

IN THE SUPREME COURT OF FLORIDA

**IN RE: AMENDMENTS TO THE FLORIDA
RULES OF JUDICIAL ADMINISTRATION, THE
FLORIDA RULES OF CIVIL PROCEDURE, THE
FLORIDA RULES OF CRIMINAL PROCEDURE,
THE FLORIDA PROBATE RULES, THE FLORIDA
RULES OF TRAFFIC COURT, THE FLORIDA CASE NO.: SC10-2101
SMALL CLAIMS RULES, THE FLORIDA RULES
OF JUVENILE PROCEDURE, AND THE FLORIDA
RULES OF APPELLATE PROCEDURES – EMAIL
SERVICE RULE**

COMMENTS OF THE FAMILY LAW SECTION OF THE FLORIDA BAR

Diane M. Kirigin, Chair, the Family Law Section of The Florida Bar, and Matthew B. Capstraw, Senior Co-Chair of the Rules and Forms Committee of the Family Law Section of The Florida Bar, file these Comments of the Family Law Section of the Florida Bar, Section, to proposed Fla. R. Jud. Admin. 2.516. These Comments were approved by a vote of the Executive Committee of the Family Law Section of the Florida Bar by a vote of 4 of 5 Committee members in favor; 1 member failed to vote. In drafting these Comments, the Family Law Section of the Florida Bar has reviewed the Comments of the Family Law Rules Committee and is in agreement with those Comments.

CONCERNS RELATED TO THE IMPLEMENTATION OF THIS PROPOSED RULE

The Section is concerned that the implementation of the proposed eservice rule is a fundamental change in the day-to-day practice of law for every attorney in this State. As it is such a pervasive change, it should be done carefully and with due consideration of the potential ramifications to the people of the State of Florida.

One of the Section's basic concerns with the implementation of this proposed rule is how long the procedures set forth herein will actually be in effect. The current efileing proposal will require significant modifications to this rule as the filing of court documents will be handled very differently. Under the current proposal, attorneys are to forward to opposing counsel any document they file with the court via email. Once efileing is in place, attorneys will upload the document to the court. Then the clerk, through an automated system, will either forward a copy of or notify all parties of the filing the document. The Section believes that fundamental changes to the day-to-day practice of law should be minimized. Since it is foreseeable that major revisions will need to be made with the implementation of efileing, it would be better to implement both eservice and efileing contemporaneously rather than through repeated piecemeal changes.

The Section is aware of other Comments made related to security concerns for email and writes to emphasize that these concerns could disproportionately affect litigants in family law actions due to the sheer number of financial documents, with full social security numbers, credit card numbers, and bank account information, that will be required to be exchanged via email with the implementation of this proposed rule. The Section is concerned that the security issues with eservice have not been fully explored, and this proposed rule should not be implemented until they have been. In exploring the security concerns of eservice, inquiry should also be made as to whether some of these security concerns could be eliminated or mitigated through the implementation of efilings as suggested in another Comment.

COMMENTS RELATED TO THE PROPOSED LANGUAGE

The Section is concerned the proposed rule is difficult to read and understand, and made more complicated than necessary. As simple and clear rules are beneficial to attorneys, self-represented parties, and the Court, the Section recommends the following revisions. The rationale for the revisions will be provided following the proposed rule. For ease of reference, the language removed has been stricken through, the language added has been underlined.

RULE 2.516 SERVICE OF PLEADINGS AND DOCUMENTS

~~(a) **Service; When Required.** Unless the court otherwise orders, or a statute or supreme court administrative order specifies a different means of service, every pleading subsequent to the initial pleading and every other document filed in any court proceeding, except applications for witness subpoenas and documents served by formal notice or required to be served in the manner provided for service of formal notice, must be served in accordance with this rule on each party. No service need be made on parties against whom a default has been entered, except that pleadings asserting new or additional claims against them must be served in the manner provided for service of summons.~~

(a) **Service: When Required.** All documents and pleadings, subsequent to the initial pleading, must be served upon each party in accordance with this rule except those that are required to be served by formal notice.

(1) **Represented Parties:** When service is required or permitted to be made upon a party represented by an attorney, service must be made upon the attorney unless service upon the party has been specifically ordered by a court.

