

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO RULE OF
CIVIL PROCEDURE 1.490

CASE NO: SC13-684

COMMENT ON AMENDMENTS TO RULE 1.490

Robert J. Jones, a General Magistrate serving in the Eleventh Judicial Circuit, In and For Miami-Dade County, Florida, files this comment on the amendments to Rule 1.490, Florida Rules of Civil Procedure, adopted by the Court on May 9, 2013.

First, I thank the **Trial Court Budget Commission**, the **Foreclosure Initiative Workgroup** and the **Court** for recognizing that Rule 1.490, Florida Rules of Civil Procedure (hereinafter referred to as “Rule 1.490”), needs to be amended and that General Magistrates may be able to assist our State Court System in its efforts to efficiently process the mounting number of residential foreclosure cases in our courts.

The **Civil Procedure Rules Committee** also recognizes that Rule 1.490 needs to be amended and has proposed changes to Rule 1.490 in its Petition filed with this Court in **Case Number SC13-74**. **That Petition is still pending** before the Court and the undersigned timely filed a comment and an amended comment regarding that committee’s proposed changes to Rule 1.490.

Changes to Rule 1.490 are clearly necessary because Rule 1.490 is relatively archaic and procedurally problematic.

CONCERNS

The amendments to Rule 1.490 adopted by the Court on May 9, 2013 and the Civil Procedure Rules Committee’s proposed amendments to Rule 1.490 are clearly steps in the right direction, i.e., steps in the direction of modernizing a rule that clearly needs to be modernized.

However, my concern is that the amendments and proposed amendments do not go far enough in addressing some of the most problematic aspects of Rule 1.490, and that they perpetuate and/or create various inconsistencies between the

various Court rules that govern the appointment, practices, procedures and utilization of General Magistrates and Special Magistrates in our state.

I am also concerned that the amendments to Rule 1.490 adopted by the Court create certain internal inconsistencies within the rule by allowing implied consent for the referral of a specific type of case/matter handled in the Civil Divisions of our courts while, at the same time, maintaining, in effect, a prior affirmative consent requirement for the referral of all other types of cases/matters handled in the Civil Divisions of our courts, as well as by allowing for the “chief judge of each judicial circuit” to appointment General Magistrates who will be handling a certain type of case/matter but maintaining the requirement that all other General Magistrates will be appointed by the “Judges of the circuit court.”

In addition, I am concerned that instead of promoting a reduction in the confusion that occurs when attorneys and litigants become involved in proceedings before a Magistrate in one division of our Court (such as the Family/Domestic Relations/Unified Family Court division) and then become involved in proceedings before a Magistrate in another division of the Court (such as the Civil Division), the nature of the amendments and proposed amendments will simply perpetuate the existing confusion or promote even more confusion for the Bench, Bar and Litigants, and will not strike the appropriate balance between the due process rights of litigants on the one hand and the effective, efficient and timely resolution of disputes on the other hand.

In light of those concerns and my professional experience, I firmly believe and respectfully submit that, among other things, Rule 1.490 should be amended by replacing the current provisions of Rule 1.490 with, for the most part, the current provisions of Rule 12.490. I also firmly believe and respectfully submit that an applicable form Order of Referral and applicable form Notice of Hearing should also be created.

PROFESSIONAL EXPERIENCE

I currently serve as a General Magistrate in the Family Division of the Eleventh Judicial Circuit (Miami-Dade County) and preside over Family Law matters referred to me pursuant to Rule 12.490, Florida Family Law Rules of Procedure (hereinafter referred to as “Rule 12.490”). I have been serving as a General Magistrate or General Master for the last 23 years, during which time I also presided over certain Civil Division non-jury trials that were referred to me pursuant to Rule 1.490. During the early part of my 23 years of service, I also

presided of Family Law matters that had to be referred to me pursuant to Rule 1.490 because the Family Law Rules of Procedure were yet to be created. In short, I have a substantial amount of experience with referrals made under both Rule 1.490 and Rule 12.490.

In addition, because of various ambiguities and some confusion regarding the actual roles, powers, procedures, practices, authority and limitations associated with the positions of Magistrate and Child Support Enforcement Hearing Officers and a concern that the necessary or required procedures and practices are not being properly adhered to a times, the Other Court Personnel Committee of the FCEC and later the FCEC itself determined that a court publication should be created to serve as a guide on the use of General Magistrates, Special Magistrates and Child Support Enforcement Hearing Officers. I currently serve as a member of that Other Court Personnel Committee and as a member of the FCEC, and I assisted in the creation of that publication. That publication has been completed, is currently available for review by this Court and can be found in the Court Publications section of the Court's intranet. The publication, **"A Judge's Guide To The Practices, Procedures, And Appropriate Use of General Magistrates, Child Support Enforcement Hearing Officers and Special Magistrates Serving Within The Florida State Court System,"** is in a Q & A format and clearly highlights, inter alia, the inconsistencies in as well as some of the ambiguities and difficulties associated with some of the current court rules governing the use of General Magistrates and Special Magistrates.

My past experience and my sincere concern about the provisions of Rule 1.490, the limited nature of the amendments to Rule 1.490 recently adopted by the Court and the nature of the amendments currently being proposed by the Civil Procedure Rules Committee, compels me to file this comment and to respectfully request that the Court consider and approve the proposals being forwarded with this comment.

