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IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA
RULE OF JUDICIAL ADMINISTRATION 2.420 Case No.: SC07-2050

COMMENT OF THE APPELLATE COURT RULES COMMITTEE, REQUEST FOR ADDITIONAL TIME, AND APPOINTMENT OF WORKGROUP

Steven L. Brannock, Chair, the Appellate Court Rules Committee (ACRC), and John F. Harkness, Jr., Executive Director, The Florida Bar, submit this comment in response to this Court's proposed addition of subdivisions (f) and (g) to Florida Rule of Judicial Administration 2.420. The ACRC recommends that the Court defer adoption of both subdivisions until a joint workgroup has an opportunity to fully study the proposed subdivisions and their interplay with other rules of procedure. The ACRC recommends that the joint workgroup consist of representatives of the Rules of Judicial Administration Committee, the Criminal Procedure Rules Committee, and the ACRC.

The ACRC has approved the submission of this comment by an email vote of 39 to 0. Because this comment does not contain a specific rule amendment proposal, it was not submitted to the Board of Governors.

Two ACRC subcommittees have reviewed proposed subdivisions (f) and (g). Both subcommittees were uncertain as to the objectives proposed subdivisions (f) and (g) are intended to address. The Court's proposal of subdivisions (f) and

(g) appears to have been prompted by a Committee Note/Court Commentary initially proposed by the Rules of Judicial Administration Committee. *See* Case No. SC07-2050, *Report of the Florida Rules of Judicial Administration Committee* at 2. That proposed note/commentary stated, in part, simply:

> 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.

Collectively, the ACRC subcommittees consulted representatives of the Criminal Procedure Rules Committee and the Rules of Judicial Administration Committee, but neither ACRC subcommittee had sufficient time to fully study the interplay between the proposed subdivisions and other rules of procedure, such as proposed Rule 2.420(h) and existing Florida Rule of Criminal Procedure 3.692 and Florida Rule of Appellate Procedure 9.100(d). Additionally, the subcommittees identified several issues with the wording and application of proposed subdivisions (f) and (g) that merit further review and consideration. *See* Appendices A (Criminal Practice Subcommittee Minutes, April 11, 2008); B (Memorandum of Dorothy Easley and Paul Nettleton), C (Memorandum of Thomas Young).

Given the circumstances outlined above, the ACRC recommends that a joint workgroup be convened to further study and address each of the following questions:

1. Whether Rule 2.420 should authorize motions requesting confidentiality of appellate court records or files when such a request could have been, but was not, made in a lower tribunal. Lower tribunals are better equipped to handle necessary evidentiary hearings and should be the venue of first resort.

2. Whether, when the motion to make records confidential is made for the first time in the appellate court, an order making appellate records confidential under proposed subdivision (f) should also operate to make records in the lower tribunal confidential. Confidentiality in the appellate court arguably has no meaning unless the lower tribunal's records are sealed as well.

3. Whether the interplay between proposed Rule 2.420(f) and Rule 9.100 should be clarified. Proposed Rule 2.420(f)(1) appears to suggest that its provisions apply both to motions in the first instance and to review of a lower tribunal's denial of a motion to make records confidential. Review of orders granting or denying confidentiality will almost always be under Rule 9.100, whether through certiorari or under Rule 9.100(d), so the

provisions of proposed Rule 2.420(f) should not conflict with any provision of Rule 9.100. Moreover, as written, proposed Rule 2.420(f) conflicts with and renders moot amendments to Rule 9.100(d) currently under consideration by the ACRC.[1]

4. Whether the interplay between proposed subdivision (f)(5), proposed subdivision (h) [current subdivision (e)], and Rule 9.100(d) should be clarified. For example, if the press wants access to a record an appellate court has made confidential, is the press supposed to file a motion in the appeal under Rule 2.420(f)(5) (and how does a non-party do that), petition for mandamus or "other applicable remedy" under proposed subdivision (h), or seek appellate review through Rule 9.100(d)?

