

Supreme Court Clerk's Office - Locken, Sheree

From: Miller, Penny
Sent: Wednesday, April 17, 2013 2:36 PM
To: (SUP) Clerk of Court Office
Subject: FW: Comments on proposed amendments to Rule 3.5

Follow Up Flag: Follow up
Flag Status: Flagged

From: Dennis Johnson [mailto:Dennis@dakotalawdogs.com]
Sent: Wednesday, April 17, 2013 1:50 PM
To: Miller, Penny; Ari Johnson
Cc: wengget@pioneer.state.nd.us; MarlyceW@co.williams.nd.us; Larson, Rozanna C. (roza.larson@co.ward.nd.us); Fiesel, Amber J. (amfiesel@nd.gov); Elizabeth Pendlay (ependlay@steflaw.com); Probst, Carolyn
Subject: RE: Comments on proposed amendments to Rule 3.5

Penny,

This is an additional comment for the Rule.

The Rule does not take into consideration law offices with a small number of lawyers cannot afford to have a full time staff person deal with receipt and distribution of served document so attorneys who are handling the cases for the firm -- unlike the larger firms who can spread the cost of such an administrative assistant over several attorneys in a larger firm.

The concern is coming from the state's attorney's offices for three primary reasons:

1. It is not clear that service to be made upon the office of the state's attorney and not a state's attorney or assistant state's attorney – thus service upon an assistant upon his/her email address listed in the Supreme Court directory under the current rule could be thought of and interpreted as service upon the prosecuting attorney's office, when in fact assistant state's attorney may be a part time prosecutor or a special prosecutor who is not authorized by the acting state's attorney to be served.
2. A public official should be served at the office designated email address for service only. [Wayne Stenehjem does not want to be served at his email address – he wants service upon the office of the attorney general; attorneys serve the court and not the Justices at their email addresses – Justice Sandstrom is served at the address of the office of the Court and not at DSandstrom@ndcourts.gov because that is an appropriate place to serve the office of the court; attorneys serve the office of the secretary of state and not the secretary of state individually or a deputy secretary of state].
3. Part time state's attorneys who have private practice as well as being the public office as state's attorney should not be required to accept service as state's attorney at their private practice email address designated for his/her private practice.

The state's attorneys are raising this issue as the rule adversely impacts them, the deputy state's attorneys and their office administration. It is a unique problem. I don't think it impacts other law offices or practitioners the way that application of the rule in its current state will adversely impact

state's attorneys. The fix we are asking for not only prevents the adverse impact upon the state's attorney's offices – it makes it abundantly clear to all attorneys that if service is to be made upon a state's attorney's office – it must be done so at the email address for the office of the state's attorney.

We just experienced this issue today when a private attorney appealing a mental health commitment was very frustrated in that the deputy state's attorney who would have handled this case has his email set for "auto response" since he will be out of the office for 10 days and the appellant's attorney did not know who to serve. The deadline for perfecting an appeal is a short fuse as you know in mental health cases. Had the attorney been subject to the rule that service upon a state's attorney's office is upon the office and not the individual – his fear of not having perfected his appeal and making proper service would have been eliminated as he would have servd the office of the state's attorney and the matter would have been directed to the attorney handling the appeal in the absence of the attorney who had handled the commitment hearing.

Please don't take insult to this, but the rule does not take into account the *practicalities of practicing law*, especially in the office of a state's attorney.

Again, we ask for this simple modification of the Rule to fix the problem. Thank you.

Dennis Johnson

From: Miller, Penny [<mailto:PMiller@ndcourts.gov>]
Sent: Wednesday, April 17, 2013 1:21 PM
To: Ari Johnson; Dennis Johnson
Cc: wenget@pioneer.state.nd.us; MarlyceW@co.williams.nd.us; Larson, Rozanna C. (roza.larson@co.ward.nd.us); Fiesel, Amber J. (amfiesel@nd.gov); Elizabeth Pendlay (ependlay@steflaw.com); Probst, Carolyn
Subject: RE: Comments on proposed amendments to Rule 3.5

Nothing in the rule explicitly prohibits an office-wide e-mail. An attorney must provide an e-mail address for service. It doesn't say an e-mail address different from any other attorney. Allowing two e-mail addresses on the web, does not mean every attorney must have 2. The rules only require a current e-service email address.

The concern about a prohibition of an office-wide e-mail account is only coming from State's Attorneys, yet some law firms already use them.

