IN THE SUPREME COURT OF FLORIDA

CASE NOS.: SC10-2101 & SC11-399

IN RE: AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE, FLORIDA RULES OF JUDICIAL ADMINISTRATION,FLORIDA RULES OF CRIMINAL PROCEDURE, FLORIDA PROBATE RULES, FLORIDA SMALL CLAIMS RULES, FLORIDA RULES OF JUVENILE PROCEDURE, FLORIDA RULES OF APPELLATE PROCEDURE, FLORIDA FAMILY LAW RULES OF PROCEDURE — ELECTRONIC FILING

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 SMALL CLAIMS RULES, THE FLORIDA RULES OF JUVENILE PROCEDURE, AND THE FLORIDA RULES OF APPELLATE PROCEDURE — EMAIL SERVICE RULE

JOINT SUPPLEMENTAL REPORT

The Florida Courts Technology Commission (FCTC), by and through its Chair, the Honorable Judith L. Kreeger, the Rules of Judicial Administration Committee (RJA Committee), by and through its Chair, Keith H. Park, and John F. Harkness, Jr., Executive Director of The Florida Bar, file this joint supplemental report responding to the remaining issues in the Court's December 6, 2011, Order. A Partial Response and Request for Extension of Time was filed in this matter on February 3, 2012. By Order of February 10, 2012, the Court granted an extension of time to file this supplemental report.

On December 6, 2011, the Court issued an order (Order) in this matter

directing the FCTC and the RJA Committee to convene a joint workgroup to address several issues of concern to the Court regarding efiling and email service. The joint workgroup was charged with addressing the following three issues: a) the extent to which specific exceptions from electronic filing in criminal cases are necessary; b) whether institutional non-parties should be required to file documents electronically and if so, whether additional rule amendments should be proposed; and c) whether the efiling deadlines should apply to the implementation of email service.

Throughout this supplemental report, the phrase "email service" is used to describe the method of service prescribed in proposed Rule 2.516, when a document is attached to an email and sent to the recipient. The word "eservice" is used to describe the method of service that will occur automatically when a document is efiled through the E-Portal. Eservice is not yet available as a function of the E-Portal in Florida.

Upon receipt of the Court's Order, the Chairs of the FCTC and the RJA Committee immediately constituted a large and diverse workgroup that included the following representatives, as listed in the initial response and set forth again here for ease of reference:

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Judge Judith L. Kreeger, Chair, Florida Courts Technology Commission (FCTC)

Judge S. Scott Stephens, FCTC member and subcommittee chair

Paul Regensdorf, FCTC member and member of Appellate Court Rules Committee and RJA Committee

James Jett, FCTC member and Clerk of the Circuit Court, Clay County

Court Rules Committees:

Keith H. Park, Chair, RJA Committee

Judge Donald Scaglione, Chair, Criminal Procedure Rules Committee (CPRC), representing both the CPRC and RJA Committee

Judge Jon Morgan, RJA Committee member

Robert Strain, RJA Committee member and criminal defense attorney, CCRC

George Tragos, RJA Committee member and criminal defense attorney

William Vose, RJA Committee member and prosecutor

Joel Silvershein, Chair, Juvenile Court Rules Committee, RJA Committee member and prosecutor

Marynelle Hardee, RJA Committee member and member of Traffic Court Rules Committee (Jill Hampton, Chair)

Ashley McCorvey Myers, Chair, Family Law Rules Committee

Public Defender representatives:

Nancy Daniels, Public Defender 2d Circuit, President, Florida Public Defender Association

John Tomasino, Public Defender's Office 2d Circuit and Florida Public Defender Association

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State Attorney representatives:

William Eddins, State Attorney 1st Circuit, President Florida Prosecuting Attorneys Association

Gregory Marcille, State Attorney's Office 1st Circuit

William Cervone, State Attorney 8th Circuit, former President Florida Prosecuting Attorneys Association

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Douglas Smith, Department of Corrections (DOC)

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Gregory Venz, Department of Children and Families (DCF)

Brian Berkowitz, Department of Juvenile Justice (DJJ)

Other Participants:

Professor Charles Ehrhardt

The workgroup held an initial meeting by conference call on December 13, 2011, and has had at least one conference call every week through February 17, 2012. An agenda was prepared for each call, and each call lasted between an hour and a half and two hours. In preparation for and following these conference calls, members of the workgroup exchanged their views about the issues daily, sometimes hourly, in lengthy and numerous email and telephone communications. Based upon the consensus that the workgroup reached, it responds as follows:

ISSUE 1

Electronic Filing Exceptions[1] In Criminal Cases

The Court requested that the workgroup consider revised rules proposals for the possible exceptions to electronic filing in criminal cases, now pending before this Court in proposed Rule 3.030(c). In response to this issue, for the following reasons the workgroup proposes further amendments to Rules 2.525, 3.030, and 3.090.

