IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO 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 SMALL CLAIMS RULES, THE FLORIDA RULES OF JUVENILE PROCEDURE, THE FLORIDA RULES OF APPELLATE PROCEDURE, AND THE FLORIDA FAMILY LAW RULES OF PROCEDURE EMAIL SERVICE RULE.
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Case No. SC10-2101

COMMENTS OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION

The Florida Public Defender Association, Inc. ("FPDA") respectfully offers the following joint comments on the proposed email service requirements. The FPDA consists of the twenty elected public defenders, hundreds of assistant public defenders, and support staff. As appointed counsel for indigent criminal defendants, FPDA members are deeply interested in the rules of procedure designed to ensure the efficiency of the criminal justice system.

The FPDA supports the use of technology in the criminal justice system when it increases efficiency and decreases the costs associated with attorneys or support staff performing routine and time-consuming activities. In an era of high

case loads and flat or decreasing budgets, the intelligent use of technology is one of the few ways public defenders can stretch their limited budgets.

The petition before this Court claims that email service "can be accomplished with practically no cost to the Bar and the courts." (Petition at 5). That statement is not true for public defenders, and probably is not true for other large government-funded components of the criminal justice system - - the state attorney offices and regional counsel offices. The proposed email service requirement will create inefficiencies and increase costs, not just immediately, but also in the future.

A primary and immediate inefficiency will result from having a dual service systemùpaper for the courts, but electronic for opposing counsel. A less-immediate, but potentially even costlier inefficiency will be that whatever systems created by public defender offices to perform email service will inevitably have to be replaced when electronic filing is finally available. The final inefficiency will be that this rule will result in the creation and maintenance of dual files - - one electronic, one paper- - because in most courtrooms, assistant public defenders do not have any way to access their office's electronic records.

The Current Situation

The petition proposes adopting a uniform rule electronic service rule now because it envisions that someday there will be a "single uniform delivery point for pleadings." (Petition at 8). This assumption of uniformity in the future ignores very real and important differences that exist between criminal and civil litigation at present.

In many civil law firms, there are relatively few cases and the number of pages of documents per case is very high. Additionally, the number of parties in a case can be quite expansive, requiring service of documents on several other civil law firms. In such an environment, document management becomes of premium importance. Many civil law firms have gone to electronic document management for its sheer efficiency in organizing and locating documents. Civil law firms (hopefully) generate profits and often have substantial technology budgets and will probably update their document management systems several times before the courts ever implement electronic filing.

Additionally, attorneys in civil practice usually appear in court on a single case. They do not bring their entire file but can selectively print or copy any documents they might need for that appearance. Because of the volume of pages in discovery responses, many of those documents need never be brought into court.

In the criminal law setting the situation is the opposite. There are high

numbers of cases that generate relatively few pages of materials.[1] Generally, there are only two parties, the state and the defendant. Multiple defendant cases are possible but even then rarely are there more than three or four parties. Document management in most cases involves placing any papers into a single file folder. Most trial cases do not result in file folders thicker than an inch or two. Especially with the recent budget shortfalls, public defenders, state attorneys and regional counsel do not have technology budgets designed to do more than maintain their current systems. Many state attorneys and public defenders have their email through county servers that are notorious for rejecting email with attachments or email incorrectly treated as spam (e.g., email or attachments involving sexual predator, offenders or sexually violent predators because of the repetition of the word "sex.").

In most public defender offices, many if not most pleadings are computerized forms that support staff fill in case-specific details (the client's name, case number, etc.). Some pleadings, such as acknowledgements of appointment, support staff produce simultaneously in large numbers of cases. The support person will print or make an original and three copiesùone for the file,

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[1] The exception is death penalty cases. Because this Court sees such a large proportion of death penalty cases, the sizable records on appeal may skew this Court's perspective. This Court should not assume that the type of intensive litigation occurs in almost any other type of case.

one for the judge,[2] and one for the state. The certificate of service is usually to the state attorney's office as a whole. In both state attorney and public defender offices, multiple attorneys will be responsible for a case as it progress from arrest through appeal. Attorney attrition due to low salaries, no raises, and no prospect of any raises in the future also increases the number of attorneys who will be responsible for a case through time.