(2) **Default:** No service need be made on parties against whom a default has been entered, except that pleadings asserting new or additional claims against the defaulted party must be served in the manner provided for service of a summons.

However, in family law cases, notices of final hearing, judgments or court orders shall be served on a defaulted party in the same manner provided for service of pleadings and papers pursuant to Florida Family Law Rules, Rule 12.082 (c)(2).¹

~~(b) **Service; How Made.** When service is required or permitted to be made upon a party represented by an attorney, service must be made upon the attorney unless service upon the party is ordered by the court.~~

¹ There is a substantial body of case law in marital and family law cases that addresses the obligation of a Court to inquire and determine what is in a child's best interest. This body of case law is unique in as much as it permits a defaulted party to still participate and present evidence on parental responsibility, ultimate decision making authority and time-sharing matters despite the entry of a default against that party.

~~(1) **Service by Electronic Mail (“Email”).** All documents required or permitted to be served on another party must be served by email, unless this rule otherwise provides. When, in addition to service by email, the sender also utilizes another means of service provided for in subdivision (b)(2), any differing time limits and other provisions applicable to that other means of service control.~~

~~(A) **Service on Attorneys.** Upon appearing in a proceeding, an attorney must serve a designation of a primary email address and may designate no more than two secondary email addresses. Thereafter, service must be directed to all designated email addresses in that proceeding. Every document filed by an attorney thereafter must include the primary email address of that attorney and any secondary email addresses. If an attorney does not designate any email address for service, documents may be served on that attorney at the email address on record with The Florida Bar.~~

~~(B) **Exception to Email Service on Attorneys.** Service by an attorney on another attorney must be made by email unless excused by the court. Upon motion by an attorney demonstrating that the attorney has no email account and lacks access to the Internet at the attorney’s office, the court may excuse the attorney from the requirements of email service. Service on and by an attorney excused by the court from email service must be by the means provided in subdivision (b)(2) of this rule.~~

~~(C) **Service on and by Parties Not Represented by an Attorney.** Any party not represented by an attorney may serve a designation of a primary email address and also may designate no more than two secondary email addresses to which service must be directed in that proceeding by the means provided in subdivision (b)(1) of this rule. If a party not represented by an attorney does not designate an email address for service in a proceeding, service on and by that party must be by the means provided in subdivision (b)(2) of this rule.~~

(b) **Service; How Made.** Service may be accomplished in the following methods:

(1) **Service upon Attorneys by Attorneys.** All documents required or permitted to be served on another party who is represented by an attorney must be served by e-mail unless otherwise provided by this rule.

(A) **Designation of Email Address.** Upon appearing in a proceeding, an attorney must serve on each party a designation of primary email address and a maximum of two secondary email addresses. Every subsequent document filed by an attorney shall also list their primary and

secondary email addresses. If an attorney does not designate an email address for service, documents must be served at the attorney's email address on record with The Florida Bar.

(B) Exception to Email Service on Attorneys. Upon motion by an attorney demonstrating that the attorney has no email account and lacks access to the Internet at the attorney's office, the court may excuse the attorney from the requirements of email service. If exempted service must be conducted as set forth in (b)(3).

(C) ~~(D)~~ Time of Service by email. Service by email is complete when it is sent.

(i) An email is deemed served on the date it is sent.

(ii) If the sender learns that the email did not reach the address of the person to be served, the sender must immediately send another copy by email, or by a means authorized by subdivision (b)(3)~~(2)~~ of this rule.

(iii) Email service is treated as service by mail for the computation of time.

~~(D)~~(E) Format of Email for Service. Service of a document by email is made by attaching a copy of the document in PDF format to an email sent to all addresses designated by the attorney or party.

(i) All documents served by email must be attached to an email message containing a subject line beginning with the words "SERVICE OF COURT DOCUMENT" in all capital letters, followed by the case number of the proceeding in which the documents are being served.

(ii) The body of the email must identify the court in which the proceeding is pending, the case number, the name of the initial party on each side, the title of each document served with that email, and the sender's name and telephone number.

(iii) Any document served by email may be signed by the "/s" format, as long as the filed original is signed in accordance with the applicable rule of procedure.