When the proposed exceptions for electronic filing in criminal cases under

[1] The Court's Order refers to and uses the terms "exemptions." The workgroup used the terms "exceptions" and "exemptions" interchangeably throughout its discussions. The term "exceptions" is the preferred term and used in this report solely because Rule 2.525(d) explicitly uses that term. However, for purposes of this report, the terms are deemed to be synonymous.

Rule 3.030 were reviewed, the workgroup concluded that the concern of those practitioners who expressed reservations was not directed to the filing of particular paper documents. Their real concern was preserving the evidentiary significance of paper documents, which have been historically filed. The conceptual difference between filing a document and preserving a document is important because very few filed paper documents need to be preserved in paper format. For statutory purposes, including but not limited to "best evidence" and authentication considerations, certain original paper documents may presently need to be preserved in their paper format. The workgroup acknowledges that the currently perceived need to preserve paper documents may be obviated by future legislation and advancements in technology.

For the immediate future, it was determined that the preservation of paper documents in criminal practice should be limited to only sworn and verified documents and judgments. Sworn and verified paper documents should be preserved in the event of future criminal prosecution premised on the contents of the documents, and paper judgments and sentences (with original fingerprints) are required to determine possible enhancement for future criminal sentencing.[2] It is noted that pursuant to the workgroup's proposals, these paper documents are not necessarily "exceptions" to electronic filing. Pursuant to proposed Rule 2.525,

[2] A significant number of workgroup participants who primarily represented the clerks' perspective did not agree that paper judgments should be retained by the clerks.

these documents are made part of the electronic court file in one of two ways: 1) by electronic transmission if efiled by an attorney; or 2) by conversion to electronic documents and their placement in the electronic court file if the paper documents are filed with the clerk. Therefore, although these specific criminal paper documents will be preserved, attorneys will nonetheless still be required to file these and other documents by electronic transmission.

The workgroup considered several methods for preserving filed paper documents. When it is necessary to preserve a paper document, in most instances it is sufficient for the filer to retain or reacquire possession of any filed paper document after it has been converted to electronic form. However, in the context of criminal filings, the majority of the workgroup felt that the clerk should serve as the neutral repository of documents that may later be the subject of evidentiary disputes. Accordingly, after original sworn and verified paper documents and paper judgments have been filed and made a part of the electronic court file pursuant to proposed Rule 2.525, the paper documents should be "deposited" with the clerk for safekeeping.

After identifying the paper documents that should be preserved and the mechanism of preservation, the workgroup reviewed the exceptions listed in proposed Rule 2.525(d) as requested by the Court for the purpose of determining whether the listed exceptions would preserve sworn and verified paper documents

and judgments without listing the specific documents in Rule 3.030(c). The workgroup concluded that the paper filing exceptions listed in proposed Rule 2.525(d) are inadequate to preserve the specific criminal documents for two reasons: 1) subdivision (d) exceptions are not specific enough to include all sworn and verified paper documents; and 2) although subdivision (d) describes the paper documents that may be filed or preserved, the existing proposed rules do not provide an adequate method for preserving paper documents.

Furthermore, proposed Rule 2.525 is incomplete in its application because it provides for filing by "electronic transmission," but does not clearly address converting a previously filed paper document into an electronic document for placement in the electronic court file. The need to convert a filed paper document into an electronic document is critical to the concept of maintaining a complete electronic court file.

Additionally, in the process of investigating Issue 1, the workgroup determined that the subdivision (d) exceptions would require the clerk to maintain a burdensome volume of paper documents. The operation of filing paper documents with the clerk pursuant to subdivision (d) requires the continued maintenance of a paper filing system; the workgroup deemed this result to be unacceptable. Requiring the clerk to maintain dual filing systems (paper and electronic) is contrary to the concept of maintaining a singular electronic court file.