The state's copies are placed in a bin and transported (usually not mailed) to the state attorney's office. State attorneys' offices do the same for public defender offices. Making a third copy for opposing counsel takes little additional time. It obviously involves some costs in paper and ink, but those costs are nothing in comparison to the costs of the time of support person. In most public defender offices, approximately 95 percent of the budget goes for personnel. By comparison, supplies and all other expenses are negligible.

Many other documents are personally served by handing them to the opposing counsel in court. Usually those documents are placed immediately in the file folder.

Both the assistant public defenders and assistant state attorneys have many

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[2] In an ideal world, the judge would see the original document in the court file. In the real world, those documents rarely make it to judge in a timely manner if at all, and any attorney who wants a judge to actually read a document knows that it must be provided directly to the judge's chambers.

cases set on calendar the same day, and they often spend hours in court. Most courtrooms do not have secure computer terminals with internet access where counsel can retrieve and view electronic files. Most courthouses across the state do not provide wireless internet access ("wi-fi"). Cellphone based access is expensive, and cellphone reception inside many courtrooms is weak at best. Therefore, until the courthouses are retrofitted or rebuilt, these attorneys must rely on paper file folders for information about a case while they are in court, no matter what technology may be available back in their offices.

The Inefficiency of Dual Service

If there was electronic filing in criminal cases, aside from the start-up costs, electronic service would be much more efficient. Essentially, an electronic copy of whatever was filed would merely be sent to opposing counsel.

The hybrid system under consideration, however, is much less efficient. Currently a support person merely making an additional copy (and remember, these documents tend to be only a few pages) and dropping it in a bin for opposing counsel. Under the proposed rule, the support person must still make hard copies for the court system, but must now also create a separate .pdf version of the document and initiate an email with case-specific information in it. This action is not extremely time-consuming in any given case. The problem for public defenders,

state attorneys and regional counsel, however, is the overwhelming volume of cases, not the work required in any given case.

Without pilot projects it is difficult to project, but the best estimate is that double forms of service will require about twice the time of support staff. That increased workload will require more support staff and leaving fewer dollars available to hire attorneys. The cost savings from a decrease in paper and ink will never compensate for the additional time.

Without pilot projects in different size jurisdictions, it is also difficult to know how much additional inefficiency will be caused by attorneys not receiving documents, perhaps because they were lost in, or rejected by, their email servers. It is also difficult to know whether hackers and spammers will discover and exploit a system where attorneys are required by rule to open an attachment to an email if it is merely labeled "SERVICE OF COURT DOCUMENT" followed by a case number. The potential for mass disruption, however, is too great to ignore without initial testing in pilot projects.

Additionally, under the proposed rule, the simple ease of handing opposing counsel a document in open court is gone. Under the proposed rule, email service is mandatory and is not complete unless that document is scanned and emailed to opposing counsel. Requiring that a document be scanned after, or instead of, handing it over in open court creates additional inefficiencies.

The Petition claims that without mandating electronic service, the courts will have to maintain a dual paper and electronic filing system that will "impede[] the modernization of the legal system." (Petition at 7). The proposed rule, however, virtually requires exactly such a dual system at a cost to be borne by public defender offices and ultimately the taxpayers.

The Inefficiency of Sequential Systems

At some point in time, there will be electronic filing in Florida (after all, eventually the last buggy whip manufacturer did close, even if years after Mr. Ford began mass-producing the automobile). The petition before this court suggests that the proposed rule will be a "bridge" to that day. (Petition at 5). In reality, however, it will be a bridge to nowhere.

Technology tends not to be compatible with older technologies. For instance, although VHS and Beta may have accustomed Americans to watching movies at home, those technologies were not compatible with DVDs and web streaming. The investment in all of those VHS and Beta players, and in all the electronic systems to create those formats, was lost. Planned obsolesce may be a highly profitable idea for technology companies, but it is costly for consumers.