(iv) Any email which, together with its attached documents, exceeds five megabytes (5MB) in size, must be divided and sent as

separate emails, no one of which may exceed 5MB in size and each of which must be sequentially numbered in the subject line.

(2) Service on and by Parties Not Represented by an Attorney. Any party not represented by an attorney must serve documents as set forth in the Service by Other Means below.

(A) An unrepresented party may designate a primary and a maximum of two secondary email addresses for all future service. Once a party has designated an email address, service upon or by that party must be as set forth in (b)(1). Upon motion and good cause shown, a court may excuse a party who has designated an email address from future service by email.

(3) (2) Service by Other Means. In addition to, and not in lieu of, service by email, service may also be made upon ~~attorneys~~ a party by any of the means specified in this subdivision ~~(b)(2)~~. Service on and by all parties who are not represented by an attorney and who do not designate an email address, and on and by all attorneys excused from email service, must be made by delivering a copy of the document or by mailing it to the party or attorney at their last known address or, if no address is known, by leaving it with the clerk of the court. Service by mail is complete upon mailing. Delivery of a copy within this rule is complete upon:

(A) handing it to the attorney or to the party,

(B) leaving it at the attorney's or party's office with a clerk or other person in charge thereof,

(C) if there is no one in charge, leaving it in a conspicuous place therein,

(D) if the office is closed or the person to be served has no office, leaving it at the person's usual place of abode with some person of his or her family above 15 years of age and informing such person of the contents, or

(E) transmitting it by facsimile to the attorney's or party's office with a cover sheet containing the sender's name, firm, address, telephone number, and facsimile number, and the number of pages transmitted. When service is made by facsimile, a copy must also be served by any other method permitted by this rule. Facsimile service occurs when transmission is complete.

(F) Service by delivery after 5:00 p.m. must be deemed as if it had been made by mailing on the date of delivery but will be considered to have been delivered the next day that is not a Saturday, Sunday or legal holiday for the computation of time.

(c) Service; Numerous Defendants. In actions when the parties are unusually numerous, the court may regulate the service contemplated by these rules on motion or on its initiative in such manner as may be found to be just and reasonable.

(d) Filing. All original documents must be filed with the court either before service or immediately thereafter, unless otherwise provided for by general law or other rules. If the original of any bond or other document is not placed in the court file, a certified copy must be so placed by the clerk.

(e) Filing Defined. The filing of documents with the court as required by these rules must be made by filing them with the clerk, except that the judge may permit documents to be filed with the judge, in which event the judge must note the filing date before him or her on the documents and transmit them to the clerk. The date of filing is that shown on the face of the document by the judge's notation or the clerk's time stamp, whichever is earlier.

(f) Certificate of Service. When any attorney certifies in substance:

“I certify that a copy hereof has been furnished to (here insert name or names and addresses used for service) by (email) (delivery) (mail) (fax) on(date).....

Attorney”

the certificate is taken as prima facie proof of such service in compliance with this rule.

(g) Service by Clerk. Service of notices and other documents required to be made by the clerk must also be done as provided in subdivision (b).

(h) Service of Orders.

(1) A copy of all orders or judgments must be transmitted by the court or under its direction to all parties at the time of entry of the order or judgment. No service need be made on parties against whom a default has been entered except

orders setting an action for trial and final judgments that must be prepared and served as provided in subdivision (h)(2). The court may require that orders or judgments be prepared by a party, may require the party to furnish the court with stamped, addressed envelopes for service of the order or judgment, and may require that proposed orders and judgments be furnished to all parties before entry by the court of the order or judgment. The court may serve any order or judgment by email to all attorneys who have not been excused from email service and to all parties not represented by an attorney who have designated an email address for service.

(2) When a final judgment is entered against a party in default, the court must mail a conformed copy of it to the party. The party in whose favor the judgment is entered must furnish the court with a copy of the judgment, unless it is prepared by the court, with the address of the party to be served. If the address is unknown, the copy need not be furnished.

(3) This subdivision is directory and a failure to comply with it does not affect the order or judgment, its finality, or any proceedings arising in the action.

