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April 30, 2020

Florida Supreme Court
Clerk of the Court
500 South Duval Street
Tallahassee, FL 32399-1927

Case No.: SCA9-2163

**RE: In Re: Amendments to the Florida Rules of Judicial Administration and
Florida Rule of Criminal Procedure 3.030 – Electronic Filing and Service**

To Whom This May Concern:

These comments are submitted by Southern Legal Counsel, Inc. ("SLC") in response to the Florida Supreme Court Case No. SCA9-2163, *In Re: Amendments to the Florida Rules of Judicial Administration and Florida Rule of Criminal Procedure 3.030 – Electronic Filing and Service*.

Founded in 1977, SLC is a Florida statewide not-for-profit public interest law firm committed to equal justice for all and the attainment of basic human and civil rights. SLC assists individuals and groups with public interest issues who would not otherwise have access to the justice system. SLC concentrates on people and issues in the most need of civil legal assistance, including LGBTQ individuals and those experiencing homelessness and housing instability.

As explained below, SLC has serious concerns regarding the proposed amendments in SCA9-2163, particularly regarding how some of the proposed changes will impede access to the courts and deny access to justice.

Received, Clerk, Supreme Court

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I. Proposed Amendment to Fla. R. Jud. Admin. 2.520(d) Exhibits and (d)(1) Exhibits to Electronic Documents

SLC is concerned that the language of this amendment is unduly broad and will lead to confusion, and also that it sets a standard that is difficult, if not impossible, for many attorneys and litigants to meet. As proposed, Rule 2.520(a) states that “[d]ocuments generated by lawyers or represented parties for filing under rule 2.525 or service under rule 2.516 must comply with the formatting requirements of this subdivision, but exhibits attached to those documents need only comply with subdivision (d).”¹ Subdivision (b) states that “[e]lectronic documents submitted for filing must be in PDF format and not be a scanned, printed document. Documents must also be text searchable [....]” Finally, subsection (d) states that documents “not generated within the control of a lawyer or represented party may be appended as an exhibit [...but] the following requirements apply [...e]xhibits that are attached to an electronic document must be bookmarked [....]”

SLC has several concerns with the proposed Rule 2.520. First, the rule does not make clear whether it applies to pro se litigants in addition to “lawyers or represented parties.” (See Rule 2.520(a), “[d]ocuments generated by *lawyers or represented parties for filing*...”). Assuming that the broad language includes pro se litigants, the burdens imposed by the proposed amendment are even less reasonable. Further, the requirement that documents comply with subsection (a) or (d) is problematic as not all documents *can* comply with these two subsections. Parties may need to produce for filing documents that are not in PDF version (such as a photo or a scanned document). The proposed rule does not make clear how documents created by the attorney or filer on their computer are treated versus those documents that the attorney or filer had no role in creating (or for which they do not possess an “original.”) *Compare* Fla. R. Jud. Admin. 2.520(a) and (b) with Fla. R. Jud. Admin. 2.520(d)). An additional point of inconsistency and confusion is found in proposed Rule 2.520(d)(1) requirement that “non-original” documents filed as exhibits must still comply with the *Standards for Electronic Access*. Thus, the exemption the proposed rule attempts to create disappears as the *Standards* re-incorporate all of the form details from proposed Fla. R. Jud. Admin. 2.520(a) and (b).

Second, the proposal’s requirement in subdivision (d)(1) that, without exception, all documents filed as an exhibit “must be bookmarked” is an unnecessary obstacle. The bookmarking requirement is both expensive and beyond the technical skills of many attorneys and litigants. The bookmarking capability is not available in a free version of Adobe - it is only available through the purchase of Acrobat DC software, which, at its least expensive, is approximately \$13.00 for one month’s access. SLC works extensively with low-income populations, and the individuals most in need of access to pro se filing as their only option for accessing the courts cannot afford this fee. However, even assuming a person could afford such a purchase, the technological savvy required to insert bookmarks is not a reasonable expectation of

¹ Rule 2.520(a) sets forth the following requirements for document formatting: pages must be 8.5x11 inches; pages must be consecutively numbered

² A quick search for a “how to” indicated that it would take no less than 6 steps to create a bookmark, and would also require the user to be knowledgeable about changing view settings, default settings within Acrobat, and click & drag. <https://helpx.adobe.com/acrobat/using/page-thumbnails-bookmarks-pdfs.html>, accessed 4/29/2020. This does

practitioners or pro se litigants.² In addition to being an unnecessary and burdensome requirement, this proposed rule could result in clerks “disallowing” otherwise properly filed documents due to any technical failure in “bookmarking.” (See SLC’s comments re: Fla. R. Jud. Admin. 2.525(f), below).