HISTORY

General Magistrates and Special Magistrates serving in our State Court system were formerly known as General Masters and Special Masters. In 2004, the title of "General Master" was changed to "General Magistrate" and the title of "Special Master" was changed to "Special Magistrate" in both our Court rules and Florida Statutes.

Historically, courts relied upon the common law and upon the court's inherent authority to appoint masters and to define the master's duties and responsibilities. The practice of utilizing masters to assist judges in the disposition of cases predates the American legal system and has its origin in common law English chancery courts. Congestion in the federal court system spawned the use of masters in the United States as early as the colonial period. The role of masters eventually evolved, from a strict and limited role of trial assistance, to a more expanded view, with the duties and responsibilities of masters being extended to almost every phase of litigation. With burgeoning court dockets, and as litigation became increasingly complex, the utilization of masters increased. Over time, the use and appointment of masters came to be governed by state and federal rules of civil procedure.

In our State Court system, Rule 1.490 was created and for many decades governed *all* appointments of, referrals to and practices and procedures of and before general masters and special masters. However, during most of those decades, the use of general masters and special masters in our state was relatively limited. During or about 1994 to 1995, it was determined that "Family Law Rules of Procedure" needed to be created and, since the use of general masters in family law related matters was expanding, a more modernized rule governing the appointment, practices and procedures of general masters was necessary. In 2004, during the Article V, Revision 7 related process, general masters were designated as being an "essential element" of our State Court System. The Circuits that did have general masters prior to the conclusion of the Article V/Revision 7 process had them because of funding provided by a county or municipality. The conclusion of the Article V, Revision 7 related process resulted in "parity" occurring, with a certain number of state funded general master positions being included in the State Court System budget and Circuits throughout most of the state being allocated a certain number of general masters. That allocation resulted in many Circuits having the use and benefit of a general master or a number of general masters for the very first time.

With the advent of the Family Law Rules of Procedure, a more modernized rule, Rule 12.490, governing the appointments of, referrals to and practices and procedures of General Masters, emerged. In addition, Rule 12.492 was created to govern the appointments of, referrals to and practices and procedures of Special Masters. Unfortunately, however, although the provisions of the new Rule 12.490 were clearly a huge improvement over the provisions of the outdated Rule 1.490, the new Rule 12.492 was, and still is, for the most part, a carryover of Rule 1.490

and is problematic in many of the same ways as the current Rule 1.490. Those two rules became effective January 1, 1996, over 17 years ago.

Thousands upon thousands of referrals have been made pursuant to Rule 12.490 since January 1, 1996 and that rule, with a few amendments since January 1, 1996, has proven to be an effective rule and a rule that clearly strikes the appropriate balance between the due process rights of both pro se and represented litigants on the one hand and the effective, efficient and timely resolution of disputes on the other hand.

PROBLEMS AND PROPOSED SOLUTIONS

Some of the problems associated with the Rule 1.490 (recently amended by the Court), what the Civil Procedure Rules Committee is proposing to resolve some of those problems and why the adoption of, for the most part, the provisions of Rule 12.490 would solve or better solve some of those problems associated with the current Rule 1.490 are set forth below.

1. **Consent.** Rule 1.490 requires consent from all of the parties to any referral. Before the recent amendments to Rule 1.490, the necessary consent was construed as being prior affirmative or express consent. However, Rule 1.490, as recently amended by the Court, now allows for implied consent, in accordance with the requirements of the rule, for referrals of “residential mortgage foreclosure actions and suits” to a “magistrate.” On the other hand, Rule 1.490, as amended, still requires prior affirmative or express consent for referrals of all other matters governed by the Rules of Civil Procedure. I respectfully submit that this internal conflict in the rule should be avoided by the Court and the rule should be harmonized in a manner that provides for the same implied consent process for all referrals made under the rule.

I sincerely believe that the Trial Court Budget Commission, the Foreclosure Initiative Workgroup and this Court supported the adoption of the implied consent related amendments for the referral of “residential mortgage foreclosure actions and suits” to a “magistrate” because those amendments positively contribute to the streamlining of the process and to the avoidance of certain affirmative or express consent related problems, including delays, while at the same time carefully protecting a party’s constitutional right to have his, her or its residential mortgage foreclosure related matter heard by an Article V Judge.

If the Court harmonizes the rule in a manner that provides for the same implied consent process for all referrals made under the rule, the process for all referrals made under the rule will be streamlined, and certain prior affirmative or express consent related problems, including delays, for all referrals made under the rule will be avoided. In addition, the harmonized rule, with its objection process and exception process, will also serve to protect a party's constitutional right to have his, her or its civil matter heard and/or reviewed by an Article V Judge.

If the rule is not so harmonized, the consent issue regarding civil matters, other than residential foreclosure matters, will still be problematic because of the lack of specificity regarding the manner in which the prior affirmative consent is to be obtained and/or how the consent, if given, is to be documented or recorded. In addition, at times certain civil matters have been and are being referred, by an Order of Referral, to a General Magistrate prior to consent ever being sought from the parties or without any affirmative consent every being obtained from the parties, with there being a reliance on the decision in Martinez v. Garcia, 575 So.2d 1365 (Fla. 3d DCA 1991)(A party's failure to object to a reference before the commencement of the hearing on the referred matter in conjunction with that party's voluntary participation in the proceeding before the master constitutes a **waiver** of that party's right to object to even an invalid referral.). That approach, however, has resulted in:

A. Various hearings being set before a Magistrate, for the Magistrate to hear the improperly referred matter; and

B. The parties, their attorneys and witnesses subsequently appearing before the Magistrate for the scheduled hearing; and

C. The hearing being cancelled because one of the parties, at the commencement of the hearing, objects to the hearing going forward on the basis that the referral to the General Magistrate is invalid because the objecting party had never consented and does not consent to the invalid referral.