Rationale for the Changes

The Section is concerned that the language proposed as Rule 2.516 (a) is unnecessarily difficult to read and will lead to substantial confusion. The Section's proposed revisions shorten and simplify the material while maintaining the meaning contained therein. Segregating the default information, serves to better highlight same. The material about service on an attorney when a party was represented was made part of the initial portion of the rule, with a title was added to call more attention to that provision.

The materials in (b) "Service; How Made" were revised to enhance the flow and readability of this provision. The Section is concerned that proposed (b)(1) would create confusion as it includes the initial statement "[a]ll documents

required or permitted to be served on another party must be served by email, unless this rule otherwise provides.” The Section believes that provisions which contain such caveats should be avoided whenever possible as they add additional difficulty in understanding the requirements of the rule. Further, the proposed language quoted above seems contradictory to other material within the rule as:

(1) materials cannot be served on a party if the party is represented, and (2) email is not to be used unless it is between attorneys or there has been a designation of email address.

The sections revisions to (b)(1)(A) “Service on Attorneys” were an attempt to clarify that material, but also to place all requirements of e-mail service in the same area of the rule. The Section believes that the proposed rule is needlessly complicated by its current structure. These revisions streamline the reference to and review of the rule for and by litigants.

The provisions of (b)(1)(C) “Service on and by Parties Not Represented by an Attorney” were revised to move the reader’s reference to “service by other means” to the forefront of that provision. The designation of email addresses was made into a separate subcategory of that provision to further aid the reader. The Section also incorporated a provision enabling a self-represented litigant to file a motion with the court to end the use of eservice. It is not unusual in family law proceedings for a litigant’s economic situation to deteriorate, to be removed from

his or her home and/or business, or to encounter some other action would interfere or hinder the ability to access and communicate by email. For this reason, the Section believes that the designation be revocable in such instances by filing a motion with the court and obtaining court approval. This requirement would ensure court control over changing the methodology of service rather than just allowing a self-represented party to change participation by eservice by whim.

The Section has made only a minor revision to “Service by Other.” The proposed rule (2)(F) provides: “Service by delivery after 5:00 p.m. must be deemed as if it had been made by mailing on the date of delivery.” The Section has revised the language and suggests as follows: “(F) Service by delivery after 5:00 p.m. must be deemed as if it had been made by mailing on the date of delivery but will be considered to have been delivered the next day that is not a Saturday, Sunday or legal holiday for the computation of time.” This revision is created to prevent any confusion with the application of this rule and the various time rules.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by electronic mail to: e-file@fl.courts.org in accordance with the court’s administrative order *In re Mandatory Submission of Electronic Copies of Documents*, Fla. Admin. Order No. AOSC04-84 (Sept. 13, 2004) and by United States Mail on this 18th day of January, 2011, to: copy has been served on the committee chairs, **Robert M. Eschenfelder**, Chair, Code and Rules of Evidence Committee, 1112 Manatee Avenue W., Suite 969, Bradenton 34205-7804; **John Granville Crabtree**, Chair, Appellate Court Rules Committee, 240 Crandon Boulevard, Suite 234, Key Biscayne 33149-1624; **Robert T. Strain**, Chair,

Criminal Procedure Rules Committee, 3801 Corporex Park Drive, Suite 210, Tampa 33619-1136; **Donald E. Christopher**, Chair, Civil Procedure Rules Committee, P.O. Box 1549, Orlando 32802-1549; **Steven P. Combs**, Chair, Family Law Rules Committee, 3217 Atlantic Boulevard, Jacksonville 32207-8901; **William W. Booth**, Chair, Juvenile Court Rules Committee, 425 Fern Street, Suite 200, West Palm Beach 33401-5839; **Michele A. Cavallaro**, Chair, Small Claims Rules Committee, 6600 N. Andrews Avenue, Suite 300, Ft. Lauderdale 33309-2189; **Jeffrey S. Goethe**, Chair, Probate Rules Committee, 3119 Manatee Avenue W., Bradenton 34205-3350; **John J. Anastasio**, Chair, Traffic Court Rules Committee, 3601 S.E. Ocean Boulevard, Suite 203, Stuart 34996-6737; and **Katherine E. Giddings**, Chair, Rules of Judicial Administration Committee, 106 E. College Avenue, Suite 1200, Tallahassee 32301-7741

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

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

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