IN THE SUPREME COURT OF FLORIDA

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, and FLORIDA FAMILY LAW RULES OF PROCEDURE.

CASE No. SC11-399

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COMMENTS OF COURTHOUSE NEWS SERVICE

Courthouse News Service ("Courthouse News") respectfully submits these comments in response to the invitation for written input on the proposed rule amendments to implement electronic filing.

Specifically, we are writing about Proposed Rules of Civil Procedure 2.520 and 2.525, which would allow mandatory e-filing in Florida's courts in those instances where the court clerk or chief judge has requested it and the Supreme Court has entered an order granting permission to accept e-filed documents.

As explained more fully below, as a member of the news media, Courthouse News' primary concerns relate to potential delays in media access to newly filed complaints and petitions. Long before the advent of e-filing or electronic public access, it was common practice for news reporters all across Florida to review new case initiating documents at the end of the same day on which those documents were filed. This kind of review continues in many courts in Florida and around the

country. And while many people assume that e-filing will allow for instantaneous access to newly e-filed case initiating documents, in fact the contrary is often true. Courthouse News has seen firsthand the transition from paper filing to electronic filing in any number of courts, and in many instances, e-filing actually leads to delayed access, even in those courts where access to the paper record had previously been provided promptly (*i.e.*, on a same-day basis). Accordingly, Courthouse News suggests that the proposed rules be amended to ensure that e-filing does not result in delays in access to newly filed civil complaints, petitions, and other case-initiating documents.

In addition, Courthouse News is concerned about the fees that may be charged for accessing electronic court records, and respectfully submits that the proposed rules also be amended to make clear that there must be some way for news reporters and other interested persons to obtain timely access to newly-filed court records free of charge at the courthouse itself, even if a fee is assessed to those who wish to review electronic versions of court records remotely over the Internet.

I. About Courthouse News Service

Courthouse News Service is a 20-year-old legal news service for lawyers and the news media. It is based in Pasadena, California, but has reporters stationed across the country, including many in Florida. Courthouse News is similar to other news wire services, such as the Associated Press, except that it focuses on civil lawsuits, from the date of filing through the appellate level. Courthouse News does not report on criminal or family law matters.

The majority of Courthouse News' nearly 2,500 subscribers nationwide are lawyers and law firms, including several prominent Florida firms, as well as regional and national firms with Florida offices. Courthouse News' local subscribers are thus largely comprised of this Court's most important constituencies: the Florida Bar. In addition, other news outlets are increasingly looking to Courthouse News to provide them with information about newsworthy new civil filings. Included among them are the *Tampa Bay Business Journal*, *The Atlanta Journal-Constitution*, FOX News, *The Dallas Morning News*, the *Houston Chronicle*, *The Boston Globe*, the *Detroit Free Press*, the *Los Angeles Times*, and the *San Jose Mercury News*, all of which puts Courthouse News in a position

similar to that of a pool reporter. Courthouse News' subscribers also include colleges and universities, including the University of South Florida.

Courthouse News' core news publications are its new litigation reports, which are e-mailed to subscribers daily and contain coverage of all significant new civil complaints within a particular jurisdiction. In addition, Courthouse News' web site (www.courthousenews.com), which features news reports and commentary about civil cases and appeals, receives an average of 850,000 unique visitors each month.

II. Background

From what we understand, many counties in Florida are currently using internally operated e-filing systems that use a state-run program that allows counties to offer either a multi-vendor system or a uniform e-filing interface that automatically integrates with the existing e-filing system. In January 2011, a statewide, state-administered e-filing portal provided by the Florida Association of Court Clerks was launched, and is being rolled out in counties across the state. We understand those counties that are currently using the state-run system have the option of either allowing filers to select which of the two systems to use, or of putting the new portal on top of the current system, thereby creating an extra step on the way to the clerk's office that e-filed documents would pass through. It is expected that by the end of this year, every county in the state will be connected to the Court Clerks' portal.

It appears that for courts that do not have an e-filing system in place, the statewide e-filing portal provides a turnkey, state-administered solution. The Florida Supreme Court has specifically ordered that the court record reside "on technology which is under the direct control of the Court and in the custody of the clerks." *See* Florida Supreme Court Standards for Electronic Access to the Courts, June 2009, at p. 11. Additionally, the Supreme Court requires that county clerks ensure that vendors do not release or distribute court data to third parties or data mine information for commercial or other non-court related uses, and that no additional fees be assessed or collected other than those approved by statute. *See* Electronic Transmission and Filing of Documents Under Florida Rule of Judicial Administration 2.525 for Orange County, in the Ninth Judicial Circuit, Supreme Court Administrative Order No. AOSC09-24 (June 1, 2009).

Under the proposed rules, electronic filing will be mandatory once each court has the ability to accept electronically transmitted documents. *See* Proposed Rule of Civil Procedure 2.520(a). From what we understand, each court in the state will be connected to the portal, and therefore able to accept e-filing, by the end of this year. Of course, the rules provide for certain exceptions where paper documents could be manually submitted to the clerk for filing, such as where a litigant is self-represented, or when the filing involves non-electronic documents or exhibits. Proposed Rule of Civ. Proc. 2.525(d).

In sum, it appears that Florida appears to be taking an approach to e-filing that would leave the courts — and not a third-party vendor — in control of the court record. Courthouse News applauds the judiciary's choice in this regard, which is consistent with the principle that no private entity should have priority access to the public court record. This has been a problem in those courts that have adopted e-filing systems run by a single private vendor. In many such instances, the private vendor has also been in the publishing business has priority access and control over new court filings, thus leading to a system of unequal access to the public record.

Even so, the fact that the Proposed Rules contemplate mandatory e-filing has caused Courthouse News to have certain questions and concerns about the media's continued ability to obtain prompt and inexpensive access to newly filed court records under a system in which virtually all court filings — including case-initiating documents — are required to be e-filed.

As you review these comments, please keep in mind that our purpose in bringing these issues to your attention is motivated only by Courthouse News' desire to ensure timely and inexpensive access to the court record. Courthouse News does not provide e-filing software or services, and does not have any plans to do so in the future; its only business is news reporting.

III. Proposed Rules Of Civil Procedure 2.520 and 2.525 Should Be Amended To Ensure That The Transition To E-Filing Does Not Result In Delays In Access To Newly-Filed Court Records

In Florida, the press has a presumptive constitutional and common law right of access to pleadings filed in civil cases. *See, e.g.* Art. 1, § 24, Fla. Const. ("Every

person has the right to inspect or copy any public record made or received in connection with the official business of any public body ... This section specifically includes the ... judicial branches"); *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113, 116 (Fla. 1988) ("the filed records of court proceedings are public records available for public examination"); *see also* Fla. R. Jud. Admin. 2.051 (implementing Article 1, § 24 of the Florida Constitution).

Decisions of the federal circuit courts are in accord, recognizing that even short delays constitute "a total restraint on the public's first amendment right of access even though the restraint is limited in time," and are unconstitutional unless the strict test for denying access has been satisfied. *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1147 (9th Cir. 1983); *accord, e.g., Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) ("[i]n light of values which the presumption of access endeavors to promote, a necessary corollary to the presumption is that once found to be appropriate, access should be immediate and contemporaneous"); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) ("even a one to two day delay impermissibly burdens the First Amendment"). And as the Florida Supreme Court itself has observed, "[t]o be useful to the public, news events must be reported when they occur ... News delayed is news denied." *State ex rel. Miami Herald Pub'g Co. v. McIntosh*, 340 So. 2d 904, 910 (Fla. 1976).

The reason for this rule — that even temporary access delays are the functional equivalent of access denials — is clear. The "newsworthiness of a particular story is often fleeting," *Grove Fresh*, 24 F.3d at 897, and given the vast amount of information competing for its attention, it is only while new court actions are still "current news that the public's attention can be commanded." *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975). Thus, a court record that cannot be accessed on the day it is filed, but instead only becomes available for media review on a delayed basis, has a far lower chance of being reported on. And because few members of the public can observe the court's activities directly, they learn what transpires in courthouses "chiefly through the print and electronic media," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (1980), and a court record that is not reported on has a far lower chance of coming to the attention of interested members of the public.

For all of these reasons, courts around the country have traditionally made new paper filings available on the same day they are filed, at least for news

reporters who visit the court every day specifically to review and report on new filings. This has been particularly true with regard to newly filed civil complaints and petitions, which provide the means by which interested members of the public can learn about the existence of new lawsuits.

The critical element of intake procedures that result in same-day media access to new paper complaints is the opportunity for interested news reporters to see them promptly after they are submitted to the court, instead of making reporters wait until docketing or other administrative intake procedures have been completed. This is often accomplished either by placing the day's newly filed civil complaints in a press box that can be accessed during a pre-arranged window of time at the end of the day, or by promptly scanning newly filed documents and making them immediately available through computer terminals at the courthouse, irrespective of whether the documents will later be made available for remote viewing over the Internet.

This fundamental principle is the same for documents that are e-filed. Contrary to the popular assumption that speedy access to court records automatically flows from e-filing, Courthouse News' experience is that the implementation of e-filing often brings ***delays*** in access to newly filed civil actions because courts have chosen to make e-filed documents available only after various administrative tasks have been completed (*e.g.*, manually checking the filing, making it available for electronic review, etc.).[1] E-filing courts have typically surmounted these access problems in one of two ways:

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[1]. A good example of the delays that often accompany e-filing can be found in the King County Superior Court in Seattle, Washington. Traditionally, reporters who visited the court regularly had same-day access to paper filings behind the court's intake counter. After the court instituted e-filing, however, Courthouse News found that it could not access documents filed after about noon until the following day. Similarly, after the Eighth Judicial District Court in Las Vegas, Nevada, switched to mandatory e-filing in early 2010, Courthouse News' reporter could not see new complaints until they were at least a day old, and the delays were often longer. After discussions with the court regarding these delays, the court instituted the electronic in-box procedure described herein, and reporters who visit the court once again have same-day access to new complaints.

