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March 31, 2008

VIA EMAIL & U.S. MAIL

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

Re: Rule of Judicial Administration 2.420
Case No. SC07-2050
Comment on Behalf of the Florida Media Organizations

Dear Mr. Hall,

In response to this Court's invitation to comment upon proposed revisions to Rule 2.420 of the Florida Rules of Judicial Administration, we offer this comment on behalf of Media General Operations, Inc., d/b/a *The Tampa Tribune*, WFLA-TV/News Channel 8 and WMBB-TV/News Channel 13; NYT Management Services, Inc., publisher of the (Sarasota) *Herald-Tribune*, (Lakeland) *Ledger*, *Gainesville Sun* and (Ocala) *Star-Banner*; Sentinel Communications Company, d/b/a the *Orlando Sentinel*; and Sun-Sentinel Company, d/b/a the *South Florida Sun-Sentinel* (collectively the "Florida Media Organizations").

We appreciate the Court's willingness to consider our comments concerning the recommendations of the Rules of Judicial Administration Committee and the Court's *sua sponte* proposed revisions to Rule 2.420. Since the super sealer

problems came to light in 2006, we know that the Court and the Committee have invested much effort in restoring public confidence in the judicial system. The proposed rules, however, threaten those efforts to maintain transparency and rebuild confidence in the system. We submit this comment to address two major areas of concern: the closure of all motions to make court records confidential in all cases and the closure of the entire sealing process in certain criminal cases.[1]

I. Automatic Closure of Motions to Make Court Records Confidential in All Cases

The Court's *sua sponte* proposed amendments to Rule 2.420 require that motions to make court records confidential in civil (subsection (d)(1)) and criminal (subsection (e)(2)(A)) cases be withheld from the public pending the Court's ruling on the motion. In other words, motions seeking closure are themselves automatically and categorically exempt under the proposed amendments.

How the Closure Process Generally Works Today

Under the existing rule, motions seeking closure are open – as they had been for decades prior to the rule's 1992 adoption. In our experience representing the print and broadcast media, the system has historically worked as follows. For example, assume the current rule applies where the defendant wants to file a transcript of a purported confession under seal in support of a motion to suppress the confession. The defendant files a motion with the Court seeking to seal the record containing the confession. The motion generally specifies the basis for the requested closure (typically, fair trial rights) without revealing the specific information sought to be protected from disclosure (the details of the confession).

[1] The Court's amendments propose additional provisions to address the topic of appellate court records. The problems inherent in the application of the proposed rule to trial court records are the same when applied to appellate court records. Therefore, we will not separately comment on the appellate court records provisions, except to state that the problems raised with respect to the Rule's application to trial court records apply with equal force in the appellate context.

This vagueness is permitted by Rule 2.420(d)(1)(A) and was acknowledged in *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988).[2]

Upon review of the motion, the public or the press may intervene for the limited purpose of opposing closure. (At other times, the motion is not opposed after review of the basis for the motion.) The opportunity to review the motion is particularly crucial because if the *parties* agree to closure, no hearing on the issue is held.[3] It is only after this review that the public can legitimately determine whether closure is properly being sought or interject, when appropriate, to prevent closure. If the parties do not agree to closure or if a non-party intervenes and opposes closure, an open hearing is held. The open motion to seal gives intervenors at least some due process notice of the basis for the motion. During the hearing, the parties to the underlying proceeding speak generally of the confession without revealing its substance. They will have the ability to make submissions to the Court *in camera*, if appropriate. Often the confession itself is submitted *in camera*. The public or the press present arguments to the Court that flesh out the public interest in access – sometimes, the substance of the confession is already public or the defendant has made statements to the media that reiterate the substance of the confession. More fully apprised of the relevant facts and legal issues, the Court is then able to decide the motion to seal.

Thereafter, any closure order will be entered and published publicly. If closure is ordered, the public still will not know the substance of the confession. If warranted, the non-party intervenor can appeal the closure of the record on an

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[2] As recognized in *Barron*, the vagueness of motions seeking closure is a problem for intervenors who generally do not have full access to the basis for closure. *Barron*, 531 So. 2d at 118-119 (holding that the burden of proof on the issue of access is "heavy" and rests on the party seeking closure because those challenging closure "will generally have little or no knowledge of the specific grounds requiring closure"). These problems are magnified when the motion seeking closure is itself closed.