The public defenders (and state attorneys and regional counsel) do not have

the technology budgets to create computer systems to efficiently and effectively comply with email service requirements, only to scrap those systems and create new systems that will be compatible with whatever statewide electronic filing system is eventually adopted. It is going to be hard enough to get the Legislature to appropriate the funds necessary to set up one system. Doing so twice will be impossible.

The Inefficiency of Dual Files

For attorneys practicing criminal law, going to a paperless office is impossible without courtrooms designed for the digital age. Such courtrooms must have computers, monitors and internet access to make documents available without having paper files. The petition before this Court acknowledges that some lawyers will continue to rely on paper files. What the petition does not acknowledge is that even if public defenders and other large, publically-funded law firms had unlimited technology budgets, they would still have rely on paper files because the courtrooms where the assistant public defenders, assistant state attorneys, etc., spend their days are designed pretty much the same way they were in Blackstone's era.

Delivering documents electronically therefore creates no savingsùthe paper and ink will be spent on one side or the other. The only effect will therefore be

that public defenders, state attorneys and regional counsel will now have the costs of creating, maintaining and achieving electronic records in addition to the paper files. The only way to avoid such a duplicative file system would be to delete the incoming electronic version once paper version is printed. No reasonable, prudent attorney would do such a thing. The electronic version is now the ôoriginalö and, as such, will require an electronic filing system.

Again, the problem is not having dual files in specific case. Both the paper file and the electronic file are likely to be relatively small. The problem is the huge number of these files that must be create and maintained in some format where they are readily available. Under the proposed rule, the public defenders will have two such systems, increasing costs with no compensatory benefit other than having everything in duplicate.

A Government Mandate is not the Solution

The real question is why the petitioners believe that a single, government mandated solution is superior? As recognized above, the economic situations of private civil law firms are very different than these public entities involved in the criminal justice system. Converting to electronic service may be cost-beneficial for many attorneys practicing civil law, and, if given the option, many attorneys would probably begin using electronic service via email. Individual attorneys and

law firms are capable of deciding for themselves whether serving documents electronically is cost-effective for them. Attorneys could indicate on their notices of appearance or bar listings whether they prefer electronic service. In short, a rule could be crafted to allow electronic service without mandating it.

The petition claims that mandating electronic service is necessary to get "the maximum benefit." (Petition at 7). That statement assumes, of course, that electronic service is always cost-beneficial - - an assumption that is not true in the criminal justice system. The petition also claims that the rule will avoid the court system having "two systems, paper and electronic." (Petition at 7). Service on other attorneys, however, does not affect filing with the courts. The only way to avoid the dual file problem for the courts is to mandate electronic filing for those few (non-criminal) courts that accept electronic filing. No such proposal is before this Court.

As it clear from its introduction, the real impetus for the proposal seems to be an attempt to force a shift in culture of law from a paper-based system to an electronic system. (Petition at 2-3). A technology whose use has to be government-mandated, however, is a technology that has failed the test of the free market. It is one thing for this Court to acknowledge and facilitate electronic service. It is another thing entirely to mandate it, especially without first testing it in a pilot project in high-volume situations.

Mandating technology also stymies its greatest advantagesùflexibility and growth. For all we know, by the time there is a state-wide uniform electronic filing system, email may be as archaic as a Commodore 64 computer, AOL's "chat rooms," or a digital pager. The proposed rule, however, by mandating email service will freeze the legal profession into a technology that is already decades old.

A Uniform System is not Necessary

Even if this Court agrees to mandate electronic service in some areas of practice, there is no reason to include the criminal justice system at this time. While recognizing that at some point some form electronic service will be inevitable, the Criminal Procedure Rules Committee set forth serious and substantial concerns about this rule. Unfortunately, those concerns do not appear until page 27 of the petition (after the discussion of the line edits) and could easily be overlooked. The petitioners never address or attempt resolutions for those concerns.