1. Providing reporters with access to an electronic in-box on computer terminals at the courthouse through which records can be viewed as soon as they cross the electronic equivalent of the intake counter at the clerk's office, regardless of what administrative processing might remain to be done and/or whether the document has been made available for remote electronic viewing on a public web site. The electronic in-box has been successfully implemented in the Ninth Judicial Circuit Court in Orlando, where e-filing is still currently optional, as well as the Eighth Judicial Circuit Court in Las Vegas, Nevada, where e-filing is mandatory. Other courts using variations of the electronic in-box include the United States District Courts for the Western District of Pennsylvania, the Northern District of Georgia, the District of New Jersey, the District of Minnesota, the Western District of Kentucky, and the Eastern District of Missouri. The Northern District of Illinois also used a similar in-box solution until recently, when it began making new civil complaints immediately available on PACER.

2. Printing out copies of e-filed cases, either as a standard practice or promptly upon a reporter's request, regardless of any processing tasks that may remain. Courts that have implemented this kind of system include the Dallas County District Court in Dallas, Texas, the San Francisco Division of the United States District Court for the Northern District of California, the United States District Courts for the Western and Eastern Districts of Texas, the Northern and Southern Districts of Ohio, the Eastern District of Wisconsin, and the District of Minnesota.

We wish to emphasize that Courthouse News is *not* taking the position that newly filed court records must be made available for remote electronic viewing over the Internet on a same-day basis. Courthouse News understands that posting documents online for remote viewing can sometimes take time for any number of reasons. Rather, Courthouse News is simply asserting that even if such records are later made available for remote viewing on the Internet through a state-administered public access program, there should nevertheless be some means by which reporters who actually visit the courts can see new filings on a timely basis — *i.e.*, no later than the end of the day on which those records are filed.

In accordance with these considerations, Courthouse News respectfully submits that it would be appropriate to amend Proposed Rules of Civil Procedure 2.520 and 2.525 to make clear that the transition to electronic filing shall not result in delays in access to new court records, and that courts shall provide for effective public access to electronically filed documents (at least at the courthouse itself) from the time of the receipt of the filing, even if those documents have not yet been made available for remote electronic viewing over the Internet.

IV. Proposed Rules Of Civil Procedure 2.520 and 2.525 Should Be Amended To Ensure There Is Some Way For The Media And Other Interested Persons To Review Court Records Free Of Charge

We understand that there are currently no plans for an online, statewide repository or access system for docket information or court documents. Thus, it appears that individual courts could decide whether to provide online access to court-filed documents, and could also decide whether to charge for such access. While Courthouse News does not object to charging a reasonable fee for the privilege of reviewing court records electronically over the Internet from the comfort of one's own home or office, there must be alternative methods for the media to review e-filed documents (and docket information about those documents) free of charge, as has traditionally been the case with regard to paper-filed documents. This is particularly important for those media entities such as Courthouse News who review the entire flow of new civil litigation in several courts within each state to determine which cases are worthy of inclusion in news reports. In such situations, even a small per-document or per-page fee can quickly escalate to unreasonable amounts.

In Courthouse News' experience, there are three ways to do this. One way is to make documents available remotely over the Internet free of charge. Another way is to make documents available for viewing free of charge (either through public access terminals, or by making printouts available in a media box) at the courthouses themselves, thus ensuring that reporters who are willing to make the trip to the courthouse can continue to review these records for free, as they always have. Alternatively, or in addition to this, the courts could make newly filed cases available online for free for 24 hours after they are filed, after which they could be placed behind a paid wall. This last method, which is being used by the Harris County District Court in Houston, Texas, would preserve the courts' ability to generate revenue from its public access system while still making it possible for the

press (and others who are closely monitoring a case) to review newly filed cases without incurring excessive fees.

In any case, Courthouse News respectfully submits that Proposed Rules of Civil Procedure 2.2520 and 2.525 be amended to make it clear that a court that adopts electronic filing must provide some means by which interested members of the media and the public can obtain access to newly-filed court records, including but not limited to case-initiating documents, free of charge.

Courthouse News appreciates the Court's consideration of its views about the importance of ensuring the public's right of access, specifically its right of timely and cost-effective access, is not adversely impacted by the broader adoption of e-filing in Florida pursuant to Proposed Rules of Civil Procedure 2.520 and 2.525. Should there be any questions regarding these comments, please do not hesitate to contact our offices.

Respectfully submitted,

SACHS SAX CAPLAN, P.L.
On behalf of Courthouse News Service

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Certificate of Font Compliance

I HEREBY CERTIFY that these comments are printed in 14-point Times New Roman font, in accordance with Fla. R. App. P. 9.210(a)(2).

/s/Robert Rivas
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Certificate of Service

I HEREBY CERTIFY that on May 2, 2011, I served a copy of these comments by U.S. Mail on all counsel listed in the attached Service List.

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