IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF JUDICIAL ADMINISTRATION – PARENTAL LEAVE

CASE NO. SC18-1554

_____/

COMMENT OF FLORIDA PUBLIC DEFENDER ASSOCIATION

The Florida Public Defender Association, Inc., ("FPDA") respectfully offers the following comments on the proposed adoption of Florida Rule of Judicial Administration 2.570, on parental leave, published in the October 15, 2018, edition of The Florida Bar News. The FPDA consists of nineteen elected public defenders, hundreds of assistant public defenders, and support staff. As appointed counsel for indigent criminal defendants in hundreds of trials every year, FPDA members are familiar with issues relating to continuances, which this proposal addresses.

The FPDA objects to the parental leave proposal because it does not exempt criminal cases. The FPDA believes this is an oversight. Florida Rule of Criminal Procedure 3.191 has specific speedy-trial clocks for resolution of criminal cases. The Sixth and Fourteenth Amendments also guarantee criminal defendants a speedy trial. These rights cannot be overcome by parenting considerations. Although the proposed rule contains a "substantial prejudice" proviso, defendants are entitled to be brought to trial within the time periods specified in Rule 3.191 regardless of inconvenience to witnesses, attorneys, or judges.

Neither the Rules of Judicial Administration Committee nor the Board of Governors appears to have considered the constitutional distinctions between criminal and civil cases in approving the proposal. In the past, the Committee has taken into account the differences between criminal and civil cases, and between cases involving private counsel and those involving constitutional or statutory officers, in formulating proposals. For example, in 2016 the Committee modified its proposal on "coverage attorneys" in response to comments discussing these differences. See Appendix at 5-6, 10-11. The FPDA, aware of substantial opposition to the current proposal, declined to comment previously. However, now that the proposal is before the Court, the FPDA's serious concerns must be expressed.

In the experience of FPDA members, absent a waiver of speedy trial, colleagues are substituted in pending cases for lead counsel who take parental leave. Failure to exclude criminal prosecutions from proposed Rule 2.570 will undermine this practice, cause avoidable delays in criminal cases, and imperil defendants' speedy trial rights.

For these reasons, the FPDA opposes the proposed rule in its current form. The oversight is easily remedied. The first sentence of the proposed rule should read, "Except in criminal cases, ~~U~~unless substantial prejudice is demonstrated by

another party, a motion for continuance based on the parental leave of a lead attorney in a case must be granted if made within a reasonable time ….”

SIGNATURES OF ATTORNEYS AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to Committee Chair Eduardo I. Sanchez at eduardo.i.sanchez@usdoj.gov, and Bar staff liaison Krys Godwin at kgodwin@floridabar.org, this 6th day of November, 2018.

Respectfully submitted,

FLORIDA PUBLIC DEFENDER ASSOCIATION, INC.

/s/ *Glen P. Gifford*

Glen P. Gifford.
Assistant Public Defender
Second Judicial Circuit
Florida Bar # 0664261
301 S. Monroe, St., Suite 401
Tallahassee, FL 32301
(850) 606-8500
glen.gifford@flpd2.com

SUPREME COURT OF FLORIDA

IN RE: RULES OF JUDICIAL ADMINISTRATION, CRIMINAL RULE OF PROCEDURE 3.010, AND RULE OF APPELLATE PROCEDURE 9.440 **CASE: SC16-**

JOINT OUT-OF-CYCLE REPORT OF THE RULES OF JUDICIAL ADMINISTRATION COMMITTEE, RULES OF CRIMINAL PROCEDURE COMMITTEE, AND APPELLATE COURT RULES COMMITTEE

Amy Singer Borman, Chair of the Rules of Judicial Administration Committee ("RJAC"), Meredith Charbula, Chair of the Criminal Procedure Rules Committee ("CPRC"), the Honorable T. Kent Wetherell, II, Chair of the Appellate Court Rules Committee ("ACRC"), and John F. Harkness, Jr., Executive Director of The Florida Bar, file this joint out-of-cycle report pursuant to Florida Rules of Judicial Administration 2.140. With the profession's move to fewer physical files and paperless courtrooms, electronic filing and electronic service, as well as remote access to electronic images, the Committees are concerned with the identification of practitioners who appear before the court, the identification of practitioners for electronic service of documents, and the ability of practitioners to access electronic images remotely. The changes proposed by the Committees modify how counsel appear in a case. The modification of the appearance of counsel has three results: first, it identifies attorneys who represent a client both in the filed documents as well as in court appearances; second, it ensures that the proper attorneys are included in the clerk's case maintenance systems; and third, it expands the role of limited representation beyond family and probate.

