

ORIGINAL

IN THE SUPREME COURT OF FLORIDA

FILED
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CLERK, SUPREME COURT
CASE NO. SC07-2050

**IN RE: AMENDMENTS TO RULE
OF JUDICIAL ADMINISTRATION 2.420**

REPLY OF THE SUBCOMMITTEE ON ACCESS TO COURT RECORDS

AND REQUEST FOR ORAL ARGUMENT

The Subcommittee on Access to Court Records (the Subcommittee), by and through its undersigned Chair, the Honorable Judith L. Kreeger, Circuit Judge, Eleventh Judicial Circuit, submits this reply to various comments filed in this matter. The Subcommittee is authorized by Administrative Order AOSC09-3, In Re: Florida Courts Technology Commission, Subcommittee on Access to Court Records, to act as successor to the Petitioner Committee on Access to Court Records (the Access Committee) for purposes of this and related rule amendment matters. The Chair and all members of the Subcommittee were members of the predecessor Access Committee.

The Subcommittee also respectfully requests the Court to permit its Chair, Judge Judith L. Kreeger, and Jon Kaney, Esquire, a member of the Subcommittee and former Chair of the Rule 2.420 Workgroup of the Committee on Access to Court Records, to participate in oral argument scheduled at 9:00 a.m. Tuesday, June 2, 2009.

In the view of the Subcommittee, the numerous issues related to these rules proposals are well presented in the comments that have been submitted. The various committees and other commentators are to be commended for their contributions, as well as the constructive attitude and good faith they have displayed throughout this long and challenging process.

The Subcommittee offers the preliminary observation that the most difficult issue that appears to have arisen is actually only marginally germane to the overall purpose of amending Rule of Judicial Administration 2.420. It is worth reminding all involved that the purpose of the proposed amendments is to develop a workable process to segregate confidential information from non-confidential information in

court records so that non-confidential information can eventually be made available online. Resolution of the problems of privacy and confidentiality is necessary to create conditions for a transition to electronic filing in the courts. The most difficult issue that has arisen concerns the treatment of documents in cases where a defendant has agreed to cooperate in an ongoing investigation. As critical as this matter is, the fact is that these problematic documents are relatively rare among the millions of documents that are annually received or created by Florida's courts. The issue of confidential informants notwithstanding, the larger task facing the Florida court system is to implement a viable system to identify and protect confidential information within the millions of documents annually received by Florida's courts, a necessary condition to allowing online access to them.

The issue of access to documents that could reveal that a criminal defendant has entered into a substantial assistance agreement is well argued in the comments that were filed with the Court, and the Subcommittee replies here only to clarify the rationale of the Access Committee in proposing the particular language that it did. The language in question was originally proposed by the Rules of Judicial Administration Committee in its report filed in this case on October 31, 2007, Report of the Florida Rules of Judicial Administration Committee, following consultation with the Criminal Procedure Rules Committee. That proposal provides "[a]ny request to make court records confidential that may jeopardize either the safety of a person or an active criminal investigation may be made in the form of a written motion captioned 'Restricted Motion to Make Court Records Confidential.'" Such a motion and the underlying documents would be kept confidential pending a ruling on the motion.

The Access Committee was mindful of the serious concerns motivating this proposal, but after study it adopted the view that the suggested language is overly broad and would allow presumptively open records to be kept from public access without a lawful basis. This conclusion flowed from recognition of the limitations imposed by section 24, article 1 of the Florida Constitution, which disallow the creation of new rules of court limiting access to public records. In the view of the Access Committee, the confidential status of such a record must be based on a rule that existed prior to adoption of the-Sunshine Amendment in 1992, or on a statutory exemption. From this perspective the revised rule must be bounded by existing limitations on access. The language that allows "any request . . . that may jeopardize" a person or investigation to be kept confidential does not have such rule or statutory support.

The alternative language offered by the Access Committee (9/2/08) is more narrowly drawn and relies on existing language in subdivisions (c)(9)(A)(i) and (c)(9)(A)(v) of rule 2.420, which provide that a record can be determined to be confidential if it is required to "prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice" or to "avoid substantial injury to innocent third parties."