II. Proposed Amendment to Fla. R. Jud. Admin. 2.525(f) Docketing by Clerk; Unsuccessful Filing Attempt; Noncompliant Electronic Documents

The language of proposed Rule 2.252(f) states:

(f) Docketing by Clerk; Unsuccessful Filing Attempt; Noncompliant Electronic Documents. When a document is submitted for filing under subdivision (b) or (c), the clerk is obligated to make it part of the official court file and index it in the progress docket of the case unless subdivision (f)(1) applies.

(1) A submitted document will not be docketed if it:

- (A) contains an incorrect or missing case number or case style;
- (B) consists of multiple documents filed as 1 document;
- (C) consists of a multi-page document filed as separate documents;
- (D) is a proposed, i.e. unsigned, order or correspondence to the court;
- (E) contains illegible, corrupt, or blank content; or
- (F) is barred by order of court or is otherwise incapable of being filed in the clerk’s case maintenance system.

SLC is concerned about the proposed changes to 2.252(f), which confer upon the Clerks broad powers to reject pleadings that have been electronically filed. Among SLC’S concerns regarding the significant alteration of the rule are the following:

1. The State does not have consistent protocols for case numbers or styles

The first issue is the lack of consistency statewide for case numbers and case styles. As Florida does not have a statewide protocol for naming such documents, and because many cases are initiated by pro se litigants who may not understand these rules, it is not inconceivable that documents may be mislabeled with incorrect case styles or even case numbers. To penalize a party because a case name is written in a format different from another party is illogical.

2. The rule is unclear how much effort the clerk must exert to clarify an error or locate a case before deeming it

² A quick search for a “how to” indicated that it would take no less than 6 steps to create a bookmark, and would also require the user to be knowledgeable about changing view settings, default settings within Acrobat, and click & drag. <https://helpx.adobe.com/acrobat/using/page-thumbnails-bookmarks-pdfs.html>, accessed 4/29/2020. This does not even get into editing, rearranging, or adding actions to bookmarks, or creating a bookmark hierarchy.

Second, the amendment does not clarify the degree of effort which the Clerk must exert to clarify the error or locate the case. Under the proposed amendment, it is foreseeable that a clerk could search for a case name and, upon not immediately seeing it, decide that the case style is insufficient and refuse to file the document. This requirement is overly burdensome on filers, particularly pro se litigants, who should receive latitude in complying with the technical requirements of court filings.

3. The rule is not clear how long the clerk has to contact parties regarding “problematic” documents

Third, the amendment does not clarify the timeframe within which the clerk should contact the parties regarding the problematic document. The amendment only provides that the clerk should hold the documents for ten days. While the amendment states that corrected documents may be submitted, it does not provide a timeframe for said submission while also providing that documents may be discarded after 30 days.

4. The rule allows the clerk broad discretion in determining whether a document is docketable because no guidance or direction is provided

Fourth, subsection (f)(1)(E) allows a clerk to refuse to docket a case if it “contains illegible, corrupt, or blank content.” Again, however, no guidance is provided as to what constitutes illegible, corrupt, or blank content. Illegible content raises the biggest concern as it could refer both to the presentation of handwriting or the substance of one’s argument, thus conferring upon the clerk an unprecedented amount of authority and discretion to determine whether to docket a document. Furthermore, the filer of a document may not have control over the presentation of handwriting or printed text, as they may be submitting a document produced by a third-party. It is unfair to unnecessarily punish a filer over that which they have no control. Documents may also have sections that should be blank but, without more guidance to clerks, these documents may be incorrectly withheld from filing.

