IN THE SUPREME COURT OF FLORIDA

2007 OCT 31 P 12:33
CLERK, SUPREME COURT

IN RE: SEALING OF COURT RECORDS
AND DOCKETS CASE NO. [redacted]

SC07-2050

REPORT OF THE FLORIDA RULES OF JUDICIAL ADMINISTRATION COMMITTEE

The Honorable Robert T. Benton II, Chair, Florida Rules of Judicial Administration Committee, and John F. Harkness, Jr., Executive Director, The Florida Bar, file this report of the Rules of Judicial Administration Committee as requested by the Court in letters from Chief Justice R. Fred Lewis dated April 19, 2007, and under *Fla. R. Jud. Admin.* 2.140(f). In two separate letters, the Court requested that (1) the Rules of Judicial Administration Committee and the Appellate Court Rules Committee work together "to consider the need for rules governing requests to seal appellate court records," and (2) the Rules of Judicial Administration Committee and the Criminal Procedure Rules Committee work together "specifically to address the need for a rule governing the sealing of court records in criminal cases as well as the concerns raised about the need to protect confidential informants." Copies of the letters from the Chief Justice are appended to this report as Appendix C.

Specific Issues Related to Proposed Amendment to Rule 2.420(d)(7)

As to Item (1) above governing appellate matters, a subcommittee of the Rules of Judicial Administration Committee held two conferences to review the rule. These conferences were joint conferences with a designated subcommittee from the Appellate Court Rules Committee. The report of the joint subcommittees' conferences is attached as Appendix D, and the following discussion focuses on the subcommittees' reasoning, which was adopted by a vote of 36 to 0 on September 6, 2007, by the Rules of Judicial Administration Committee.

The subcommittees concluded that rules governing the sealing of appellate court records were best included in the Rules of Judicial Administration rather than in the Rules of Appellate Procedure. The subcommittees felt that it was logical and helpful for courts and practitioners

for all such rules to be centrally located within the judicial administration rules.

Existing subdivision (d)(7) addresses appeals. The subdivision provides a mechanism by which the appellate court can be advised that the record contains sealed documents. The subcommittees propose modifying this provision[1] to make it clear that it encompasses records of all lower tribunals (including hearing tribunals in the executive branch) that are made confidential under the procedures specified in subdivision (d).

Finally, given that the Supreme Court had considered and approved the procedure for making civil court records confidential, the subcommittees felt that appellate courts should consider requests for confidential treatment under the same standards and guidelines applicable to trial courts under subdivision (d).

The subcommittees also propose the following Committee Note (with a recommendation[2] that the Court adopt the Committee Note as a Court Commentary):

> Subdivision (d)(7) does not preclude review by an appellate court or affect the standard of review by an appellate court of an order by a lower tribunal making a record confidential.
>
> If an appellate court is presented with a request to make an appellate court record confidential (whether relating to a record that was presented or presentable to a lower tribunal, but not made confidential by a lower tribunal, or a record presented to an appellate court in an original proceeding), the appellate court should consider the request for confidentiality under the standards and guidelines applicable to trial courts under subdivision (d) of this rule.

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[1]The amendment is in the first sentence of the subdivision: "~~Court records~~ Records of a lower tribunal made confidential ~~under this rule~~ by that tribunal must be treated as confidential during any ~~appellate~~ review proceedings."

[2]Because rules committees are not authorized to create Court Commentaries, the foregoing is a suggestion only and is not included in the proposed rule as set forth in Appendix B to this report.

Specific Issues Related to Proposed New Rule 2.420(e)

As to Item (2) above governing criminal matters, the same subcommittee of the Rules of Judicial Administration Committee held a series of conference calls to review Rule 2.420 and consider amendments to the rule to address the sealing of court records in criminal cases. Those calls were joint conferences with a designated subcommittee composed of members of the Criminal Procedure Rules Committee, who were involved from the earliest stages in the process of considering the substantive proposals through to the drafting of the final proposed amendment, which is set forth in this report as proposed new subdivision (e). The following discussion focuses on the joint subcommittees' reasoning, which was adopted by a vote of 24 to 1 on October 25, 2007, by the Rules of Judicial Administration Committee.

1. Location and Structure of Amendment

The subcommittees first determined that the rules governing confidential documents in criminal cases should appear in the Rules of Judicial Administration rather than in the Rules of Criminal Procedure (which is consistent with the views of the subcommittees that addressed appellate issues, as outlined above). The subcommittees felt that it would be helpful to both courts and practitioners for all rules governing confidential court records to be located in the same place, and further expected that any new rule governing criminal matters would relate to and rely heavily upon the procedure set forth in Rule 2.420(d). Accordingly, the subcommittees drafted a new subdivision of Rule 2.420, designated 2.420(e), which sets forth the mechanism for sealing records in criminal cases.[3]

2. Scope of Rule

More substantively, the subcommittees felt that the procedure established in the existing Rule 2.420(d) would be adequate to address sealing issues in criminal cases in all but two exceptional circumstances.

[3]As noted in new subdivision (e)(4), this procedure does not address proceedings to seal or expunge criminal history records, which have resided in the Rules of Criminal Procedure for over 30 years. *See Fla. R. Crim. P.* 3.692.

Specifically, the subcommittees concluded that additional procedures to protect confidentiality would be necessary only when the very act of filing a motion under subdivision (d) could jeopardize either the safety of a person or the integrity of an active criminal investigation, *e.g.*, when such a filing might reveal the existence of a confidential informant. Accordingly, proposed new subdivision (e)(1) provides that the procedures governing civil cases will apply to criminal cases except when the very narrow aforementioned circumstances warrant a special procedure, which procedure is then set forth in the subsequent subdivision (e)(2).

3. Heightened Confidentiality

For motions filed in accordance with the new procedure set forth in proposed subdivision (e)(2), the most salient difference from the procedure governing civil matters in subdivision (d) is that both the motion itself and any order issued thereon is to be kept confidential. Again, the primary reason that the Supreme Court expressed concern regarding the applicability of subdivision (d) to criminal matters was the fear that even a bare-bones motion filed pursuant to that subdivision would be a public document that might alert the targets of a criminal investigation to the existence of a confidential informant. As such, subdivision (e)(2)(A) provides that the clerk must keep the motion confidential pending the court's ruling, and subdivision (e)(2)(E) similarly requires that orders issued pursuant to such motions are to be kept confidential by the clerk.

