IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF APPELLATE PROCEDURE

(THREE-YEAR CYCLE) Case No. SC11-192

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THREE-YEAR CYCLE AMENDMENTS TO THE FLORIDA RULES OF APPELLATE PROCEDURE

Comment by Mark King Leban, Circuit Judge

The Court has before it for commentary proposed amendments to the Florida Rules of Appellate Procedure, and in particular, rule 9.420, "Filing; Service of Copies; Computation of Time," which proposed amendment would create a new subsection, (b) (2), "Service. By the Court." The undersigned, in his capacity as Administrative Judge of the Appellate Division of the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County,[1] hereby submits the following comment and suggested revision to the proposed amendment.

[1] In addition, the undersigned is a former Chair of the Appellate Court Rules Committee (ACRC), circa 2003-4, and was an appellate practitioner for 23 years before becoming a judge in 1995.

In the ACRC's "THREE-YEAR CYCLE AMENDMENTS" petition, the text of the newly created proposed subsection, rule 9.420 (b) (2), appears as follows in Appendix B at page 98 [underlining indicates new text]:

> (2) By the Court. A copy of all orders and decisions shall be transmitted, in the manner set forth for service in rule 9.420(c), by the court or under its direction to all parties at the time of entry of the order or decision, without first requiring payment of any costs for the copies of those orders and decisions. Prior to its entry of an order or decision, the court may require that the parties furnish the court with stamped, addressed envelopes for transmittal of the order or decision.

The *purpose* for the proposal appears at Appendix C 37 as follows:

> Created to prevent the *clerk's office* from withholding copies of orders pending statutorily defined fees for copies under section 119.07, Florida Statutes.[2] [Emphasis added].

Consistent with this stated purpose, the ACRC's petition itself posits at page 7 thereof: "This provision will require the *clerk* to provide copies, but also provides the option of courts to require parties to provide stamped, self-addressed envelopes for service of those copies." [Emphasis added]. *See* n. 2, *supra*. The undersigned submits, however, that the *text* of the proposal fails to accomplish its

[2] Assuming this stated purpose for the ACRC's proposed amendment becomes the Committee Note, this Court traditionally asserts in its Rules Opinions, that, unless otherwise intended by the Court, "[t]he committee notes are offered for explanation only and are not adopted as an official part of the rules." *In re Amendments to The Florida Rules of Appellate Procedure*, 41 So.3d 885, 887 (Fla. 2010).

stated purpose, and it is for that, and other reasons set forth herein, that the undersigned seeks a minor revision to the proposal pending before the Court.

By way of brief introduction, the undersigned administers a large Appellate Division involving some 600 appeals or extraordinary writs annually, and eighty Circuit Judges acting in their appellate capacity pursuant to rule 9.030 (c) (1) – (3); § 26.012, Florida Statutes; Article V, § 5 (b), Florida Constitution. Recent developments have arisen in the administration of these appeals whereby the Clerk of Court, a constitutional officer pursuant to Article V, § 16, Fla. Const., has experienced severe budgetary cuts, as have the courts. These cuts have resulted in the loss of personnel. Accordingly, the Clerk of Court (COC), at least in the Eleventh Judicial Circuit, has taken the position that certain previously undertaken COC functions, in the wake of Revision 7 to Article V of the Florida Constitution, will no longer be performed by COC, and that the Courts, hereinafter AOC (Administrative Office of the Courts), under their "Case Management" duties and functions, must now perform these prior COC acts. Specifically, *the Eleventh Circuit COC has ceased mailing out orders and decisions of the Appellate Division to litigants and or their counsel*, and now requires AOC (including judges and judicial staff) to copy, conform, and serve appellate parties and/or counsel with all

such orders and opinions entered by the Appellate Division.[3] The volume of this undertaking cannot be understated. Despite collegial efforts between AOC and COC to resolve this "division of labor," COC steadfastly maintains that this is a "case management" task for *the courts* as opposed to a "case maintenance" function for COC, pursuant to Revision 7, as implemented by Florida law, *see* §

[3] The undersigned has undertaken a random survey of the practices of Florida's largest Circuits and learned that, amongst the 9th, 11th, 13th, 15th and 17th Circuits, in the 9th, 11th, 13th, and 17th Circuits, the AOC, rather than the COC, serves orders and decisions of their respective Appellate Divisions. By way of contrast, in the 15th Circuit there is an Administrative Order, A/O No. 8.101-6/09, entitled IN RE: APPEALS FROM COUNTY COURT, etc…, which, in pertinent part, provides, "II. THE CLERK OF COURT A. DUTIES OF THE CLERK OF COURT," subsection 1 of which provides: "The clerk shall perform all functions and discharge all duties fulfilled by clerks in Florida's Fourth District Court of Appeal. See Manual of Internal Operating Procedures…", which Manual, in turn, provides in section 3.7, in pertinent part, as follows:

> 3.7 * * * ***The Clerk*** shall furnish without charge to all parties or attorneys of record ***a copy of any order or written opinion*** rendered in such action. [Emphasis added].

Thus, there is not a uniformity in practice throughout Florida regarding which entity shall perform the furnishing of appellate orders and opinions to litigants and or their counsel.

28.35 (3) (a), Fla. Stat. (2010),[4] and COC will no longer perform pre-Revision 7 tasks which COC deems to be "case management" duties.

The present proposed amendment before this Court, by its terminology, is limited to "the *Courts*" [emphasis added] transmitting of "all orders and decisions" without requiring prepayment of costs therefor. It does *not*, as presently worded, thereby direct or require the COC to perform what the undersigned suggests is *a pure ministerial duty* versus a "case management" function, as the Clerk maintains. It is for this reason that the undersigned proposes a suggested revision of the proposal pending before this Court. The undersigned is authorized to represent herein that the proponent of the pending rule change has no objection to the undersigned's suggested revision, as is set forth below.

Before proceeding, the undersigned wishes to express that he has no desire to create animosity or hostility with COC, but to the contrary, endeavors only to *avoid* litigation or seeking the imposition of an Administrative Order (AO) by his

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4 The implementing law clearly contemplates that rules promulgated by this Court may define AOC functions that COC shall perform; the cited statute expressly provides, in pertinent part, as follows:

(3) (a) The court-related functions that clerks may perform are limited to those functions expressly authorized by . . .court rule. Those functions include . . . *case maintenance . . . and . . . processing of appeals*… . [Emphasis added].

§ 28.35 (3) (a), Fla. Stat. (2010).

Circuit's Chief Judge pursuant to rules 2.215 (b) (6) & (9); *and see* rules 2.215 (e) (3) & (h), Fla. R. Jud. Admin.[5] *See also, Fuller v. Truncale*, 50 So.3d 25 (Fla. 1st DCA 2010) (an AO bestows upon a Clerk of Court jurisdiction to perform a "judicial act" so as to afford judicial immunity upon the COC). Rather than resorting to the issuance of an AO, or other possible remedies (*see note* 6, *infra*), the undersigned proposes a simple amendment, to be set forth below, to the amendment now pending approval before this Court.

In its extensive and thorough report to this Court regarding its proposed creation of rule 2.516 involving the closely related subject of email service, the appropriate subcommittee of the Rules of Judicial Administration Committee acknowledged the distinction between the Office of the Clerk of Court (COC) and

[5] These Rules of Judicial Administration, as with the Revision 7 implementing statutory law cited above, *see* n. 4, *supra*, clearly contemplate the authority of a Chief Judge to issue Administrative Orders requiring compliance by COC in a myriad of ways, e.g., "[t]he chief judge may require . . . from the clerks of the courts . . . periodic reports that the chief judge deems necessary." Rule 2.215 (b) (6), Fla. R. Jud. Admin.; *see also*, subsection (9) of the same rule (chief judge may authorize the clerks of courts to maintain branch court facilities); *and see*, subsection (e) (3) of the same rule (requiring "the *clerk of the circuit court"* to index, record, and "*provide[ ] to any requesting party*" "all administrative orders . . . designated by the chief judge")[emphasis added]; the same rule in subsection (h), even goes so far as to provide that "[t]he failure of any . . .*clerk* . . . too comply with an order or directive of the chief judge shall be considered neglect of *duty"* which shall be reported to the Chief Justice of this Court. [Emphasis added]. Thus if this Court's Rules of Judicial Administration can operate to compel clerk duties, so too can this Court's Rules of Appellate Procedure, such as rule 9.420 now being proposed before the Court for amendment.

the Courts themselves (AOC). Thus, the following appears in the RJA Committee Report:

OUT-OF-CYCLE REPORT OF THE FLORIDA RULES OF JUDICIAL ADMINISTRATION COMMITTEE ON EMAIL SERVICE AND CONFORMING CHANGES IN THE OTHER COURT RULES OF PROCEDURE

* * *

D. Benefits to the Clerks. The benefits to the clerks of court are directly comparable to the benefits to the courts themselves. *As with courts, clerks from time to time are required to serve orders, opinions, notices, and other documents to parties and attorneys* and are usually required to do so using paper, ink, toner, envelopes, postage, and the United States mail. [Emphasis added].

The pending amendment to rule 9.420 (b) (2), entitled "(2) By the Court." , however, fails to recognize this crucial distinction, and appears instead to be directed solely to service of "[a] copy of all orders and decisions . . . *by the court…*". [Emphasis added].