That approach results in a waste of limited judicial time and resources, wastes the time and resources of the parties and/or their attorney's and wastes the time and resources of the witnesses.

On the other hand, the referral process in Rule 12.490, with its built in Order of Reference, Notice requirements, objection process and implied consent, avoids such a waste of time and limited resources and results in a more expeditious

resolution of disputes, while at the same time protecting the Due Process rights of the parties. With regard to the due process issue, there is no due process violation where there is an intentional relinquishment of a known right or privilege. Barbon-Zurita v. State, 415 So.2d 824 (Fla. 3d DCA 1982). Under Rule 12.490, the parties are clearly advised in the form Order of Referral that their consent is required, that they are entitled to have their matter heard by a judge, that if they do not want their matter heard by the Magistrate they need file a written objection to the referral within certain specified time periods and that a failure to file a written objection within the applicable time period is deemed a consent to the referral. Based on my experience, I can say with confidence that this referral process has been effective and has worked very well during the last 17 years in cases involving parties who were represented by counsel as well as in cases where one or more of the parties were self-represented.

The Civil Procedure Rules Committee's pending proposed amendments to Rule 1.490 do not address the consent issue and the Court's recent amendments to Rule 1.490 only partially addresses the consent issue for referrals made under Rule 1.490. However, I respectfully request that the Court amend Rule 1.490 to reflect the consent process set forth in Rule 12.490 with regard to all referrals made to a General Magistrate under Rule 1.490.

2. **Method of Referral.** Other than for a referral of a residential foreclosure matter made to a General Magistrate under Rule 1.490, the rule does not specify how the referral of other types of civil matters are supposed to be made. Is an order required? Although the better practice would seem to be to require the entry of an order of referral, in light of the ambiguity in the rule it appears that a referral could be made by way of a letter, a memorandum, an oral statement from the judge, an order or maybe some other method. On the other hand, Rule 12.490 clearly requires an order of reference, which is to include certain notices in bold print.

The Civil Procedure Rules Committee's pending proposed amendments do not address this issue and the Court's recent amendments to Rule 1.490 do not address the issue with regard to referrals of other types of civil matters. However, I respectfully request that the Court amend Rule 1.490 to specifically require an Order of Reference as required by Rule 12.490 for all referrals made under Rule 1.490.

3. **Establishment of Record.** Rule 1.490 includes the following language: "The evidence shall be taken in writing by the magistrate or by some other person under the magistrate's authority in the magistrate's presence and shall be filed with

the magistrates' report.” What does that mean?

In **De Clements v. De Clements**, 662 So.2d 1276 (Fla. 3rd DCA1995), the Court determined that:

“(1) The Master, *not a litigant*, has the obligation and responsibility either to create an accurate and complete **written record** of the evidence received by the Master or to ensure that that some other person (such as a court reporter), acting under the authority of the Master in the Master's presence, shall create such a written record of the evidence received by the Master. The written record may consist of a **narrative summary of the evidence** either prepared by the Master or, as indicated above, by some other person acting in a manner consistent with the Rule. In such a case the narrative summary must specify who testified, **who said what**, what stipulations were entered into, and what documents (or other items) were admitted into evidence or excluded. Alternatively, the record may consist of a verbatim transcript of the proceedings, such as that which would be created by a court reporter attending the hearing.

(2) The Master **shall file** the above-described written record of the evidence with the Master's report that is filed with the Court. The said written record to be filed by the Master with the Master's report shall be in such a form so as to be readable by the litigants and the Court. In other words, if the Master has a court reporter present during the evidentiary hearing in furtherance of creating a written record of the evidence received, as required by Rule 1.490(f), the Master will then also have the responsibility of making sure that the written record of the hearing that is filed with the Master's report is a complete and transcribed record of the evidence from the hearing held before the Master, and not merely a package containing the court reporter's notes.”

The dissenting opinion in *De Clements*, *supra*, is instructive. That dissenting opinion provides, in part, as follows: “However, the majority now places this financial burden on the Master, and consequently, the county who finances the Masters. In all likelihood, this is an additional financial burden that the county may not be willing, nor able, to support in times of financial austerity. As such, the majority's opinion may mean the end of the Masters as we know them today. For these reasons, I disagree with the majority and believe that, as in other civil cases, the burden of providing the written record of the evidence should be on the litigant who seeks review. Finally, because the majority's opinion will most likely mean the end of the Master's program, which the majority itself recognizes as well worth

preserving, I think that this question should be certified to the Florida Supreme Court as one of great public importance.”

In **Gordin v. Gordin International, Inc.**, 605 So.2d 154, 155 (Fla. 4th DCA 1992), the court stated that “[a]lthough the general master did make some sketchy, handwritten notations of the proceeding, these were patently insufficient to constitute a record of the evidence.”

For additional cases on the issue, see **Knupp v. Knupp**, 625 So.2d 865 (Fla. 3rd DCA 1993) (“This requires the master personally to detail the evidence adduced at the master’s hearing in a written report or, as we have held, to have available a court report to take down the evidence as it unfolds at the hearing-so that the objecting party may then take the necessary steps to provide the trial court with an appropriate record to support the party’s exceptions to the master’s report.”); **Petrakis v. Petrakis**, 597 So.2d 856 (Fla. 3rd DCA 1992) (“This requirement as to the recording of documentary evidence is imperative to ensure that the party taking exceptions has an adequate and fair opportunity to have the Master’s report reviewed in order to ensure that it is not contrary to the evidence or to the law.”)(emphasis added); **Kay v. Kay**, 430 So.2d 532 (Fla. 4th DCA 1983) (Noting that the decision in **Berk v. Berk**, 423 So.2d 1018 (Fla. 4th DCA 1982) held that the filing of a **transcript** of the master’s hearing with the report was mandatory.)

The concerns regarding the meaning and impact of that language were raised when the newly proposed Rule 12.490 was initially before the Florida Supreme Court for the Court’s consideration. After considering the concerns raised, which were reflected in several comments filed by Judges and lawyers from across our state (some of which comments mentioned all of the above mentioned cases), the Court removed that language from Rule 12.490 and added the following language to the rule: “The general magistrate shall take testimony and establish a record which may be by electronic means as provided by Florida Rule of Judicial Administration...or by a court reporter. The parties may not waive this requirement.” The then new Rule 12.490 also required, and the current Rule 12.490 still requires, that: “The notice or order setting a matter for hearing shall state whether electronic recording or a court reporter is provided by the court. If the court provides electronic recording, the notice shall also state that any party may provide a court reporter at the party’s expense.” That action by the Court resulted in a rule that again strikes the appropriate balance between ensuring the effective, efficient and timely resolution of disputes and protecting the Due Process rights of litigants.

The Civil Procedure Rules Committee's pending proposed amendments do not address this issue and the Court's recent amendments to Rule 1.490 do not address this issue. However, I respectfully suggest that the current language in Rule 1.490, i.e., "The evidence shall be taken in writing by the magistrate or by some other person under the magistrate's authority in the magistrate's presence and shall be filed with the magistrates' report," should be struck from the Rule 1.490 and the current language in Rule 12.490, i.e., "The general magistrate shall take testimony and establish a record which may be by electronic means as provided by Florida Rule of Judicial Administration 2.533(g)(3) or by a court reporter. The parties may not waive this requirement," should be inserted in Rule 1.490, except that the stated Florida Rule of Judicial Administration should be amended to reflect the actual number of the applicable rule, which is 2.533(h)(3).

4. **Contents of Report.** Although Rule 1.490 does state what should not be recited in the Report, it does not specifically provide what should be in a Magistrate's Report. The Civil Procedure Rules Committee's pending proposed amendments do not address this issue and the Court's recent amendments to Rule 1.490 do not address this issue. On the other hand, Rule 12.490 is clear and provides that: "The General Magistrate shall file a report that includes findings of fact and conclusions of law, together with recommendations. If a court reporter was present, the report shall include the name and address of the reporter." I respectfully suggest that, for the most part, the language used for the Report in Rule 12.490 should be used for Rule 1.490. Specifically, I respectfully suggest that the following language be used: "The ~~General~~ Magistrate shall file a report that includes, **if applicable**, findings of fact and conclusions of law, together with recommendations. If a court reporter was present, the report shall include the name and address of the reporter."

5. **Exceptions.** Rule 1.490 currently provides that: "The parties may serve exceptions to the report within 10 days from the time it is served on them." The Civil Procedure Rules Committee's pending proposed amendments to Rule 1.490 include a proposal that Rule 1.490 be amended to require that the exceptions be "filed" rather than "served" within the 10 day period. Rule 12.490 and Rule 12.492, as well as various other Court rules, require that exceptions to a report be filed, rather than served, within the applicable 10 day period. The Court's recent amendments to Rule 1.490 do not address this issue. I fully support the Civil Procedure Rules Committee's proposal on this issue and respectfully request that the Court amend Rule 1.490 accordingly.

6. **Cross Exceptions.** Rule 1.490 does not provide for cross-exceptions. On the other hand, Rule 12.490 does provide for cross-exceptions. In addition, the Civil Procedure Rules Committee's pending proposed amendments to Rule 1.490 include a proposal to amend Rule 1.490 to provide for cross-exceptions. The Court's recent amendments to Rule 1.490 do not address this issue. I fully support the Civil Procedure Rules Committee's proposal on this issue and respectfully request that the Court amend Rule 1.490 accordingly.

7. **Record.** Rule 1.490 does not specifically delineate what the Record is or what has to be produced to the Court when exceptions are filed. The Court's recent amendments to Rule 1.490 do not address this issue. On the other hand, Rule 12.490 does specifically delineate what the Record is and what has to be produced to the Court when exceptions are filed. In addition, the Civil Procedure Rules Committee's pending proposed amendments to Rule 1.490 do include a proposed record provision. However, I support amending Rule 1.490 to include a record provision but, for uniformity/consistency purposes and for other reasons, I respectfully suggest that the language used for the Record in Rule 12.490 should be used for Rule 1.490.