4. Hearing

Proposed subdivision (e)(2)(B) includes a requirement that a hearing be held on any motion filed hereunder that is not unopposed, and that such hearing be held *in camera*. The subcommittees felt that a requirement that the motion be signed by both parties to indicate that it is unopposed would provide additional security against misuse of the heightened confidentiality attendant to this provision. Again, given the increased sensitivity of motions filed under subdivision (e)(2), the subcommittees felt that it was necessary to provide for such hearings to occur promptly, *i.e.*, within 15 days of the filing of such motion. The subdivision further provides for prompt rulings on motions filed pursuant to subdivision (e)(2), *i.e.*, within 10 days of either the filing of an agreed motion or the hearing on a contested motion.

5. Additional Procedural Safeguards

Given the heightened level of secrecy attendant to motions filed pursuant to proposed new subdivision (e), the subcommittees felt it necessary to impose limitations on such orders that would help to ensure that they were not implemented beyond the point of necessity. Accordingly, subdivision (e)(2)(C) provides that orders sealing court records pursuant to the new procedure must be limited in duration, and in no case may extend beyond 120 days without a new application being made to the court. The proposed rule further permits the extension of such orders even after an appeal is taken by giving the lower tribunal jurisdiction to consider such applications during the course of an appeal.

6. Interplay with Subdivision (d) of 2.420

The new procedure relies in part on the preexisting procedure developed in the civil context under Rule 2.420(d), and is structured accordingly. Given that the purpose of new subdivision (e) is to create a heightened level of confidentiality under those narrow circumstances where such additional protections are warranted, new subdivision (e) dispenses with certain of the procedural elements of existing subdivision (d), notably those that provide for publication and public hearing, and public notice of requests to treat court records as confidential.

Proposed subdivision (e)(2)(D) retains certain procedures now required by subdivision (d): the content of orders, *see* (d)(3)(A)–(G); the obligation that motions be filed in good faith, *see* (d)(6); and continued confidential treatment of records on appeal, *see* (d)(7). But subdivision (e)(2)(D) also specifies that certain procedures required by subdivision (d) do not come into play under subdivision (e): the public filing of motions, *see* (d)(1); public hearings, *see* (d)(2); publication and public notice of orders, *see* (d)(3)(H) and (d)(4); and a procedure for challenging the entry of confidentiality orders following public notice, *see* (d)(5).

Throughout the process of developing and drafting these new procedures, the subcommittees and the full RJA Committee expressed concern that the new proposed Rule 2.420(e) removed certain aspects of the public justice system from public scrutiny. But both the subcommittees and the full committee concluded that there was no way to effectuate the goals of protecting the personal safety of individuals assisting in the pursuit of

criminal justice without imposing some additional levels of secrecy, and the committee relies on a series of procedural safeguards embedded in the proposed rule to ensure that the new procedure was as narrowly tailored and free of the potential for abuse as possible.

Specific Issues Related to Proposed Amendment to Rule 2.420(c)(10)

An additional corrective amendment (not requested by the Court) has been made in subdivision (c)(10), where a reference to the "Judicial Ethics Advisory Committee" has been substituted for an outdated reference to the "Committee on Standards of Conduct for Judges." (A clarifying change in punctuation has also been made immediately preceding that subdivision.) These changes were adopted by a vote of 36 to 0 on September 6, 2007, by the Rules of Judicial Administration Committee.

The amendments to Rule 2.420 proposed by the Rules of Judicial Administration Committee are set forth in legislative format in Appendix A. The amended rule is set forth in two-column format in Appendix B. Because only the Rules of Judicial Administration Committee is proposing amendments, no separate report on these proposals is being filed by the Criminal Procedure Rules Committee or the Appellate Court Rules Committee, but, as noted above, the work product of designated subcommittees of the latter two committees is reflected in the proposal appended to this report. In addition, the Criminal Procedure Rules Committee voted 24 to 0 on October 25, 2007, to endorse the amendments to subdivision (e) submitted with this report. The Appellate Court Rules Committee took no formal vote on the proposal in subdivision (d)(7), but endorsed the work product of its subcommittee as its official statement on the amendments.

The proposal was reviewed by the Executive Committee of The Florida Bar Board of Governors and was approved by the Executive Committee by a vote of 7 to 0 on October 30, 2007.

Because this matter is being submitted pursuant to *Fla. R. Jud. Admin.* 2.140(f), it has not been pre-published for comment.

WHEREFORE, the Rules of Judicial Administration Committee respectfully submits this Report to the Court on October 31, 2007.

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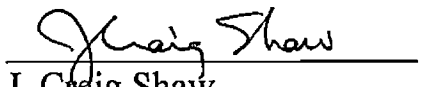
CERTIFICATIONS

I certify that this rule was read against *West's Florida Rules of Court – State* (2007).

I certify that this report was prepared in MS Word using 14 point Times New Roman font.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished by United States mail to: H. Scott Fingerhut, Chair, Criminal Procedure Rules Committee, 2400 S. Dixie Hwy., Fl. 2, Miami, FL 33133-3156, and Steven L. Brannock, Chair, Appellate Court Rules Committee, P.O. Box 1288, Tampa, FL 33601-1288, on October 31, 2007.



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APPENDIX A

Rule in Legislative Format

RULE 2.420. PUBLIC ACCESS TO JUDICIAL BRANCH RECORDS

(a) Scope and Purpose. Subject to the rulemaking power of the Florida Supreme Court provided by article V, section 2, Florida Constitution, the following rule shall govern public access to the records of the judicial branch of government. The public shall have access to all records of the judicial branch of government, except as provided below.

(b) Definitions.