The history behind the ACRC's proposed amendment to rule 9.420 (b) (2) has, as its genesis, events leading to an exchange of correspondence between a private appellate practitioner and the Clerk of Court for Miami-Dade County, wherein, the Clerk advised all counsel that from a date certain, "copies of judicial orders and/or opinions will no longer be automatically mailed to all parties on Appellate cases," but would henceforth require pre-payment of the statutory fee for

such copies. The present proposal before this Court, passed nearly unanimously (47-1) by the ACRC, aims to solve the problems identified in the practitioner's correspondence by no longer requiring the pre-payment of costs for the transmittal of orders and decisions "by the court" or whichever parties the court directs to receive such orders and opinions. (The undersigned wholeheartedly agrees with the laudatory additional requirement in the existing proposed amendment permitting "the court [to] require [the furnishing of] the court with stamped, addressed envelopes…", and, indeed urges that the Clerk may also so require that such envelopes be furnished to the Clerk by the parties.)

In keeping with the recognition by the RJA Committee, *supra*, that "*[a]s with courts, clerks from time to time are required to serve orders, opinions, notices, and other documents,"* [emphasis added], and in view of (1) the crushing volume of orders and opinions that must be issued to parties by the various appellate divisions of circuit courts, (2) the present position of the Clerk of Court in Miami-Dade County, and elsewhere, that the transmittal of orders and opinions is a CASE MANAGEMENT function of the Court (AOC), as opposed to a CASE MAINTENANCE function of the Clerk of Court (COC), and (3) in an effort to avoid lengthy, costly and, what is hoped to be a totally unnecessary, mandamus

proceeding[6] , the undersigned submits that the present proposed amendment to rule 9.420 (b) (2) , be itself amended to read as follows [insertions indicated by double underlining]:

> **(2) By the Court or the clerk.** A copy of all orders and decisions shall be transmitted, in the manner set forth for service in rule 9.420 (c), by the court or under its direction the clerk to all parties at the time of entry of the order or decision, without first requiring payment of any costs for the copies of those orders and decisions. Prior to its entry of an order or decision, the court or clerk may require that the parties furnish the court or clerk with stamped, addressed envelopes for transmittal of the order or decision.

By approving this revision, this Court will assure that the COC, previously well suited and equipped to perform this ministerial function, will better

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[6] See, e.g., *State, Office of Atty Gen. v. Shore*, 41 So.3d 966 (Fla. 2d DCA 2010) (rejecting clerk's argument in mandamus proceeding seeking clerk's providing of copies of transcripts that "he is following the rules correctly while operating under statutory and supreme court mandates to go paperless, [and] that the Clerk's budget is likewise limited," Second DCA granted mandamus, holding "*the act is ministerial; the Clerk has no discretion to prepare or not prepare the copies.*") *Id*. at 968, 971 [emphasis added]; *Tucker v. Ruvin*, 748 So.2d 376 (Fla. 3d DCA 2000) ("Clerk of the Court had a clear legal, ministerial duty to accept the pleading for filing. *See Mantilla v. State,* 615 So.2d 809 (Fla. 3d DCA 1993); *Kollin v. Ader,* 591 So.2d 320 (Fla. 3d DCA 1991); *Mattson v. Kolhage*, 569 So.2d 1358 (Fla. 3d DCA 1990"); *Outboard Marine Domestic International Sales Corp. v. Florida Stevedore Corp,* 483 So.2d 823-4 & n.3 (Fla. 3d DCA 1986) (clerk has a ministerial duty to accept a complaint for filing even when insufficient filing fees are tendered: "*the rights of the parties will be determined, as they should be, by the court, rather than the clerk*")[Emphasis added] ; *Lyons v. Jackson Correctional Institution*, 981 So.2d 1271 (Fla. 1st DCA 2008) (same); *Mattson v. Kolhage*, 569 So.2d 1358, 1360 (Fla. 3d DCA 1990) ("grant[ing] . . .mandamus and direct[ing] that the clerk of the circuit court accept motions presented for filing in circuit court civil cases," notwithstanding local order by circuit judge to the contrary).

accommodate the AOC in performing its true "case management" services to the betterment of the administration of justice in our courts.

Respectfully submitted,

Mark King Leban
Administrative Judge
Appellate Division, Eleventh Judicial Circuit

CERTIFICATE OF SERVICE

I hereby certify that the original and nine (9) copies of the foregoing have been served, both electronically and by U.S. Mail, upon Tom D. Hall, Clerk of the Court, 500 South Duval Street, Tallahassee, FL 32399-1925, and a true and correct copy has been served upon ACRC Committee Chair, John Crabtree, Esq., 240 Crandon Blvd., Ste. 234, Key Biscayne, FL 33149-1624; and the proponent, Michael Catalano, Esq., 1531 N.W. 13th Ct., Miami, FL 33125-1605, this 7th day of March, 2011.

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Mark King Leban

CERTIFICATION OF FONT COMPLIANCE

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

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Mark King Leban