8. **Utilization of Communication Equipment.** Rule 1.490 does not specifically provide that a magistrate shall have the same powers as a circuit judge to utilize communication equipment as defined and regulated by Florida rule of Judicial Administration 2.530. The pending amendments proposed by the Civil Procedure Rules Committee do not address this issue and the Court's recent amendments to Rule 1.490 do not address this issue. However, Rule 12.490(d)(3) specifically provides that: "The general magistrate shall have the same powers as a circuit judge to utilize communication equipment as defined and regulated by Florida Rule of Judicial Administration 2.530." It should be noted that although Rule 2.530(d)(1) now specifically mentions general magistrates and special magistrates, Rule 2.530(b) and Rule 2.530(c) do not mention general magistrates and special magistrates. Therefore, under the circumstances, I respectfully suggest that Rule 1.490 should be amended to include the following provision: "The ~~general~~ magistrate shall have the same powers as a circuit judge to utilize communication equipment as defined and regulated by Florida Rule of Judicial Administration 2.530."

9. **Appointment of General Magistrates by Chief Judge.** The Court's recent amendments to Rule 1.490 amend the rule to provide as follows: "The chief judge of each judicial circuit shall appoint such number of magistrates to handle only residential mortgage foreclosures from among the members of the Bar

in the circuit as are necessary to expeditiously preside overall actions and suits for the foreclosure of a mortgage on residential real property; and any other matter concerning the foreclosure of a mortgage on residential property as allowed by the administrative order of the chief judge.” On the other hand, Rule 1.490 provides that: “Judges of the circuit court may appoint as many general magistrates from among the members of the bar in the circuit as the judges find necessary, and the general magistrate shall continue in office until removed by the court.” In light of the actual practice in every circuit within our state, i.e., historically the practice of the chief judge of the circuit, not the “judges of the circuit court,” appointing, by administrative order, the general magistrate (s) serving within the circuit, and to avoid what appears to be two different appointing authorities or approaches within the rule, it is respectfully suggested that all appointments of general magistrates under Rule 1.490 should be made the chief judge of the applicable circuit and the appointment should be done by way of an Administrative Order entered by the chief judge. Further, I respectfully suggest that instead of having a carve out provision in the rule for a certain type of civil action or matter, any carve out provision with respect to the type of civil matter that can be referred to the appointed general magistrate(s) should be set forth in and be a part of the Administrative Order appointing the general magistrate(s), with one exception. For example, if there is a specific targeted budget allocation for a certain number general magistrates to handle residential foreclosure actions, suits or matters, and various circuits are allocated and are to appoint a certain number of those specifically budgeted general magistrate positions, the Chief Justice of this Court could enter an Administrative Order mandating that the Administrative Order, entered by the applicable chief judge, appointing each such general magistrate will include the required carve out or limitation regarding the type of matter that is to or can be referred to such general magistrate. I respectfully submit, however, that Rule 1.490 should include one carve out or limitation and that carve out or limitation should, in light of Lackner v. Central Florida Investments, Inc., 14 So.3rd 1050 (Fla. 5th DCA 2009), be an exclusion from presiding over **jury trials**.

11. **Ethical Issue/Conflict Avoidance**: The Court’s recent amendments to Rule 1.490 includes the following provision: **“Magistrates shall not practice law of the same case type in the court in any county or circuit the magistrate is appointed to serve.”** Although that provision should probably be in the “Application of the Code of Judicial Conduct” section of the Code of Judicial Conduct instead of in Rule 1.490, I fully support the inclusion of that provision in Rule 1.490 as well as in the “Application of the Code of Judicial Conduct” section of the Code of Judicial Conduct.

RECOMMENDATIONS/PROPOSALS

In closing, I am respectfully recommending that the Court consider replacing its current Rule 1.490 with my proposed Rule 1.490 (General Magistrates and Special Magistrates Rule) (See Appendix A), which is forwarded herewith and basically mirrors Rule 12.490, with a few changes. I am also respectfully recommending that the Court consider the proposed forms (Order of Referral to Magistrate -See Appendix B) (Notice of Hearing - See Appendix C) submitted with this comment. I firmly believe that the proposed forms, if approved by the Court, will be helpful to the Bench, Bar and litigants, and will help promote consistency. Again, the jury trial exclusionary language was included in my proposed Rule 1.490 because of the case of Lackner v. Central Florida Investments, Inc., 14 So.3rd 1050 (Fla. 5th DCA 2009).

Thank you for the opportunity to file this comment as well as the proposed Rule 1.490 and the proposed forms submitted herewith.

Respectfully submitted July 5, 2013.

CERTIFICATION OF COMPLIANCE

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

I also hereby certify that a true and correct copy of this amended comment, including each Appendix, has been served on the Commission Chair, The Honorable Margaret O. Steinbeck, Lee County Justice Center, 1700 Monroe Street, Fort Myers, Florida 33901, msteinbeck@ca.cjis20.org.

