

IN THE SUPREME COURT OF FLORIDA

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

CASE NO. SC13-684

RESPONSE OF THE TRIAL COURT BUDGET COMMISSION

Margaret O. Steinbeck, Circuit Judge, Chair, Trial Court Budget Commission (Commission), files this response to the comments submitted by interested persons on the amendments to Fla. R. Civ. P. 1.490. Comments were submitted by: Mark P. Stopa, Esq.; Aderant CompuLaw; The Florida Bar's Civil Procedure Rules Committee; and General Magistrate Robert J. Jones. A joint comment was filed by Jacksonville Area Legal Aid, Inc., the Florida Consumer Action Network, and the Public Interest Law Section of The Florida Bar.

On April 23, 2013, the Commission filed an emergency petition requesting the Court to approve the following rules changes: (1) amendment of Rule 1.490(a), to authorize the chief judge of each circuit to appoint general magistrates, who are members of The Florida Bar to preside over residential mortgage foreclosure actions; (2) amendment of Rule 1.490(c), to allow for referral of a residential mortgage foreclosure case to a magistrate with the implied consent of the parties if an objection is not made within 10 days of the referral; (3) amendment of Rule 1.490(c), to provide language that must be included in bold type in the order of referral; and (4) amendment of Rule 1.490(d), to prohibit magistrates appointed under the rule from practicing law of the same case type in the court in the county or circuit where the magistrate is appointed to serve.

The rule changes implement the Commission's Foreclosure Initiative Workgroup's recommendations developed to address the significant number of mortgage foreclosure cases pending in Florida's trial courts. The Court approved the emergency petition and the amendments became effective immediately upon release of the Court's opinion on May 9, 2013. The amendments were published in the June 15, 2013, edition of *The Florida Bar News*.

The Commission appreciates the efforts of those who filed comments to the

rule amendments.

Mark Stopa

Mark P. Stopa, Esq., opposes the rule amendment which allows a 10-day period to object to the referral of a residential mortgage foreclosure matter to a general magistrate. Mr. Stopa acknowledges that the rule as amended gives the parties ten days *from the service* of the order in which to object, yet states that “if the Order is not received within this 10-day window, then parties will not have been given any opportunity to interpose an objection.” Mr. Stopa stated that it takes more than ten days for parties to receive orders due to the volume of paperwork that the clerks and judicial assistants must manage. Further Mr. Stopa asserts that a “lengthier time” to respond would benefit pro se litigants. Mr. Stopa suggests a 20-day objection period.

Response: The Commission does not agree with Mr. Stopa’s suggestion of a 20-day period to object to the referral to a general magistrate. The 10-day time period to object to the referral to a general magistrate in residential foreclosure matters in Rule 1.490 mirrors the same structure that has operated in the context of the Family Law Rules for many years without any evident hardship on the litigants.

Moreover, Mr. Stopa’s comments, in part, fail to consider that the “clock” will not start until service of the order. Rule 1.090(e), provides additional time after any service by mail, adding 5 days to the prescribed period.

In addition, Rule 1.090(b) provides that the court, on request, may enlarge the period to respond under the rules. Even after expiration of the specified period, under rule 1.090(b), the court may permit the objection to be filed late if failure to timely file was the result of excusable neglect.

The Commission believes the amendment requiring an objection to the general magistrate referral within 10 days of service is appropriate. The 10-day objection period allows for the streamlining of the process and avoids certain affirmative or express consent related problems, including delays, while at the same time protecting a party’s constitutional right to have the case heard by an Article V judge.

Aderant CompuLaw

Ellie Bertwell, Esq, on behalf of Aderant CompuLaw (Aderant), a legal software provider, filed a comment on the rule amendments. Aderant's comment states that the deadline to object to an order of referral to a magistrate handling residential mortgage foreclosures is ambiguous because under Rule 1.490(c)(1)(C), the objection would be due on the day the response to the complaint is due and this may not be extending the time to file the objection. Aderant suggests that Rule 1.490(c)(1)(C) be deleted and Rule 1.490(c)(1)(A) be revised to state, "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, or within the time to respond to the initial pleading, whichever is later."

Aderant's comment further states that the "hearing" referred to in Rule 1.490(c)(1)(B) is not specified or readily ascertainable from the context of the rule and is also vague. Aderant suggests the hearing be identified by name.

Response: The Commission does not oppose the additional new language proposed by Aderant to clarify the deadline to object to an order of referral to a magistrate handling residential mortgage foreclosures. The Commission agrees that absent an emergency or other circumstances where the time frame may be shorter, such as provided in Rule 1.490(c)(1)(B), litigants should have at least 10 days to object to a referral to a magistrate.

The Commission does not agree that it is necessary to specifically define the "hearing" referred to in Rule 1.490(c)(1)(B), and prefers the uniform, general language that has worked well in the context of the Family Law Rules for years.

