IN THE SUPREME COURT OF FLORIDA

IN RE:
AMENDMENTS TO FLORIDA RULE OF JUDICIAL ADMINISTRATION AND THE FLORIDA RULES OF APPELLATE PROCEDURE— IMPLEMENTATION OF COMMISSION ON TRIAL COURT PERFORMANCE AND ACCOUNTABILITY RECOMMENDATIONS
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SC08-1658

COMMENTS OF FLORIDA PUBLIC DEFENDER ASSOCIATION

The Florida Public Defender Association, Inc. ("FPDA") respectfully offers the following comments on the proposed amendments to Florida Rules of Administrative Procedure 2.535. The FPDA consists of the twenty elected public defenders, hundreds of assistant public defenders and support staff. As appointed counsel for indigent criminal defendants, FPDA members are deeply interested in the rules of procedure designed to ensure the integrity, accessibility and accuracy of court records. Additionally, FPDA members have an interest in the efficient use of resources, especially in the current fiscal environment.

The FPDA is primarily concerned with the newly proposed subsection (h)(5), involving electronic records. This subsection enacts an unecessarily broad restriction on access to electronic recordings of events occurring in a public

courtroom. Such a restriction is not needed to prevent the rare occasion of inadvertent disclosure of confidential matters. Rules, guidelines, technology and training are more effective and far less restrictive means to address these concerns without the adverse consequences of restricting disclosure of events in a public courtroom.

Electronic recordings are now in widespread use throughout the courtrooms in this state. These recordings have proven useful, reliable, efficient and cost effective in many situations, and access to these recordings should not be curtailed or left to the unfettered discretion of the trial judge or chief judge. The FPDA is also concerned that the rule creates an ambiguity that might result in it being applied to discovery depositions taken pursuant to Florida Rule of Criminal Procedure 3.220(h).

I.
ELECTRONIC RECORDS OF COURT PROCEEDINGS ARE PUBLIC RECORDS AND SHOULD NOT BE PRESUMED TO BE CONFIDENTIAL.

The FPDA appreciates that the bar committee's proposals were motivated by a sincere desire to avoid accidental capture and disclosure of confidential matters on electronic recordings. *See Holt v. Chief Judge*, 920 So. 2d 814 (Fla. 2d DCA

2006). The proposed rule does not solve the capture of confidential communications, only the access to those communications through the electronic record. A transcriptionist cannot lawfully delete anything captured on the electronic recording. Therefore, the proposed restrictions on access to the electronic record may not protect against the disclosure of possible confidential communications. Further, since electronic recording systems have come into widespread use FPDA members' experiences suggest that in the very rare instance such occurs, it can be addressed in a far less restrictive manner than a broad prohibition on access. In fact, FPDA members' experiences suggest that rather than capturing confidential information, the real problem with many electronic recording systems is that they do not capture all the information that they should, notably bench conferences whispered too low for the jury to hear, or the microphones to pick up.

More importantly, since electronic recording has become the accepted mode of recording court proceedings, concerns have arisen that the quality of the transcripts created from electronic recording is substantially worse than from court reporters taking contemporaneous stenographic notes. *See Moorman v. Hatfield*, 958 So. 2d 396, 398 (Fla. 2d DCA 2007) ("The Office of the Attorney General agrees that digital recording has resulted in a substantial decline in the quality of

transcription."); *R. P. v. Department of Children and Family Services*, 975 So. 2d 435, 437 (Fla. 2d DCA 2007) ("[W]e must observe that the trial proceedings were tape-recorded and transcribed by a court reporter with results that can only be described as dismal."). The proposed rule places total reliance on these questionable transcripts and would impair a litigant's ability to access the electronic recording and insure accurate transcription.

The proposed rule would make it improper to use electronic recordings "in subsequent court proceedings," even if the chief judge at his or her discretion makes such recordings available to counsel. *See* Fla. R. Judicial Admin. 2.535(h)(5)(A)(i) (proposed rule). This rule has several unpalatable consequences.

Under this rule, counsel could have access to recordings of court proceedings that would justify a petition for writ of habeas corpus (if the chief judge allowed such access), but the petition could not be filed until transcripts are received because a habeas proceeding would be a "subsequent court proceeding." An attorney could not even copy down what was said in the recording and submit it as part of a pleading because "[t]he electronic record may be transcribed only by an approved transcriptionist." Fla. R. Judicial Admin. 2.535(h)(5)(B) (proposed rule).