The inefficiencies discussed above result from the attempt to institute email service when no courts have electronic filing in criminal cases. The petition before this Court admits that "no comprehensive e-filing/e-court system [appears to be] on the horizon." (Petition at 4). The petitioners are rightly frustrated with the

"political and financial constraints" that have prevented Florida from implementing a functional and cost-effective electronic filing system. (Petition at 12). The petitioners envision that an electronic service requirement "will help the courts transition to a fully electronic court." (Petition at 14). In effect, the petitioners admit they are recommending putting the cart before the horse in the hopes that doing so the will drag the state into funding and creating an electronic filing system. The problem is that the public defenders, state attorneys and regional counsel are in no better fiscal shape than the court system or any other state entity.

While this rule may be efficient in other areas of practice, without an electronic filing system already in place, mandating it in the criminal justice system is costly and fiscally irresponsible.

Instead, the petition claims that uniformity is necessary across all areas of practice because attorneys are "entitled to expect that single uniform statewide is available" for serving document. (Petition at 8). The petition is correct that those private attorneys who have practices in both criminal and civil law may be inconvenienced by different service requirements in civil and criminal cases. Nevertheless, the vast majority of the cases in the criminal justice system are being handled by state-paid attorneys, working as assistant state attorneys, assistant public defenders or assistant regional counsel. If this Court decides to impose a mandate, that mandate should fit the way the majority of the cases are handled.

Until electronic filing and other infrastructure changes make a paperless criminal justice system a realistic possibility, the most economical solution is to make electronic filing permissive rather than mandatory in the criminal justice system.

The FPDA also concurs with the Criminal Rules Committee's final recommendation that, if mandated in the criminal justice system, electronic service should begin as either a pilot project or with a lengthy phase-in period:

> The CPRC believes a broad pilot program or phase-in period should predate the move to mandatory electronic service. This would provide an opportunity to address problems before implementation statewide. Justice and liberty interests in criminal proceedings are too valuable and important to risk by moving forward too rapidly in these untested waters. Furthermore, state attorney and public defender offices are suffering from chronic underfunding. A mandate to move forward with electronic service may well present an insurmountable burden on already limited resources. A pilot project and/or phase-in period would allow agencies to determine the cost and best practices for technology upgrades, personnel, and training, in order to adequately address the requirements of electronic service. It also would insure that dollars are not used on efforts that are not successful. The private sector is likewise experiencing financial hardships. The additional technology necessary to implement this rule may be beyond the ability of the small practitioner.

(Petition at 29-30).

Respectfully submitted,

Florida Public Defender Association, Inc.
By: Nancy Daniels
FPDA President
Public Defender
Second Judicial Circuit of Florida

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of these comments were served by mail **Robert M. Eschenfelder,** Chair Code and Rules of Evidence Committee, 1112 Manatee Avenue W., Suite 969, Bradenton, Florida 34205-7804; **John Granville Crabtree**, Chair Appellate Court Rules Committee, 240 Crandon Boulevard, Suite 234, Key Biscayne, Florida 33149-1624; **Robert T. Strain**, Chair Criminal Procedure Rules Committee, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136; **Donald E. Christopher**, Chair Civil Procedure Rules Committee, P.O. Box 1549, Orlando, Florida 32802-1549; **Steven P. Combs**, Chair Family Law Rules Committee, 3217 Atlantic Boulevard, Jacksonville, Florida 32207-8901; **William W. Booth**, Chair Juvenile Court Rules Committee, 425 Fern Street, Suite 200, West Palm Beach, Florida 33401-5839; **Michele A. Cavallaro**, Chair Small Claims Rules Committee, 6600 N. Andrews Avenue, Suite 300, Ft. Lauderdale, Florida 33309-2189; **Jeffrey S. Goethe**, Chair Probate Rules Committee, 3119 Manatee Avenue W., Bradenton, Florida 34205-3350; **John J. Anastasio**, Chair Traffic Court Rules Committee, 3601 S.E. Ocean Boulevard, Suite 203, Stuart, Florida 34996-6737; and **Katherine E. Giddings**, Chair Rules of Judicial Administration Committee, 106 E. College Avenue, Suite 1200, Tallahassee, Florida 32301-7741, this ___ day of January 2011.

I hereby certify that these comments were printed in 14-point Times New Roman.

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NANCY DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT