

Supreme Court of Florida

CASE NO. _____

JUDE M. FACCIDOMO,
MICHELLE A. ESTLUND, and ROY D. WASSON,

Petitioners,

v.

HON. JOEL H. BROWN, as Chief Judge of the
Eleventh Judicial Circuit, State of Florida

Respondent.

ON PETITION FOR REVIEW OF ADMINISTRATIVE
ORDER BY LOCAL RULES ADVISORY COMMITTEE

**PETITION TO REVIEW ELEVENTH JUDICIAL
CIRCUIT'S ADMINISTRATIVE ORDER 12-02**

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STATEMENT OF THE CASE AND FACTS

On June 29, 2012, The Respondent Chief Judge Joel H. Brown issued in the Eleventh Judicial Circuit Administrative Order 12-02 ("AO 12-02"), as authorized by chapter 2012-123, Laws of Florida. App. A.

Chapter 2012-123 authorizes a chief judge to establish a "limited registry" of attorneys available to represent indigent defendants in cases requiring court appointment of private counsel. The attorneys on the limited registry are required to waive any compensation beyond the flat fees set for each type of case as prescribed in Florida Statute section 27.5304. Chapter 2012-123 also requires that, if such a limited registry is established, the court shall appoint attorneys from the limited registry unless there are no attorneys available to accept the appointment on the limited registry.

This differs from the current general registry system, wherein attorneys who agree to represent indigent clients normally accept the designated flat fee, but are also permitted to seek additional fees when the work required is extraordinary and unusual. Chapter 2012-123 does not allow additional fees, no matter how difficult the case turns out to be or how many hours of work it requires.

AO 12-02 establishes that a "limited registry" of attorneys shall be created in the Eleventh Circuit and provides for its implementation.

Multiple sections of the Florida Statutes were amended by the passage of chapter 2012-123, which becomes effective on July 1, 2012. See Ch. 2012-123, §8, Laws of Fla.

Chapter 2012-123 is comprised of eight sections. See Ch. 2012-123 §§ 1-8. The following is a summary of the sections pertinent to the present petition. The full chapter law is filed herewith as appendix exhibit App. B.

Section 1 of the chapter law substantially amends section 27.40, Florida Statutes. For example, the Legislature created the option for circuit courts to create a limited registry of attorneys to accept indigent defendants in cases requiring court appointment of private counsel. Those attorneys would accept as full payment the already existing flat fees as currently provided in section 27.5304, Florida Statutes, and would waive the already existing allowance for additional payment depending upon the nature of representation needed in an individual case.

The flat fees are not listed anywhere in the chapter law. To determine the flat fees as referenced in section 1, one must refer to Florida Statute section 27.5304, which provides that the flat fees shall be established annually in the General Appropriations Act. For the fiscal year 2012-2013, the General Appropriations Act is set forth in chapter 2012-118, and section 4 provides, in pertinent part:

The maximum flat fee to be paid by the Justice Administrative Commission for attorney fees for criminal conflict cases is set as follows:

POSTCONVICTION - Rules 3.850 and 3.800, Fla.R.Crim. Proc . . .	\$1,000
CONTEMPT PROCEEDINGS	\$400
CRIMINAL TRAFFIC	\$ 400
EXTRADITION	\$500
FELONY - LIFE	\$2,500
FELONY - PUNISHABLE BY LIFE	\$2,000
FELONY 1ST DEGREE	\$1,500
FELONY 2ND DEGREE	\$1,000
FELONY 3RD DEGREE.	\$750
FELONY OR MISDEMEANOR - NO INFORMATION FILED	\$400
FELONY APPEALS	\$1,500
JUVENILE DELINQUENCY - 1ST DEGREE FELONY	\$600
JUVENILE DELINQUENCY - 2ND DEGREE	\$400
JUVENILE DELINQUENCY - 3RD DEGREE	\$300
JUVENILE DELINQUENCY - FELONY LIFE	\$700
JUVENILE DELINQUENCY - MISDEMEANOR	\$300
JUVENILE DELINQUENCY - DIRECT FILE/ NO PETITION FILED	\$300
JUVENILE DELINQUENCY APPEALS	\$1,000
MISDEMEANOR	\$400
MISDEMEANOR APPEALS	\$750
VIOLATION OF PROBATION - FELONY (INCLUDES VOCC)	\$500
VIOLATION OF PROBATION - MISDEMEANOR (INCLUDES VOCC)	\$300
VIOLATION OF PROBATION (VOCC) JUVENILE DELINQUENCY	\$300

* * *

The maximum flat fee to be paid by the Justice Administrative Commission for attorney fees for the following dependency and civil cases is set as follows:

ADMISSION OF INMATE TO MENTAL HEALTH FACILITY	: \$300
ADULT PROTECTIVE SERVICES ACT - Ch. 415, F.S.	: \$500
BAKER ACT/MENTAL HEALTH - Ch. 394, F.S.	: \$400
CINS/FINS - Ch. 984, F.S.	: \$750
CIVIL APPEALS	: \$400
DEPENDENCY - Up to 1 Year	: \$800
DEPENDENCY - Each Year after 1st Year	: \$200
DEPENDENCY - No Petition Filed or Dismissed at Shelter	: \$200
DEPENDENCY APPEALS	: \$1,000
DEVELOPMENTALLY DISABLED ADULT - Ch. 393, F.S.	: \$ 400
EMANCIPATION - Section 743.015, F.S.	: \$400
GUARDIANSHIP - EMERGENCY - Ch. 744, F.S.	: \$400
GUARDIANSHIP - Ch. 744, F.S.	: \$400
MARCHMAN ACT/SUBSTANCE ABUSE - Ch. 397, F.S.	: \$300
MEDICAL PROCEDURES - Section 394.459(3), F.S.	: \$400
PARENTAL NOTIFICATION OF ABORTION ACT.	: \$ 400
TERMINATION OF PARENTAL RIGHTS -	
Ch. 39, F.S. - Up to 1 Year	: \$1,000
TERMINATION OF PARENTAL RIGHTS - Ch. 39, F.S. -	
Each Year after 1st Year	: \$200
TERMINATION OF PARENTAL RIGHTS - Ch. 63, F.S. -	
Up to 1 year	: \$1,000
TERMINATION OF PARENTAL RIGHTS - Ch. 63, F.S. -	
Each Year after 1st Year	: \$200
TERMINATION OF PARENTAL RIGHTS APPEALS	: \$2,000
TUBERCULOSIS - Ch. 392, F.S.	: \$300

The only fees for indigent criminal defense and dependency cases listed in the entire chapter law are wholly unrelated to and unavailable for attorneys on the limited registry list. The chapter law lists only the following maximum capped fees (as listed in section 4 of the chapter law) which are allowable under certain circumstances for attorneys on the general registry list, but not the limited registry:

For misdemeanors and juveniles represented at the trial level :\$ 1,000.
For noncapital, nonlife felonies represented at the trial level : \$ 2,500.
For life felonies represented at the trial level : \$3,000.
For representation on appeal : \$2,000.

...

At the trial level, compensation for representation for dependency proceedings shall not exceed \$1,000 for the first year following the date of appointment and shall not exceed \$200 each year thereafter. Compensation shall be paid based upon representation of a parent irrespective of the number of case numbers that may be assigned or the number of children involved, including any children born during the pendency of the proceeding. Any appeal, except for an appeal from an adjudication of dependency, shall be completed by the trial attorney and is considered compensated by the flat fee for dependency proceedings.

Section 4 of the chapter law amends section 27.5304, Florida Statutes, by ordering all circuit judges to select only one judge per circuit to hear and determine motions to exceed fee limits in court-appointed cases, and providing that multicounty circuits and the Eleventh Circuit may have up to two such designated judges. The effect of said amendment will usually be to remove the decision regarding motions to exceed fee limits from the judge presiding over the case, instead requiring that determination to be made by a specific judge who did not preside over the matter.

