SPLC FLORIDA

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November 9, 2023

Office of the General Counsel
Attn: Florida Department of Corrections Rule Correspondence
501 South Calhoun Street
Tallahassee, Florida 32399
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Sent via email

Re: Objections to Proposed Fla. Admin. Code. R. 33-210.012 and Request for Workshop

To Whom It May Concern:

We write to urge the Department to reject the preliminary text of Proposed Fla. Admin. Code R. 33-210.012 about legal mail. In summary, the proposed rule fails to remedy problems with the existing rule about legal mail and creates new legal issues and barriers to individuals' access to counsel and the courts.

First, several existing and proposed provisions are vague, overbroad, or arbitrary. Second, the proposed section about "soliciting" violates non-profit legal organizations' First Amendment right to initiate confidential communications with incarcerated people. Third, to act as gatekeepers under the existing and proposed rules, prison staff must unlawfully review the content of privileged legal mail. Also, the lack of standards in the proposed rule to authenticate attorney registration allows prison staff to arbitrarily bar attorney-client communications. Finally, the new administrative requirements, considered together, unduly burden access to courts and the practice of law.

We assume that the Department's interest in revising the rule is to prevent contraband from entering its facilities, but the proposed rule creates more problems than it solves. The Department should reject the revisions as explained below.

1. The Existing and Proposed Rules are Vague, Overbroad, and Arbitrary.

There are several vague, overbroad, and arbitrary provisions in the existing and proposed rules that interfere with access to court, attorney-client communications, and the practice of law. These include the prohibitions on "publications" and "written materials of

a non-legal nature," copied in Proposed Sections (7) and (7)(a)(2), respectively. Relying on these sections, prison staff could prohibit, for example, "publications" issued by the U.S. Department of Justice[1] or United States Department of Education[2] even when attorneys have deemed them necessary to provide appropriate and complete legal advice. Prison staff could also prohibit documents that may appear "non-legal," but are in fact legal documents that clients must review as evidence for litigation. There is no "threat to prison security" that justifies interfering with the practice of law or prohibiting legal communications related to "seek[ing] redress in the courts" in this manner. *See Cruz v. Beto*, 603 F.2d 1178, 1185 (5th Cir. 1979).

The Department should eliminate, as opposed to re-codify in Proposed Section (13)(c), the vague prohibition of "standard envelopes." Without definition, prison staff is free to unreasonably block legal mail based on its own interpretation of "standard envelope." Indeed, there is no reason for the Department to regulate envelopes because the U.S. Postal Service already does so.[3]

The 25-page limit in Proposed Section (7)(b) is also patently unreasonable. Civil complaints, civil and post-conviction motions, habeas petitions, and court opinions are just some examples of legal documents that commonly exceed 25 pages. To ensure access to courts and legal representation, attorneys must be able to send legal documents in their entirety.[4] *See Procunier v. Martinez*, 416 U.S. 396, 419 (1974) (incarcerated people "must have a reasonable opportunity to seek and receive the assistance of attorneys"), *overruled on other grounds*, 490 U.S. 401 (1989). Requiring attorneys to divide legal documentation into multiple mailings is needlessly burdensome to attorneys, confusing for clients, more work for prison staff, and causes delay.

2. The Proposed Rule Violates Non-Profit Legal Organizations' First Amendment Rights.

Proposed Section (8) violates non-profit legal organizations' First Amendment right to solicit incarcerated clients and advise them of their legal rights. *See Jean v. Nelson*, 711 F.3d 1455, 1508-09 (11th Cir. 1982), *on rehearing*, 727 F.2d 957 (11th Cir. 1984) (en banc), *rev'd on other grounds*, 472 U.S. 846 (1985). Under the proposed rule, when a non-profit legal organization initiates contact with an incarcerated person, prison staff may reject the communication unless labeled as "Advertisement" and subject to prison staff's review. But "advertisements" under Florida Bar Rule 4-7.11 are communications that seek "legal employment" for pecuniary gain. In contrast, non-profit legal organizations initiate contact with incarcerated people as an exercise of their First Amendment right to investigate conditions of confinement and advocate for and enforce

[1] https://www.justice.gov/publications.
[2] https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2023-03-29/eligibility-confined-or-incarcerated-individuals-receive-pell-grants.
[3] https://pe.usps.com/text/dmm300/601.htm.
[4] The 25-page limit is also inconsistent with the existing provision of the rule, copied in Proposed Section 7(c), that allows legal mail measuring up to nine inches.

prisoners' constitutional and statutory rights. *See National Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415 (1963); *In re Primus*, 436 U.S. 412 (1978). This right is rendered meaningless if such communications are not confidential. *See Am. C.L. Union Fund of Michigan v. Livingston Cnty.*, 796 F. 3d 636, 644 (6th Cir. 2015) ("Precluding [confidential] pre-litigation correspondence and investigation, at the very least, chills important First Amendment rights.").

To address this potential constitutional violation, Proposed Section (2) should include "non-profit legal organizations."[5] Proposed Section (8) should also include a stated exemption that allows non-profit legal organizations to initiate confidential communications consistent with their well-established First Amendment rights.

3. The Existing and Proposed Rules Impermissibly Require Prison Staff to Read Legal Mail.

The existing and proposed rules require prison staff to read the substance of legal communications to determine if they are "of a legal nature," "non-legal," "publications," or "advertisements." This violates the existing provision, copied in Proposed Section (13)(d), that allows prison staff to read only the letterhead and signature of incoming legal mail. It also violates federal law that prohibits prison staff from reading, or even being given the opportunity, to read legal communications. *See, e.g., Christmas v. Nabors*, 76 F.4th 1320, 1328-1330 (11th Cir. 2023) (finding a First Amendment violation when prison officials "*could*" but did not "actually read his legal mail") (emphasis in original). Prison staff are already impermissibly reading legal mail; our offices have raised it with several institutions. The proposed rule should remedy this issue, not further codify and expand it.

