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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 Proposed Rule 33-602.205

To Whom It May Concern:

The undersigned organizations and individuals write to urge the Florida Department of Corrections (FDC) to reject the proposed revisions to Proposed Rule 33-602.205 that were published on December 10, 2021. Specifically, we object to the changes to subsection (3)(a) regarding attorney calls. The changes appear to state that an attorney may only arrange a private, unmonitored telephone call with an incarcerated person "with whom the attorney has established an attorney-client relationship," and further state that "[a]ttorneys shall not be permitted to make prior arrangements for prospective inmate clients to receive a private telephone call from the attorney on an unmonitored telephone." This revision will make it more difficult for incarcerated people to learn about and vindicate their rights, will disrupt decades of settled practice during which attorneys have been permitted to arrange private calls with incarcerated people without having previously established an attorney-client relationship, and raises constitutional concerns.

We urge the Department to reject the proposed rule for several reasons. First, the proposed change will make it more difficult for incarcerated people to learn about their rights while incarcerated and ultimately vindicate those rights through legal representation. Obviously, to obtain that representation (and form the attorney-client relationship), a prospective client must consult with a lawyer first. By not permitting lawyers to arrange for this consulting phone call, this proposed revision erects unnecessary roadblocks that will make that consultation much more difficult, and in some cases impossible.

The proposed alternative appears to be for the attorney to write to the incarcerated person requesting a private call, who then must show that letter to prison staff and request that the call be arranged, who then must contact the attorney to arrange the call. But this is not an adequate substitute for an attorney-arranged call. Many people in prison may not be familiar with their legal rights and are not aware that they need a lawyer. It can be impossible to sufficiently communicate difficult legal concepts, discuss sensitive subjects, or even express the importance of having a phone call by letter. Requiring the incarcerated person to affirmatively request the phone call will ensure that many incarcerated people will not learn that their rights have been violated or about steps they can take to vindicate those rights. Moreover, many people in prison have cognitive

disabilities, mental illnesses, or insufficient reading abilities—i.e., those who may be most in need of representation—that increase the difficulty of communicating these concepts by letter.

The proposed rule also disrupts decades of settled practice. Most institutions are well-versed in the process of arranging attorney calls, but this revision will require a new layer of administrative work, as staff will have to process requests for phone calls, contact the attorney, possibly verify the attorney-client relationship, and schedule the call. This will be particularly difficult for those held in restrictive housing, who must submit written requests and rely on staff to process them in a timely manner. These additional steps, especially when the Department is faced with severe understaffing, will ensure that many of these calls will not occur.

The proposed revision also raises constitutional concerns. As the Supreme Court has explained, incarcerated people "must have a reasonable opportunity to seek and receive the assistance of attorneys." *Procunier v. Martinez*, 416 U.S. 396, 419 (1974), overruled on other grounds, 490 U.S. 401 (1989). Thus, "[r]egulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid." *Id.* at 419.

It also raises constitutional concerns for organizations, like many of the undersigned, who notify incarcerated people about their legal rights. The Supreme Court has recognized the constitutional implications of this work. *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). The Eleventh Circuit, relying on these cases, has held that such organizations have a constitutional right to solicit incarcerated clients to inform them of their legal rights. *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). The proposed revisions could interfere with that right.

This change may also dissuade private attorneys from representing incarcerated people. If such an attorney receives a letter requesting legal assistance, the most efficient way to have a consultation is through a phone call. For all the reasons explained above, requiring that the attorney write a letter to the prospective client, who then must navigate the process of requesting a call, will simply dissuade many attorneys from pursuing the representation at all. Similarly, before and during a representation, an attorney must investigate, which often times means speaking to incarcerated witnesses. Since these witnesses are not seeking legal representation from the attorney, it is unclear whether calls with these individuals would even be permitted under the proposed rule, even if requested by the witnesses. Moreover, some witnesses may be reluctant to come forward and may ignore letters requesting assistance, especially if a staff member is a defendant or witness in the case. This inability to conduct a proper investigation will dissuade attorneys from taking meritorious cases, impeding prisoners' access to courts and interfering with the truth-seeking process.

This can be especially problematic for lawyers representing clients in criminal and post-conviction proceedings. In both instances, the attorneys may need to interview incarcerated witnesses, some of whom may be providing mitigating evidence in capital cases. Barring these attorneys from having phone calls with such witnesses will prevent them from providing effective representation in very serious matters.

There are also problems with the logistics of the proposed revision. It is unclear what evidence, if

any, an attorney will be required to show to demonstrate "an established attorney-client relationship" with an incarcerated person. Such relationships can take many forms, some of which will be formed through a written retainer agreement, and some of which will simply be oral agreements to advocate for a client. Moreover, lawyers have relationships with prospective clients, to whom they owe duties of confidentiality. *See* R. Reg. Fla. Bar 4-1.18 ("Duties to Prospective Client"). Requiring classification officers to navigate these difficulties and determine the purpose of the call will complicate the process and likely strain the FDC's resources.

Finally, requiring incarcerated people to show staff a letter from an attorney to request a call risks disclosing confidential communications and possibly waiving important privileges, thereby putting all written communications between the lawyer and client at risk of disclosure. *See, e.g., Hamilton v. Hamilton Steel Corp.*, 409 So. 2d 1111, 1114 (Fla. 4th DCA 1982) ("[O]nce the privilege is waived, and the horse is out of the barn, it cannot be revoked."). Moreover, showing such a letter may require the disclosure of sensitive legal information, such as a person's status as a class member in a lawsuit or the nature of their underlying case, or protected health information that may potentially violate HIPAA.

In sum, the proposed revision raises a host of legal, constitutional, and logistical difficulties that will result in incarcerated people not being made aware of their rights and will impede their access to legal representation. We urge the FDC to reject these proposed revisions.

We are happy to discuss any of the above at your convenience.

Best regards,

Florida Justice Institute
Southern Poverty Law Center
Florida Legal Services
Human Rights Defense Center
American Civil Liberties Union of Florida
Disability Rights Florida
Florida Association of Criminal Defense Lawyers
Florida Cares Charity Corp.
Carlos J. Martinez, Public Defender, Eleventh Judicial Circuit of Florida
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