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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

**CIVIL PROCEDURE RULES COMMITTEE'S COMMENTS
TO MAY 9, 2013 AMENDMENTS TO RULE 1.490**

Thomas H. Bateman III, Chair, Civil Procedure Rules Committee (Committee), and John F. Harkness, Jr., Executive Director, The Florida Bar, on behalf of the Committee, file these comments to the Court's May 9, 2013 opinion adopting amendments to Fla. R. Civ. P. 1.490 based on an emergency petition filed by the Trial Court Budget Commission (TCBC) "to help alleviate the residential mortgage foreclosure case backlog Florida courts are currently facing." Pursuant to the rule amendments, local attorneys would be selected by the chief judge of each circuit to serve as general magistrates only in residential mortgage foreclosure cases; the residential mortgage foreclosure matters would be implicitly referred to a foreclosure general magistrate subject to a timely objection by a party; and the attorneys serving in this capacity would not be required to post bond or surety. The opinion, however, specifies that the amendments "do not change the consent requirements for other civil cases."

The Committee understands the need for the expanded use of magistrates in these residential foreclosure cases given the incredible backlog of cases currently pending in the state's trial courts and hopes that the backlog is temporary. In this regard, the Committee has a strong preference that any provisions for a special system for foreclosure magistrates appear in a separate rule, both to avoid confusion with other civil cases and to make it easier to remove the provisions once the backlog is cleared. Under the Committee's proposal in this comment, the amendments to Rule 1.490 promulgated by the Court's May 9, 2013 opinion relating to residential mortgage foreclosure magistrates would be deleted in their entirety and moved to new proposed Rule 1.491. Accordingly, the Committee is proposing a new Rule,¹ 1.491, drawing from the language of the Court's opinion to the greatest extent possible. At its meeting during the Annual Meeting of The Florida Bar, the Committee membership voted 28 to 0 in favor of proposing new Rule 1.491 and recommended contacting the TCBC to discuss the matter. The proposed rules are found in Appendix A (full page) and Appendix B (two-column).

The Committee Chair has conferred with the Hon. Margaret Steinbeck, TCBC

¹ For example, currently pending before the Court in SC13-74 is the Committee's 3-year cycle petition that includes proposed amendments to Rule 1.490. Proposed Rule 1.491, however, does not include the Court's referral order language concerning review of the foreclosure magistrate's report and recommendations because similar language would be required in the magistrate's report itself if the Court adopts the Committee's proposed amendment to Rule 1.490(h), Magistrate's Report, pending in the Court on the non-argument calendar in case number SC13-74.

Chair, regarding placing the residential foreclosure magistrate provisions into a new rule and is authorized to advise the Court that she and the Commission members fully support this approach.

Accordingly, the Committee respectfully urges the Court to adopt the Committee's proposed new Rule 1.491 and amend Rule 1.490 as provided in this comment.²
Respectfully submitted, July 19, 2013.

/s/ Thomas H. Bateman III
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/s/ John F. Harkness, Jr.
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² In an abundance of caution and to be sure an additional matter discussed with Judge Steinbeck and the TCBC is brought to the Court's attention, the Committee has filed a Supplemental Petition to its 3-year cycle proposed amendments to Rule 1.490 relating to a necessary amendment to subsection 1.490(f) deleting the words "in writing." *See* SC13-74. In the event the Court prefers not to permit the supplemental petition in SC13-74, the Committee Chair is authorized to advise the Court that the TCBC agrees that the subsection must be amended by deleting the words "in writing" in order to remove any confusion about who is responsible for the record and the means by which it may be taken down. If the Court is not inclined to permit the Supplemental Petition in SC13-74, the Committee and the TCBC would urge the Court to make the amendment in this case.

CERTIFICATE OF SERVICE

I certify that a copy of this supplemental petition was served by email on July 19, 2013, on:

Honorable Margaret Steinbeck
Chair, Trial Court Budget Commission
msteinbeck@ca.cjis20.org

/s/ John F. Harkness, Jr.

CERTIFICATE OF COMPLIANCE

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

I certify that these rules were read against Wet's *Florida Rules of Court — State Vol. I* (2013) and *In re Amendments to Florida Rule of Civil Procedure 1.490*, 111 So. 3d 777 (Fla. 2013).

/s/ Ellen H. Sloyer
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APPENDIX A

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) **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.

(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 may be express or may be implied 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 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 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 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 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 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 parties. ~~Magistrates shall not practice law of the same case type in the court in any county or circuit the magistrate is appointed to serve.~~ All grounds of disqualification of a judge shall apply to magistrates.

(e) **Bond.** When not otherwise provided by law, the court may require magistrates who are appointed to dispose of real or personal property to give bond and surety conditioned for the proper payment of all moneys that may come into their hands and for the due performance of their duties as the court may direct. The bond shall be made payable to the State of Florida and shall be for the benefit of all persons aggrieved by any act of the magistrate.