From: Ari Johnson [<mailto:Ari@dakotalawdogs.com>]
Sent: Wednesday, April 17, 2013 12:51 PM
To: Dennis Johnson
Cc: Miller, Penny; wenget@pioneer.state.nd.us; MarlyceW@co.williams.nd.us; Larson, Rozanna C. (roza.larson@co.ward.nd.us); Fiesel, Amber J. (amfiesel@nd.gov); Elizabeth Pendlay (ependlay@steflaw.com); Probst, Carolyn
Subject: Re: Comments on proposed amendments to Rule 3.5

Penny:

Please take this e-mail as an addendum to my previously submitted comment. It more succinctly states the issue.

The amended rule explicitly prohibits an office-wide e-mail address. That is the core problem here. The secondary problem is that attorneys are not put on notice of the office-wide addresses and the amendment makes it even harder to assume that they will figure it out without us telling them.

Rules should say what they mean and mean what they say. The Court presumes that of the legislature and practitioners should presume it of the Court. And rules should put practitioners on notice how to follow them. Rule 3.5, as amended, falls short on both those points.

Ari

On Apr 17, 2013, at 12:15 PM, "Dennis Johnson" <Dennis@dakotalawdogs.com> wrote:

The State's Attorney hope that the rule will be changed to prevent claims later that service was made upon the state's attorney when it was not. Making serving and actually receiving it electronically are often two completely different events – on a regular basis one not happening (technical issues with computers, internet service providers, lawyer's gone on vacation, lawyers away from their office due to illness, no one checking or able to check their email while they are gone, etc.).

If there is ONE address for the state's attorney's office – that email address can easily be monitored by staff to assure that service when received is sent immediately to the attorney that is handling the file.

The dangers of cyber space in administering justice would be a great CLE topic!

Dennis

PS – Spelling was never my best subject and typing was learned AFTER I became a lawyer. Sometimes my fingers do not go where the mind wills them to go.

From: Miller, Penny [<mailto:PMiller@ndcourts.gov>]
Sent: Wednesday, April 17, 2013 12:02 PM
To: Dennis Johnson
Subject: RE: Comments on proposed amendments to Rule 3.5

Thank you. I do not in the strings below that in both instances the email address was misspelled. We are processing this as a comment and forwarding it to the Court. I don't know this will help your cause but, once the programming is complete, on each lawyer's page in the web directory if 2 addresses are posted, one will be identified as the e-service address, which will be information the attorney provides. Ward County has provided the same e-service address for all of the attorneys in their office, much like some of the firms do.

From: Dennis Johnson [<mailto:Dennis@dakotalawdogs.com>]
Sent: Wednesday, April 17, 2013 11:49 AM
To: Probst, Carolyn; Ari Johnson; 'roza.larson@wardnd.com'; 'wenget@pioneer.state.nd.us'; 'Amber Fiesel'; 'Elizabeth L. Pendlay'; 'Marlyce Wilder'
Cc: Miller, Penny
Subject: RE: Comments on proposed amendments to Rule 3.5

Penny,

This is my third try to attempt to include you on this dialogue and submit additional comment on Rule 3.5. This time I resorted to the address for you personally shown on your website.

The other email address I attempted was for the office of the Clerk of the Supreme Court as listed in the lawyer directory which is listed as: supclerkofcourt@ndcourts.gov

It bounced back to me twice trying to file this additional comment on Rule 3.5 I submit this as an additional comment on Rule 3.5.

Thank you.

Dennis Johnson

From: Dennis Johnson
Sent: Wednesday, April 17, 2013 11:44 AM
To: 'Probst, Carolyn'; Ari Johnson; roza.larson@wardnd.com; wenget@pioneer.state.nd.us; 'Amber Fiesel'; 'Elizabeth L. Pendlay'; 'Marlyce Wilder'
Cc: -
Subject: RE: Comments on proposed amendments to Rule 3.5

Penny Miller

You can see the problems with eservice. I apparently did not type the correct email address for YOUR OFFICE.

Please accept this as additional comment on Rule 3.5

Thank you

Dennis Johnson

From: Dennis Johnson
Sent: Wednesday, April 17, 2013 11:41 AM
To: 'Probst, Carolyn'; Ari Johnson; roza.larson@wardnd.com; wenget@pioneer.state.nd.us; 'Amber Fiesel'; 'Elizabeth L. Pendlay'; 'Marlyce Wilder'
Cc: 'supclerkof'
Subject: RE: Comments on proposed amendments to Rule 3.5

Carolyn,

Thank you for the news, but we still need the rule changed. Service on a state's attorney office should be at the email address they designate and NOT at their private practice email address. The rule as we contemplated before was that each state's attorney's office have ONE address designated for that office.

The service would be the same as someone that is e-serving the clerk. The Clerk has ONE address so that it does not get lost by going to a deputy clerk that might not be involve or have knowledge of the matter or have to waste time trying to figure out who is handling that file.