[3] As advocated in our January 2007 comment on the initial adoption of Rule 2.420(d), a hearing should be held in all cases requesting closure so that the public has an opportunity -- *before* closure occurs – to argue whether closure is appropriate. *See, e.g., Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988)(affirming public's standing to oppose closure).

expedited basis. Fla. R. Jud. Admin. 2.420(e) & Fla. R. App. P. 9.100(d). If a non-party first learns of closure after the order is entered, the non-party can review the motion, the hearing transcript, and the order and, if appropriate, seek to have the closure order vacated under Rule 2.420(d)(5).

The Proposed Amendments Drastically Alter this System

The proposed amendments wholly alter this system which has operated effectively for decades. The amendments also create an entire category of automatically closed records: motions to seal. In some criminal cases, the entire process for challenging access -- including the motion, related proceedings and the closure order -- will be secret.[4] This closed system for adjudicating access rights creates grave federal and state constitutional issues, as well as fundamental systemic problems.

More than two decades ago, in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the United States Supreme Court recognized the public's First Amendment right to open courtrooms. In *Press-Enterprise Company v. Superior Court*, 464 U.S. 501 (1984), that Court extended the constitutional right of access to encompass the transcript of closed voir dire proceedings. Two years later, in *Press-Enterprise Company v. Superior Court*, 478 U.S. 1 (1986), the Court found the right of access included the transcript of a closed preliminary hearing in California. *See also Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989)(First Amendment violated by law that mandates the automatic sealing of court files in cases ending in acquittals, dismissals, nolle prosequi or no probable cause findings). The United States Supreme Court has clearly articulated a presumptive right of access to court records. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). This Court has also recognized the historically open nature of court records and the public benefits of transparency. *Barron,* 531 So. 2d at 118 ("A trial is a public event, and the filed records of court proceedings are public records available for public examination"); and *Miami Herald Publishing Co. v. Lewis*, 426 So. 2d 1 (Fla. 1982) (public access to the criminal justice system promotes confidence in the system, assures the fairness of the proceedings, encourages participants to be conscientious in the performance of their roles and serves as a check on corrupt practices by exposing the process to

[4] We address the proposed amendments that relate to certain Rule 2.420(e)(2) criminal records more thoroughly in Part II below.

public scrutiny). Categorically sealing all closure motions opens Rule 2.420 to a Section 1983 federal challenge. The automatic exemption of a category of court records also places Rule 2.420 in conflict with Article I, Section 24 of the Florida Constitution, which mandates that only the Legislature can create records exemptions for the three branches of government and details the strict requirements that must be satisfied prior to enacting any exemption.

Equally important, the proposed exemption runs afoul of this Court's own pronouncements in *Barron* and *Lewis*. Closure motions not only impact the right of access, but are also court records themselves. The categorical closure of sealer motions, thus, has a double impact. Because of the presumption of openness, the party seeking closure has a "heavy" burden to justify closure. *Barron*, 531 So. 2d at 118. Before any closure of court records can occur, closure must be supported by a demonstrated compelling state interest, and the Court must find that no reasonable alternatives to closure exist. *Id.* Any closure order must be narrowly tailored to protect that compelling interest. *Id.* Instead, under the proposed amendments, motions seeking closure are automatically closed without satisfying any of these standards. And that closure then impacts the application of those same standards to the documents that are the subject of the motion to seal.

Many of the legal implications also carry with them practical problems. Without the ability to review the motion seeking closure, the public is denied any meaningful opportunity to ascertain for itself whether the closure is warranted and is provided no real opportunity to contest closure before it occurs.[5] Practically, the public would not even be aware of the nature of the records sought to be closed under a system that seals the motion seeking closure. The problem of a lack of access to the motion itself is amplified in "agreed" cases in which the litigants all stipulate to closure. In such cases, a closure order may be entered without any hearing, and with no opportunity for the public to review the request for closure.[6]

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[5] The proposed amendments do not make clear whether there would be a docket entry (in civil or criminal cases) indicating that a motion for closure was filed. Surely, the public would have no opportunity at all to assess the propriety of closure and object if there is no public indication that a closure motion has been filed. Such a system would mimic the super sealer system in Broward that the Court has so diligently worked to eradicate.

[6] The Florida Media Organizations support the proposed amendments that require movants to set forth the specific legal authority and legal standards upon

Likewise, in certain criminal cases, the order itself would also be sealed – leaving nothing open in the entire process of sealing court records, which are supposed to be presumptively open. Under that process, the favored policy is secrecy, and the presumption is closure.