(1) "Records of the judicial branch" are all records, regardless of physical form, characteristics, or means of transmission, made or received in connection with the transaction of official business by any judicial branch entity and consist of:

(A) "court records," which are the contents of the court file, including the progress docket and other similar records generated to document activity in a case, transcripts filed with the clerk, documentary exhibits in the custody of the clerk, and electronic records, videotapes, or stenographic tapes of depositions or other proceedings filed with the clerk, and electronic records, videotapes, or stenographic tapes of court proceedings; and

(B) "administrative records," which are all other records made or received pursuant to court rule, law, or ordinance, or in connection with the transaction of official business by any judicial branch entity.

(2) "Judicial branch" means the judicial branch of government, which includes the state courts system, the clerk of court when acting as an arm of the court, The Florida Bar, the Florida Board of Bar Examiners, the Judicial Qualifications Commission, and all other entities established by or operating under the authority of the supreme court or the chief justice.

(3) "Custodian." The custodian of all administrative records of any court is the chief justice or chief judge of that court, except that each judge is the custodian of all records that are solely within the possession and control of that judge. As to all other records, the custodian is the official charged with the responsibility of maintaining the office having the care, keeping, and supervision of such records. All references to "custodian" mean the custodian or the custodian's designee.

(c) Exemptions. The following records of the judicial branch shall be confidential:

(1) Trial and appellate court memoranda, drafts of opinions and orders, court conference records, notes, and other written materials of a similar nature prepared by judges or court staff acting on behalf of or at the direction of the court as part of the court's judicial decision-making process utilized in disposing of cases and controversies before Florida courts unless filed as a part of the court record;

(2) Memoranda or advisory opinions that relate to the administration of the court and that require confidentiality to protect a compelling governmental interest, including, but not limited to, maintaining court security, facilitating a criminal investigation, or protecting public safety, which cannot be adequately protected by less restrictive measures. The degree, duration, and manner of confidentiality imposed shall be no broader than necessary to protect the compelling governmental interest involved, and a finding shall be made that no less restrictive measures are available to protect this interest. The decision that confidentiality is required with respect to such administrative memorandum or written advisory opinion shall be made by the chief judge;

(3)(A) Complaints alleging misconduct against judges until probable cause is established;

(B) Complaints alleging misconduct against other entities or individuals licensed or regulated by the courts, until a finding of probable cause or no probable cause is established, unless otherwise provided. Such finding should be made within the time limit set by law or rule. If no time limit is set, the finding should be made within a reasonable period of time;

(4) Periodic evaluations implemented solely to assist judges in improving their performance, all information gathered to form the bases for the evaluations, and the results generated therefrom;

(5) Only the names and qualifications of persons applying to serve or serving as unpaid volunteers to assist the court, at the court's request and direction, shall be accessible to the public. All other information contained in the applications by and evaluations of persons applying to serve or serving as unpaid volunteers shall be confidential unless made public by

court order based upon a showing of materiality in a pending court proceeding or upon a showing of good cause;

(6) Copies of arrest and search warrants and supporting affidavits retained by judges, clerks, or other court personnel until execution of said warrants or until a determination is made by law enforcement authorities that execution cannot be made;

(7) All records made confidential under the Florida and United States Constitutions and Florida and federal law;

(8) All records presently deemed to be confidential by court rule, including the Rules for Admission to the Bar, by Florida Statutes, by prior case law of the State of Florida, and by the rules of the Judicial Qualifications Commission;

(9) Any court record determined to be confidential in case decision or court rule on the grounds that

(A) confidentiality is required to

(i) prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice;

(ii) protect trade secrets;

(iii) protect a compelling governmental interest;

(iv) obtain evidence to determine legal issues in a case;

(v) avoid substantial injury to innocent third parties;

(vi) avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of proceeding sought to be closed;

(vii) comply with established public policy set forth in the Florida or United States Constitution or statutes or Florida rules or case law;

(B) the degree, duration, and manner of confidentiality ordered by the court shall be no broader than necessary to protect the interests set forth in subdivision (A); and

(C) no less restrictive measures are available to protect the interests set forth in subdivision (A)~~.~~;

(10) The names and any identifying information of judges mentioned in an advisory opinion of the ~~Committee on Standards of Conduct for Judges~~ Judicial Ethics Advisory Committee.

(d) Request to Make Circuit and County Court Records in Noncriminal Cases Confidential.

(1) A request to make circuit and county court records in noncriminal cases confidential under subdivision (c)(9) must be made in the form of a written motion captioned "Motion to Make Court Records Confidential." A motion made under this subdivision must:

(A) identify the particular court records the movant seeks to make confidential with as much specificity as possible without revealing the information to be made confidential; and

(B) specify the bases for making such court records confidential.

Any motion made under this subdivision must include a signed certification by the party making the request that the motion is being made in good faith and is supported by a sound factual and legal basis. The court records that are subject to a motion made under this subdivision must be treated as confidential by the clerk pending the court's ruling on the motion. Notwithstanding any of the foregoing, the court may not make confidential the case number, docket number, or other number used by the clerk's office to identify the case file.

(2) Except when a motion filed under subdivision (d)(1) represents that all parties agree to all of the relief requested, the court must, as soon as practicable but no later than 30 days after the filing of a motion under this subdivision, hold a hearing before ruling on the motion. Whether or not any motion filed under subdivision (d)(1) is agreed to by the parties, the court may in its discretion hold a hearing on such motion. Any hearing held under

this subdivision must be an open proceeding, except that any party may request that the court conduct all or part of the hearing in camera to protect the interests set forth in subdivision (c)(9)(A). The moving party shall be responsible for ensuring that a complete record of any hearing held pursuant to this subdivision be created, either by use of a court reporter or by any recording device that is provided as a matter of right by the court. The court may in its discretion require prior public notice of the hearing on such a motion in accordance with the procedure for providing public notice of court orders set forth in subdivision (d)(4) or by providing such other public notice as the court deems appropriate.