Jacksonville Area Legal Aid, Florida Consumer Action Network, and the Public Interest Law Section of The Florida Bar

Jacksonville Area Legal Aid (JALA), the Florida Consumer Action Network, and the Public Interest Law Section of The Florida Bar filed a joint comment. The first issue addressed by the joint comment suggested the Court adopt a minimum of thirty (30) days from the filing of the service of the order of referral for the parties to file written objections. The second issue suggested in the joint comment is that the word "consent" in the bold type notice provision for the order of referral, Rule 1.490(c)(2), is confusing and does not make it clear to the homeowner that consent will actually be implied if a party fails to respond. The third issue addressed in the joint comment concerns Rule 1.490(d), which was

amended to prevent the magistrate from practicing law in the same case type in the court or circuit the magistrate is appointed to serve. The joint comment suggests that in order to avoid potential bias, the new magistrates should not have practiced foreclosure law within the year of their respective applications to the position.

Response: The Commission opposes the suggestion in the joint comment of a 30-day period to object to the referral to a general magistrate. Having a 10-day objection period allows for the streamlining of the process and avoids certain affirmative or express consent related problems, including delays, while at the same time protecting a party's constitutional right to have the case heard by an Article V judge. Again, the 10-day time period for objection to the referral to a general magistrate in the new amendments for residential foreclosure matters in Rule 1.490 is the same structure that has operated in the context of the Family Law Rules for many years without any evident hardship on the litigants.

The Commission also opposes the suggestion that the new magistrates should not have practiced foreclosure law within the past year prior to being hired to handle these cases for the circuits that have chosen to use general magistrates. The general magistrates hired by the courts to handle residential foreclosure matters are subject to the same rules of disqualification and recusal, and must conform to the applicable provisions of the Code of Judicial Conduct. Canon 7, "Application of the code of Judicial conduct," states that a general magistrate shall, while performing judicial functions, conform with Canons 1, 2A, and 3, and such other provisions of the Code that might reasonably be applicable depending on the nature of the judicial function performed.

The Commission disagrees that use of the word "consent" in the bold type notice for the order of referral, Rule 1.490(c)(2), is confusing. The amendments to Rule 1.490(c)(2) tracks Family Law Rule 12.490, which also refers matters to a magistrate and requires an objection within a 10-day period. The Commission opposes any rewording because the same language has worked well within the context of Family Law Rule 12.490.

Magistrate Jones

Robert J. Jones, a General Magistrate in the family division, serving in the Eleventh Judicial Circuit, filed a comment on the amendments to Rule 1.490. Many of Magistrate Jones' suggestions are beyond the scope of the rule amendments adopted by this Court on May 9, 2013. Several of the suggestions of Magistrate Jones have been considered by the Civil Procedure Rules Committee as discussed

in the Committee's Three-Year Cycle Report (see SC13-74). The Committee stated in its Three-Year Cycle Report that "Mr. Jones' proposals were too extensive to properly study and make revisions in time for this cycle report." The Committee has established a subcommittee to consider Magistrate Jones' proposals.

The first suggestion offered by Magistrate Jones is that the rule should be harmonized in a manner that provides for the same implied consent process for all referrals made under the rule.

The second suggestion of Magistrate Jones is that the Court amend Rule 1.490 to specifically require an Order of Reference as required by Family Law Rule of Procedure 12.490 for all referrals made under Rule 1.490. This matter was not specifically related to the amendments adopted by this Court on May 9, 2013, and is part of Magistrate Jones' support of broader Rule 1.490 reform.

The third suggestion proposed by Magistrate Jones is that the current language in Rule 1.490(f), specifically, "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 Rule 1.490(f), and replaced with the current language in Family Law Rule of Procedure 12.490, that is, "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 [sic](h)(3) or by a court reporter. The parties may not waive this requirement."

The fourth suggestion proposed by Magistrate Jones concerns the contents of the magistrate's report. This matter is unrelated to the amendments adopted by this Court on May 9, 2013.

The fifth and sixth suggestions raised by Magistrate Jones (exceptions and cross exceptions) in his comment have already been proposed in the Civil Procedure Rules Committee's pending proposed amendments to Rule 1.490, which apparently Magistrates Jones supports.

The seventh suggestion raised by Magistrate Jones in his comment, concerning the record, is already part of the Civil Procedure Rules Committee's proposed amendments to Rule 1.490. Magistrate Jones has a somewhat different suggestion as to the exact language to promote uniformity. Again, this matter is unrelated to the amendments adopted by this Court on May 9, 2013.

The eighth suggestion raised by Magistrate Jones in his comment is that a magistrate should have the same powers as a circuit judge to utilize communication equipment as defined and regulated by Rule of Judicial Administration 2.530. Again, this matter is unrelated to the amendments adopted by this Court on May 9, 2013.

The ninth suggestion raised by Magistrate Jones is that all appointments of general magistrates under Rule 1.490 should be made by the *chief judge* of the applicable circuit and the appointment should be done by way of an Administrative Order entered by the chief judge. Magistrate Jones points out some inconsistency in Rule 1.490 which 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.”

