(2):

> (2) ~~Proposals~~Rules suggestions shall be submitted to the clerk of the supreme court, the committee chair(s) of a Florida Bar committee listed in subdivision (a)(3), or the Bar staff liaison of The Florida Bar in writing and shall include a general description of the proposed rule change or a specified proposed change in context. The clerk of the supreme court shall refer ~~proposals~~rules suggestions he or she receives to the supreme court for consideration. If the supreme court deems it appropriate, the supreme court shall ask the clerk of the supreme court to refer a rule suggestion to the appropriate committee under subdivision (a)(3).

FJRI appreciates the opportunity to provide this comment and fully endorses the Court's efforts to make the rulemaking process more timely and efficient.

Respectfully submitted on April 17, 2020.

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CERTIFICATE OF SERVICE

I certify that the foregoing has been electronically filed with the Florida Supreme Court on April 17, 2020:

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CERTIFICATE OF COMPLIANCE

I certify that this comment was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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