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IN THE SUPREME COURT OF FLORIDA

**IN RE: AMENDMENTS TO FLORIDA
RULE OF CIVIL PROCEDURE 1.490**

CASE NO: SC13-684

**COMMENTS OF JACKSONVILLE AREA LEGAL AID, FLORIDA
CONSUMER ACTION NETWORK, AND THE PUBLIC INTEREST
LAW SECTION OF THE FLORIDA BAR**

Jacksonville Area Legal Aid, Florida Consumer Action Network and the Public Interest Law Section of the Florida Bar, pursuant to the order issued by this court on May 9, 2013, and the notice published in The Florida Bar News on June 15, 2013, file these comments to the proposed amendments to the Florida Rule of Civil Procedure Rule 1.490.

INTRODUCTION

Jacksonville Area Legal Aid (hereafter JALA) is a legal services provider to qualifying indigents. JALA has provided and continues to provide representation to hundreds of qualifying low income, working poor and elderly homeowners faced with foreclosure of their homes. Florida Consumer Action Network is a statewide consumer organization engaged in, among other issues, advocating for the protection of homeowners in foreclosure. The Public Interest Law Section of the Florida Bar promotes

the interests of consumers.

We understand the difficult task before the Court in addressing the overwhelming number of pending mortgage foreclosure cases and the concern for the anticipated significant increase in additional filings. JALA has felt this increase in filings through the exponential increase in the demand for our services. Each of the organizations has distinguished themselves by recognizing the need to take a holistic approach in addressing the foreclosure crisis. Through consumer education, individualized legal assistance and housing counseling, we have been able to effectively determine which cases raise legitimate legal issues and which individuals will benefit from qualified housing counselors to assist them with successful loan modifications or to assist those whose income does not fit their home to find more affordable alternatives.

We appreciate the recommendation of the Trial Court Budget Commission's Foreclosure Initiative Workgroup to "address the significant number of mortgage foreclosure cases pending in Florida's trial courts and expected to be filed in the next few years" by streamlining the process for appointment of magistrates in foreclosure cases. JALA is very familiar with the use of magistrates in the family court process and Rule 12.490(b),

Florida Family Law Rules of Procedure, which the Workgroup relied on in drafting its proposal for foreclosure cases. For the reasons stated below, though these rules may work within the family law context, we cannot agree that they are the best course of action in foreclosure cases. We make the following suggestions to improve the process for referral of residential mortgage foreclosure cases to magistrates to make the process more fair and balanced.

RULE 1.490(c)(1) 10-DAY TIME PERIOD

One of the keys to the effective the use of magistrates in foreclosure cases is ensuring the participants have meaningful choice in whether to use the magistrates or request judicial review. It is our collective concern that limiting the response period to ten (10) days will unduly limit borrowers' ability to make a meaningful choice as to the relative benefits or downside to them in using the magistrate process. With only ten days to make this decision it will be very difficult for those who cannot readily afford an attorney with an opportunity to make an informed decision. Legal aid offices such as JALA typically schedule initial appointments three to four weeks from the date of service because of the huge demand for legal services.

Therefore, we suggest a minimum of thirty (30) days from the filing

of the service of the order of referral for the parties to file written objections. We see no basis for shortening this time period where a hearing has been set or if the referral is served with the initial process. Therefore, if a response to the Complaint is due or a hearing is scheduled within the 30-day period, the deadline to object to the referral to a magistrate should remain 30 days. Alternatively, the rule should provide that where the mortgagor in a residential foreclosure has not filed any response to the foreclosure within the required time and/or the mortgagor does not appear at a properly noticed hearing, his or her consent to the referral to a magistrate is no longer required.

Further basis for our suggestion for the change in the amended rule is because of our experience representing hundreds of homeowners facing foreclosure. We see daily the confusion laypersons experience because of the avalanche of advertisements, attorney solicitations, and other mail homeowners receive once a lawsuit is filed. It can be very difficult for a layperson to determine which papers are important, legal and require their attention. We are concerned that the magistrate notice, which in a foreclosure case under the Court's proposed rule would require immediate affirmative action by the homeowner, may get lost in the never-ending stream of mail. A borrower needs time and assistance to sort through these

documents to determine what is legitimate and what is not. This cannot be accomplished in ten days.

RULE 1.490(c)(1) AND (2) CONFUSING USE OF “CONSENT” IN
MODEL NOTICE

We also are concerned that the use of the word “consent” is confusing as set out in the proposed notice. By using the word “consent” predominately in the notice, it makes it less clear to the homeowner that consent will actually be implied if the homeowner, or any party, fails to respond. We believe this confusion could be easily remedied by a technical amendment to the notice: the homeowner should be initially told he or she must affirmatively object if they do not want the case referred to a magistrate. The Court’s proposed language implies the parties must affirmatively act to “consent” to referral. For example, the proposed Rule 1.490(c)(2) opens with the statement that “(a) referral to a magistrate for a residential mortgage foreclosure matter requires the consent of all parties.” In fact, referral to a magistrate in a residential mortgage foreclosure case may only be avoided by a party affirmatively objecting to the referral within a specific time period. The language must be amended to avoid confusion to homeowners and others.