The RJAC initially began reviewing the appearance of attorneys generally; that review was joined in a parallel manner by the Access to Legal Services Subgroup of The Florida Bar's Vision 2016 Commission Comprehensive Study of the Future Practice of Law ("Vision 2016 Commission") that studied limited appearance within cases. In response to the amendments created by this tandem progress, the CPRC and the ACRC reviewed their respective rules to ensure there was no conflict and to carve out necessary exceptions.

The proposed rules were published in The Florida Bar *News* (Appendix D) and comments were received (Appendix E). The comments were reviewed and addressed by the respective committees and ultimately, proposed amendments

were approved. The rule amendments were then presented to and approved by The Florida Bar Board of Governors. A vote chart is provided (Appendix A); the proposed rule amendments are attached in full-page format (Appendix B) and in two-column format in (Appendix C).

History

Rule of Judicial Administration 2.505(e) currently permits an attorney to appear in a case in one of three ways: by serving or filing the party's first pleading or document; by filing a substitution of counsel; or by filing and serving a notice of appearance. There has been a growing practice of hiring attorneys to appear in court to "cover" for other attorneys. These "coverage" attorneys usually are present to argue motions or answer questions of the court at status/case management conferences. Unless required by the court, most of these coverage attorneys do not file a notice of appearance and they have not signed any filed pleading or document or been substituted in as counsel. Because they are just covering a specific matter, these attorneys do not want, or need, to be served with court filings nor do they have direct communication with the client. Because the word "appearance" has not been defined, it is unclear whether the covering attorney who represents a client's interest before the court is in violation of Rule of Judicial Administration 2.505(e). Without a notice of appearance filed, and with fileless courts and civil courtrooms without deputy clerks, there may be no recordation of the name of the attorney who was present in court.

Aware that both coverage work is a burgeoning industry and that courts with heavy dockets rely on coverage attorneys, the Rules of Judicial Administration Committee embarked on exploring amendments to Rule 2.505(e) to allow for coverage attorneys while ensuring that clients are properly represented and courts have a mechanism for recalling who was present at the court proceeding. The discussion led to whether attorneys in law firms who attend court hearings and argue motions, but who have not filed a notice of appearance or who did not file the first pleading or paper, are also covering attorneys. Discussion then addressed whether assistant public defenders, assistant state attorneys, and other governmental attorneys are performing coverage duties when they handle matters in the courtroom but are not the attorney assigned to the case. These discussions then led to the question of "who is an attorney of record" and what makes an attorney an "attorney of record" as that term has also not been defined.

The RJAC further realized that for law firms which have large caseloads, complications arise when an attorney leaves the firm. Many times, an attorney who signed the first pleading or document leaves the firm but does not obtain a substitution of counsel since the case remains with the law firm. Because there is only an attorney of record—and not a law firm of record[1]—orders of substitution must be obtained. Unfortunately, with high turnover and large caseloads, this requirement is not always followed.

The failure to substitute the attorney has consequences for electronic service by the court. For instance, many courts rely on the clerk's case maintenance system for a listing of attorneys and e-mail addresses. This reliance could result in the court serving a Notice of Lack of Prosecution on an attorney no longer affiliated with the firm. Unlike paper mail, which would still be delivered to the law firm's office, electronic mail is sent to the e-mail address listed with the attorney's e-filing profile. If no optional secondary or tertiary address is listed, there is no fallback to ensure that service is received by the law firm that retained the case.

With the move to electronic filing and service through the Florida Courts E-Filing Portal or other court e-filing system, as well as remote access to court images, the identification and recordation of the attorney of record is of the utmost importance. Under the matrix developed by the Florida Courts Technology Commission, Governance Access Board, only an attorney who has been identified and listed in the Clerk's Case Maintenance System will be permitted remote access to court documents. In re: Standards for Access to Electronic Court Records, AOSC14-19. Thus, the concern became: should covering attorneys be considered attorneys of record and how can the courts ensure that electronically served orders and notices are served to the correct attorney?

While the RJAC was reviewing these issues, the Vision 2016 Commission was developing a rule for limited representation to assist self-represented litigants in civil matters. The RJAC, as the rules coordinating Committee, suggested that these proposed limited appearance rule amendments be placed in the Rules of Judicial Administration as a rule of general applicability since limited representation is applicable in several courts.

---

[1] The Florida Bar informed the RJAC that it has no regulation authority over a law firm but rather it only has regulation authority over an attorney.

The combined work of the RJAC and the Vision 2016 Commission developed a three-part system of representation: Lead Counsel, Additional Counsel (coverage and attorneys in a law firm or governmental agency) and Limited Representation Counsel. Each type of representation has its own rules for appearance and termination of that appearance in a case. A definition of an attorney of record was also created to assist the Florida Courts Technology Commission with the access to court records matrix.

Proposed Rule Amendments

RULE 2.120. DEFINITIONS

In response to a concern that there is no definition for who is the attorney of record, the RJAC added subdivision (d) (Attorney of Record) that defines "Attorney of Record" as "lead counsel, additional counsel, or limited representation counsel in accordance with rule 2.505."

RULE 2.505. ATTORNEYS

There were three distinct reasons why Rule 2.505 was reviewed and amended: the increase in the use of covering attorneys; attorneys of record being properly noticed in this technically growing profession; and self-represented litigants having equal access to the courts. The first two concerns were raised and addressed by the RJAC. The third concern was raised and addressed by the Vision 2016 Commission. Proposed amendments are detailed individually.

Subdivision (e) (Appearance of Attorney) currently defines the manners in which an attorney may appear in a case, specifically: serving and filing the first pleading, by filing a substitution of counsel that must be accepted by the court, or by filing a notice of appearance.

Subdivision (f) (Termination of Appearance of Attorney) currently defines how an attorney's appearance may be terminated: by withdrawal of the attorney, by order of court accepting a substitution, by the conclusion of the case, or, for family law limited appearance situations, by filing a notice of completion.

The proposed amendments to subdivision (e) will delete all current text and insert detailed procedures for lead counsel to both appear and be terminated from a case. Proposed amendments to subdivision (f) will delete all current text and insert detailed procedures for additional counsel to both appear and be terminated from a case. Lastly, current subdivision (g) (Law Student Representation) will be moved

to subdivision (h) and the proposed amendments to new subdivision (g) will provide detailed procedures for limited representation counsel to appear and be terminated from a case. Current subdivision (h) (Attorney as Agent of Client) will be moved to new subdivision (i).

The first sentence of proposed subdivision (e) (Lead Counsel) will specifically identify the lead counsel as "the attorney principally responsible for the representation of a party." Lead counsel is the attorney who first appears for the client and will stay lead in the case until changed by order of the court or completion of the case. Due to concern raised by public defenders and state attorneys, the last sentence in this opening subdivision paragraph clarifies that attorneys holding "constitutional or statutory offices will be deemed lead counsel" unless specifically designated otherwise.

Proposed subdivision (e)(1) (Appearance) defines the specifics of how a lead counsel may appear; specifically, subdivision (e)(1)(A) by first appearance, subdivision (e)(1)(B) by stipulation for substitution of lead counsel, and subdivision (e)(1)(C) by filing a notice of appearance for parties not previously represented. Proposed subdivision (e)(2) (Termination or Modification) defines the manner in which a lead counsel may be terminated or modified; specifically, subdivision (e)(2)(A) by order of withdrawal, subdivision (e)(2)(B) by order of substitution of lead counsel that will include whether the attorney will remain as additional counsel, and subdivision (e)(2)(C) by the termination of the case.

Within proposed subdivision (f) (Additional Counsel) this new term is defined simply as those attorneys who are not lead or limited appearance counsel. There is also a clarification that attorneys working under constitutional or statutory officers are deemed additional counsel unless designated otherwise.

Proposed subdivision (f)(1) (Appearance) defines the specifics of how additional counsel may appear; specifically, subdivision (f)(1)(A) provides for inclusion by being named in the initial filing but not specifically designated as lead counsel, subdivision (f)(1)(B) provides for appearance by filing subsequent documents with a notice of appearance, subdivision (f)(1)(C) provides for inclusion by simply filing a Notice of Appearance, and subdivision (f)(1)(D) establishes attorneys as additional counsel when appearing in court. If appearing in court for only that one specific proceeding, the court may waive the filing of a notice of appearance.

Proposed subdivision (f)(2) (Termination) establishes the procedures for the termination of appearance for additional counsel. Specifically, subdivision (f)(2)(A) defines the specifics required within a motion to withdraw, subdivision (f)(2)(B) defines the ability to file a notice of withdrawal, subdivision (f)(2)(C) provides for automatic termination of representation based on the termination of the court case, and subdivision (f)(2)(D) establishes the ability to be removed verbally by the court at the conclusion of a specific court proceeding.

The proposed new subdivision (g) (Limited Representation Counsel) defines this appearance as "an attorney for a party or non-party who provides limited representation" and also recognizes this type of representation may be limited or prohibited by other rules of court. The second sentence regarding limitation or prohibition of this role stemmed specifically from concerns raised by criminal law attorneys who felt it necessary to clarify that there are several types of cases for which limited appearance representation is restricted. Proposed subdivision (g)(1) details the procedure by which an attorney may appear for limited purposes in a case and defines the requirement to file a notice of limited representation with each aspect of the representation identified. Proposed subdivision (g)(2) details the procedure by which a limited appearance may be terminated; specifically, subdivision (g)(2)(A) establishes the filing of a Notice of Termination of Limited Representation when either (i) the specific aspect of the case for which the limited representation was sought concludes, or (ii) the time period set in the notice of limited representation expires. This subdivision also defines the personal information of the client and certification required to be included in the notice of termination of limited representation.

Proposed subdivision (g)(2)(B) provides procedures to address the Order of Withdrawal; specifically, subdivision (g)(2)(B)(i) states a hearing will be held on the motion unless the limited representation was for an appeal, and subdivision (g)(2)(B)(ii) provides for an order of withdrawal if the limited representation counsel cannot certify the client has no objection to the withdrawal or the counsel has made reasonable efforts to communicate with the client but was unable. This subdivision also requires that limited representation counsel be able to withdraw from a case unless the work for which limited representation counsel is hired is not complete and provides for the scheduling of a hearing unless the limited representation involved an appeal.

Proposed subdivision (g)(3) defines the limited representation counsel as the attorney of record for the specific purpose or time period defined by the Notice.

Proposed subdivision (g)(3)(A) requires the filed documents to identify that the attorney is representing for a limited purpose, the subject matter or proceeding of that limited representation, and the specific identification of the party being represented. Proposed subdivision (g)(3)(B) requires that pro se filers, if assisted, identify the attorney who assisted in the creation of legal documents, and require the pro se party to include his or her name and specific contact information in the pleadings or documents filed. Proposed subdivision (g)(3)(C) requires all filed documents be served on the attorney of record during the attorney's limited representation and the party. This subdivision also requires that, if the term of the limited representation is not defined in the Notice and the limited representation counsel has completed the term but receives notice of a hearing unrelated to the representation, the attorney who is no longer representing the party notify the court and opposing party.

The current subdivision (g) (Law Student Participation) is renumbered as (h). Current subdivision (h) (Attorney as Agent of Client) will be renumbered as subdivision (i). The proposed amendments to newly numbered subdivision (i) will fine-tune the awareness that an attorney acts as an agent for the party he or she represents and is bound by the Rules Regulating The Florida Bar.

The Committee created a Committee Note to help practitioners and pro se parties understand the amendments clearly. The Committee also proposes adding what is titled "Appendix A" to Rule 2.505, created by Vision 2016. This appendix shares forms: Notice of Limited Representation and Notice of Termination of Limited Representation.

ACRC's Concerns with "Additional Counsel" and "Limited Representation Counsel"

The ACRC has concerns about appellate counsel appearing in trial court. These concerns were shared with the RJAC, but are not addressed by the proposed amendments. Appellate lawyers often appear in the trial court in an appellate "trial support" role. However, the appellate lawyer's specific responsibilities in that role often vary and may be unforeseeable. For example, some appellate lawyers appear for a discrete purpose, such as arguing a pretrial evidentiary motion, a motion on a particular legal issue, the charge conference, or a motion for directed verdict. Others, however, may have a broader role. For example, some "trial support" counsel may attend the entire trial and assist when and if needed on a range of

issues. In this instance, the lawyer cannot specifically identify the aspect of the court case for which he or she is appearing.

Under the currently proposed rule, it is unclear whether appellate lawyers providing trial support would fall under the category of "additional counsel" or "limited scope counsel." ACRC's initial reaction was that lawyers serving in a trial support capacity would simply be "additional counsel." However, given the responsibilities the proposed rule confers on the newly-designated "lead counsel" and "additional counsel," this may make the appellate lawyer effectively responsible for parts of the case that lawyer is not involved in and has no control over.

The only other option is "limited representation counsel." However, when applied to lawyers providing trial support, we believe the current rule could lead to confusion and may be untenable. The proposed rule requires "limited representation counsel" to file and serve a "Notice of Limited Representation" that identifies each aspect of the court case or the time period to which the notice pertains. But, as explained above, an appellate lawyer providing trial support often is unable to identify a discrete aspect of the case to which he or she is providing representation. The lawyer also is unable to identify the time period to which the notice pertains because, typically, the appellate lawyer's role is ongoing. Most of the time, that appellate lawyer will become lead counsel for the appeal. Consequently, it may be unfeasible to identify each aspect of a court case or the time period to which the representation pertains.

ACRC is also concerned with the impact of the additional requirement that limited scope counsel confer with the client about the scope of the limited representation, that the client sign the lawyer's Notice of Limited Scope Appearance, and that the limited scope lawyer confer with the client regarding withdrawal as limited scope counsel. Many appellate lawyers are retained by, and work closely with, the trial lawyer, and it is the trial lawyer who maintains communication with the client.

Finally, some appellate lawyers are hired to appear in a case to monitor the record and ensure that issues are being adequately preserved for appeal. It is imperative that this appellate lawyer be able to access the court documents filed in the case.

RULE 2.515. SIGNATURE AND CERTIFICATES OF ATTORNEYS AND PARTIES

The proposed amendment to subdivision (a) (Attorney's Signature and Certificates) provides an exception to the requirement of having an attorney's signature and certificate for "documents filed outside the scope of limited representation counsel." Proposed subdivision (d) (Signature on Document Drafted with Assistance of Attorney) establishes the requirement that attorneys who do not represent a client but who help draft a document for a pro se party be identified on that document. The pro se party must sign the document; the attorney must include the statement "Prepared with the assistance of counsel" on the document when delivered to the party.

RULE 2.516. SERVICE OF PLEADINGS AND DOCUMENTS

The RJAC proposes adding a new subdivision (b)(1)(F) (Service, How Made; Service by Electronic Mail; Service in Limited Appearance Cases). This new subdivision specifically requires service of pleadings and documents to be made upon the limited representation counsel and the party during the attorney's term of limited representation. It further requires the limited representation attorney, if that attorney receives notice of a proceeding for which the attorney is not representing the party, to inform the court and the opposing party that the proceeding is "outside the limited representation" agreed to by the attorney and the client.

RULE 3.010. SCOPE

In the rule defining the scope of the Rules of Criminal Procedure, the CPRC proposes adding a sentence that will clearly define the limits of application of Rule 2.505(g) within the criminal courts. Specifically, Rule 2.505(g) will not apply to any proceeding governed under the Criminal Rules *except* first appearances, applications to set bond or modify bond, and motions for pretrial release.

The CPRC has concerns with limited representation permitted by Rule 2.505(g). There is the potential for conflicting strategies by attorneys if multiple attorneys participate in substantive pre-trial matters without an overall agreement on trial strategy. In a criminal case with appointed counsel, cost is not a factor in determining whether to file a motion or adopt a strategy; if a motion is not filed and argued, it is because appointed counsel determined it had no legal merit or because it was in conflict with overall trial strategy. To allow a defendant or his/her family to hire an attorney for purposes of a single motion or hearing, could interfere with lead counsel's representation of the defendant. This situation could

also be seen to be in conflict with the case law holding that a defendant is not entitled to "hybrid representation." See *State v. Tait*, 387 So. 2d 338 (Fla. 1980).

To remedy this concern, CPRC proposes amendments to Rule 3.010 to make it clear that limited representation will be permitted only in criminal proceedings through first appearance, the setting and modification of bond, and motions for pretrial release. After this point in the proceedings, limited representation counsel is only permitted by leave of the court.

The Florida Public Defender Association ("FPDA") and Blaise Trettis, Public Defender, 18th Circuit, commented on the proposed amendments to Rule 3.010.