(3) Any order granting in whole or in part a motion filed under subdivision (d)(1) must state the following with as much specificity as possible without revealing information made confidential:

(A) The type of case in which the order is being entered;

(B) The particular grounds under subdivision (c)(9)(A) for making the court records confidential;

(C) Whether any party's name is to be made confidential and, if so, the particular pseudonym or other term to be substituted for the party's name;

(D) Whether the progress docket or similar records generated to document activity in the case are to be made confidential;

(E) The particular court records that are to be made confidential;

(F) The names of those persons who are permitted to view the confidential court records;

(G) That the court finds that: (i) the degree, duration, and manner of confidentiality ordered by the court is no broader than necessary to protect the interests set forth in subdivision (c)(9)(A); and (ii) no less restrictive measures are available to protect the interests set forth in subdivision (c)(9)(A); and

(H) That the clerk of the court is directed to publish the order in accordance with subdivision (d)(4).

(4) Except as provided by law or court rule, notice must be given of any order granting a motion made under subdivision (d)(1) as follows. Within 10 days following the entry of the order, the clerk of court must post a copy of the order on the clerk's website and in a prominent, public location in the courthouse. The order must remain posted in both locations for no less than 30 days.

(5) If a nonparty requests that the court vacate all or part of an order issued under subdivision (d)(3), the request must be made in the form of a written motion that states with as much specificity as possible the bases for the request. The movant must serve all parties in the action with a copy of the motion. In the event that the subject order specifies that the names or addresses of one or more parties are to be made confidential, the movant must state prominently in the caption of the motion "Confidential Party — Court Service Requested." When a motion so designated is filed, the court shall be responsible for providing a copy of the motion to the parties in such a way as to not reveal the confidential information to the movant. Except when a motion filed under this subdivision represents that all parties agree to all of the relief requested, the court must hold a hearing before ruling on the motion. Whether or not any motion filed under this subdivision is agreed to by the parties, the court may in its discretion hold a hearing on such motion. Any hearing held under this subdivision must be an open proceeding, except that any party may request that the court conduct all or part of the hearing in camera to protect the interests set forth in subdivision (c)(9)(A). The movant shall be responsible for ensuring that a complete record of any hearing held under this subdivision be created, either by use of a court reporter or by any recording device that is provided as a matter of right by the court.

(6) If the court determines that a motion made under subdivision (d)(1) was not made in good faith and supported by a sound legal and factual basis, the court may impose sanctions upon the movant.

(7) ~~Court records~~ Records of a lower tribunal made confidential ~~under this rule~~ by that tribunal must be treated as confidential during any ~~appellate~~ review proceedings. In any case where an order making court records confidential remains in effect as of the time of an appeal, the clerk's index must include a statement that an order making court records confidential has been entered in the matter and must identify such order by date or docket number.

(e) Request to Make Circuit and County Court Records in Criminal Cases Confidential.

(1) Subdivision (d) shall apply to any request by the state or a defendant to make circuit or county court records confidential pursuant to subdivision (c)(9), except as provided in subdivision (e)(2).

(2) Any 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." As to any motion made pursuant to this subdivision (e)(2), the following procedure shall apply:

(A) Any motion made pursuant to this subdivision and all court records that are the subject of such a motion must be treated as confidential by the clerk pending the court's ruling upon the motion.

(B) Except when the motion filed under this subdivision represents that both the movant and any other party subject to the motion agree to all of the relief requested, as evidenced by all such parties signing the motion, the court shall hold a hearing on a motion filed under this subdivision within 15 days of the filing of the motion, but such hearing shall be a closed session held in camera. The court shall issue a ruling on motions filed under this subdivision within 10 days of the hearing on contested motions or within 10 days of the filing of agreed motions.

(C) No order entered under this subdivision may authorize or approve the sealing of court records for any period longer than is necessary to achieve the objective of the motion, and in no event longer than 120 days. Extensions of an order issued hereunder may be granted for 60-day periods, but each such extension may be ordered only upon the filing of another motion in accordance with the procedures set forth under this subdivision. In the event of an appeal of a matter in which an order is entered under this subdivision, the lower tribunal shall retain jurisdiction to consider motions to extend orders issued hereunder during the course of the appeal.

(D) The provisions of subdivisions (d)(3)(A)–(G), (d)(6), and (d)(7) shall apply to motions made pursuant to this subdivision. The provisions of subdivisions (d)(1), (d)(2), (d)(3)(H), (d)(4), and (d)(5) shall not apply to motions made pursuant to this subdivision.

(E) The clerk of the court shall not publish any order of the court issued hereunder in accordance with subdivision (d)(4) unless directed by the court.

(3) This subdivision (e) does not apply to records of the judicial branch deemed confidential under subdivisions (c)(1)–(c)(8) or (c)(10).

(4) Requests to seal or expunge criminal history records must be made in accordance with Florida Rule of Criminal Procedure 3.692.

~~(e)~~ (f) **Judicial Review of Denial of Access Request.** Expedited review of denials of access to records of the judicial branch shall be provided through an action for mandamus, or other appropriate appellate remedy, in the following manner:

(1) Where a judge who has denied a request for access to records is the custodian, the action shall be filed in the court having appellate jurisdiction to review the decisions of the judge denying access. Upon order issued by the appellate court, the judge denying access to records shall file a sealed copy of the requested records with the appellate court.

(2) All other actions under this rule shall be filed in the circuit court of the circuit in which such denial of access occurs.

~~(f)~~ (g) **Procedure.** Requests and responses to requests for access to records under this rule shall be made in a reasonable manner.

(1) Requests for access to records shall be in writing and shall be directed to the custodian. The request shall provide sufficient specificity to enable the custodian to identify the requested records. The reason for the request is not required to be disclosed.

(2) The custodian shall be solely responsible for providing access to records of the custodian's entity. The custodian shall determine whether the requested record is subject to this rule and, if so, whether the record or portions of the record are exempt from disclosure. The custodian shall determine the form in which the record is provided. If the request is denied, the custodian shall state in writing the basis for the denial.

(3) Fees for copies of records in all entities in the judicial branch of government, except for copies of court records, shall be the same as those provided in section 119.07, Florida Statutes (2001).

Committee Note

1995 Amendment. This rule was adopted to conform to the 1992 addition of article I, section 24, to the Florida Constitution. Amendments to this rule were adopted in response to the 1994 recommendations of the Study Committee on Confidentiality of Records of the Judicial Branch.