Expedited transcripts are neither always available nor instantaneous. Waiting for a transcript to be produced can cost clients several days of liberty. Additionally,

even if available, expedited transcripts are very expensive. The state's current economic crisis and the resulting reductions in budgets militate against ordering expensive expedited transcripts when a relatively inexpensive electronic recording would suffice.

Similarly, if there is a dispute about what occurred or was stated in a previous hearing (unfortunately, not a rare event), this rule would require the expense and delay of ordering a transcript rather than the quick and virtually costless alternative of simply listening to an electronic recording.

Electronic recordings of testimony are also frequently used in subsequent litigation for preparation, as evidence (e.g., statements of a party), or impeachment. The electronic recording is a more accurate, far less expensive means of reviewing and presenting prior statements under oath than the (possibly inaccurate) words in a transcript. The impact of cost cannot be understated: the electronic recordings are a fraction of the cost of transcripts.

Finally, as the appellate bench and bar know all too well, transcripts often contain inaccuracies and errors. The electronic recordings format produces a truer public record than transcripts, which do not capture tone of voice, pauses, rapidity of speech, the interchange when people are talking over one another, and difficulties with language, or a myriad of other parts of human communication

beyond the words themselves. The proposed rule, however, denigrates these electronic recordings in favor of possibly less accurate transcripts that are simply not capable of capturing these aspects of communication. For ease of use, written transcripts should continue to be used in official records of court proceedings, but where an electronic recording can breathe life into (or correct) the cold words on the transcript, attorneys should be able to include electronic recordings into the official record. Restricting access to electronic recordings is especially problematic given that the transcripts produced from those recordings have been accurately described as "dismal." *R.P.*, 975 So. 2d at 437.

These pragmatic problems with the proposed rule result from the proposed rule's fundamental presumption that electronic recordings of proceedings in open court are somehow not public records. The proposed rule begins by stating that the "electronic record is not the official record of a proceeding and is not subject to disclosure except as follows" and then lists exceptions. Fla. R. Judicial Admin. 2.535(h)(5)(A) (proposed rule). Under the proposed rule, the trial court may exercise discretion to make the electronic recordings available to the public and to *pro se* litigants, provided no confidential information is disclosed. *See* Fla. R. Judicial Admin. 2.535(h)(5)(A)(ii) (proposed rule). Inexplicably, access by counsel is even more restricted than the public, requiring the exercise of discretion by the

chief judge and with prohibitions on using the recordings to prepare the official record, disclosing the recordings outside counsel's office, using them in "subsequent court proceedings," as discussed previously, and enhancing or modifying the recordings to reveal confidential information. Only the last of these prohibitions is warranted, and nothing merits giving the chief judge or the trial court unilateral control over these public records.

The proposed rules are at odds with the spirit of this Court's recent decision in *In re Amendments to Florida Rule of Juvenile Procedure 8.100*, 985 So. 2d. 534 (Fla. June 26, 2008), which specifically removed a requirement that a court must enter an order for transcripts precisely because that requirement impaired litigants ability to seek habeas corpus. *See id.* at 534-35.

More importantly, this proposed amendment is at odds with the general rules regarding confidentiality of judicial materials. This Court has recently reaffirmed "the courts' longstanding presumption in favor of open records." *In re Amendments to Florida Rule Of Judicial Administration 2.420-Sealing Of Court Records And Dockets*, 954 So. 2d. 16, 23 (Fla. 2007). In part, this presumption flows from the Sunshine Amendment to the Florida Constitution:

> SECTION 24. Access to public records and meetings.- Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder....

Art. I, §24, Fla. Const. (emphasis supplied).

Transcripts of court proceedings are public records. *See Lewis v. State*, 958 So. 2d. 1027, 1028 (Fla. 5th DCA 2007). The definition of public records includes not just "documents" and "papers," but also "sound recordings." § 119.011(11), Fla. Stat. (2007). Therefore, an electronic recording of a court proceeding is a public record made in connection with the official business of the courts.[1] The

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[1] The Commission on Trial Court Performance and Accountability, from which these proposed amendments originated, suggested that these electronic recordings are not public records because they are but preliminary drafts and are equivalent to a court reporter's backup audio recording, found not to be a public record in *Holt v. Allen*, 677 So. 2d 81 (Fla. 2d DCA 1996). The rationale for that decision was as follows:

> The audiotape which is the subject of the petition is an informal audiotape made by the court reporter to utilize at a later time to complete official transcripts of court proceedings. The audiotape was not taken in accordance with Florida Rule of Judicial Administration 2.070(b)[now 2.535]. That rule provides for electronic reporting. The recording was not made pursuant to any court rule, law or ordinance, or in connection with the

presumption of nondisclosure in this rule seems to be an attempt to create a rule-based exception to this constitutional and statutory right of access to public records. Whether this rule would ultimately be struck down as a violation of this constitutional and statutory right is beyond the scope of these comments, but this Court should be aware that the proposed rule invites serious litigation of these issues.