The secretary of state, the supreme court, the attorney general's office, DOT, etc -- all public offices have ONE email address that "service" or "notice" is sent to and that is all the state's attorney's offices are asking for – ONE email designated address per county prosecutor's office to avoid missing service by having it sent to a personal or private practice email address.

Most part time state's attorneys have a separate telephone number for their private practice and a separate mailing address for their private practice which are different than that used by the public office of state's attorney. A separate email address for service on a state's attorney office should really not be a controversial or onerous request from the state's attorneys that could not be accommodated.

Again, State's Attorneys are not filing clerks and it is grossly inconvenient, confusing and time wasting the have multiple email address used for service upon a state's attorney's office.

Trying to train defense counsel and their staff to follow a procedure where they chose which address of two to send to for service on a state's attorney's office will be like trying to herd cats. It is likely to be worse instead of better.

If the rule were as simple as "*service upon a prosecuting attorney office may only be made at an address designated by the state's attorney for the respective county*" would avoid the extreme confusing and potential of lost or inappropriate serve by counsel upon a state's attorney's office – especially where there are multiply prosecuting attorneys in that office.

Thank you.

Dennis

From: Probst, Carolyn [<mailto:CProbst@ndcourts.gov>]
Sent: Wednesday, April 17, 2013 11:15 AM
To: Ari Johnson; Dennis Johnson; 'roza.larson@wardnd.com'; wenget@pioneer.state.nd.us; 'Amber Fiesel'; 'Elizabeth L. Pendlay'; 'Marlyce Wilder'
Subject: FW: Comments on proposed amendments to Rule 3.5

Good Morning,

I think all of you have seen the comments submitted by Ari in reference to the amendments to Rule 3.5 and electronic e-file and serve.

I did find that the SA page on the Supreme Court Website will remain available which provides the service address preferred in each SA office statewide (if you've communicated that information to the state). I've been told they are going to try to make that page more user friendly as well..

I was also told the state is hoping to be able to enhance the full attorney list to reflect two e-mail addresses in the future opposed to the current personal e-mail reflected.

Therefore, the feedback I received was that the amendments will not affect what you are currently doing or change this process as it pertains to the service addresses you have posted.

I would also suggest that each document you send out have the service address you want others to respond to. It's my understanding a party can still serve you at the e-mail address they enter, but hopefully the more information out there and the more places they see it everyone will be willing to cooperate and respond to each of your offices at the address you prefer.

I hope this makes sense and helps. If not, feel free to hit delete and disregard.

Carolyn Probst
Trial Court Administrator - Unit 4
Minot Office: 701-857-6625
Williston Office: 701-774-4367

From: Ari Johnson [<mailto:Ari@dakotalawdogs.com>]
Sent: Thursday, April 11, 2013 4:27 PM
To: Miller, Penny
Cc: Dennis Johnson; Ross Sundeen
Subject: Comments on proposed amendments to Rule 3.5

Ms. Miller:

Please consider the following comments on behalf of the McKenzie County State's Attorney and the Dunn County State's Attorney regarding the proposed amendments to Rule 3.5:

On July 2, 2012, we contacted the Supreme Court regarding the problems that part-time and other state's attorneys would likely have with electronic service of documents. There is one concern that we still have. It is significantly exacerbated by the proposed amendment to Rule 3.5.

As part-time state's attorneys, we handle a large number of private practice litigation matters in addition to our representation of the State of North Dakota in criminal and other proceedings. You are certainly aware of the overwhelming criminal case load that the western counties are experiencing. In order to manage both our private and our public case loads, we employ different personnel to assist in the different sectors. It would be impossible for us to maintain both practices if all service on the State in criminal cases were directed to our individual attorney e-mail addresses. Similarly, it would be impossible for us to maintain those separate practices if all service on the individual attorneys were directed to the State's Attorney e-mail address. Due to ethical considerations, we are extremely careful not to intermingle our separate and distinct legal practices.

The concern we raised not only impacts part-time state's attorneys, though, as it also applies to full-time state's attorney offices. The proposed amendment makes the matter worse. As amended, Rule 3.5 allows a defendant to serve any arbitrary assistant state's attorney with papers in a criminal proceeding and service will be effective on the State of North Dakota. There is no consideration given to how the state's attorney office assigns work (perhaps one attorney should be served with motions regarding bond and another served with evidentiary motions; or perhaps one attorney handles the entire case—as proposed, the actual attorney to whom the papers are directed has no bearing on which attorney must be served). Nor is there consideration given to the fact that individual attorneys generally want to publish their individual e-mail addresses but are not the appropriate person to sort electronically served documents. We encourage you to speak with the Cass County State's Attorney as an example of a larger, full-time office whose desire is to have all service upon the State of North Dakota made, in that county, on an officewide e-mail address.