(f) **Hearings.** The 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. If any party fails to appear, the magistrate may proceed ex parte or may adjourn the proceeding to a future day, giving notice to the absent party of the adjournment. The magistrate shall proceed with reasonable diligence in every reference and with the least practicable delay. Any party may apply to the court for an order to the magistrate to speed the proceedings and to make the report and to certify to the court the reason for any delay. Unless otherwise ordered by the court, all hearings shall be held in the courthouse of the county where the action is pending. 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 magistrate's report. The magistrate shall have authority to examine the parties on oath upon all matters contained in the reference and 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 magistrate shall admit evidence by deposition or that is otherwise admissible in court. The magistrate may take all actions concerning evidence that can be taken by the court and in the same manner. All parties accounting before a magistrate shall bring in their accounts in the form of accounts payable and receivable, and any other parties who are not satisfied with the account may examine the accounting party orally or by interrogatories or deposition as the magistrate directs. All depositions and documents that have been taken or used previously in the action may be used before the magistrate.

(g) **Magistrate's Report.** In the reports made by the magistrate no part of any statement of facts, account, charge, deposition, examination, or answer used before the magistrate shall be recited. The matters shall be identified to inform the court what items were used.

(h) Filing Report; Notice; Exceptions. The magistrate shall file the report and serve copies on the parties. The parties may serve exceptions to the report within 10 days from the time it is served on them. 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.

Committee Notes

1971 Amendment. The entire rule has been revised. Obsolete language has been omitted and changes made to meet objections shown by the use of local rules in many circuits. Subdivisions (a) and (b) are not substantially changed. Subdivision (c) is shortened and eliminates the useless priority for setting the matter for hearing to permit either party to go forward. Subdivision (d) eliminates the right of the parties to stipulate to the place of hearing. Subdivision (e) is not substantially changed. Subdivisions (f), (g), (h), and (i) are combined. The right to use affidavits is eliminated because of the unavailability of cross-examination and possible constitutional questions. The vague general authority of the magistrate under subdivision (g) is made specific by limiting it to actions that the court could take. Subdivision (j) is repealed because it is covered in the new subdivision (f). Subdivision (g) is the same as former subdivision (k) after eliminating the reference to affidavits. Subdivision (h) is the same as former subdivision (l).

1980 Amendment. Subdivision (d) is amended to delete the specific reference to the direction of process so that process issued by the master will be governed by the law applicable to process generally.

Court Commentary

1984 Amendment. The consent of all parties is required for any reference to a special master. Special masters may be used as provided by statute even with the rule change. See *Slatcoff v. Dezen*, 74 So. 2d 59 (Fla. 1954).

RULE 1.491. GENERAL MAGISTRATES FOR RESIDENTIAL FORECLOSURE MATTERS

(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) 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 may be express or may be implied 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 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 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 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 A 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 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 or circuit the magistrate is appointed to serve.

(e) **Hearings.** The 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. If any party fails to appear, the magistrate may proceed ex parte or may adjourn the proceeding to a future day, giving notice to the absent party of the adjournment. The magistrate shall proceed with reasonable diligence in every reference and with the least practicable delay. Any party may apply to the court for an order to the magistrate to speed the proceedings and to make the report and to certify to the court the reason for any delay. Unless otherwise ordered by the court, all hearings shall be held in the courthouse of the county where the action is pending. 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 magistrate's report. The magistrate shall have authority to examine the parties on oath upon all matters contained in the reference and 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 magistrate shall admit evidence by deposition or that is otherwise admissible in court. The magistrate may take all actions concerning evidence that can be taken by the court and in the same manner. All parties accounting before a magistrate shall bring in their accounts in the form of accounts payable and receivable, and any other parties who are not satisfied with the account may examine the accounting party orally or by interrogatories or deposition as the magistrate directs. All depositions and documents that have been taken or used previously in the action may be used before the magistrate.

(f) **Magistrate's Report.** In the reports made by the magistrate no part of any statement of facts, account, charge, deposition, examination, or answer used before the magistrate shall be recited. The matters shall be identified to inform the court what items were used.

(g) **Filing Report; Notice; Exceptions.** The magistrate shall file the report and serve copies on the parties. The parties may serve exceptions to the report within 10 days from the time it is served on them. 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.

Committee Notes

2013 Adoption. This rule is the result of an emergency petition by the Trial Court Budget Commission and is intended to alleviate the backlog of residential mortgage foreclosure cases that Florida courts are currently facing.

APPENDIX B

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.~~

Text deleted and transferred to Rule 1.491

(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 may be express or may be implied in accordance with the requirements of this rule.~~

Text deleted and transferred to Rule 1.491

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~~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 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.

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Text deleted and transferred to Rule 1.491

(e) [No change]

(f) [No change]

(g) [No change]

(h) [No change]

Committee Notes

[No change]

Court Commentary

[No change]

**RULE 1.491. GENERAL MAGISTRATES FOR
RESIDENTIAL FORECLOSURE
MATTERS**

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Creates a new rule to govern the use of general magistrates in residential mortgage foreclosure proceedings. The rule is based on amendments to Rule 1.490 made in *In re: Amendments to Florida Rule of Civil Procedure 1.490*, 113 So. 3d 777 (Fla. 2013). Two changes have been made to the Court's amended rule.

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Committee **Notes**

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