5. Whether proposed subdivision (f)(7), which speaks to records of a lower tribunal made confidential by that tribunal, is duplicative of subdivision (d)(7), which provides that court records made confidential by a lower

[1] The proposed amendments to Rule 9.100 under review by the ACRC are designed to balance the competing constitutional interests in privacy and public access and to provide meaningful appellate review to parties aggrieved by orders denying a request to make records confidential or granting a request to open records. Based on Rule 2.420(d)(1)(B), which makes records subject to the motion confidential pending the lower tribunal's ruling, and Rule 2.420(d)(7), which continues the lower tribunal's confidentiality through appellate proceedings, the ACRC at its June 2008 meeting will be considering a proposed amendment to Rule 9.100(d), which would provide for a short automatic stay to maintain confidentiality long enough for the aggrieved party to seek review under Rule 9.100 and to file a motion to continue the automatic stay provided by amended Rule 9.100(d).

tribunal remain confidential during appellate proceedings. The language of proposed subdivision (f)(7) implies a motion must be filed in the appellate court even when the lower tribunal has granted the records confidential status. To that extent, proposed subdivision (f)(7) is inconsistent with the plain language of subdivision (d)(7).

6. Whether, to the extent proposed subdivision (f)(7) may be necessary in the context of second appeals, such as appeals to the supreme court, the proposed subdivision should be modified to read as follows:

> Records of an appellate court ~~lower tribunal~~ made confidential by that court ~~tribunal~~ must be treated as confidential during any 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. This subdivision does not preclude review ~~by an appellate court~~, or affect the standard of review ~~by an appellate court~~, of an order by an appellate court ~~lower tribunal~~ making a record confidential.

7. Whether the existence of proposed subdivisions (f) and (g) should be generally cross-referenced within the Florida Rules of Appellate Procedure as an aid to appellate practitioners.

8. Whether, to the extent proposed subdivisions (f) and (g) apply to original proceedings that have no corresponding case in a lower tribunal, their

provisions should specifically cross-reference and work in tandem with Rule 9.100.

9. Whether the cross-references in proposed subdivision (g) should be simplified and streamlined. For example, the limitation language of proposed subdivisions (g)(1) and (g)(3) could be combined. Alternatively, proposed subdivision (g)(2) could be incorporated into proposed subdivision (f) under a new provision labeled "Exceptions," and proposed subdivisions (g)(1), (g)(3), and (g)(4) could be eliminated.

10. Whether proposed subdivision (g)(4) is misleading and should be deleted.

11. Whether a new subdivision should be added to clarify that Rule 2.420 does not authorize a request to seal or expunge criminal history records. Such a subdivision might read:

> **Applicability.** This rule does not apply to criminal history records maintained by any executive branch entity. Requests to seal or expunge criminal history records must be made in accordance with Florida Rule of Criminal Procedure 3.692.

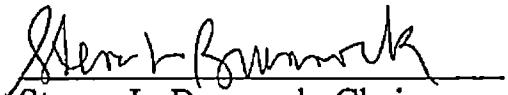
In summary, the ACRC thinks that adoption of proposed subdivisions (f) and (g), as those proposals are presently written, will create confusion and divert limited judicial resources to collateral issues. Referring the proposals to a joint workgroup comprising the various rules committees, whose substantive areas of practice are directly impacted by the proposals, will result in more finely tuned

proposals that will address the Court's concerns, eliminate duplication among various rules, and reduce confusion surrounding the interplay between proposed subdivisions (f) and (g) and other rules of procedure.

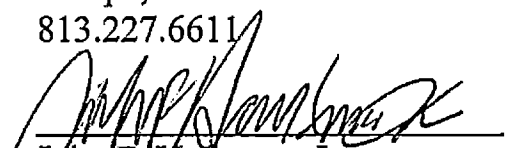
For these reasons, the ACRC respectfully requests that the Court defer adoption of proposed subdivisions (f) and (g) to Rule 2.420 until a joint workgroup has an opportunity to fully study and address the questions identified by the ACRC.

Dated: May 9, 2008

Respectfully submitted,



Steven L. Brannock, Chair
Fla. Bar No. 0319651
Holland & Knight
Post Office Box 1288
Tampa, FL 33601
813.227.6611



John F. Harkness, Jr.
Fla. Bar No. 123390
Executive Director
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300
850.561.5600

CERTIFICATE OF COMPLIANCE

I certify that this Comment was prepared in compliance with the font requirements of *Fla.R.App.P.* 9.210(a)(2).