Subdivision (b) has been added by amendment and provides a definition of "judicial records" that is consistent with the definition of "court records" contained in rule 2.075(a)(1) [renumbered as 2.430(a)(1) in 2006] and the definition of "public records" contained in chapter 119, Florida Statutes. The word "exhibits" used in this definition of judicial records is intended to refer only to documentary evidence and does not refer to tangible items of evidence such as firearms, narcotics, etc. Judicial records within this definition include all judicial records and data regardless of the form in which they are kept. Reformatting of information may be necessary to protect copyrighted material. *Seigle v. Barry*, 422 So. 2d 63 (Fla. 4th DCA 1982), *review denied*, 431 So. 2d 988 (Fla. 1983).

The definition of "judicial records" also includes official business information transmitted via an electronic mail (e-mail) system. The judicial branch is presently experimenting with this new technology. For example, e-mail is currently being used by the judicial branch to transmit between judges and staff multiple matters in the courts including direct communications between judges and staff and other judges, proposed drafts of opinions and orders, memoranda concerning pending cases, proposed jury instructions, and even votes on proposed opinions. All of this type of information is exempt from public disclosure under rules 2.051(c)(1) and (c)(2) [renumbered as 2.420(c)(1) and (c)(2) in 2006]. With few exceptions, these examples of e-mail transmissions are sent and received between judicial officials and employees within a particular court's jurisdiction. This type of e-mail is by its very nature almost always exempt from public record disclosure pursuant to rule 2.051(c). In addition, official business e-mail transmissions sent to or received by judicial officials or employees using dial-in equipment, as well as the use of on-line outside research facilities such as Westlaw, would also be exempt e-mail under rule 2.051(c). On the

other hand, we recognize that not all e-mail sent and received within a particular court's jurisdiction will fall into an exception under rule 2.051(c). The fact that a non-exempt e-mail message made or received in connection with official court business is transmitted intra-court does not relieve judicial officials or employees from the obligation of properly having a record made of such messages so they will be available to the public similar to any other written communications. It appears that official business e-mail that is sent or received by persons outside a particular court's jurisdiction is largely non-exempt and is subject to recording in some form as a public record. Each court should develop a means to properly make a record of non-exempt official business e-mail by either electronically storing the mail or by making a hard copy. It is important to note that, although official business communicated by e-mail transmissions is a matter of public record under the rule, the exemptions provided in rule 2.051(c) exempt many of these judge/staff transmissions from the public record. E-mail may also include transmissions that are clearly not official business and are, consequently, not required to be recorded as a public record. Each court should also publish an e-mail address for public access. The individual e-mail addresses of judicial officials and staff are exempt under rule 2.051(c)(2) to protect the compelling interests of maintaining the uninterrupted use of the computer for research, word-processing, preparation of opinions, and communication during trials, and to ensure computer security.

Subdivision (c)(3) was amended by creating subparts (a) and (b) to distinguish between the provisions governing the confidentiality of complaints against judges and complaints against other individuals or entities licensed or regulated by the Supreme Court.

Subdivision (c)(5) was amended to make public the qualifications of persons applying to serve or serving the court as unpaid volunteers such as guardians ad litem, mediators, and arbitrators and to make public the applications and evaluations of such persons upon a showing of materiality in a pending court proceeding or upon a showing of good cause.

Subdivision (c)(9) has also been amended. Subdivision (c)(9) was adopted to incorporate the holdings of judicial decisions establishing that confidentiality may be required to protect the rights of defendants, litigants, or third parties; to further the administration of justice; or to otherwise promote a compelling governmental interest. *Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113 (Fla.1988); *Miami Herald Publishing Co.*

v. Lewis, 426 So.2d 1 (Fla.1982). Such confidentiality may be implemented by court rule, as well as by judicial decision, where necessary for the effective administration of justice. *See, e.g.*, Fla.R.Crim.P. 3.470, (Sealed Verdict); Fla.R.Crim.P. 3.712, (Presentence Investigation Reports); Fla.R.Civ.P. 1.280(c), (Protective Orders).

Subdivision (c)(9)(D) requires that, except where otherwise provided by law or rule of court, reasonable notice shall be given to the public of any order closing a court record. This subdivision is not applicable to court proceedings. Unlike the closure of court proceedings, which has been held to require notice and hearing prior to closure, *see Miami Herald Publishing Co. v. Lewis*, 426 So. 2d 1 (Fla.1982), the closure of court records has not required prior notice. Requiring prior notice of closure of a court record may be impractical and burdensome in emergency circumstances or when closure of a court record requiring confidentiality is requested during a judicial proceeding. Providing reasonable notice to the public of the entry of a closure order and an opportunity to be heard on the closure issue adequately protects the competing interests of confidentiality and public access to judicial records. *See Florida Freedom Newspapers, Inc. v. Sirmons*, 508 So.2d 462 (Fla. 1st DCA 1987), *approved, Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113 (Fla.1988); *State ex rel. Tallahassee Democrat v. Cooksey*, 371 So.2d 207 (Fla. 1st DCA 1979). Subdivision (c)(9)(D), however, does not preclude the giving of prior notice of closure of a court record, and the court may elect to give prior notice in appropriate cases.

2002 Court Commentary

The custodian is required to provide access to or copies of records but is not required either to provide information from records or to create new records in response to a request. Op. Atty. Gen. Fla. 80-57 (1980); *Wootton v. Cook*, 590 So.2d 1039 (Fla. 1st DCA 1991); *Seigle v. Barry*, 422 So.2d 63 (Fla. 4th DCA 1982).

The writing requirement is not intended to disadvantage any person who may have difficulty writing a request; if any difficulty exists, the custodian should aid the requestor in reducing the request to writing.

It is anticipated that each judicial branch entity will have policies and procedures for responding to public records requests.

The 1995 commentary notes that the definition of "judicial records" added at that time is consistent with the definition of "court records" contained in rule 2.075(a)(1) [renumbered as 2.430(a)(1) in 2006] and the definition of "public records" contained in chapter 119, Florida Statutes. Despite the commentary, these definitions are not the same. The definitions added in 2002 are intended to clarify that records of the judicial branch include court records as defined in rule 2.075(a)(1) and administrative records. The definition of records of the judicial branch is consistent with the definition of "public records" in chapter 119, Florida Statutes.