The concern that electronic recordings are capturing confidential information can be addressed in far less restrictive ways than the sweeping restrictions on access proposed. First, technology should insure that attorneys can easily shield confidential conversations from recording (e.g., on/off switches at counsel table).

> transaction of official business by the court or any court agency. Further, the audiotape in question is not a judicial record as defined in Rule 2.051(b) [now 2.420].

Holt v. Allen, 677 So. 2d at 82.

This rationale would not be applicable under the new rules and the use of electronic recording systems without court reporters physically present in court taking stenographic notes. The electronic recordings of court proceedings would not be an unofficial backup tape made for the convenience of such a court reporter. Instead, the transcriptionist would be relying entirely on the recording. Thus, the recording would be the primary source, not a secondary or backup source.

Additionally, changes in the rules have undermined the rationale in *Holt*. Initially, and contrary to the situation in *Holt*, the electronic recordings would now be taken in accordance with Rule 2.535. Moreover, in 2002, this Court amended the definition of judicial records to include "electronic records . . . of court proceedings." *See In re Report of Supreme Court Workgroup on Public Records*, 825 So. 2d 889, 896 (Fla. 2002) (at time numbered as 2.051(b)(1)(A), now

Training and clear instructions to attorneys and litigants as to the areas in the courtroom which are subject to recording would reduce the chance of inadvertent capture of confidential information. In the event confidential information is nevertheless inadvertently captured, rules and guidelines can be established to control the dissemination of confidential information. Guidance for how to handle any confidential information inadvertently captured in an audio recording can be found in the recent ethics opinion governing the possibility of confidential information being found in the electronic versions of written documents:

> The duties of a lawyer when sending an electronic document to another lawyer and when receiving an electronic document from another lawyer are as follows:
>
> (1) It is the sending lawyer's obligation to take reasonable steps to safeguard the confidentiality of all communications sent by electronic means to other lawyers and third parties and to protect from other lawyers and third parties all confidential information, including information contained in metadata, that may be included in such electronic communications. (2) It is the recipient lawyer's concomitant obligation, upon receiving an electronic communication or document from another lawyer, not to try to obtain from metadata information relating to the representation of the sender's client that the recipient knows or should know is not intended for the recipient. Any such metadata is to be considered by the receiving lawyer as confidential information which the sending lawyer did not intend to transmit. *See*, Ethics Opinion 93-3 and Rule 4-4.4(b), Florida Rules of

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renumbered as 2.420(b)(1)(A)).

> Professional Conduct, effective May 22, 2006.(3) If the recipient lawyer inadvertently obtains information from metadata that the recipient knows or should know was not intended for the recipient, the lawyer must "promptly notify the sender." *Id.*

Professional Ethics Comm., The Florida Bar, Op. 06-2 (Sept. 1, 2006).

Rather than a blanket presumption of nondisclosure, these principles should be applied here. First, it is the attorney's duty to ensure that confidential information is not captured on electronic recordings of court proceedings. In the FPDA's experience, counsel can largely avoid inadvertent capture of confidential information by pressing a "kill" switch on the microphone at a counsel table (or unplugging or covering it) and by warning clients about the dangers and instructing them to either whisper or write any comments. There may be a period of adjustment while attorneys learn appropriate behaviors in newly "wired" courtrooms, but in the FPDA's experience attorneys quickly adapt.

Second, if another attorney reviews the electronic recordings, that attorney cannot digitally enhance the recordings trolling for such confidential information. This principle is part of the proposed rule and is salutary. *See* Fla. Rule Judicial Admin. 2.535(h)(5)(A)(i) (proposed rule).

Third, if another attorney reviews the electronic recording and comes across confidential information, that attorney has a duty to notify opposing counsel.

Opposing counsel could then move to prohibit that portion of the electronic recording that reveals the confidential information, similar to the procedure this Court approved in recently rewritten the administrative rule governing confidentiality in civil cases. *See In re Amendments to Florida Rule Of Judicial Administration 2.420-Sealing Of Court Records And Dockets*, 954 So. 2d. 16 (Fla. 2007). The basic thrust of those amendments is that court records are presumed public unless a party moves to make them confidential. The definition of "court records" in that rule includes "electronic records, videotapes, or stenographic tapes of court proceedings." Fla. R. Judicial Admin. 2.420(b)(1)(A).