Joanna A. Mauer
Bar Staff Liaison, Florida Appellate Court Rules Committee
The Florida Bar
Florida Bar No. 0763251

CERTIFICATE OF SERVICE

I certify that copy of the foregoing was furnished by United States mail to: Honorable Robert T. Benton II, Chair, Florida Rules of Judicial Administration, First District Court of Appeal, 301 South Martin Luther King, Jr., Blvd., Tallahassee, FL. 32399-6601; and H. Scott Fingerhut, Chair, Florida Criminal Procedure Rules Committee, 2400 S. Dixie Highway, Miami, FL 33133-3156 on May 9, 2008.

Joanna A. Mauer
Bar Staff Liaison, Florida Appellate Court Rules Committee
The Florida Bar
Florida Bar No. 0763251

APPENDIX A

MINUTES OF ACRC CRIMINAL SUBCOMMITTEE

On Friday, April 11, 2008, at 10:00 a.m., the ACRC Criminal Subcommittee held a telephonic meeting to discuss whether the full ACRC Committee should offer comments regarding the Florida Supreme Court's adoption of proposed Rule of Judicial Administration 2.420. Selected members of the Record on Appeal Subcommittee were invited to join the meeting. Prior to the meeting, emails were exchanged, including the request for comments, see In re Amendments to Florida Rule of Judicial Administration 2.420, Florida Supreme Court Case No. SC07-2050; notification that we had obtained an extension of the April 1 date for commenting; comments outlining concerns about confusion in the rule as proposed; and work product relating to 2.420's implications on current appellate and criminal rules. The meeting was attended by: Calianne Lantz, chair; Carol Dittmar, vice-chair; Porsche Shantz; Susan Wright; Gwendolyn Powell Braswell; Fran Toomey; Ken Nunnelley; Maria Armas; Susan Hugentugler; and Fleur Lobree, liaison from the Criminal Procedure Rules Committee. Henry Gyden, Tom Young, and Paul Nettleton attended from the Record on Appeal Subcommittee. Dittmar agreed to take minutes.

Lantz opened the meeting and outlined the agenda. The Criminal subcommittee also has a pending referral from the Florida Supreme Court for consideration of changes to Rule of Appellate Procedure 9.200 regarding custody of physical evidence, which would be considered at the end of the meeting, time permitting. The primary objective was discussion regarding the proposed changes to Rule 2.420 published in SC07-2050.
Several members questioned the scope of any proposed comments we should offer. It was noted a number of committees have worked on the issues raised in 2.420 and it didn't make sense to rehash something that had already been done. Nettleton outlined some of the consideration that had been given to potential conflict between 2.420(e) and Rule 9.100, and the suggestion to either delete the subsection entirely or cross reference the appellate rule. Wright noted that, in her experience working in the appellate court, a party wanting to limit access to appellate records could simply file a motion.

Attention was focused on 2.420(g), "Request to Make Appellate Court Records in Criminal Cases Confidential." Toomey made a motion, seconded by Hugentugler, that this subcommittee limit its discussion and report to those rules which affect appellate procedure. The motion carried unanimously.

Lobree offered a history of the proposed changes to 2.420. The rule was substantially revised in the last year or so, but the Florida Prosecuting Attorney's Association had filed comments noting that the new rule failed to take into account the need for confidentiality in particular situations unique to criminal cases. For example, the need to protect confidential informants, plea negotiations with co-defendants, and active criminal investigation information required exceptions to some of the pleading requirements and modification of the procedures in seeking confidentiality. The Rules of Judicial Administration Committee drafted 2.420(e) to address situations where disclosure of information from circuit and county court records could jeopardize the safety of a person or an active criminal investigation. In requesting comments on (e) and other new proposals for 2.420, the Florida Supreme Court extended the proposals as submitted by the RJA Committee and sua sponte offered proposed rules 2.420(f) and (g), to apply to requests appellate court records, which generally parallel 2.420(d) and (e) provisions for circuit and county court records.[2] However, some of the provisions are out of place in the appellate context. For example, 2.420(g)(4) provides that "Requests to seal or expunge criminal history records must be made in accordance with Florida Rule of Criminal Procedure 3.692." This provision suggests that the appellate court may expunge a record, without regard to the potential effect on published opinions. It may seem unlikely, but in fact it has come up, in a case where the State took a pretrial appeal and thereafter dropped charges, and the accused later seeks to clear his name from all records. What if the opinion seeking to be expunged has precedential value?