Therefore, the workgroup concluded that the following rule revisions are essential to fully address the Court's inquiries in Issue 1: 1) further amend Rule 3.030(c) to significantly reduce the list of specific criminal paper documents to be preserved; 2) further amend Rule 3.030(c) to specify a method for preserving the identified criminal documents; and 3) further amend Rule 2.525 to create a process for handling paper filings in all types of cases that is consistent with maintaining a comprehensive electronic court file.

The workgroup's primary purposes for amending Rule 2.525 are to: 1) define the content of the court file; 2) establish that the documents in the court file have the legal significance of original documents for all purposes; 3) require conversion of all paper documents filed after the effective date of these amendments to an electronic format; 4) provide for the return of paper documents to filers who prepay postage for such return; and 5) allow paper documents that need not be preserved in paper format to be recycled after they have been converted to electronic documents. The proposals are:

Rule 2.525(a) is amended to clarify the definition of "electronic transmission of documents" and provide that such transmissions may be performed "by" the clerk or court. Because the clerk may also convert paper documents into electronic documents for inclusion in the court file, it was felt that clarification was necessary in order to fully describe the clerk's function.

Rules 2.525(c)(2) through (c)(7) are amended to: 1) define and describe the contents of the official court file to include electronic documents and non-electronic documents and materials; 2) establish that the documents in the official court file have the legal significance of original documents; 3) provide for conversion of filed paper documents to electronic documents; 4) establish the filing of storage media and the transfer of documents from such storage media to the official court file; 5) provide for the return of paper documents to filers who accompany the filing with a postage paid envelope and that paper documents not so returned may be destroyed; and 6) allow paper documents filed before this rule's implementation to be converted to electronic documents, along with the subsequent destruction of the paper documents.

Rule 2.525(d) is amended to clarify exceptions.

Rule 2.525(d)(2) is amended to clarify filing pursuant to Issue #2.

Rule 2.525(d)(3) is amended to clarify that the subdivision refers to filing.

Rule 2.525(d)(4) is amended to describe the exception to include only evidentiary exhibits and the filing of non-documentary materials.

Rule 2.525(d)(5) is amended to clarify storage medium.

Rule 2.525(d)(7) is amended to delete the exception in its entirety.[3]

[3] There was a nearly equal split in the voting regarding this issue. The "minority" position was to retain the exception in the following form: "when the document is required by any statute of other rule of procedure to be an original paper document." It is noted that this was perhaps the most controversial issue debated by the workgroup. Some participants changed their positions on one or more occasions during the several debates. Due to the

Rules 3.030(b) and (c) are amended to specifically list sworn and verified documents and judgments as paper documents to be deposited with the clerk after filing. Pursuant to proposed Rule 2.525, attorneys will efile sworn and verified documents and self-represented parties will file sworn and verified paper documents with the clerk. The workgroup determined that Rule 3.030(c) should specify that paper documents will be preserved by "depositing" the documents with the clerk. Under the workgroup's proposed amendments to rule 2.525, the mere act of filing a paper document does not normally preserve the document in its paper form, and the concept of "depositing" is deemed necessary to assure that the few special documents will be preserved.

Rule 3.090 is amended to require sworn and verified documents to include that fact as an identifying caption to aid the clerk and lawyers in determining which documents should be deposited with the clerk after filing. This proposal to plainly label the captions of sworn and verified documents is intended to reduce confusion and uncertainties regarding the identification of those specified documents that must be deposited after the documents have been filed.

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apparently balanced opinions regarding what should be done, 3 separate votes were taken. If all the votes from the three attempts to resolve the issue are totaled, the vote to delete the entire subdivision prevails by a tally of 19 to 17. The main points argued to support the deletion of the subdivision were: 1) it serves no known purpose; 2) it is potentially confusing and subdivision (d) needs to be as clear and understandable as possible; and 3) it is contrary to the concept of maintaining an electronic file. The main points argued to support the exception's existence in the amended form were: 1) it is consistent with and necessary to support the existence of Rule 3.030(c); 2) it may serve other purposes that have not yet been ascertained; and 3) it does no harm.

ISSUE 2

Electronic Filing By Institutional Non-Parties

The second issue that the Order directed to the workgroup is: "whether non-parties, especially 'institutional' non-parties such as the Florida Department of Law Enforcement and the Florida Department of Corrections, should be required to file documents electronically." This Court also directed that if the workgroup determines that electronic filing by certain non-parties should be required, the workgroup should propose appropriate rule amendments.

As stated in its initial response, the workgroup concluded that institutional non-parties should be permitted and encouraged to efile, but they should not be required to do so at this time. It is anticipated that state funded institutional non-parties will eventually be required to efile their documents.