/s/ Robert J. Jones

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APPENDIX A

Rule 1.490. General Magistrates and Special Magistrates

(a) Appointment.~~General Magistrates.~~

(1) General Magistrates. ~~Judges of the circuit court~~ **The Chief Judge of each Judicial Circuit** may, **by Administrative Order**, appoint as many general magistrates from among the members of The Florida Bar in the circuit as the Chief Judge judges finds necessary, and the general magistrates shall continue in office until removed by the court. The order making an appointment shall be recorded. **The Administrative Order making an appointment may include limitations on the types of matters that can be referred to the appointed General Magistrate.** Every person appointed as a general magistrate shall take the oath required of officers by the constitution and the oath shall be recorded before the magistrate discharges any duties of that office. **General Magistrates shall not be required to give bond or surety.**

(2) Special Magistrates. **The court may appoint members of The Florida Bar as special magistrates for any particular service required by the court, and they shall be governed by all the provisions of law and rules relating to magistrates except they shall not be required to make oath or give bond unless specifically required by the order appointing them. Upon a showing that the appointment is advisable, a person other than a member of the Bar may be appointed.**

(b) Reference.

(1) No matter shall be heard by a ~~general~~-magistrate, **either general or special**, without an appropriate order of reference and the consent to the referral of all parties. Consent, as defined in this rule, to a specific referral, once given, cannot be withdrawn without good cause shown before the hearing on the merits of the matter referred. Consent may be express or may be implied in accordance with the requirements of this rule.

(A) A written objection to the referral to a ~~general~~-magistrate must be filed within 10 days of the service of the order of referral.

(B) If the time set for the hearing is less than 10 days after service of the order of referral, the objection must be filed before commencement of the hearing.

(C) If the order of referral is served within the first 20 days after the service of the initial process, the time to file an objection is extended to the time within which to file a responsive pleading.

(D) Failure to file a written objection within the applicable time period is deemed to be consent to the order of referral.

(2) The order of referral shall be in substantial conformity with ~~Florida Family Law Rules of Procedure Form 12.920(c)~~ Florida Rules of Civil Procedure Form 1.978, and shall contain the following language in bold type:

A REFERRAL TO A ~~GENERAL~~ MAGISTRATE REQUIRES THE CONSENT OF ALL PARTIES. YOU ARE ENTITLED TO HAVE THIS MATTER HEARD BEFORE A JUDGE. IF YOU DO NOT WANT TO HAVE THIS MATTER HEARD BEFORE THE ~~GENERAL~~ MAGISTRATE, YOU MUST FILE A WRITTEN OBJECTION TO THE REFERRAL WITHIN 10 DAYS OF THE TIME OF SERVICE OF THIS ORDER. IF THE TIME SET FOR THE HEARING IS LESS THAN 10 DAYS AFTER THE SERVICE OF THIS ORDER, THE OBJECTION MUST BE MADE BEFORE THE HEARING. IF THIS ORDER IS SERVED WITHIN THE FIRST 20 DAYS AFTER SERVICE OF PROCESS, THE TIME TO FILE AN OBJECTION IS EXTENDED TO THE TIME WITHIN WHICH A RESPONSIVE PLEADING IS DUE. FAILURE TO FILE A WRITTEN OBJECTION WITHIN THE APPLICABLE TIME PERIOD IS DEEMED TO BE A CONSENT TO THE REFERRAL.

REVIEW OF THE REPORT AND RECOMMENDATIONS MADE BY THE ~~GENERAL~~ MAGISTRATE SHALL BE BY EXCEPTIONS AS PROVIDED IN ~~RULE 12.490(f), FLA. FAM. L. R. P. RULE 1.490.(f), FLA.R.Civ.P.~~ A RECORD, WHICH INCLUDES A TRANSCRIPT OF PROCEEDINGS, MAY BE REQUIRED TO SUPPORT THE EXCEPTIONS.

(3) The order of referral shall state with specificity the matter or matters being referred and the name of the **general** magistrate to whom the matter is referred. The order of referral shall also state whether electronic recording or a court reporter is provided by the court, or whether a court reporter, if desired, must be provided by the litigants.

(4) When a reference is made to a **general** magistrate, any party or the **general**

magistrate may set the action for hearing.

(c) **General Powers and Duties.** Every ~~general~~-magistrate shall perform all of the duties that pertain to the office according to the practice in chancery and rules of court and under the direction of the court except those duties related to **jury trials. domestic, repeat, dating, and sexual violence.** A ~~general~~-magistrate shall be empowered to administer oaths and conduct hearings, which may include the taking of evidence. All grounds for disqualification of a judge shall apply to ~~general~~-magistrates. **Magistrates shall not practice law of the same case type in the court in any county or circuit the magistrate is appointed to serve.**

(d) **Hearings.**

(1) The ~~general~~-magistrate shall assign a time and place for proceedings as soon as reasonably possible after the reference is made and give notice to each of the parties either directly or by directing counsel to file and serve a notice of hearing. If any party fails to appear, the general magistrate may proceed ex parte or may adjourn the proceeding to a future day, giving notice to the absent party of the adjournment. The ~~general~~-magistrate shall proceed with reasonable diligence in every reference and with the least delay practicable. Any party may apply to the court for an order to the ~~general~~-magistrate to speed the proceedings and to make the report and to certify to the court the reason for any delay.

(2) The ~~general~~-magistrate shall take testimony and establish a record which may be by electronic means as provided by [Florida Rule of Judicial Administration 2.535\(g\)\(h\)\(3\)](#) or by a court reporter. The parties may not waive this requirement.