Section 4 also amends the manner in which criminal court orders of payment in excess of flat fees shall be paid in relation to the General Appropriations act; the manner in which payment shall be made in the event that designated funds are

exhausted; and creates a requirement that the Justice Administrative Commission provide certain monthly data concerning court-appointed cases, payments in excess of flat fees, and cases where compensation was waived.

Specifically as regards what will occur when the designated funds are exhausted, Section 4 amends §27.5304, Fla. Stat. to provide as follows: “If, during the fiscal year, all funds designated for payment of the amount ordered by the Court in excess of the flat fee is spent *the amount of payments in excess of the flat fee shall be made from the due process funds*, or other funds as necessary, appropriated to the state courts system in the General Court Appropriations Act.” Section 27.5304(12)(f)3., Fla. Stat. (Emphasis added).

Senate Bill 1960 (“SB 1960”) is the bill that eventually became chapter 2012-123. The original version of SB 1960 as preserved in Florida’s public records at <http://www.flsenate.gov/Session/Bill/2012/1960/BillText/Filed/PDF> was filed on February 16, 2012, and contained no reference to a limited registry.

Neither the first nor the second amendment to SB 1960 contained any reference to a limited registry. Only in the third amendment to SB 1960 was the creation of a limited registry addressed. The first lines of title of the bill were changed from the original:

“An act relating to the state judicial system; amending s. 27.511, Fl.S.; revising the procedures by which a regional conflict counsel is appointed by the Governor; . . . ”

to the amended:

“An act relating to the state judicial system; amending s. 27.40, F.S.; authorizing the chief judge of the circuit to limit the number of attorneys on the circuit registry list; providing criteria in order to qualify for inclusion on a registry; authorizing the chief judge to establish a limited registry that includes only those attorneys willing to waive compensation in excess of a flat fee; requiring the court to appoint attorneys from the flat-fee limited registry unless there are no attorneys available to accept the appointment on the limited registry;. . . ”

The limited registry language and the title amendments were both introduced in the bill’s third amendment on the single day prior to the vote on the bill. The third amendment was filed at 8:03 a.m. on March 8, 2012.

SB 1960 was passed in the Senate the next day, March 9, 2012, at 3:17 p.m. It was adopted in the House and passed in the House on March 9, 2012, at 8:39 p.m., the last day of the legislative session.

Circuit courts throughout the State of Florida are working to adopt administrative orders compliant with the legislature’s direction. Although the legislation is not yet in force, in addition to the Eleventh Circuit’s AO 12-02, the chief judges of the Seventh Circuit, Eighth Circuit, Twelfth Circuit, and Eighteenth Circuit have already taken action compliant therewith.

Attached as an appendix exhibits are the Eighth Judicial Circuit's administrative order No. 1,470 (App. C) and the Eighth Circuit's registry going into effect on July 1 containing both a general registry and the limited registry mentioned in the administrative order. App. D. Attached as Appendix Exhibits E and F are the Seventh and Twelfth Judicial Circuits' new forms of application to the court-appointed registry which reflect that there are now a general registry and a limited registry.¹ Lawyers applying for court-appointed status must indicate whether they are willing to serve on the limited registry and waive the right to apply for fees in excess of the caps.

Also filed in the appendix hereto is a copy of the Administrative Order of the Eighteenth Judicial Circuit establishing the limited registry of attorneys willing to accept court-appointments without ever seeking additional fees in extraordinary and unusual cases. App. G. Similar administrative orders and local practices consistent with Chapter 212-123 are in the process of being adopted throughout the State of Florida.

¹ The office of Chief Judge Owens from the Twelfth Judicial Circuit has advised that Chief Judge is implementing the legislation by merely changing the application form for the registry and will not enact a separate administrative order. The Seventh Circuit apparently has adopted the same procedure as there is no actual administrative order accompanying the change in the registry application form.

