

April 11, 2005

VIA E-MAIL and FEDERAL EXPRESS

The Honorable Thomas D. Hall
Clerk of the Court
Florida Supreme Court
500 South Duval Street
Tallahassee, Florida 32399-1927

Re: Comment to Proposed Changes to Florida Rule
of Judicial Administration 2.170 - Case No.
SC05-173

Dear Mr. Hall:

On behalf of the First Amendment Foundation (“FAF”), we submit this comment in opposition to the proposed changes in Fla. R. Jud. Admin. 2.170, governing cameras in the courtroom.

FAF is a public interest organization formed for the purpose of helping preserve and advance freedom of speech and of the press as provided in the U.S. Constitution and the Florida Constitution and acting as an advocate and defender of the public right of access to records and meetings of government. It represents more than 200 members, including most of Florida's daily newspapers, other media organizations, First Amendment and media law attorneys, students, private citizens, and public interest organizations.

Additional information about our organization and its officers and governing body can be obtained by visiting our website at <http://www.floridafaf.org/>.

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We apologize that this comment is out of time. However, Judge Isom has kindly agreed that I may represent to you that she has no objection to this late filing.

FAF previously submitted comments on an earlier version of this rule to Judge Webster. I understand that these comments were included in the committee's report to the Court and will not burden the file by repeating or copying these comments, which I believe are still pertinent and incorporate by reference.

We are interested in reiterating these concerns as well as bringing to the Court's attention two additional concerns.

First, the proposed rule would deny public access to video recordings made by security cameras in the courtroom. Since these recordings are made in the course of performing official business, we believe they are public records and that access to them may be denied only by a proper legislative exemption adopted in accordance with Art. I, § § 24(a)(c) of the Florida Constitution. At this stage in our inter-branch jurisprudence, it is not consistent with our understanding of the constitutional right of access that the Court could categorically exclude a set of public records from public view. In keeping with our view that camera access should be limited only on a case-by-case basis, I offer the gratuitous comment that Rule 2.051(c)(9) offers grounds for a case-specific order of sealer of such tapes when the elements of that rule are present. But we must urge the Court not to adopt a categorical "exemption" from the right of public access granted by Art. I, § 24(a), Fla. Const. See Art. I, § 24(c), Fla. Const.

Second, we are concerned that the proposed changes to the rule that would allow the trial court broad discretion to prohibit filming, photographing, or videographing of juror's faces is now expressly intended to overrule the case law of Florida as held in *WFTV, Inc. v. State*, 704 So. 2d 188 (Fla. 4th DCA 1997). Inasmuch as the majority opinion in this case is the highest law of the State of Florida and could be overruled only through the exercise of the Supreme Court's adjudicatory powers in a proper case or controversy laid before the Court in the course of determining the outcome

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of contested cases, we believe the Court lacks jurisdiction to adopt a rule overruling the holding in WFTV.¹

Accordingly, for the reasons set forth herein, those we urged upon Judge Webster in our previous comment, and for the additional reasons set forth in the Media comment filed by Carol Jean LoCicero of Holland & Knight, we urge the Court to decline to adopt the proposed changes.

Very truly yours,

Jonathan D. Kaney Jr.
General Counsel

cc: Honorable Claudia R. Isom
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¹ See Kogan and Waters, The Operation and Jurisdiction of the Florida Supreme Court, 18 Nova L. Rev. 1151 (1994) ("It is worth noting that by promulgating a rule, the Court does not vouch for its constitutionality. A court rule could thus be challenged in a future proceeding on any valid constitutional ground. This is because rules are issued as an administrative function of the Court, not as an adjudicatory function. For much the same reason, the act of promulgating a rule does not foreclose challenges that it contains "substantive" aspects and to that extent is invalid. Questions such as these can only be decided when affected parties bring an actual controversy for resolution").

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