Nettleton noted that the review process for confidentiality issues will be addressed in 9.100, and that 2.420 was only addressing court records that are maintained as case records, and not administrative records as defined in 2.420(b)(1)(B). Lobree noted that one problem with the rule was the headings were misleading, adding a civil/criminal distinction and blurring the case records/administrative records issues.

Turning to 2.420(g) specifically, the discussion focused on the cross-reference to Rule 3.692 in (g)(4) quoted above. While it may alert litigants that 2.420 is not to be used for that purpose, it suggests that there is a procedure by which expunction of appellate records may be sought. Shantz noted that the criminal history contemplated is not kept by the courts, but by criminal agencies; it would not be

[2] The RJA's proposals are "Part One" and the Florida Supreme Court's proposals are "Part Two" in the order for comments in SC07-2050. Both proposals are the same for 2.420(e).

kept in appellate court records. It was noted that 3.692 was also cross-referenced in 2.420(e)(4), although again the criminal history records should not be part of judicial records subject to 2.420 at all. There was a suggestion that the cross-reference to 3.692 be moved to another part of 2.420, such as the provisions on the scope of the rule or the definition of judicial records. There was also discussion as to whether any cross-reference was necessary, or if the provision should simply be deleted.

Ultimately, Gyden made a motion to move the cross-reference to 3.692 to another provision in 2.420. Dittmar seconded the motion. Gyden offered to draft language and circulate it via email as members discussed the concept generally. It was noted that our role is to offer comments to the proposed rule and we did not necessarily have to agree on specific language to offer as a counter-proposal. Lobree discussed what her subcommittee and the full Criminal Rules Committee approved, which had been circulated prior to the meeting. That Committee is recommending that 2.420(g) be returned to the Rules of Judicial Administration Committee, as well as offering an alternative proposal to 2.420(g) which deleted the cross-reference to 3.692. Shantz questioned whether any appellate court record had been expunged, and Wright noted that a motion to expunge would be denied as inappropriate, but some records could be sealed. She was not aware of any authority for expunction of appellate records. Conceptually, members agreed that the cross-reference to 3.692 should be removed from 2.420(g)(4), and felt that it was unnecessary in 2.420(e)(4) as well, while recognizing our earlier motion limiting our discussion to 2.420(g). The motion to move the reference passed unanimously.

Discussion drifted to other issues implicated by 2.420. It was again noted that other committees were working on comments, particularly the interplay with appellate review under 9.100. Focusing on the content of 2.420(g), concerns were expressed that the proposed rule is confusing, particularly the cross-referencing of pleading requirements. Several members voiced the opinion that, if the intended purpose was to simply and clarify the rule, this purpose had not been achieved because it was too unwieldy. Although the headings suggest (f) pertains to all civil cases and (g) pertains to all criminal cases, criminal cases are governed by (f) unless they relate to seeking the confidentiality of information which could jeopardize the safety of a person or an active criminal investigation under (g)(1); perhaps (g) could be more appropriately titled "Exceptions in criminal cases."

In light of the concerns outlined, Toomey offered to draft an alternative proposal for 2.420(g) to be circulated for further consideration. Noting that the RJA

Committee had never had the opportunity to consider the Florida Supreme Court's proposals in 2.420(f) and (g), several members suggested that we lay out our concerns in the minutes of this meeting, and recommend that proposed rule 2.420 be returned to the RJA Committee for consideration of the concerns and suggestions discussed. We would like to see the Criminal Rules Committee work with the RJAC to improve the proposal as currently drafted. All members agreed that the ACRC should recommend returning the rule to the RJAC for further consideration.

These are our observations and suggestions:

Rule 2.420(g) as proposed is confusing; cross-references should be simplified and streamlined. Rule 2.420(g)(2)(D) is difficult to follow. Rule 2.420(g)(1) limits the application to (c)(9) records not covered by (f) and then (g)(3) notes that it does not apply to (c)(1)-(c)(8) or (c)(10) records; perhaps these provisions could be combined. Better headings would help clarity. Or, all of (g)(2) could be moved into 2.420(f) as a subsection titled "Exceptions" and (g)(1), (g)(3) and (g)(4) can be deleted.