The Supreme Court set forth legal mail procedures that balance the interests of security and confidential attorney-client communications while ensuring access to courts. *See Wolf v. McDonell*, 418 U.S. 539, 576-77 (1974). Prison staff may require legal mail "to be specially marked as originating from an attorney, with his name and address being given, . . . that a lawyer desiring to correspond with a prisoner first identify himself and his client to the prison officials," and that prison staff may "open the mail in the presence of inmates" without reading it. *Id.* There is no legitimate reason to go beyond these procedures.

There is also no legitimate reason for Proposed Section (19)(a) to re-codify the notary requirements from the existing rule. This section requires a "designated employee" to determine whether an incarcerated person "understands [the document's] contents" before providing notarization. But the role of a notary is only to determine "that the person whose signature is to be notarized is the individual who is described in and who is

[5] Not all non-profit legal organizations are approved "legal aid organizations" under Florida Bar Rule 11-1.5, nor are they required to be for the purpose of solicitation under the First Amendment. *See, e.g., Button*, 371 U.S. at 430 (recognizing the First Amendment solicitation rights of the NAACP, which is a "political' organization that uses litigation as one of many methods to achieve its mission).

executing the instrument." § 117.05(5), Fla. Stat. (2023). Requiring prison staff to assess reading comprehension is another unlawful infringement on the right to confidential legal communications and goes beyond Florida law.

4. The Proposed Rule Lacks Necessary Standards for Attorney "Authentication."

Proposed Section (4)(a) grants Department staff unfettered discretion to deny attorneys' "registration," and so bars confidential communications, access to courts, and ability to practice law. Under the proposed rule, before they can use legal mail, attorneys must complete Form DC1-214 (Attorney Registration Number Request) to receive an Attorney Registration Number (ARN). But there is no information about what attorneys must include for approval, the criteria for approving or denying registration, who in the Department is responsible for reviewing the registration, a timeframe for approving or denying registration, nor a process for reviewing denials. Instead, the rule should make clear that the sole criteria for ARNs is valid licensure from a state bar association. It should also identify the staff who will make decisions about registration requests, and provide a clear review process with deadlines and standards for denials.

5. The Proposed Rule's Administrative Requirements Unduly Burden Access to Courts and Practice of Law.

Proposed Section (3) imposes burdensome administrative requirements that, when combined with the provisions described above, unlawfully interfere with the rights of access to courts and the practice of law. *See Cruz*, 603 F.2d at 1186 (affirming that unreasonable burdens on legal communications violated incarcerated clients' and their attorney's constitutional rights). Under the proposed rule, attorneys must meter or print postage directly on envelopes, and may not use U.S. postage stamps or adhesive labels on incoming or return envelopes. Attorneys can use legal mail only after they register with the Department, wait for an ARN and unique link, click on the link to obtain a unique code for every piece of mail, and then print that information onto each envelope. Attorneys must also tally and divide documents in excess of 25 pages into multiple mailings to satisfy the new page limitations.

In addition, because Proposed Section (3)(c)2. requires attorneys "to treat as confidential" their ARNs[6] and unique links, they must personally perform administrative tasks that support staff could otherwise complete. Federal and state courts allow attorneys to share their electronic filing credentials with support staff. The Department should allow the same here.

The totality of the proposed rule is an untenable drain on attorneys' time and resources simply to communicate with their clients. Solo practitioners, small firms, government attorneys, and non-profit legal organizations are typically the only attorneys who represent incarcerated people in response to an overwhelming need for legal

[6] It is impossible for attorneys to keep their ARNs confidential when they are required to write it on the outside of the envelope under Proposed Section (4)(c)5.

assistance. The proposed rule will force such offices to bear significant administrative costs and increase disputes about mail censorship. It will also create delays that interfere with court deadlines. As a result of these burdens, incarcerated people will have even less access to counsel than they already do. *See Makemson v. Martin Cnty.*, 491 So. 2d 1109 (Fla. 1986) (recognizing that a consequence of "rising costs" is the denial of effective assistance of counsel). Moreover, it serves the Department's and the courts' interests to *decrease*, rather than increase, the number of legal mail disputes and plaintiffs who are *pro se* only because counsel are unavailable.

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In sum, the proposed revisions to the legal mail rule raise new legal and practical issues and fail to remedy a host of issues that pose constitutional violations. We urge the Department to reject these proposed revisions.

Please provide a copy of Proposed Form DC1-214 for our review. We also request a workshop to work together to understand the Department's concerns about the existing rule and discuss revisions that could remedy those concerns while also balancing incarcerated people's and attorneys' First and Fourteenth Amendment rights.

Sincerely,

Southern Poverty Law Center
Florida Legal Services
Florida Justice Institute
Human Rights Defense Center
Disability Rights Florida
Florida Cares Charity Corp. .
The Public Interest Law Section of the Florida Bar
Floridians for Alternatives to the Death Penalty
Prisoner Connections, LLC
Luke Newman, President, Florida Association of Criminal Defense Lawyers
James Cook, Esq.
Loren Rhoton, P.A.
James Slater, Slater Legal PLLC
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Weitzer & Jonas, P.A