The FPDA believes that Rule 2.505(e)–(g) should not apply in any criminal proceedings. In particular, FPDA raised concerns about conflicts between appointed counsel and a lawyer making a "limited appearance" through Rule 2.505(g). "The statute delineating the duties of the Public Defender, section 27.51, Florida Statutes (2015), 'does not permit the appointment of the public defender as co-counsel with privately retained counsel.' *Behr v. Gardner*, 442 So. 2d 980 (Fla. 1st DCA 1983); *Thompson v. State*, 525 So. 2d 1011 (Fla. 3d DCA 1988)." (*See* Appendix E – 6.)

FPDA also raised concerns that allowing limited appearance counsel at first appearances through bail hearings will lead to "[t]he ultimate appointment of the public defender be[ing] delayed, to the detriment of the indigent accused. Private limited appearance counsel will not conduct any investigation unrelated to first appearance because he or she has not been hired or paid to do so, and the public defender cannot conduct any investigation or begin crucial early intervention services unless appointed." (*See* Appendix E – 7.) The CPRC recognizes that currently it is not uncommon for the first appearance hearing or bond hearing to be handled by private counsel, which may delay the appointment of the public defender. However to not permit it, at all, would arguably interfere with the defendant's right to counsel of his choice.

The FPDA suggested that subdivisions (e) (Lead Counsel) and (f) (Additional Counsel) of Rule 2.505 are ill-suited to criminal cases. "Proposed rule 2.505(f)(1) would create an obligation that each public defender who appears in a case as additional counsel file a pleading listing his/her name, or a formal notice of appearance, unless that requirement is specifically waived by the court. Moreover, every public defender who at one point appeared as additional counsel, but will not

continue on the case, must also file a motion or notice of withdrawal, or seek verbal leave of court to withdraw if the attorney made a single appearance. And the clerk would have to diligently record each and every verbal order first waiving the requirement to file a formal notice, then allowing the attorney to withdraw. If Rule 2.505 applies in criminal cases, there could be hundreds of such orders in a single morning calendar." (*See* Appendix E – 10 – E – 11.) When CPRC raised similar concerns during the rule development process, the response was that the requirements of filing an appearance, filing a motion to terminate, and receiving an order of termination of appearance are currently required by Rule 2.505.

Blaise Trettis shared concerns regarding the proposed amendments "which would allow a private attorney to appear as additional counsel or limited representation counsel at any stage of the prosecution upon motion and leave of court. This leave of court provision would allow a private attorney who is paid a nominal amount of money such as $250 to $500 to just show up unannounced to appointed counsel at a docket sounding or pre-trial conference to verbally announce to the court that they have been retained as additional counsel or limited representation counsel to represent the defendant at that hearing to expressly 'overrule' the strategy of appointed counsel announced at the pre-trial conference." (*See* Appendix E – 14.)

The CPRC attempted to address these concerns by proposing additional amendments to Rule 3.010 to clarify that once a defendant is appointed counsel, limited appearance counsel is only permitted with leave of the court.

FDPA further suggested that the proposed amendments to Rule 2.505 do not restrict, via the security matrix, the limited appearance counsel's access to documents not necessary for the purpose of the limited appearance.

This rule was also edited to correct the title of the Florida Rules of Traffic Court within the text.

RULE 9.440. ATTORNEYS

The proposed amendment to Florida Rule of Appellate Court 9.440 creates new subdivision (a) (Appearance of Attorneys) that specifically excludes appellate attorneys from Rule of Judicial Administration 2.505(e)–(g). This new subdivision further establishes the requirements for an attorney to appear in a case under the appellate rules by (1) being included in a signature block or the service list in an initial filing invoking jurisdiction in the appellate court, or (2) by filing a notice of

appearance. Current subdivisions (a) (Foreign Attorneys) and (b) (Withdrawal of Attorneys) are renumbered, respectively, as subdivisions (b) and (c).

The reasons that the Appellate Court Rules Committee voted to "opt out" of Rule of Judicial Administration 2.505(e)–(g) are two-fold. First, there are concerns that "lead counsel" often changes depending on what court the case is in. The proposed amendments to Rule 2.505 appear to impose additional, and potentially unnecessary, burdens on appellate courts to consider and rule upon motions to terminate and substitute lead counsel. Second, the proposed amendments to Rule 2.505 may lead to confusion as to the role and responsibilities of appellate lawyers who appear in the trial court to provide "trial support."