Given that some institutional non-parties are currently filing documents electronically, the workgroup recommends a minor rule amendment that permits but does not require institutional non-party representatives to efile. Accordingly, Rule 2.525(d)(2) is amended as the method of permitting such participation.

ISSUE 3

Efiling Deadlines and Email Service

In Issue 3, the Court asked the workgroup to address how the proposed phase-in schedule in the efiling case, SC11-399, will affect, if at all, the

implementation of the email service rules proposed in the email service case, SC10-2101, specifically whether the efiling deadlines and schedule should apply to the implementation of email service.

As explained in its initial response, the workgroup has carefully considered this question and believes that email service should become mandatory for civil (*i.e.*, non-criminal) practitioners[4] as soon as practicable and, in any event before the implementation of required efiling in any division or court. Attorneys in Florida should alter their document handling procedures to fully incorporate the use of digitized documents, and email service is a valuable first step that should be mandated as soon as possible. The E-Portal will eventually provide automatic service similar to the federal system. However, this eservice component for the E-

[4] The workgroup recommends that, for the purposes of efiling and email service implementation, the following divisions and courts be considered as "civil" or "non-criminal", such that efiling would be available by July 1,2012, and become mandatory April 1, 2013, and email service would begin mandatorily as soon as possible, in advance of those dates: civil, probate, family, small claims.

It is also the recommendation of the workgroup that the following divisions and courts be considered "criminal" such that efiling would be available in all courts by January 1, 2013, and made mandatory by October 1, 2013, and email service or eservice would NOT be implemented mandatorily until efiling is started: criminal, traffic, juvenile delinquency, and juvenile dependency.

The workgroup is well aware that the FCTC in its report to this Court on October 7, 2011, recommended the inclusion of juvenile dependency as a "non-criminal" division, such that the earlier starting dates above would be implicated. On further reflection, however, and after discussions with many practitioners familiar with juvenile dependency, the workgroup reached the conclusion that attorneys working with state-funded organizations heavily involved in juvenile delinquency (like the public defenders and the attorney general's office) are also heavily involved in dependency matters and will have the same inability to begin efiling and email service as their brethren working on delinquency matters. Since it is the limitations of these public offices that drove the decision to delay efiling/email service in the criminal field, that exact same concern militates in favor of moving juvenile dependency matters, and the lawyers who work on them, into the "criminal" category for purposes of the implementation schedules for efiling, email service, and eservice.

Portal has not yet been designed, built or tested, and consequently it may not be available until January 2013, or conceivably later. Regardless of the ultimate availability of eservice through the E-Portal after efiling becomes mandatory, attorneys will nonetheless still need to avail themselves of email service for a significant amount of material that must be served, but will not be filed with the court and will therefore not be filed or served through the E-Portal. Given that a considerable amount of material prohibited from being filed with the court is required to be served among practitioners in civil cases, that area of practice requires a method of electronic service that for the present can only occur via email. Moreover, it is felt that by requiring email service before efiling becomes mandatory, those practitioners will be better prepared for the digital world when efiling is mandated.

As to criminal court and juvenile court practitioners, the consensus of the workgroup is that although nearly all attorneys in the private sector are capable of currently participating in email service, attorneys who practice with state-funded entities, especially those employed in state attorney and public defender offices, will not be able to use email service for the foreseeable future, due mostly to budgetary and staffing constraints and disparities among counties. The workgroup was also informed that some institutional criminal law practitioners already participate in alternate methods of sharing electronic information that do not

involve email. Therefore, the workgroup concluded that attorneys who are involved in the criminal and juvenile court systems should be permitted, but not required, to follow email service procedures in proposed Rule 2.516. The workgroup believes that mandatory email service (or hopefully eservice by then) for criminal court and juvenile court practitioners should therefore be delayed until efiling is mandatory for this group.