SUMMARY OF THE ARGUMENT

This Committee should recommend that the Administrative Order be quashed because it constitutes a Local Rule that was enacted without compliance with the requirements of the Rules of Judicial Administration. It is a local rule because it “supplies an omission in or facilitates application of a rule of statewide application,” within the meaning of Fla. R. Jud. Admin. 2.120(b)(1). That rule of statewide application is the Florida Rule of Criminal Procedure applicable to providing counsel to indigents. The administrative order is a “local rule” as opposed to an administrative order because it was adopted by Chief Judge Brown in the Eleventh Circuit to supply the omission from Rule 3.111 in the rates to be paid to appointed counsel. It was enacted to meet “local conditions,” being the rampant budgetary crisis.

Second, the administrative order should be quashed because it is a Rule of Court within the meaning of Fla. R. Jud. Admin. 2.120(a). It is not being enacted solely in the Eleventh Judicial Circuit but is being adopted statewide as a result of the Florida Legislature’s passage of Chapter 2012-123, Laws of Florida. The Eleventh Circuit Rule is a part of that rule of statewide application that will be applicable to all proceedings in which counsel is appointed to represent indigent criminal defendants.

ARGUMENT

I.

THE ADMINISTRATIVE ORDER SHOULD BE QUASHED BECAUSE IT IS A LOCAL RULE ADOPTED WITHOUT COMPLIANCE WITH THE REQUIREMENTS FLA. R. JUD. ADMIN. 2.215(e)(1)

This Committee should recommend that the Supreme Court quash the Eleventh Circuit's administrative order because it amounts to a Local Rule adopted without compliance with the requirements of Fla. R. Jud. Admin. 2.215(e)(1). The administrative order is a local court rule as defined by Fla. R. Jud. Admin. 2.120(b)(1) because it is "a rule of practice or procedure for circuit or county application only that, because of local conditions, supplies an omission in or facilitates application of a rule of statewide application and does not conflict therewith."

The "rule of statewide application" that the administrative order augments is Fla. R. Crim. P. 3.111. Rule 3.111, entitled "Providing Counsel to Indigents" sets forth the procedures for appointing counsel to represent indigent criminal defendants. Rule 3.111 contains no reference to the measure of compensation of court-appointed counsel. Therefore, the administrative order in question "supplies an omission in or facilitates application of" Rule 3.111.

The other aspect of the definition of a “Local Court Rule” is that it is adopted “for circuit or county application only . . . because of local conditions.” The local conditions under which the Eleventh Circuit’s administrative order establishing the limited registry was adopted is the tension between the terrible budgetary crisis facing the court system in the Eleventh Judicial Circuit and the need to properly compensate counsel in extraordinary cases in excess of the statutory caps pursuant to *Makemson v. Martin County*, 491 So. 2d 1109 (Fla. 1986) and its progeny. The Respondent Chief Judge of the Eleventh Judicial Circuit was placed in an untenable position to have to decide between proper compensation for court appointed counsel and taking action to meet the rampant budgetary crisis. Therefore, he understandably saw fit to adopt the administrative order to augment the provisions of Rule 3.111 “because of [those] local conditions.” Thus, the administrative order fits the definition of Local Court Rule and should be quashed unless and until it is promulgated in accordance with the procedures for adoption of such local rules.

The Eleventh Circuit’s administrative order is no less a Local Rule than the administrative order quashed by the Supreme Court in *In Re Administrative Orders of the Seventeenth Judicial Circuit—Nos. III-92-D-2B & III-92-D-5A1*, No. 81,773; 1993 Fla. LEXIS 2005 (Fla. Dec. 20, 1993). That case involved review of the Seventeenth Judicial Circuit’s administrative order which “mandates that noncontract

special assistant public defenders undertake the first legal matter assigned in each category, except dependency, for no fee other than reimbursable costs.” The Supreme Court “agree[d] with the Petitioner that the challenged provision is a rule of practice or procedure for circuit application that, because of local conditions, facilitates application of a rule of statewide application and therefore must be vacated as an improperly promulgated rule.” *Id.* at *2. Similarly, the Eleventh Circuit’s administrative order under review should be quashed as an improperly promulgated rule.