5. Clerks have never before had this kind of broad discretionary power

Fifth, and most significantly, the exceptions to filing, as carved out in 2.520 (f)(1)(A)-(f)(1)(F) grant powers to the clerk that, heretofore, have not been granted. The current Fla. R. Jud. Admin. 2.520 lays out the technical details and requirements of how filed documents should appear, but it expressly directs that no clerk may refuse to file *any document* because of any non-compliance with that Rule. (*See* 2.520(f)). This is because the position of Clerk is one that is, by nature, ministerial. Duties of the clerk include maintaining all court records and dockets, issuing process when legally required, entering judgments and orders issued by a court, and collecting court fines/fees. *See, e.g., Collins v. Taylor*, 579 So. 2d 332, 333 (Fla. 1st DCA 1991) (clerk has ministerial duty to accept and file petitions).

SLC has had experience with this issue in recent litigation against the Clerk of the Circuit Court for the Eleventh Judicial Circuit for refusal to docket a properly submitted pleading. SLC assists transgender individuals statewide in obtaining legal name changes, a process by which the litigant files the name change petition and accompanying forms pro se in their circuit court. The

Clerk of the Circuit Court for the Eleventh Judicial Circuit refused to docket a properly tendered name change petition, and abandoned the petitioner's pleadings for a legal name change. We then filed a petition for writ of mandamus with the Third District Court of Appeal to compel the Clerk to comply with its ministerial duty to receive and docket the name change petition that had been tendered to the Court through the E-Filing portal. The Clerk was serving as a gatekeeper to the courthouse doors, and not permitting any filing by Petitioner to get a name change petition heard by the Court. An Agreed Order of Dismissal was entered which made clear the Clerk's ministerial duties to docket petitions. *Hermann v. Clerk of Courts*, Case No. 2019-026944-CA-01 (Jan. 24, 2020) ("As required by Article I, Section 21, of the Florida Constitution, to comply with its ministerial duties, and to ensure that all litigants have access to the courts, the Clerk will accept, docket, and assign case numbers to all pleadings filed by pro se litigants, whether filed in person or electronically, pursuant to Florida law, Florida court orders, Florida Eleventh Judicial Circuit Local Rules, and Florida Standards for Electronic Access to the Courts.)

While the current e-filing system streamlines many court processes, the *Standards for Electronic Access* also recognize that problems do occur. Section 3.19 of that document states that if "something just isn't quite right" about a document filed with the Clerk, the Clerk can place the document in a queue for five days, during which they shall attempt to reach the filer to obtain a corrected version of the document. At the end of that five-day period, however, the Clerk is not empowered to discard the document; rather, the Clerk is required to file and process the pleading for review.

The proposed rule significantly alters these processes by granting the Clerk the authority to discard and refuse to file any pleading or document they deem improper. As illustrated above through *Hermann v. Clerk*, even under the current rules that do not provide Clerks the legal authority to reject pleadings for any reason, Clerks nevertheless "abandon" documents properly filed by pro se litigants. *See also, e.g., Florida Supreme Court Standards For Electronic Access to the Courts 3.1.9* (electronic filings, even ones that conflict with court rules or standards, must be docketed as filed and processed for judicial review).

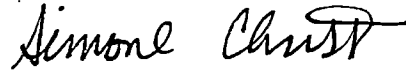
6. Additional court costs only hamper access to justice

Finally, SLC strongly opposes the imposition of yet another court costs against individuals who may make no more than an inadvertent error in the filing process. The proposed amendment provides that "[t]he court may assess costs in favor of any other party, the clerk, or portal in an amount sufficient to discourage repetition of the noncompliant behavior." This rule is overly punitive. It fails to require mens rea to commit noncompliance, does not indicate the amount or range of the penalty to be imposed, and neglects to specify how many acts of noncompliance are required before said penalty can be imposed. Such a rule will only further discourage people from utilizing the courts when needed and result in indigent persons facing potentially hefty court fines and collateral consequences as a result of their inability to pay said fines.

Conclusion

Thank you for the opportunity to submit comments regarding the proposed amendments. If you have any questions or concerns, please do not hesitate to contact Simone Chriss at simone.chriss@southernlegal.org.

Respectfully Submitted,

A handwritten signature in black ink that reads "Simone Chriss". The signature is written in a cursive style with a horizontal line underneath it.

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