



May 17, 2022

Via Email

Office of the General Counsel
Attn. FDC Rule Correspondence
501 South Calhoun Street
Tallahassee, Florida 32399
FDCRuleCorrespondence@fdc.myflorida.com

Re: Objections to Form DC6-20001 Associated with Rule 33-602.205

To Whom It May Concern:

We are writing regarding Form DC6-20001 entitled “Attorney Request for Unmonitored Phone Call with Inmate,” which was apparently created to implement the provisions of the amendments to Rule 33-602.205 concerning unmonitored attorney calls. We are concerned that the form was released to the public well after the text of the rule was adopted, does not accurately reflect the requirements of the rule, requires attorneys and incarcerated people to unnecessarily disclose sensitive information, and does not permit nonprofit organizations to exercise their constitutional right to inform people about their legal rights. While we appreciate the revisions to the rule that were made following our initial comments, we believe the Form will still interfere with inmates’ ability to contact attorneys.

First, the Form was not available at the time of the public hearing, and was not released to the public until well after the final Rule language was announced, thereby preventing the public from commenting on it. The version of the proposed rule with the amendments to the attorney call provisions was published on December 10, 2021. On January 31, 2022, we submitted a letter outlining our objections to that version. A public hearing was held on February 18, 2022. On March 10, 2022, a new version of the rule was published. If the form existed at that point, it was not included in any of the public notices about the rule change. It was not until April 27, 2022, when the online Florida Rules system announced that the rule was finalized, that the proposed Form DC6-20001 was publicly announced. Because the Form was not available at the time our comments were submitted and the public hearing occurred, the public was not given the opportunity to voice any objections to it.

Second, the Form is not consistent with the Rule, as it imposes additional substantive requirements for attorney calls that do not appear in the Rule. The only requirement in the Rule for an attorney-initiated call is that it be “limited to those which are necessary and cannot reasonably be accomplished through other available means of communication.” F.A.C. 33-602.205(3)(a). However, the Form imposes additional substantive requirements—namely, an attorney can only initiate a call if the attorney 1) already represents the inmate, 2) is seeking the call upon request of a third party for potential representation, or 3) is seeking the call because the inmate is a potential

witness to a legal proceeding which must be identified. These requirements appear nowhere in the Rule. When we reviewed the proposed changes to the Rule, we understood that the only substantive limitations would be those that appeared in the text, and that the Form would be merely ministerial. But the Form goes well beyond that, imposing additional substantive requirements that we were not aware of.

Third, the requirement to disclose whether the attorney represents the inmate and the name of the legal proceeding to which the call pertains risks exposing sensitive, confidential, and potentially privileged information; and does not allow an attorney to conduct an adequate pre-filing investigation before agreeing to a representation. Many times, the relevant legal proceeding is one in which the Florida Department of Corrections—or an FDC staff member, officer, or medical provider—is a defendant. For inmates in confinement, one of those defendants may have to escort the inmate to and from the call. Requiring the inmate and attorney to disclose this information to the FDC—which then becomes part of the inmate’s public file—is unnecessary, intrusive, and puts the inmate at risk of retaliation, thus frustrating the truth-seeking process of the legal system. Moreover, because attorneys have to disclose the name of the pending legal proceeding, it would appear that attorneys can only speak to witnesses if a legal proceeding has already commenced. But in many instances an attorney must speak to potential witnesses *before* filing a case to ensure it has sufficient factual support—in fact, this pre-filing investigation may be required by ethical rules.

Finally, the Form does not appear to permit attorneys working for nonprofit organizations to speak to inmates to inform them of their legal rights unless the attorney has already been contacted or a legal proceeding is underway. But nonprofit attorneys are permitted to contact potential clients without a request. The relevant Florida Bar Rules prohibit solicitation only “when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.” Rule 4-7.18(a)(1), Rules Regulating the Florida Bar. Nonprofit attorneys seeking to inform people of their legal rights are generally not doing so for pecuniary gain. Moreover, even if the conduct were prohibited by Bar rules, nonprofit organizations have a constitutional right to solicit incarcerated clients to inform them of their legal rights. *See Nat’l Ass’n for Advancement of Colored People v. Button*, 371 U.S. 415 (1963); *In re Primus*, 436 U.S. 412 (1978); *Jean v. Nelson*, 711 F.2d 1455, 1508–09 (11th Cir. 1983), on reh’g, 727 F.2d 957 (11th Cir. 1984), *aff’d*, 472 U.S. 846 (1985).

We understand the FDC has significant leeway in how to administer its rules; therefore, we are not requesting that the form be rejected outright. Rather, we recommend the following limited revision of the third check box on the current form:

I seek to speak to the above-named inmate because the inmate is a potential party in, or witness who may be relevant to, a pending or potential legal proceeding. ~~(Please provide case name, docket number, and court.)~~

This revision will permit attorneys to initiate unmonitored calls to potential witnesses even if there is no currently pending case, and accordingly removes the requirement to provide the case name to avoid disclosure of that information. We believe this revision strikes an appropriate balance between FDC’s need to regulate its facilities and the constitutional rights of incarcerated people and nonprofit organizations seeking to assist them.

Please let us know promptly whether the FDC will be amending the Form. We are happy to discuss

any of the above at your convenience.

Best regards,

Florida Justice Institute

Florida Legal Services

Carlos J. Martinez, Public Defender, Eleventh Judicial Circuit of Florida

Human Rights Defense Center

Florida Cares Charity Corp.

Innocence Project of Florida

Southern Poverty Law Center

Cc:

Amy Matlock, Assistant General Counsel, Florida Department of Corrections

Sharon Jones, Chief Attorney, Joint Administrative Procedures Committee