II.

THE ADMINISTRATIVE ORDER SHOULD BE QUASHED BECAUSE IT IS A RULE OF COURT ADOPTED WITHOUT COMPLIANCE WITH THE REQUIREMENTS OF FLA. R. JUD. ADMIN. 2.140

The Eleventh Circuit’s administrative order in question cannot be perceived in a vacuum only as an impermissible local rule. That administrative order has been entered as part of a statewide effort by chief judges from most, if not all, of the circuits to comply with the Legislature’s directive in Chapter 2012-123. Therefore, the Eleventh Circuit’s administrative order should be viewed in the context of being

part of a rule of statewide application.² As such, it amounts to an impermissible Court Rule as defined by Fla. R. Jud. Admin. 2.120(a).

As noted above, the chief judges of the Seventh Judicial Circuit, Eighth Judicial Circuit, Twelfth Judicial Circuit and Eighteenth Judicial Circuit already have implemented the provisions of Chapter 2012-123 by adopting administrative orders and/or establishing limited registries. More such administrative orders are on the way and are expected to be implemented very soon. The limited registry may be a matter of statewide application without having been promulgated under the requirements of Fla. R. Jud. Admin. 2.140.

Indigent criminal defendants will not be able to enjoy the services of appointed counsel from general registries statewide as a result of the host of administrative orders adopted by other circuits in conjunction with the adoption of the Eleventh Circuit's order. The committee should recommend that the Supreme Court quash all such orders as being violative of the Rules of Judicial Administration's procedural requirements for adopting and amending Rules of Court.

² That rule of statewide application is effectively being promulgated by the Florida Legislature, and therefore may be susceptible to a challenge as a improper procedural rule. However, the constitutional issues are beyond the scope of this challenge.

CONCLUSION


WHEREFORE, the administrative order being in essence a court rule or local rule rather than an administrative order, the Committee should recommend that the Supreme Court of Florida quash said order.

Respectfully submitted,

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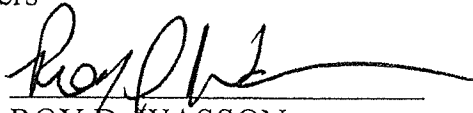
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing were served by U.S. Mail upon Hon. Joel H. Brown, Chief Judge, Lawson E. Thomas Courthouse Center, 175 NW First Avenue, Room 3045, Miami, FL 33128; Harvey Ruvin, Clerk Hon. J. Preston Silvernail, Circuit Court Judge, Eighteenth Judicial Circuit, 2825 Judge Fran Jamieson Way, Melbourne, FL 32940-8006; Linda Kearson, General Counsel, Eleventh Judicial Circuit Court, 175 NW First Avenue, Miami, FL 33128; on this the 29th day of June, 2012.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition has been computer generated in 14 point Times New Roman font and complies with the requirements of Rule 9.210(a)(2).

By: 

ROY D. WASSON
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing were served by U.S. Mail upon Hon. Joel H. Brown, Chief Judge, Lawson E. Thomas Courthouse Center, 175 NW First Avenue, Room 3045, Miami, FL 33128; Harvey Ruvin, Clerk, 73 West Flagler Street, Miami, FL 33130; Hon. J. Preston Silvernail, Circuit Court Judge, Eighteenth Judicial Circuit, 2825 Judge Fran Jamieson Way, Melbourne, FL 32940-8006; Linda Kearson, General Counsel, Eleventh Judicial Circuit Court, 175 NW First Avenue, Miami, FL 33128; on this the 29th day of June, 2012.

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