If there is going to be a hearing on closure (none is even required if the parties agree) and if the public is fortunate enough to learn about any hearing on the motion (the rule does not provide for prior notice of hearings), then the public first gains some insight into the type of closure sought at the closure hearing itself. This lack of notice of the closure grounds provided impedes the public (and press) in offering written papers to the Court, informed argument and citations of authority relevant to the Court's decision on the motion. Under such a system, any attempt to intervene by a non-party (as *Barron* and *Lewis* clearly provide standing to do) is likely to result in a significant disruption of the proceedings, even a rescheduling of the motion for closure until such time as the person seeking to intervene can obtain counsel, prepare for argument and file any helpful papers. In short, sealing the motions for closure effectively shuts the public out of the access process and deprives trial courts of healthy adversarial proceedings. Opposing closure under these circumstances is equivalent to defending a lawsuit without access to the complaint.

The automatic sealing of motions is wholly unnecessary, undermines the transparency policies this Court has so zealously protected and jeopardizes the very validity of Rule 2.420.

II. Special Procedures for Court Records in Certain Criminal Cases

Both versions of the proposed rule establish that the procedure applicable to seeking closure of court records in civil cases generally applies to criminal cases, except in two circumstances: where the release of records may "jeopardize" (1) the "safety of a person" or (2) an "active criminal investigation." In these circumstances, the proposed rule sets forth a separate, even more secret procedure for seeking closure.

(cont'd) which a request for closure is premised. *See* Proposed Amendments § 2.420(d)(1), (5). However, without access to the motion, the public has no opportunity to determine for itself whether the cited law truly justifies the closure sought.

Under the applicable procedure, the motion for closure is closed (subdivision (e)(2)(A)), any hearing on such a motion is closed (subdivision (e)(2)(B)), and all orders on these motions are closed (subdivision (e)(2)(E)). Moreover, because subdivision (d)(1) is expressly made inapplicable to these motions, there is no requirement of good faith in seeking closure nor is there a requirement that the motion set forth the legal basis for the requested secrecy.[7] Notification of the order is also generally not required. *See* Proposed Rule 2.420 (e)(2)(E). Additionally, nonparties are not granted standing to challenge orders entered in these contexts because subdivision subsection (d)(5), which addresses non-party challenges to closure orders, is expressly inapplicable. *See* Proposed Rule 2.420(e)(2)(D). In short, the entire process of closing a presumptively open court record is shielded from public view in situations where the proponent of closure vaguely alleges either "the safety of a person" or "an active criminal investigation" is jeopardized. The public may never know closure was sought or obtained, and throughout the process, the public is afforded no opportunity to challenge the motion or provide the Court with argument.

Safety Concerns

The Florida Media Organizations certainly do not wish to jeopardize the safety of persons in the name of open access. Without workable parameters on what this concept means, however, it is easy to imagine a system in which court records in criminal cases are often closed. For example, any witness who testifies against a criminal defendant fears at least some risk of potential retaliation by the defendant or another person hoping to prevent a conviction. Would the rule protect records identifying all adverse witnesses in a criminal prosecution because of generalized safety fears?

There may be some contexts in which safety issues warrant a limited, brief closure. Records revealing the identity of a confidential informant or cooperating co-conspirator are two such instances in which closure *may* be appropriate for a limited amount of time. *But only when an actual and imminent threat to human*

[7] This creates a drafting ambiguity. Orders granting closure in response to a restricted motion must comply with subdivisions (d)(3)(A)-(G), which contain the requirements for orders granting closure. Judges are required to provide the legal basis for granting closure, but the proponent of closure is not required to provide the Court with that legal basis in its motion.

life exists.[8] Generalized, unsupported fears should not be sufficient to warrant the automatic closure of all proceedings related to safety issues. Even here, an open process should control. *E.g., In re Petition Post-Newsweek Florida, Inc.*, 370 So. 2d 764, 775-76 (Fla. 1979) (unsubstantiated concern that jurors and witnesses would fear for their safety if cameras were allowed in courtrooms not sufficient to prevent camera access).

The closure process already is designed to protect sensitive information by permitting movants to provide only the level of specificity necessary to support the motion without revealing the contents of the subject records and by allowing for *in camera* records submissions. The automatic closure of motions and hearings on these matters unconstitutionally presupposes that the requirements of *Lewis* have been met in all cases. Presumptive openness is the way requests for closure have been handled post-*Lewis*, presumptive openness is required by the federal and state constitutions, and there is no evidence that actual harm has occurred as a result of this existing open process. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982)(deeming unconstitutional statute that provided for mandatory closure of courtrooms during the testimony of minor victims of sexual violence and finding that First Amendment required a case-by-case closure analysis). By contrast, a secret closure process threatens the establishment of secrecy as the norm in many criminal cases and does not honor Florida's commitment to and presumption in favor of open court records and proceedings. In exceptional circumstances, trial courts always retain the power to fashion appropriate measures to guard against imminent violence.

