

Supreme Court Clerk's Office - Erck, Sarah

From: Miller, Penny
Sent: Monday, April 15, 2013 2:14 PM
To: (SUP) Clerk of Court Office
Subject: FW: Comments on proposed amendments to Rule 3.5

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From: John Gosbee [mailto:jgosbee@gosbeelaw.com]
Sent: Friday, April 12, 2013 5:16 PM
To: Miller, Penny
Cc: 'Ariston Johnson'
Subject: FW: Comments on proposed amendments to Rule 3.5

Hello Penny Miller --

Please add my name to the list of State's Attorneys who concur in the suggestion by Ari Johnson, repeated below.

Sincerely, John Gosbee
Sioux County State's Attorney

From: Ari Johnson
Sent: Thursday, April 11, 2013 4:27 PM
To: PMiller@ndcourts.gov
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