2005 Court Commentary

Under courts' inherent authority, appellate courts may appoint a special magistrate to serve as commissioner for the court to make findings of fact and oversee discovery in review proceedings under subdivision (d) of this rule. Cf. *State ex rel. Davis v. City of Avon Park*, 158 So. 159 (Fla. 1934) (recognizing appellate courts' inherent authority to do all things reasonably necessary for administration of justice within the scope of courts' jurisdiction, including the appointment of a commissioner to make findings of fact); *Wessells v. State*, 737 So. 2d 1103 (Fla. 1st DCA 1998) (relinquishing jurisdiction to circuit court for appointment of a special master to serve as commissioner for court to make findings of fact).

2007 Court Commentary

New subdivision (d) applies only to motions that seek to make court records in noncriminal cases confidential in accordance with subdivision (c)(9).

2007 Committee Commentary

Subdivision (d)(2) is intended to permit a party to make use of any court-provided recording device or system that is available generally for litigants' use, but is not intended to require the court system to make such devices available where they are not already in use and is not intended to eliminate any cost for use of such system that is generally borne by a party requesting

use of such system.

APPENDIX B

Rule in Two-Column Format

Proposed rule	Reasons for change
RULE 2.420. PUBLIC ACCESS TO JUDICIAL BRANCH RECORDS	
(a) Scope and Purpose. [NO CHANGE]	
(b) Definitions. [NO CHANGE]	
(c) Exemptions. The following records of the judicial branch shall be confidential:	
(1)–(9) [NO CHANGE]	
(10) The names and any identifying information of judges mentioned in an advisory opinion of the ~~Committee on Standards of Conduct for Judges~~ Judicial Ethics Advisory Committee.	Subdivision (c)(10) amended to replace out-of-date reference to committee that has been renamed.
(d) Request to Make Circuit and County Court Records in Noncriminal Cases Confidential.	
(1)–(6) [NO CHANGE]	
(7) ~~Court records~~ Records of a lower tribunal made confidential ~~under this rule~~ by that tribunal must be treated as confidential during any ~~appellate~~ review proceedings. In any case where an order making court records confidential remains in effect as of the time of an appeal, the clerk's index must include a statement that an order making court records	Subdivision amended to clarify that records of all lower tribunals (including hearing tribunals in the executive branch) are subject to the provisions of the rule.

confidential has been entered in the matter and must identify such order by date or docket number.

(e) Request to Make Circuit and County Court Records in Criminal Cases Confidential.

Subdivision (e) added to address the sealing of court records in criminal cases; subsequent subdivisions (e) and (f) relettered as (f) and (g), respectively.

(1) Subdivision (d) shall apply to any request by the state or a defendant to make circuit or county court records confidential pursuant to subdivision (c)(9), except as provided in subdivision (e)(2).

Subdivision (e)(1) added to clarify that scope of new subdivision (e) encompasses only sealing requests described in (e)(2) that warrant a special procedure; all other sealing requests shall be governed by existing subdivision (d).

(2) Any 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." As to any motion made pursuant to this subdivision (e)(2), the following procedure shall apply:

Subdivision (e)(2) added to describe procedure to be followed when request is made to make court records confidential because of concerns either about the safety of a person or the integrity of an active criminal investigation.

(A) Any motion made pursuant to this subdivision and all court records that are the subject of such a motion must be treated as confidential by the clerk pending the court's ruling upon the motion.

Subdivision (e)(2)(A) included to establish threshold confidentiality of motions filed under subdivision pending further court action.

(B) Except when the motion filed under this subdivision represents that both the movant and any other party subject to the motion agree to all of the relief requested, as evidenced by all such parties signing the motion, the court shall hold a hearing on a motion filed under this subdivision within 15 days of the filing of the motion, but such hearing shall be a closed session held in camera. The court shall issue a ruling on motions filed under this subdivision within 10 days of the hearing on contested motions or within 10 days of the filing of

Subdivision (e)(2)(B) sets forth hearing procedure to be followed in event all parties do not agree to relief requested. Given the sensitivity of motions filed under this subdivision, short time frames (hearing within 15 days of filing; ruling within 10 days of hearing or agreed motion) are provided.

agreed motions.

(C) No order entered under this subdivision may authorize or approve the sealing of court records for any period longer than is necessary to achieve the objective of the motion, and in no event longer than 120 days. Extensions of an order issued hereunder may be granted for 60-day periods, but each such extension may be ordered only upon the filing of another motion in accordance with the procedures set forth under this subdivision. In the event of an appeal of a matter in which an order is entered under this subdivision, the lower tribunal shall retain jurisdiction to consider motions to extend orders issued hereunder during the course of the appeal.

Subdivision (e)(2)(C) provides durational limits on sealing orders. Extensions beyond 120 days require a new application to be made to the court by a party seeking further protection of confidential information.

(D) The provisions of subdivisions (d)(3)(A)–(G), (d)(6), and (d)(7) shall apply to motions made pursuant to this subdivision. The provisions of subdivisions (d)(1), (d)(2), (d)(3)(H), (d)(4), and (d)(5) shall not apply to motions made pursuant to this subdivision.

(E) The clerk of the court shall not publish any order of the court issued hereunder in accordance with subdivision (d)(4) unless directed by the court.

Subdivisions (e)(2)(D) and (E) have been included to address which portions of subdivision (d) of the rule apply in sealing proceedings under subdivision (e) and which do not. Because of the heightened level of confidentiality contemplated for proceedings arising under (e), those portions of (d) that address public filings of motions, public hearings, and public notices are specifically excluded from application to proceedings under (e).

(3) This subdivision (e) does not apply to records of the judicial branch deemed confidential under subdivisions (c)(1)–(c)(8) or (c)(10).

Subdivision (e)(3) clarifies that the scope of new (e) is limited to addressing only relevant proceedings under subdivision (d)(9) and has no application to other proceedings deemed exempt under subdivision (d).