As to appellate court practitioners, the workgroup believes that email service should be mandatory as soon as possible, but in no event later than when efiling is mandated. It is noted that the current concept of phasing in mandatory efiling will start with appellate practice and will begin in the very near future (October 1, 2012 as presently proposed). The eservice function through the E-Portal may not be operational when efiling becomes mandatory for appellate practice. Therefore, email service for appellate practice attorneys must become mandatory no later than the beginning date for mandatory efiling for appellate practice, and hopefully sooner.[5]

[5] In considering email service, several workgroup members expressed concerns about the ever present danger of exposure to malicious software in the form of computer viruses and spyware and exposure to unsolicited commercial advertisements. At least one dissenting member of the workgroup strongly felt that there was no pressing need for email service and that mandatory email service may disrupt the competitive balance between firms having more resources and those having less. The workgroup accepts that there are legitimate concerns about requiring email service in view of the potential exposure to malicious software. Although viruses may pose some danger to an email based service system, the vast majority of the workgroup participants did not feel that the danger outweighed the benefits of such a system. Anecdotally, there have been no reports of any significant issues by the many thousands of attorneys and judges who regularly use email as a method of sending documents and communicating. Just as importantly, the experts and informed IT personnel who have been consulted, including those with ISS and OSCA, believe that because email service transmissions will be limited to emails and documents

The above proposals are attached in both full page format (see Amended Appendixes B) and two-column format (see Amended Appendixes C).

As required by Rule 2.140, the Rules of Judicial Administration Committee and the Criminal Procedure Rules Committee voted on their respective rule amendments, and The Florida Bar Board of Governors Executive Committee then voted on the proposals. The votes are included in the attached tables of contents. See Amended Appendixes A.

The FCTC voted to approve the proposals by a vote of 19 affirmative votes and no negative votes.

Explanation of Formating in Amended Appendixes B and C

The full text of the proposed amendments in legislative format and in two-column format shows both the pending amendments to the rules in SC10-2101 and SC11-399, in legislative format without shading, and the amendments proposed by the workgroup, which are only those portions of Rules 2.525, 3.030, and 3.090 that are shaded in grey. In Rule 2.525(c)(2), (d), (d)(2), (d)(4)–(5), (d)(7), and 3.030(b) and (c), where shaded text is shown in both underline or double underline (meaning it was added as part of the original proposals) and strikethrough (meaning the workgroup decided to strike it), it should be read as stricken text.

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exchanged among attorneys, and not emails with documents sent to clerks, that the dangers associated with mandatory email service are not any greater than the email problems everyone routinely encounters on a daily basis. The workgroup has been made fully aware of the reported dangers that may be associated with mandatory email service, but concludes that email service is a necessity and its implementation should not be delayed.

In addition, to assist the Court in working from the most current rules, because a number of the rules that are at issue in the email service and efiling cases were amended after these cases were filed, the attached Amended Appendixes B and C show the proposed amendments to the rules as amended by the Court through February 2012; these rules are indicated by inclusion in the tables of contents of the citations of the opinions amending the rules.

Other Pending Cases with Amendments to Rules at Issue in SC10-2101 and SC11-399

The rules committees advise that the below rules are pending in the following cases:

Rules of Civil Procedure:

Rule 1.080: SC10-2101, SC11-399

Rule 1.410: SC10-2101, SC11-1542

Rules of Judicial Administration: None

Rules of Criminal Procedure:

Rule 3.030: SC10-2101, SC11-399

Rule 3.070: SC10-2101, SC11-399

Rule 3.851: SC11-1679 and SC12-107

Florida Probate Rules: None

Small Claims Rules: None

Rule 7.080: SC10-2101, SC11-399

Traffic Court Rules: None

Rules of Juvenile Procedure: None

Rules of Appellate Procedure:

Rule 9.420: SC10-2101, SC10-2299

Family Law Rules of Procedure:

Rule 12.040: SC10-2101, SC11-399

Rule 12.080: SC10-2101, SC11-399

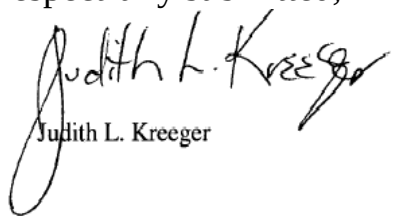
Rule 12.090: SC10-2101, SC10-2299

Rule 12.285: SC10-2101, SC11-2164

Code and Rules of Evidence: None

WHEREFORE, the FCTC and the RJA Committee respectfully request this Court to accept the recommendations and adopt the rules proposals as set forth herein.

Respectfully submitted,



Hon. Judith L. Kreeger, Chair
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Respectfully submitted on this 6th of March, 2012 by

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been sent, via U.S. Mail and email where available, on this 6th day of March, 2012, to:

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing has been submitted in compliance with the requirements of *Fla. R. App. P*. 9.210(a)(2).

I certify that these rules were read against *West's Florida Rules of Court* (2011 Revised Edition) and for those amendments not yet in *West's* the rules were read against the published opinions.

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