We specifically recommend that 2.420(g)(4), cross-referencing Rule 3.692, be deleted as unnecessary and misleading. The specific proposal circulated by Gyden called for the creation of 2.420(j), providing:

> (j) **Applicability.** This rule does not apply to criminal history records maintained by any executive branch entity. Requests to seal or expunge criminal history records must be made in accordance with Florida Rule of Criminal Procedure 3.692.

Consideration should be given to specifying that such requests "must be made *in the appropriate circuit or county court* in accordance with" Rule 3.692.

These comments will be forwarded to Steve Brannock for consideration by the full ACRC as soon as possible.

Lantz took up the second referral for the Criminal subcommittee, a request by the Florida Supreme Court of January 16, 2008, for the ACRC to "study whether rule 9.200 should be amended to require all original exhibits, including physical exhibits, to be retained in the trial court, unless otherwise ordered by the appellate court and only copies of the exhibits, when feasible, to be sent to the appellate court." The Court's referral noted that evidence had recently been lost in a death penalty case while being transported by courier back to the trial court clerk. The Court concluded that transporting original exhibits creates an unnecessary risk of

loss and has, consequently, modified its standard orders in death penalty cases to direct that all original exhibits are to be kept in the trial court unless the Court orders otherwise. The referral provides that, unless the Committee determines that the matter should be considered out of cycle, any proposed amendments should be included in the next regular-cycle report. Lantz noted our next regular-cycle report will be in 2009.

Consideration of this referral will require a determination as to the most appropriate place to retain the physical evidence as well as the adoption of a procedure for parties to request that original exhibits be provided to the appellate court when deemed necessary for full consideration of the issues presented in the appeal.

Shantz volunteered to draft language to start discussion on these issues. Once that has been circulated, Lantz will send out an email to poll for the best meeting time.

The meeting adjourned at 12:06 p.m.

APPENDIX B

Memorandum

TO:	STANFORD SOLOMON, SUBCOMMITTEE CHAIR, ACRC RECORD ON APPEAL SUBCOMMITTEE
FROM:	DOROTHY EASLEY, CO-VICE CHAIR & PAUL NETTLETON, CO-VICE CHAIR, ACRC RECORD ON APPEAL SUBCOMMITTEE
RE:	ACRC-RJA & INTERFACE BETWEEN RULES 2.420(E) & 9.100(D)
DATE:	MARCH 23, 2008 & SUPPLEMENTED APRIL 9, 2008

Short Questions

Whether Rule 2.420(e), should be amended to clarify the avenue for appellate review of orders generated under the amended, and if adopted, Rule 2.420(d), whether Rule 9.100 should be amended to clarify the avenue for appellate review of orders generated under the amended, and if adopted, Rule 2.420(d), whether both Rule 2.240(e) should be moved to Rule 9.100, or whether both Rule 2.420(e) and Rule 9.100 should be amended, along with some cross-referencing?

Short Answer

After RJA Adjunct Member, Kathi Giddings[3] and co-Vice Chairs Paul Nettleton and Dorothy Easley conferenced on March 17 and 18, 2008, and reviewed the Florida Rules of Judicial Administration, in particular Rule 2.420, and the Florida Rules of Appellate Procedure, in particular Rule 9.100, it is recommended that both Rule 2.420(e) and Rule 9.100 be amended to clarify the avenue for appellate review of orders generated under the amended, and if adopted, Rule 2.420(d) as well as clarifying the avenue for review of orders granting access to records and

[3] RJA Committee Member Kathi Giddings was invited to serve in an advisory role, because of her extensive work in this area on the RJA and her experience as former chair of the ACRC and she agreed to do so to the extent this presented no conflicts.

documents. Because of the technology and the speed with which documents are capable of being disseminated, it is also recommended that these amendments account for stay procedures that, while not protracted, permit meaningful appellate review. If Rule 9.100 is amended, then Rule 2.420(e) should be amended to refer the reader to Rule 9.100. This reduces the potential for conflict between Rule 9.100 and Rule 2.420(e), and increases the comprehensiveness and consistency of Rule 9.100. Paul Nettleton has drafted a proposed Rule Amendment to Rule 9.100, on which Dorothy Easley and Kathi Giddings made additional suggestions and revisions, and Stanford Solomon and Beth Coleman have been working on a draft proposed Rule Amendment to Rule 2.420(e).