(4) Requests to seal or expunge criminal history records must be made in accordance with Florida Rule of Criminal Procedure 3.692.

Rule 3.692 has resided in the criminal rules since 1977 and it was deemed appropriate not to address that procedure in new (e).

~~(e)~~ (f) **Judicial Review of Denial of Access Request.** Expedited review of denials of access to records of the judicial branch shall be provided through an action for mandamus, or other appropriate appellate remedy, in the following manner:

Subdivision relettered; no change in substantive provisions.

(1) Where a judge who has denied a request for access to records is the custodian, the action shall be filed in the court having appellate jurisdiction to review the decisions of the judge denying access. Upon order issued by the appellate court, the judge denying access to records shall file a sealed copy of the requested records with the appellate court.

(2) All other actions under this rule shall be filed in the circuit court of the circuit in which such denial of access occurs.

~~(f)~~ (g) **Procedure.** Requests and responses to requests for access to records under this rule shall be made in a reasonable manner.

Subdivision relettered; no change in substantive provisions.

(1) Requests for access to records shall be in writing and shall be directed to the custodian. The request shall provide sufficient specificity to enable the custodian to identify the requested records. The reason for the request is not required to be disclosed.

(2) The custodian shall be solely responsible for providing access to records of the custodian's entity. The custodian shall determine whether the requested record is subject to this rule and, if so, whether the record or portions of the record are exempt from disclosure. The custodian shall determine the form in which the record is provided. If the

request is denied, the custodian shall state in writing the basis for the denial.

(3) Fees for copies of records in all entities in the judicial branch of government, except for copies of court records, shall be the same as those provided in section 119.07, Florida Statutes (2001).

Committee Commentary

[NO CHANGE]

APPENDIX C

Referral Letters from Court

Supreme Court of Florida

500 South Duval Street
Tallahassee, Florida 32399-1925

R. FRED LEWIS
CHIEF JUSTICE
CHARLES T. WELLS
HARRY LEE ANSTEAD
BARBARA J. PARIENTE
PEGGY A. QUINCE
RAOUL G. CANTERO, III
KENNETH B. BELL
JUSTICES

THOMAS D. HALL
CLERK OF COURT

EDWARD DECOSTE
MARSHAL

April 19, 2007

Mr. Gary Devenow Fox
Chair, Rules of Judicial Administration Committee
Suntrust International Center
1 S.E. 3rd Avenue, Suite 3000
Miami, Florida 33131-1711

Mr. William C. Vose
Chair, Criminal Procedure Rules Committee
1104 Bahama Drive
Orlando, Florida 32806-1440

Re: Sealing of Court Records in Criminal Cases

Dear Mr. Fox and Mr. Vose:

I am writing to you in your respective capacities as Chairs of the Rules of Judicial Administration Committee and the Criminal Procedure Rules Committee in follow-up to the Court's recent opinion in In Re: Amendments To Florida Rule Of Judicial Administration 2.420—Sealing Of Court Records And Dockets, No. SC06-2136 (Fla. April 5, 2007). On behalf of the Court, I thank your committees for their work in response to Chief Justice Lewis' recent requests with respect to the concerns noted in the opinion.

In the enclosed opinion, the Court, on an interim, emergency basis, adopted amendments to Florida Rule of Judicial Administration 2.420, Public Access to Judicial Branch Records, proposed by the Rules of Judicial Administration Committee. The amendments provide a procedure for making circuit and county court records in non-criminal cases confidential under subdivision (c)(9) of the rule and for unsealing court records that have been made confidential under that provision. Because the Rules of Judicial Administration Committee did not focus on the sealing of court records in criminal cases and because the Criminal Procedure Rules Committee asked that this matter be returned to that committee if the Court declined to adopt certain proposals by the Florida Prosecuting Attorneys Association, the Court adopted new subdivision (d) on an interim basis and returned the matter to both of your committees to work together to propose rule amendments to address the sealing of court records in criminal cases. Slip op. at 15-16. Your committees should specifically address the need for a rule governing the sealing of court records in criminal cases as well as the concerns raised about the need to protect confidential informants.

The Court would like your committees to work together to consider these important issues. Your joint report and proposals should be filed with my office by November 1, 2007, with copies to the liaison justices to your committees and the director of central staff. The Court hopes no extensions will be necessary. However, if you should determine that more time is needed to coordinate your consideration of these issues, please file a motion for extension of time with my office indicating when the committees can file their joint report and proposals.

Should you have any questions, please do not hesitate to contact me or the Court's liaisons to your committees.

Most cordially,

By: Debbie Causseaux
Chief Deputy Clerk

Thomas D. Hall

TDH/dm/sb

Enclosure

cc: Justice Charles T. Wells, Liaison to Criminal Procedure Rules Committee
Justice Kenneth B. Bell, Liaison to Rules of Judicial Admin. Committee
Gerry Rose, Bar Staff Liaison to Criminal Procedure Rules Committee
Craig Shaw, Bar Staff Liaison to Rules of Judicial Admin. Committee
Deborah J. Meyer, Director of Central Staff

Supreme Court of Florida

500 South Duval Street
Tallahassee, Florida 32399-1925

R. FRED LEWIS
CHIEF JUSTICE
CHARLES T. WELLS
HARRY LEE ANSTEAD
BARBARA J. PARIENTE
PEGGY A. QUINCE
RAOUL G. CANTERO, III
KENNETH B. BELL
JUSTICES

THOMAS D. HALL
CLERK OF COURT

EDWARD DECOSTE
MARSHAL

April 19, 2007

Mr. Gary Devenow Fox
Chair, Rules of Judicial Administration Committee
Suntrust International Center
1 S.E. 3rd Avenue, Suite 3000
Miami, Florida 33131-1711

Mr. Edward Maurice Mullins
Chair, Appellate Court Rules Committee
Astigarraga, Davis, Mullins, & Grossman, P.A.
701 Brickell Avenue, Floor 16
Miami, Florida 33131-2801

Re: Sealing of Appellate Court Records

Dear Mr. Fox and Mr. Mullins:

I am writing to you in your respective capacities as Chairs of the Rules of Judicial Administration Committee and the Appellate Court Rules Committee in follow-up to the Court's recent opinion in In Re: Amendments To Florida Rule Of Judicial Administration 2.420—Sealing Of Court Records And Dockets, No. SC06-2136 (Fla. April 5, 2007).