In short, paper documents received in the mail are sorted by office staff but, as amended, Rule 3.5 requires every individual attorney to sort documents, likely including documents in cases the attorney

has no involvement in. That is the central concern and it applies to all attorneys in the state, but especially to state's attorneys.

The solution that the court system and Odyssey helpdesk were able to provide us with was that, since Rule 3.5(e)(3) as adopted required each "party" to "designate" an e-mail address for electronic service, the State's Attorney of each county could designate an e-mail address separate from that designated by each individual attorney. For instance, please see the Supreme Court's website for the McKenzie County State's Attorney, located at http://www.ndcourts.gov/court/counties/St_Atty/McKenzie.htm and designating a different e-mail address than for the individual attorneys within the office. This solution has not been ideal but it has mostly worked for the past 11 days during which electronic service has been mandatory.

The proposed amendment undermines this solution by requiring each "attorney" to be served at the e-mail address he or she gives to the State Board of Law Examiners. We have expended great energy and sought help from many sources, including every other state's attorney in North Dakota, the Odyssey help desk, the court administrator's office, and, through our July 2, 2012 letter, the Supreme Court itself. A technical solution is not feasible. Assuming that we had the resources to develop software, there would still be no technical means for software reliably to sort incoming e-mail from Odyssey according to whether it is service upon the State of North Dakota or upon an individual party.

Service upon an individual attorney within a state's attorney's office is not appropriate even in full-time state's attorney offices, as any one of numerous assistant state's attorneys may be responsible for a given case at a given time and the proposed amendment to Rule 3.5 would allow parties to serve an arbitrary assistant state's attorney without regard to who is actually responsible for the case. It is only made more difficult for part-time state's attorney offices.

We believe that the only permanent, workable solution to the problem is an additional change to Rule 3.5 that would make it absolutely clear to all parties that a state's attorney must be served at an address designated by the state's attorney and separate from the e-mail address provided by the state's attorney or any of his or her assistant state's attorneys to the State Board of Law Examiners. For instance, the following language would accomplish this purpose (minor changes also made for reading clarity and to make it clear which portion of the website the addresses will be posted on):

(e) Electronic service.

...

(3) Each attorney must provide an e-mail address to the State Board of Law Examiners for accepting electronic service. This e-mail address will be posted on the attorney's entry in the Lawyers Directory of the North Dakota Supreme Court website. Each state's attorney must provide an e-mail address to the North Dakota Supreme Court for accepting electronic service upon the state's attorney. This e-mail address will be posted on the state's attorney's entry in the list of State's Attorneys on the North Dakota Supreme Court website. Service on a state's attorney or assistant state's attorney acting in that capacity must be made on the address designated by the state's attorney. Service on an attorney not acting in the capacity of a state's attorney or assistant state's attorney must be served on the address designated by the individual attorney.

While more verbose, this version of the rule would leave no ambiguity and would allow both full-time and part-time state's attorneys to operate more efficiently. It would also enable state's attorneys to keep any private practice separate and distinct from those attorneys acting in their capacity as public attorneys. It will leave no doubt about how to serve the state's attorney or which e-mail address to use

when serving other attorneys (who sometimes ask for service at addresses other than those listed in the Lawyers Directory). It will adequately address the concern that we raised in July of 2012.

In conclusion, service upon a public office should not be made upon individuals employed in that office. Service should be upon the office itself, or upon its department head acting in his or her official capacity. The Secretary of State is not properly served by mailing a letter to Mr. Jaeger's house, nor is the Sheriff properly served by handing a document to a deputy in his patrol vehicle. It should be the rule that the state's attorney is, in all cases, electronically served by delivery to a state's-attorney-specific e-mail address separate from the state's attorney's private practice e-mail address and separately from service upon arbitrary assistant state's attorneys.

Please do not hesitate to contact me or to have others contact me directly to discuss this matter further. We believe that, if the Supreme Court does listen to and address the concerns of practitioners such as ourselves, electronic filing and service will increase the efficiency of litigation throughout the state. However, we have grave, rational fears that, if practitioners' concerns are either ignored or left without true solutions, the efficiency of litigation will be decreased and many part-time state's attorneys, especially those in the most heavily impacted western counties, will be unable to maintain separate private and public practices and the legal needs of private clients, county government, or both will be unmet.

Thank you for your time. Please also pass along our thanks to the Supreme Court for what we anticipate will be a full solution to this concern prior to the proposed amendment's effective date on May 15, 2013.

Ariston E. Johnson
Deputy State's Attorney
McKenzie County, North Dakota