Background

Summarizing from a January 26, 2008 referral email that RJA and ACRC Member, Paul Regensdorf, sent to ACRC Chair, Steven Brannock, this request arose out of the Access to Court Records Committee: a committee that the Florida Supreme Court has broadly charged with implementing the Privacy Committee's report of a couple of years ago, and doing so in a way that would be consistent with both open government and recognized privacy interests. Complicating this task was the approaching reality that court dockets might soon be "on the internet," making the implementation of the Privacy Committee's report and the balancing of open government and recognized privacy interests of much wider-spread impact. For these reasons, the Access to Court Records Committee was also directly charged with proposing to the Court amendments to Rule 2.420, to set forth how the numerous public records' exemptions would be addressed in a court records context. While this Access to Records Committee started its work, the Florida Supreme Court gave a separate emergency charge to the RJA, to propose a separate amendment to Rule 2.420 to address the issue of "secret dockets." That RJA Committee

largely completed that emergency charge and submitted a proposed Rule Amendment to the Court, which was, in turn, approved early last year. That Rule Amendment created a workable procedure to allow those seeking to keep records in non-criminal cases "confidential" or "secret" to obtain judicial review of that request before the clerk would make those records public, and that new procedure has been primarily set forth in Rule 2.420(d).

Paul Regensdorf raised concerns with Rule 2.420(d) as amended regarding appellate review issues: that the new Rule 2.420(d), addressing secret dockets and papers, would generate a fair number of orders that will trigger the need for appellate review, and even more if the proposed Rule 2.420(d) is also adopted, notably by those seeking to keep things confidential or those seeking to open court records. Currently, appellate review is set forth in Rule 2.420(e), and by virtue of its placement, that placement suggested that it was the Rule covering review of orders under the immediately preceding Rule 2.420(d). The concern Paul Regensdorf raised was that any order finding records "confidential" or "exempt" or "secret" under Rule 2.420(d) could easily be deemed a "denial of access request", while Rule 2.420(e) may have been specially written for a limited reason of addressing requests for access to judicial administrative records. Also of concern was the reference in Rule 2.420(e)—a rule regarding judicial administration—setting forth appellate review procedures and implying that mandamus was the appropriate review mechanism for Rule 2.420(d) orders. Because Rule 2.420(e) was not drafted with a view toward larger appellate review of more types of "access to records" orders and because that kind of review has historically been under Rule 9.100, Paul Regensdorf requested that the ACRC look at this issue to consider whether possible amendments were in order.

Chair Brannock, thereafter, referred the issues that Paul Regensdorf raised to the Record on Appeal Subcommittee, to expeditiously review and address any amendment that might be

needed to clarify the avenue for appropriate appellate review. Subcommittee Chair Sandy Solomon formed a Joint Subcommittee with the Rules of Judicial Administration, and ACRC Subcommittee co-Vice Chairs Dorothy Easley and Paul Nettleton, along with RJA Kathi Giddings, met and evaluated these issues to, thereafter, submit their analysis and proposals to the Subcommittee regarding Rule 9.100.

Analysis

A. The History of Rule 9.100(d).

Rule 9.100(d) currently permits an aggrieved party to challenge an order excluding the press or the public from access to a proceeding or record, and the procedure for doing so is by filing a petition in the appellate court. The reason that this procedure is set forth in Rule 9.100 is because subsection (d) is also intended to afford expedited relief to the press and public when constitutional rights are infringed. *State ex rel. Times Publishing Company v. Patterson,* 451 So.2d 888 (Fla. 2d DCA 1984).

Historically, the most frequently reviewed orders under Rule 9.100(d), although other denial of access orders are envisioned in the rule, have been orders sealing court files[4] and orders excluding the press and public from judicial proceedings.[5] Traditionally, however, orders restraining the press from publishing certain information have been reviewed by way of certiorari under Rule 9.100, not under Rule 9.100(u).[6]

There is presently in Rule 9.100(d) no jurisdictional time limit for filing a petition for review of an order excluding the press or the public, only that the petition be filed "as soon as

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[4] *Goldberg v. Johnson,* 485 So.2d 1386 (Fla. 4th DCA 1986).