(3) The ~~general~~-magistrate shall have authority to examine under oath the parties and all witnesses upon all matters contained in the reference, to require production of all books, papers, writings, vouchers, and other documents applicable to it, and to examine on oath orally all witnesses produced by the parties. The ~~general~~-magistrate may take all actions concerning evidence that can be taken by the circuit court and in the same manner. The ~~general~~-magistrate shall have the same powers as a circuit judge to utilize communications equipment as defined and regulated by [Florida Rule of Judicial Administration 2.530](#).

(4) The notice or order setting the cause for hearing shall be in substantial conformity with [Florida Family Law Rules of Procedure Form 12.920\(c\)](#) [Florida Rules of Civil Procedure Form 1.979](#) and shall contain the following language in bold type:

SHOULD YOU WISH TO SEEK REVIEW OF THE REPORT AND RECOMMENDATION MADE BY THE ~~GENERAL~~ MAGISTRATE, YOU MUST FILE EXCEPTIONS IN ACCORDANCE WITH RULE ~~12.490(f)~~, ~~FLA. FAM. L. R. P. 1.490(f)~~, FLA.R.Civ.P. YOU WILL BE REQUIRED TO PROVIDE THE COURT WITH A RECORD SUFFICIENT TO SUPPORT YOUR EXCEPTIONS OR YOUR EXCEPTIONS WILL BE DENIED. A RECORD ORDINARILY INCLUDES A WRITTEN TRANSCRIPT OF ALL RELEVANT PROCEEDINGS. THE PARTY SEEKING REVIEW MUST HAVE THE TRANSCRIPT PREPARED IF NECESSARY FOR THE COURT'S REVIEW.

(5) The notice or order setting a matter for hearing shall state whether electronic recording or a court reporter is provided by the court. If the court provides electronic recording, the notice shall also state that any party may provide a court reporter at that party's expense.

(e) **Magistrate's Report.** The ~~general~~-magistrate shall file a report that includes, **if applicable**, findings of fact and conclusions of law, together with recommendations. If a court reporter was present, the report shall contain the name and address of the reporter.

(f) **Filing Report; Notice; Exceptions.** The ~~general~~-magistrate shall file the report **and recommendations** and serve copies on all parties. The parties may file exceptions to the report within 10 days from the time it is served on them. Any party may file cross-exceptions within 5 days from the service of the exceptions, provided, however, that the filing of cross-exceptions shall not delay the hearing on the exceptions unless good cause is shown. If no exceptions are filed within that period, the court shall take appropriate action on the report. If exceptions are filed, they shall be heard on reasonable notice by either party or the court.

(g) **Record.** For the purpose of the hearing on exceptions, a record, substantially in conformity with this rule, shall be provided to the court by the party seeking review if necessary for the court's review.

(1) The record shall consist of the court file, including the transcript of the relevant proceedings before the ~~general~~ magistrate and all depositions and evidence presented to the ~~general~~ magistrate.

(2) The transcript of all relevant proceedings, if any, shall be delivered to the judge and provided to all other parties not less than 48 hours before the hearing on exceptions. If less than a full transcript of the proceedings taken before the **general** magistrate is ordered prepared by the excepting party, that party shall promptly file a notice setting forth the portions of the transcript that have been ordered. The responding parties shall be permitted to designate any additional portions of the transcript necessary to the adjudication of the issues raised in the exceptions or cross-exceptions.

(3) The cost of the original and all copies of the transcript of the proceedings shall be borne initially by the party seeking review, subject to appropriate assessment of suit monies. Should any portion of the transcript be required as a result of a designation filed by the responding party, the party making the designation shall bear the initial cost of the additional transcript.

(h) Costs of Special Magistrate. The costs of a special magistrate may be assessed as costs and all or part of the assessed costs may be ordered prepaid by order of the court.

APPENDIX B

PROPOSED FORM 1.978 FLORIDA RULES OF CIVIL PROCEDURE

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT,
IN AND FOR _____ COUNTY, FLORIDA

Case No: _____

Division: _____

_____,

PLAINTIFF(s),

v.

_____,

DEFENDANT(s).

ORDER OF REFERRAL TO MAGISTRATE

IT IS ORDERED THAT THE BELOW REFERENCED MATTER(S) IN THIS
CAUSE IS/ARE HEREBY REFERRED TO:

{check one}

[☐] **GENERAL MAGISTRATE** *{name}* _____.

[☐] **SPECIAL MAGISTRATE** *{name}* _____.

MATTER(S) REFERRED:

1. _____

2. _____

3. _____

This referral is made pursuant to and is governed by **Rule 1.490, Florida Rules of Civil Procedure**.

The Magistrate is authorized to administer oaths and conduct hearings, which may include taking of evidence, and shall file a report that contains findings of fact, conclusions of law, recommendations and the name of the court reporter, if any.

The Magistrate shall assign a time for the proceedings as soon as reasonably possible after this referral is made and shall give notice to each of the parties either directly or by directing counsel or a party to file and serve a notice of hearing.