Proposed Rule 2.505(e) provides that "lead counsel" is the attorney principally responsible for the representation of a party in a "court case" and will continue to be lead counsel until changed by order of court or termination of a court case. Although "court case" is not defined, when the provisions of the proposed rule are read together, it appears to mean the entirety of one case—from the proceedings in the trial court through all phases of an appeal, until an order is "final."

The person principally responsible for the representation of a party, however, often changes depending on what court the case is in. For example, when an appellate lawyer is hired to handle an appeal, that lawyer replaces trial counsel as "lead counsel" and is principally responsible for the client's representation in the appellate court.

Under the currently proposed rule, the ACRC has concerns about the added burden that will be imposed on the appellate courts by having to review motions and issue orders relating to termination and substitution of lead counsel. Further, if and when an appeal is remanded to the trial court, then trial counsel once again becomes lead counsel. The currently proposed rule would appear to once again require motions and orders terminating and substituting lead counsel.

ACRC believes it may be able to address this concern by revising Florida Rule of Appellate Procedure 9.440 to provide that subdivisions (e)–(g) of Rule of Judicial Administration 2.505 do not apply to proceedings governed by the appellate rules.

The ACRC's authority to "opt out" of Rule 2.505(e)–(g) is found in Florida Rule of Appellate Procedure 9.010 and Florida Rule of Judicial Administration

2.130. Specifically, Rule 9.010 provides that the Appellate Rules "shall supersede all conflicting statutes and, as provided in Florida Rule of Judicial Administration 2.130, all conflicting rules of procedure."

Florida Rule of Judicial Administration 2.130, in turn, provides: "The Florida Rules of Appellate Procedure shall control all proceedings in the supreme court and the district courts, and all proceedings in which the circuit courts exercise their appellate jurisdiction, notwithstanding any conflicting rules of procedure."

Respectfully submitted on June 14, 2016.

/s/ Amy Singer Borman
Amy Singer Borman, Chair
Rules of Judicial Admin. Committee
15th Judicial Circuit
205 North Dixie Highway, 5th Floor
West Palm Beach, Florida 33401
561/355-1927
aborman@pbcgov.org
Florida Bar No. 957097

/s/ John F. Harkness, Jr.
John F. Harkness, Jr.
Executive Director
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
850/561-5600
jharkness@floridabar.org
Florida Bar No. 123390

/s/ Meredith Charbula
Meredith Charbula, Chair
Criminal Procedure Rules Committee
Office of the State Attorney
311 W. Monroe Street
Jacksonville, Florida 32202-4242
904/255-2922
mcharbula@coj.net
Florida Bar No. 708399

/s/ T. Kent Wetherell, II
Hon. T. Kent Wetherell, II, Chair
Appellate Court Rules Committee
First District Court of Appeal
2000 Dayton Drive
Tallahassee, Florida 32399-0950
850/487-1000
wetherellk@1dca.org
Florida Bar No. 60208

CERTIFICATE OF SERVICE

I certify a correct copy of this Joint Out-of-Cycle Report was sent via electronic mail through the Florida Courts E-Filing Portal on this 14th day of June, 2016, to the following interested persons:

Adele Ilene Stone, Chair
The Access to Legal Service Comm.
Vision 2016 Commission
Buchanan Ingersoll & Rooney PC
1200 E. Las Olas Blvd., Suite 500
Fort Lauderdale, Florida 33301-2468
954/335-1588
Adele.stone@bipc.com
Florida Bar No. 252263

Robert Blaise Trettis
Public Defender, 18th Judicial Circuit
2725 Judge Fran Jamieson Way
2nd Floor, Building E
Melbourne, FL 32940-6605
321/617-7373
btrettis@pd18.net

Julianne M. Holt
President
Florida Public Defender Association
103 North Gadsden Street
P.O. Box 11057
Tallahassee, FL 32302
850/488-6850
jholt@pd13.state.fl.us

CERTIFICATION OF COMPLIANCE

I certify that this rule was read against *West's Florida Rules of Court – State* (2016 Ed.).

I certify that this report was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ *Krys Godwin*
Krys Godwin, Staff Liaison
Rules of Jud. Admin. Committee
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300
850/561-5706
kgodwin@floridabar.org
Florida Bar No. 2305

/s/ *Heather Savage Telfer*
Heather Savage Telfer, Staff Liaison
Appellate Court Rules Committee
Criminal Procedure Rules Committee
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300
850/561-5702
htelfer@floridabar.org
Florida Bar No. 0139149