With respect to some of the other issues raised in the comments, the Subcommittee offers the following responses:

Regarding the comment of the Clerk of Court for Miami-Dade County to the effect that the clerk should not be responsible for a determination that a filing is facially confidential, the Subcommittee observes, first, that this does not appear to be a view shared by other clerks, second, that clerks of court have been making precisely such ministerial determinations as a matter of longstanding common practice, and third, that if the clerks of court are unwilling to perform such a function it is difficult to conceive of a viable system to identify and segregate confidential information on a wholesale basis.

Regarding the comment of the Clerk of Court for Volusia County that the rule needs clarification about whether the motion itself should be maintained confidential, the proposed amendment is clear. However the Subcommittee would have no objection to adding language requiring that the party provide the caption and filing date of the document that is the subject of the motion. The Clerk further comments that there is ambiguity about the clerk's responsibility when notifying a filer that a submitted document is not facially subject to confidential treatment. The Access Committee intended that such notice would allow the filer seven days to file a motion under subdivision 2.420(d)(2), and if the filer does not file a motion, the document loses its temporary protected status and becomes accessible.

Regarding the comments submitted on behalf of Media General Operations, *et al*, concerning several statutory exemptions that would be categorically applied under the proposed rule, the Access Committee ultimately concluded that these exemptions pertain to particularly sensitive records and have been as a matter of common practice applied by the clerks. The Subcommittee recommends that these exemptions be included in the enumerated list of subdivision 2.420(d)(1), and that the Court may wish to invite the Florida Legislature to revisit these particular exemptions to clarify its intent with respect to their application to court records.

Regarding comments of the Special Joint Committee regarding the term "county and circuit court records" and the applicable part of the rule when a circuit court is acting as an appellate court, the Subcommittee concurs and would support changes in terms and headings as necessary to clarify that the meaningful distinction is between trial courts and appellate courts, and that when a circuit court is sitting in an appellate capacity the appellate subdivisions of the rule should apply.

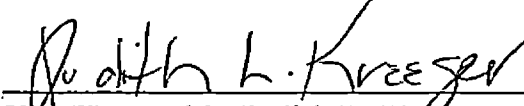
Regarding comments submitted on behalf of Media General Operations, *et al*, objecting to that portion of proposed subdivision 2.420(e)(c)(2) which allows for an in camera hearing, the Subcommittee would not object to additional language or commentary that instructs the presiding judge that the presumption is for openness and that the hearing should be conducted in a manner that is the least restrictive to access, consistent with the presumption of openness.

Regarding comments of the Special Joint Committee regarding the status of records determined to be confidential by an appellate court under subdivision 2.420(g), the Subcommittee concurs with the analysis of the Special Joint Committee and has no objection to incorporating the proposed solution into the rule.

Regarding comments of the Special Joint Committee regarding whether subdivisions 2.420(g) and 2.420(f) should be generally cross-referenced with the Florida Rules of Appellate Procedure, the Subcommittee concurs.

Regarding comments of the Special Joint Committee and the Clerk of Court for Volusia County concerning a requirement that an appellate court give notice to a lower tribunal that a record has been determined to be confidential by the appellate court, the Subcommittee concurs and would not object to such a requirement being included in proposed subdivision 2.420(g)(4).

Respectfully submitted this 15th day of April, 2009.



The Honorable Judith L. Kreeger
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I HEREBY CERTIFY that a copy of the foregoing has been furnished to the following persons by United States mail this 15th day of April, 2009:

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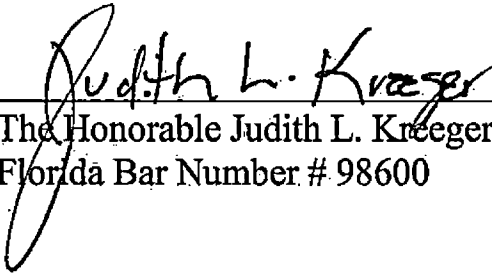
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The Honorable Judith L. Kreeger, Chair
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