A REFERRAL TO A MAGISTRATE REQUIRES THE CONSENT OF ALL PARTIES. YOU ARE ENTITLED TO HAVE THIS MATTER HEARD BY A JUDGE. IF YOU DO NOT WANT TO HAVE THIS MATTER HEARD BY THE MAGISTRATE, YOU MUST FILE A WRITTEN OBJECTION TO THE REFERRAL WITHIN 10 DAYS OF THE TIME OF SERVICE OF THIS ORDER. IF THE TIME SET FOR THE HEARING IS LESS THAN 10 DAYS AFTER SERVICE OF THIS ORDER, THE OBJECTION MUST BE MADE BEFORE THE HEARING. IF THIS ORDER IS SERVED WITHIN THE FIRST 20 DAYS AFTER SERVICE OF PROCESS, THE TIME TO FILE AN OBJECTION IS EXTENDED TO THE TIME WITHIN WHICH A RESPONSIVE PLEADING IS DUE. FAILURE TO FILE A WRITTEN OBJECTION WITHIN THE APPLICABLE TIME PERIOD IS DEEMED TO BE A CONSENT TO THE REFERRAL.

If either party files a timely objection, the above referenced referred matter(s) shall be returned to the undersigned judge with a notice stating the amount of time needed for hearing.

REVIEW OF THE REPORT AND RECOMMENDATIONS MADE BY THE MAGISTRATE SHALL BE BY EXCEPTIONS AS PROVIDED IN RULE 1.490(f), FLORIDA RULES OF CIVIL PROCEDURE. A RECORD, WHICH INCLUDES A TRANSCRIPT, MAY BE REQUIRED TO SUPPORT EXCEPTIONS.

YOU ARE ADVISED THAT IN THIS CIRCUIT:

- a. ____ electronic recording is provided by the court. A party may provide a court reporter at that party's expense.
- b. ____ a court reporter is provided by the court.

SHOULD YOU WISH TO SEEK REVIEW OF THE REPORT AND RECOMMENDATION MADE BY THE MAGISTRATE, YOU MUST FILE EXCEPTIONS IN ACCORDANCE WITH RULE 1.490(f), FLORIDA RULES OF CIVIL PROCEDURE. YOU WILL BE REQUIRED TO PROVIDE THE COURT WITH A RECORD SUFFICIENT TO SUPPORT YOUR EXCEPTIONS, OR YOUR EXCEPTIONS WILL BE DENIED. A RECORD ORDINARILY INCLUDES A WRITTEN TRANSCRIPT OF ALL RELEVANT PROCEEDINGS. THE PARTY SEEKING REVIEW MUST HAVE THE TRANSCRIPT PREPARED IF NECESSARY FOR THE COURT'S REVIEW.

ORDERED on _____.

CIRCUIT JUDGE

COPIES TO:

Plaintiff(s) (or attorney(s) for Plaintiff(s))

Defendant(s) (or attorney(s) for Defendant(s))

Magistrate

APPENDIX C

FORM 1.979 FLORIDA RULES OF CIVIL PROCEDURE

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT,
IN AND FOR _____ COUNTY, FLORIDA

Case No: _____

Division: _____

_____,

Plaintiff(s),

v.

_____,

Defendant(s).

NOTICE OF HEARING BEFORE MAGISTRATE

[fill in **all** blanks]

TO: _____

There will be a hearing before {*check one*} [☐] **GENERAL MAGISTRATE**
[☐] **SPECIAL MAGISTRATE** {*name of magistrate*} _____, at
{*address*} _____

on {*date*} _____, at {*time*} _____ .m., on
the following referred matter(s): _____

_____hour(s)/ _____ minutes have been reserved for this hearing.

PLEASE GOVERN YOURSELF ACCORDINGLY.

SHOULD YOU WISH TO SEEK REVIEW OF THE REPORT AND RECOMMENDATION MADE BY THE MAGISTRATE, YOU MUST FILE EXCEPTIONS IN ACCORDANCE WITH RULE 1.490(f), FLORIDA RULES OF CIVIL PROCEDURE. YOU WILL BE REQUIRED TO PROVIDE THE COURT WITH A RECORD SUFFICIENT TO SUPPORT YOUR EXCEPTIONS, OR YOUR EXCEPTIONS WILL BE DENIED. A RECORD ORDINARILY INCLUDES A WRITTEN TRANSCRIPT OF ALL RELEVANT PROCEEDINGS. THE PARTY SEEKING REVIEW MUST HAVE THE TRANSCRIPT PREPARED IF NECESSARY FOR THE COURT'S REVIEW.

YOU ARE HEREBY ADVISED THAT IN THIS CIRCUIT:

- a. ____ electronic recording is provided by the court. A party may provide a court reporter at that party's expense.
- b. ____ a court reporter is provided by the court.

If you are represented by an attorney or plan to retain an attorney for this matter you should notify the attorney of this hearing.

I certify that a copy of this document was [check **one** only] () mailed () faxed and mailed () hand delivered to the person(s) listed below on {*date*}
_____.

Other party or the other party(s) attorney:

Name: _____

Address: _____

City, State, Zip: _____

Fax Number: _____ E-mail address: _____

Dated: _____

Signature of Party or the party(s) attorney

Printed Name:

Address:

City, State,

Zip: _____

Telephone

Number: _____

Fax

Number: _____

E-mail address: _____

**IF A NONLAWYER HELPED YOU FILL OUT THIS FORM, HE/SHE
MUST FILL IN THE BLANKS BELOW:** [fill in **all** blanks]

I, *{full legal name and trade name of
nonlawyer}* _____,

a nonlawyer, located at *{street}* _____, *{city}*
_____,

{state} _____, *{phone}* _____, helped *{name}*
_____, who is the [check **one** only] ____ petitioner
or ____ respondent, fill out this form.