The tenth (listed as number “11” in the comment) and final issue raised by Magistrate Jones concerns the amendment that magistrates shall not practice law of the same case type in the court in any county or circuit the magistrate is appointed to serve. Magistrate Jones fully supports the inclusion of that provision in Rule 1.490, but suggests it should also be placed in the “Application of the Code of Judicial Conduct” section of the Code of Judicial Conduct.

Magistrate Jones also proposed and included in his comments two new forms for use with Rule 1.490: Order of Referral to Magistrate and Notice of Hearing.

The Commission appreciates the time and effort Magistrate Jones has dedicated to his comment and to Rule 1.490 reforms in general. However, many of Magistrate Jones’ suggestions are either unrelated to the amendments adopted by this Court on May 9, 2013, or have already been suggested in the Civil Procedure Rules Committee’s pending and proposed amendments to Rule 1.490 (SC13-74). Others are apparently being further considered by the Rules Committee and may be before the Court in the future.

The Commission’s role in proposing amendments to Rule 1.490 is limited to the Commission’s interest in facilitating the use of general magistrates as part of the foreclosure backlog reduction plan developed by the Commission’s Foreclosure Initiative Workgroup and approved by the Court in its May 9, 2013, opinion. Accordingly, the Commission declines to respond to comments that are unrelated to the amendments of this case.

Response: The first suggestion offered by Magistrate Jones is that the rule should provide the same implied consent process for all referrals made under the rule. The Commission does not take a position on this suggestion of a global implied consent process for Rule 1.490 but regards the suggestion as support for the amendment to the rule allowing implied consent for referral in residential mortgage foreclosure matters.

Magistrate Jones' third suggestion, that the current language in Rule 1.490(f), specifically, "*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 Rule 1.490(f), and replaced, raises an issue that the Commission inadvertently overlooked in its emergency petition.

The language in Rule 1.490(f), highlighted above, with its requirement that evidence be taken in "writing" is antiquated. Today, our trial courts for the most part use digital and electronic means to preserve the record, including in residential foreclosure matters. We agree that the state court system's new magistrates should have certainty and direction from this Court that hearings over which they are now presiding may have the record or evidence taken by either electronic means or by writing. While the Commission does not oppose Magistrate Jones' suggestion of tracking the current language in the family law rule, the Commission suggests that the simple deletion of the words "in writing" from rule 1.490(f) would provide the same clarification. Specifically: "*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.*"

The Civil Procedure Rules Committee supports amending Rule 1.490(f), and stated in its comment that the Committee has filed a Supplemental Petition to its 3-year cycle for the necessary amendment to subsection 1.490(f), deleting the words "in writing." The Commission and the Committee support the amendment as it clarifies who is responsible for the record and the means by which it may be captured.

Civil Procedure Rules Committee

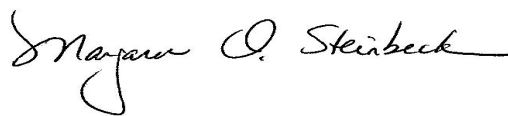
The Committee in its comment stated that the Committee has a strong preference that any provisions for a special system for foreclosure magistrates

appear in a separate rule, “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 its 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.

As previously discussed, the Committee also supports amending Rule 1.490(f), and stated in footnote 2 of its comment that the Committee has filed a Supplemental Petition to amend Rule 1.490(f), deleting the words “in writing.” The Commission and the Committee support the amendment as it clarifies who is responsible for the record and the means by which it may be captured. The Committee attached its draft rule proposal to separate the new amendments from the original rule.

Response: The Commission does not oppose moving the new amendments to proposed new Rule 1.491, but would urge the court to keep the language prohibiting magistrates from practicing in the same case type in Rule 1.490(d), for consistency as the same language will be used in proposed Rule 1.491(c) for magistrates appointed to residential mortgage foreclosure matters. In addition, the proposed amendment to Rule 1.490(f), the deletion of “in writing”, is needed and fully supported by the Committee and the Commission. The Commission urges the Court to adopt the requested amendment to Rule 1.490(f), under this case because any amendments under the Supplemental Petition filed in SC 13-74, will not be effective until January 1, 2014. With the advent of electronic resources in the courtrooms around the state our magistrates need immediate guidance. The Commission respectfully requests the Court to adopt proposed Rule 1.491, attached to this Response.

Respectfully submitted,



Margaret O. Steinbeck
Circuit Judge
Chair, Trial Court Budget Commission

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Response of the Trial Court Budget Commission is submitted in Times New Roman 14-point font, in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

I HEREBY CERTIFY that the rules in the Appendices attached to this Response were read against *West's Florida Rules of Court – State* (2012 Revised Edition).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Response and Appendices A, B, C, and D, were provided by e-mail delivery on August 12, 2013 to the following:

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