The same approach should apply here: electronic recordings should be presumed public records, readily available to counsel, parties or the public in general, unless a party moves to make them confidential.

II.
THE PROPOSED RULE SHOULD BE AMENDED TO CLARIFY THAT DISCOVERY DEPOSITIONS ARE NOT COVERED.

In a time of greatly reduced budgets, some public defender offices have opted for electronic recording of depositions. Should it become necessary to impeach a witness with a prior inconsistent statement from such a deposition, the recording

can simply be played to the jury. This efficient approach is cast into doubt by some of the proposed language as drafted.

In proposed Rule 2.535(a)(4), "court reporting" is defined as "a verbatim record of the spoken word . . . in any proceedings pending in any of the courts of this state, including all discovery proceedings conducted in connection therewith." But that same paragraph goes on to say that "court reporting" "does not mean the act of taking witness statements not intended for use in court as substantive evidence."

Additionally, proposed Rule of Judicial Administration 2.535(a)(6) defines "official record" to mean "the transcript, which is the written record of court proceedings and depositions." This definition is confusing as it suggests that "court proceedings" and "depositions" are separate. If "court reporting" includes "all discovery proceedings," as proposed Rule 2.535(a)(4) is presently written, then depositions should be subsumed by "court proceedings."[2]

Discovery depositions pursuant to Florida Rule of Criminal Procedure 3.220(h) are part of "discovery proceedings" but are never "intended for use in court as substantive evidence." *See State v. Green*, 667 So. 2d 756, 758-60 (Fla. 1995); *see also State v. Contreras*, 979 So. 2d 896, 910-11 (Fla. 2008). The rule needs to

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[2] Discovery depositions are not considered a "judicial proceeding" according to this Court's decision in *Palm Beach Newspapers v. Burk*, 504 So.2d 378 (Fla. 1987).

be clarified so that it clearly states that discovery depositions are not part of "court reporting."

Therefore, FPDA would suggest that discovery depositions should not be part of "court reporting" or the "official record" because such depositions are not substantive evidence but rather are merely a tool used to prepare for trial.[3] This principle would eliminate the concern with using electronic recordings of discovery depositions as impeachment.

Accordingly, the FPDA suggests eliminating the phrase "including all discovery proceedings conducted in connection therewith," from proposed Rule of Judicial Administration 2.535(a)(4). The FPDA also suggests that this Court redefine "official record" as "the transcript of all proceedings in which 'court reporting' is required and which is prepared in accordance with the requirements of subsection (f)."

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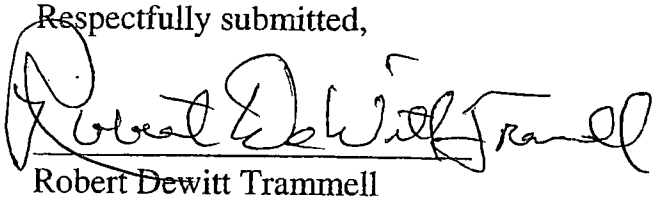
[3] For sake of consistency, the FPDA also suggests that the language "proceedings pending in any of the courts of this state" in proposed Rule of Judicial Administration 2.535(a)(4) can be replaced with "court proceeding," the term used in subdivision (a)(5). If this Court deems it necessary, court proceeding could be defined as "any proceeding that takes place in any of the courts of this state."

CONCLUSION

This Court should presume that electronic recordings of proceedings in open court are public records, freely available to counsel or the public. This Court should therefore modify the proposed rules to reverse the presumption of confidentiality, only restricting access to such records when they contain confidential information. This Court should also modify the proposed rule to specify that discovery depositions are not covered by it.

Respectfully submitted,



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CERTIFICATES

I hereby certify that a copy of these comments were served by mail on Scott M. Dimond, Chair, Rules of Judicial Administration Committee, 2665 S. Bayshore Dr., Penthouse 2, Miami, Florida 33133; John S. Mills, Chair, Appellate Court Rules Committee, 865 May St., Jacksonville, FL 32204-3310; and Robert B. Bennett, Jr., Chair, Commission on Trial Court Performance and Accountability, 2002 Ringling Boulevard, Floor 8, Sarasota, Florida 34237-7002, on this 30 day of October 2008.

I hereby certify that these comments were printed in 14-point Times New Roman.

Robert Dewitt Trammell