In the enclosed opinion, the Court, on an interim, emergency basis, adopted amendments to Florida Rule of Judicial Administration 2.420, Public Access to Judicial Branch Records. The amendments provide a procedure for making circuit and county court records in non-criminal cases confidential under subdivision

(c)(9) of the rule and for unsealing court records that have been made confidential under that provision. In the opinion, the Court also asked the Rules of Judicial Administration Committee to work with the Appellate Court Rules Committee to consider the need for rules governing requests to seal appellate court records. Slip op. at 16.

The Court would like your committees to work together to consider this important issue. Your joint report and any proposals should be filed with my office by November 1, 2007, with copies to the liaison justices to your committees and the director of central staff. The Court hopes no extensions will be necessary. However, if you should determine that more time is needed to coordinate your consideration of this issue, please file a motion for extension of time with my office indicating when the committees can file their joint report and any proposals.

Should you have any questions, please do not hesitate to contact me or the Court's liaisons to your committees.

Most cordially,

By: Dulbie Causseaux
Chief Deputy Clerk

Thomas D. Hall

TDH/dm/sb

Enclosure

cc: Justice Charles T. Wells, Liaison to Appellate Court Rules Committee
Justice Kenneth B. Bell, Liaison to Rules of Judicial Admin. Committee
Joanna Mauer, Bar Staff Liaison to Appellate Court Rules Committee
✓Craig Shaw, Bar Staff Liaison to Rules of Judicial Admin. Committee
Deborah J. Meyer, Director of Central Staff

APPENDIX D

Subcommittee Report

APPENDIX D

MEMORANDUM

TO: Gary D. Fox, RJA Chair
[Via Email: gfox@stfblaw.com
Craig Shaw, RJA Staff Liaison
[Via Email: cshaw@flabar.org]

Edward Mullins, ACRC Chair
[Via Email: emullins@astidavis.com]

Joanna A. Mauer, ACRC Staff Liaison
[Via Email: jmauer@flabar.org]

FROM: Stanford R. Solomon, Joint Subcommittee Chair

RE: Joint Subcommittee of the ACR Committee and the RJA Committee
SEALING OF APPELLATE COURT RECORDS

DATE: October 30, 2007

Final Report of
Joint Subcommittee of the Rules of Judicial Administration Committee and the Appellate Court Rules Committee to Consider Need for Rules Governing Requests to Seal Appellate Court Records [Rule 2.420(d) - Public Access to Judicial Branch Records]

On April 5, 2007, the Florida Supreme Court issued its *per curiam* opinion in In Re: Amendments to Florida Rules of Judicial Administration 2.420-Sealing of Court Records and Dockets. In that Opinion, the Florida Supreme Court stated:

> We also ask the RJA Committee to work with the Appellate Court Rules Committee to consider the need for rules governing requests to seal appellate court records.[1]

On May 10, 2007, a Joint Subcommittee of the RJA Committee and the ACR Committee met by conference call. The participants in this initial meeting were:

The Honorable Robert Benton
Scott Dimond
Dorothy Easley
The Honorable Charles J. Kahn, Jr.
The Honorable Stevan T. Northcutt
The Honorable Alan Schwartz

[1]The Supreme Court also requested that the RJA Committee and the Criminal Procedure Rules Committee "work together to propose rule amendments to address the sealing of court records in criminal cases."

Craig Shaw, RJA Staff Liaison
Stanford R. Solomon

On June 4, 2007, the Joint Subcommittee met for a second time by conference call. The participants in this second meeting were:

The Honorable Robert Benton
Scott Dimond
Dorothy Easley
The Honorable Charles J. Kahn, Jr.
The Honorable Stevan T. Northcutt
Craig Shaw, RJA Staff Liaison
Stanford R. Solomon

After extensive discussion, the Joint Subcommittee concluded as follows:

(1) If a rule is adopted to address the sealing of appellate court records, that rule should appear in the Rules of Judicial Administration rather than in the Rules of Appellate Procedure.

(2) If a rule is adopted to address the sealing of court records in criminal cases, that rule should also appear in the Rules of Judicial Administration rather than in the Rules of Criminal Procedure.

(3) Records of lower tribunals (including hearing tribunals in the executive branch) that are made confidential pursuant to the procedures specified in Rule 2.420(d) or by another appropriate procedure or applicable statute shall be treated by the appellate court during appellate proceedings in a manner that is consistent with the treatment afforded by the lower tribunal in a written order addressing confidentiality.

(4) If an appellate court is presented with a request to make appellate court records confidential (whether relating to a record that was presented or presentable to a lower tribunal but not made confidential by a lower tribunal or a record presented to an appellate court in an original proceeding), the appellate court should consider the request for confidentiality under the standards and guidelines applicable to trial courts under Rule 2.420(d).

In order to address and implement the conclusions reached by the Joint Subcommittee, the Joint Subcommittee proposes the following amendment to Rule 2.420(d)(7):

> ~~Court records~~ Records of a lower tribunal made confidential ~~under this rule must~~ by that tribunal shall be treated as confidential during any ~~appellate~~ review proceedings. In any case where an order making court

records confidential remains in effect as of the time of an appeal, the clerk's index must include a statement that an order making court records confidential has been entered in the matter and must identify such order by date or docket number.

The Joint Subcommittee also proposes the following Committee Note (with a recommendation that the Court adopt the Committee Note as a Court Commentary):

> Subdivision (d)(7) does not preclude review by an appellate court or affect the standard of review by an appellate court of an order by a lower tribunal making a record confidential.
>
> Further, if an appellate court is presented with a request to make an appellate court record confidential (whether relating to a record that was presented or presentable to a lower tribunal, but not made confidential by a lower tribunal or a record presented to an appellate court in an original proceeding), the appellate court should consider the request for confidentiality under the standards and guidelines applicable to trial courts under Rule 2.420(d).