RULE 1.490(d) MAGISTRATES' PRACTICE OF LAW

Finally we raise the ambiguity created by the limitations on the qualifications for all magistrates. In Section (d) of the proposed rule, the Court sets out that a magistrate “shall not practice law in the same case type in the court in any county or circuit the magistrate is appointed to serve.” Without more specific language, it appears an attorney can leave a mortgage foreclosure plaintiff or defense firm and be appointed directly to the position of a magistrate. We believe that in order to avoid potential bias, the applicants for the position should not “practice foreclosure law” within the year of their respective applications. This is consistent with the judicial applicants who have served on the Judicial Nominating Committee or the Judicial Qualifications Committee.

SUGGESTED RULE

Below is our suggestion for revisions to the rule, including the provisions discussed above:

RULE 1.490 MAGISTRATES

(a) General Magistrates. 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 magistrates shall continue in office until removed by the court. The order making an appointment shall be recorded. 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. 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 over all 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 real property as allowed by the administrative order of the chief judge. Magistrates appointed to handle residential mortgage foreclosure matters only shall not be required to give bond or surety.

(b) [No Change]

(c) Reference.

(1) No reference shall be to a magistrate, either general or special, without the consent of the parties., except ~~consent to a magistrate~~ for residential mortgage foreclosure actions and suits where the parties ~~may be~~ must expressly object to referral to a magistrate or consent may be ~~implied~~ deemed in accordance with the requirements of this rule.

(A) A written objection to the referral to a magistrate handling residential mortgage foreclosures must be filed within ~~10~~ 30 days of the service of the order of referral.

(B) If the time set for the hearing is less than ~~10~~ 30 days after service of the order of referral, the party must still be allowed his or her 30 days to file an objection to the use of a magistrate ~~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 remains at 30 days of the service of the order of referral ~~is extended to the time within which to file a responsive pleading.~~

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

(2) The order of referral to a magistrate handling residential mortgage foreclosures shall be in substantial conformity with this rule and shall contain the following language in bold type:

A REFERRAL TO A MAGISTRATE FOR A RESIDENTIAL MORTGAGE FORECLOSURE MATTER ~~WILL ONLY~~ SHALL BE MADE IF NO PARTY TIMELY OBJECTS ~~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 MAGISTRATE, YOU MUST FILE A WRITTEN OBJECTION TO THE REFERRAL WITHIN ~~40~~ 30 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 INITIAL SERVICE OF PROCESS, THE TIME TO FILE AN OBJECTION IS ~~EXTENDED TO THE TIME WITHIN WHICH A RESPONSIVE PLEADING IS DUE~~ 30 DAYS FROM THE DATE OF SERVICE. FAILURE TO FILE A WRITTEN OBJECTION WITHIN THE APPLICABLE TIME PERIOD IS DEEMED TO BE CONSENT TO THE REFERRAL. REVIEW OF THE REPORT AND RECOMMENDATIONS MADE BY THE MAGISTRATE SHALL BE BY EXCEPTIONS AS PROVIDED IN THIS RULE. A RECORD, WHICH INCLUDES A TRANSCRIPT OF PROCEEDINGS, MAY BE REQUIRED TO SUPPORT THE EXCEPTIONS.

When a reference is made to a magistrate, either party may set the action for hearing before the magistrate.

(d) General Powers and Duties. Every magistrate shall perform all of the duties that pertain to the office according to the practice in chancery and under the direction of the court. Process issued by a

magistrate shall be directed as provided by law. Hearings before any magistrate, examiner, or commissioner shall be held in the county where the action is pending, but hearings may be held at any place by order of the court within or without the state to meet the convenience of the witnesses or the parties. All grounds of disqualification of a judge shall apply to 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, within the year preceding the appointment.

(e) – (h) [No Change]

CONCLUSION

Jacksonville Area Legal Aid, Florida Consumer Action Network, and the Public Interest Law Section of the Florida Bar appreciate the hard work of the Trial Court Budget Commission's Foreclosure Initiative Workgroup. As attorneys and advocates for homeowners, we support the efforts to move the foreclosure cases through our overburdened courts as expeditiously as is fair to all the parties. While encouraging the use of magistrates to help with the huge volume of foreclosure cases, we feel the rule should be tempered to ensure homeowners who wish to make a reasoned decision as to whether to have their case heard by a magistrate have adequate and meaningful opportunity to do so. Most assuredly Florida will not remain in a foreclosure crisis; therefore sun setting these provisions would make sense in light of the obvious and ultimate end to the high volume of foreclosure filings.

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CERTIFICATE OF SERVICE

I certify that a copy of the Comments of Jacksonville Area Legal Aid, Florida Consumer Action Network, and the Public Interest Law Section of the Florida Bar have been sent by electronic transmission to Commission Chair Judge Margaret O. Steinbeck, Lee County Justice Center, 1700 Monroe Street, Fort Myers 33901-3071 at msteinbeck@ca.cjis20.org this 8th day of July 2013.

/s/Lynn Drysdale

Lynn Drysdale

CERTIFICATE OF COMPLIANCE

I certify that these comments were prepared in accordance with the font requirements of Fla. R. App. P. 9.210(a)(2).

/s/Lynn Drysdale
Lynn Drysdale