Active Criminal Investigations

Nor should there be a special, secret process for situations involving active criminal investigations. Litigating closure of these materials should occur in the open, again with the understanding that the current Rule 2.420 already provides protection for sensitive information by allowing for less specificity in motions to

[8] Moreover, closure orders entered for safety reasons ought to be lifted automatically once the danger no longer exists or the information that is the subject of the closure is provided to the defendant in the discovery process or the subject of testimony in open court. For example, once the identity of a confidential informant has been disclosed to the defendant, safety concerns cannot justify continued denial of public access to that information.

avoid disclosure of the matters sought to be closed and for *in camera* submissions when appropriate. To allow an active criminal investigation exception to the usual open process threatens to shield judicial activity in many, if not all, criminal cases, because an active criminal investigation is usually at the heart of any pending criminal case. Such issues are often litigated in open court without revealing the details of law enforcement's avenues of investigation.

Such an approach would create a major disparity between how litigation over access to records in the hands of police or other law enforcement agencies is conducted versus access to the very same records when they are in court files. For example, if a police department refuses to turn over requested records on the basis of the active criminal investigation exemption contained in Chapter 119, then any ensuing lawsuit seeking access to the records is open. *See, e.g., Downs v. Austin*, 522 So. 2d 931 (Fla. 1st DCA 1988) (state attorney required to release polygraph test results from an investigation to person who took tests and requested the results pursuant to Chapter 119); *Tribune Co. v. Public Records*, 493 So. 2d 480 (Fla. 2d DCA 1986), *rev. denied,* 503 So. 2d 327 (Fla. 1987) (investigation only deemed "active" through direct appeal and exemption not applicable during post-conviction proceedings); *Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775 (Fla. 4th DCA 1985), *rev. denied*, 488 So. 2d 67 (Fla. 1986) (state attorney required to turn over information furnished to defense counsel in a criminal investigation); *State v. Blankenship*, 407 So. 2d 396 (Fla. 4th DCA 1981), *rev. denied*, 413 So. 2d 877 (Fla. 1982) (newspaper reporter entitled to access tape recordings concerning a defendant in criminal prosecution where recordings had been disclosed to defendant). In contrast to the open Chapter 119 proceedings above, under the proposed amendments, litigation over public access to the same records – once in the hands of the Court – would be shrouded in complete secrecy. The motion seeking closure would be closed, any hearing on the motion would be closed, and the order would be closed. The Chapter 119 process demonstrates that such issues can safely be decided in open proceedings. The proposed closed process cannot be constitutionally justified.

Moreover, this approach is unnecessary. As explained more fully above, the present Rule 2.420 framework allows for lack of specificity in the motion seeking closure (see subdivision (d)(1)(A)) and for *in camera* review of certain materials (see subdivision (d)(2)). At present, the proponent of closure (typically the prosecutor's office) generally explains in the closure motion that an investigation is ongoing and that the State is following additional leads in the matter. At any

hearing, the proponent of closure will generally provide the same broad explanation of what is sought to be closed and may even provide the subject records to the Court for *in camera* review. The process does not reveal specifics. For example, no suspects or details of the crime scene are disclosed and, as a result, there is no need for total secrecy. The present system adequately addresses any concerns about the integrity of criminal investigations without entirely shutting the public out from the process of closure of court records. Additional secrecy measures simply are not necessary.

III. Conclusion

The Florida Media Organizations again thank this Court for providing them the opportunity to comment on the proposed amendments to Florida Rule of Judicial Administration 2.420. This Comment is presented in the spirit of cooperation to assist this Court in addressing the undoubtedly tricky task of striking the proper balance between the public's right of access with any legitimate interests supporting closure. The Florida Media Organizations urge the Court to reconsider the proposed revisions in light of the issues raised in this comment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Comment has been delivered via U.S. Mail on this 31st day of March, 2008, to:

Rules of Judicial Administration Committee
c/o Honorable Robert T. Benton, II
First District Court of Appeal
301 S. Martin Luther King, Jr., Blvd.
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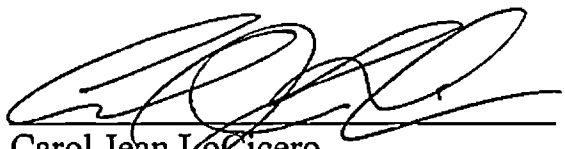

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