#2019-012

Carolyn A. Koegler

From:	Hon. Michael H. Garner
Sent:	Wednesday, November 27, 2019 10:08 AM
To:	Carolyn A. Koegler; External Joshua L. Gordon; Jeanne Herrick, Esq. (jherrick@ccsnh.edu)
Cc:	Hon. Michael H. Garner
Subject:	Advisory Committee on Rules; 2019-012
Attachments:	SKM_558e19112709390.pdf

Hello all,

I attach the results of a survey of the Circuit Court Judges on Rule 1.25-A intended to help decide whether Attorney Markell's proposed Rules amendment is necessary. The judges' voluntary comments are also attached.

My own take is that although I do not think the proposed amendment is necessary, given the inherent flexibility the Court has in applying the Rules, I do not think the proposed amendment would do any active harm to the "mandatory" nature of Rule 1.25-A.

The question whether Rule 1.25-A is enforced strictly enough seems to impact administration of the Rules rather than modification, and I think that unless there is a proposed modification before the Committee to address that issue, we should defer it to another day.

I hope these are helpful. I will bring copies to the meeting next week.

Mike Garner

Family Division Rule 1.25-A

1. Do you commonly rely on the "or ordered by the Court" language in Rule 1.25-A, B 1 to modify the application of the mandatory disclosure required under the Rule?

Answer Choices	Responses	
Yes	39.13%	9
No	60.87%	14

Comments:

1. Circumstances regularly make it difficult for parties to obtain the information required by the Rule, and I treat the Rule as waivable under the general practice.
2. I have never had any significant issues with non-compliance.
3. Many self-represented clients do not comply with the Rule. If there is a lawyer on the other side, the rule is often used to intimidate or confuse the self-represented party.
4. I do rely on the language from time to time though I do not "commonly" rely on it.

2. Please choose one of the following to describe your general practice when it comes to Rule 1.25-A:

Answer Choices	Responses	
a. Always strictly enforce.	4.35%	1
b. Usually strictly enforce.	39.13%	9
c. Sometimes strictly enforce.	17.39%	4
d. Always flexibly enforce	30.43%	7
e. Sometimes flexibly enforce.	8.70%	2

Comments:

1. I presume enforceability of the Rule in keeping with the purpose to require parties to share information and to be prepared for hearings on financial issues. I do allow for flexibility both as to timing and as to content when the benefit of having particular information is greatly outweighed by the difficult in obtaining it.

2. None.

3. Oftentimes it depends upon whether a party is self-represented or if the parties have attempted to informally settle their disputes.

4. Many self represented litigants have no idea what the rule means, despite multiple references to it. Issues generally arise when one party has counsel and the other does not.

5. Most every case has a justifiable reason to eliminate the need for some of the discovery materials covered by Rule 1.25-A.

6. When enforcement is requested, which does not happen too often, and rarely in cases with pro se litigants.

3. Does your level of enforcement of Rule 1.25-A vary depending whether any party is self-represented? If so, how?

Answer Choices	Responses	
Yes	65.22%	15
No	34.78%	8

Comments:

1. If I encounter a self-represented party who either lacks knowledge or understanding of the rule, or else is struggling to comply with it, I try to spend time educating the litigant about the rule, where to find it, what it entails, and what it requires the litigant to do. I usually try to point out that the rule applies mutually. And I am customarily flexible about the deadline for compliance, unless there is a critical event happening which requires a less flexible deadline.
2. Self represented litigants rarely have complied with Rule 1.25-A prior to a structuring conference. At that hearing the court often sets a deadline for compliance rather than penalizing a party that has not yet complied.
3. I am more flexible about the Rule in cases involving two attorneys or two self-represented litigants, and less flexible about the Rule when there is a self represented litigant and an attorney on the other side.
4. I simply reiterate the requirements of the Rule when dealing with self-represented parties.
5. I give more time for self-represented clients.
6. I try to educate self-represented parties if they have not complied when they appear before me and will probably extend the deadline.
7. If the party was genuinely trying to comply and made an error or didn't understand, I have allowed more time to comply. I want the information.
8. Pro se litigants need help clearly understanding the rule and help obtaining the necessary documents. Our opportunity to interact with them during the discovery period is very limited and we ought to be thinking of ways to engage pro se litigants early on in the process to start doing the legwork.
9. I usually relax enforcement when both parties are self-represented, but require that basic information be exchanged: e.g. paystubs, W-2s, retirement account information (if they have such accounts), and fully completed financial affidavits.

10. I allow more leeway for people who are self-represented. I do not think the average litigant even reads the rule

11. I usually end up having to spend court time explaining the rules to a pro se litigant and then come back for a future hearing when they have attempted to comply more fully.

12. Depends on whether they have made a good faith effort to comply and whether they have the ability to comply.

13. It just takes a lot more effort.

14. With either pro se or represented litigant I will generally extend the deadline in the first instance absent a clear showing of bad faith.

4. Should the 45 day/10 day deadlines in Rule 1.25-A be lengthened?

Answer Choices	Responses	
Yes	17.39%	4
No	82.61%	19

Comments:

1. The 45 day deadline is not as critical as a deadline prior to a temporary hearing or mediation. The parties should have access to the other party's financial information prior to appearing at a hearing or mediation where parties are required to advocate or make decisions regarding finances.

2. I would suggest a modification allowing the Court to expand the deadlines in the Rule as circumstances require, but if there must be some deadline for all cases I think it should be ten days before a pretrial conference; I do not often hear of mediation failing because the parties had not exchanged information and I think generally parties are more apt to exchange the information timely when they have agreed to mediate.

3. None.

4. The litigants will still wait until the last minute and request more time, further delaying the process.

5. I think that is a reasonable baseline expectation and it puts people on notice that they need to begin gathering information right away.

6. Generally, this is enough time. I think the rule could be improved to allow parties to ask the Court for more time for good reasons.

7. unless there is good cause to extend the deadlines.

8. I don't believe that extending the deadline will have an appreciable effect on compliance or non-compliance. The Court can already extend the deadline or the parties can agree to do so.