[5] *Miami Herald Publishing Co. v. Chappell,* 403 So. 2d 1342 (Fla. 3d DCA 1981).

[6] *Jacksonville Television, Inc. v. Florida Department of Health & Rehabilitative Services,* 659 So. 2d 316 (Fla. 1st DCA 1994).

practicable" following rendition of the order to be reviewed. As for a stay pending review, Rule 9.100(d)(2) empowers the appellate court to grant a stay on its own motion or on the motion of a party.

B. Dorothy Easley, Kathi Giddings and Paul Nettleton met and discussed the issues that Paul Regensdorf raised and how Rule 9.100 would be best interfaced with Rule 2.420:

Issue 1. Should the procedure for review of orders concerning access to records be in Rule 2.420 or Rule 9.100?

Appellate review procedures for these orders concerning records should be in Rule 9.100, which has historically been the Rule that addressed appellate review of orders granting access [e.g. certiorari] or denying access [e.g. Rule 9.100(d)] to records. Rule 2.420(e) is inconsistent with, if not in conflict with, Rule 9.100 and, for that reason, should be amended with a cross-reference to Rule 9.100, or deleted in its entirety. As Paul Regensdorf observed, Rule 2.420(e) is "awkwardly" written, and the references to mandamus, actions, and the courts to be filed in, create confusion.

Additionally, Rule 9.100 should be rewritten. Rule 9.100 addresses the denial of access to both proceedings and records. Rule 2.420, however, only concerns records. Both need to be addressed in Rule 9.100 and Rule 9.100(d) is out of date and should be amended to address the current Access to Records issues, and in the interest of clarity and uniformity. Rule 9.100 could be improved to allow review of both orders granting access to records and discovery and orders denying access to records and discovery.

Kathi Giddings raised additional scenarios that were very helpful to our analysis of this possible rule amendment, including the issue of expedited review. There are numerous references in the RJA rules, e.g., Rule 2.215, that concern expedited review. As such, upon further discussion, we recommend that references to expedited review remain in Rule 2.420.

Issue 2. Should there be provision for bilateral review rights?

We concluded there should be bilateral review under Rule 9.100(d) to allow review of both orders denying access and orders granting access to records claimed to be confidential and not subject to public access. This was primarily driven by the concern to protect rights of privacy and confidentiality during review of an order granting access and seeking a mechanism to stay such an order pending review to allow for meaningful review. (See Issue #4.)

Regarding access to records--e.g. the situation where the press obtains access to public records, there should be some stay pending appellate resolution of the issue given that rights of privacy and confidentiality may be just as important to protect as rights of access. The customary procedure for a motion to stay, followed by appellate review of an order denying a stay of an order granting access to records, is a procedure that has evolved in the general appellate litigation context. In the situation of the press and its desire for access to public records, however, with the developing of electronic records, these traditional procedures do not address the technology. So some revision to Rule regarding the stay of access to public records in these situations would be prudent to address the technological developments and the growing situation of virtually immediate access under an order granting access that would render traditional appellate review proceedings moot in short order.

We dedicated significant time to the issue of whether Rule 9.100(d) should be amended and decided that it should be amended to afford review bilaterally--that is, to address both the access and the denial of access of the press or public to records or proceedings. This was principally to devise a means of protecting rights of privacy and confidentiality during review of an order granting access. We recognized and agreed that there was a Rule 9.100 provision in the certiorari context, as well as other writs, for review of orders granting access. We agreed that, in

terms of review itself, the current certiorari remedy adequately addressed that. However, regarding the stay provision, we extensively discussed scenarios where access would be granted and, even before a motion for stay could be filed, let alone reviewed, electronic access would make that information widely disseminated, thus, rendering the irreparable harm moot and creating the very real risk of evading review or making review meaningless. As for stays, we deliberated where that provision for stay might best be placed. Rule 2.420 now only provides for confidential treatment on appeal when the court grants the motion to seal.

Rule 2.420 already provides for a procedure for sealing documents in the record until the lower tribunal rules to unseal it. Rule 2.420 also provides that documents the lower tribunal orders to be sealed, remain confidential during any appellate review proceeding. But Rule 2.420 currently contains no provision that would protect the alleged confidentiality of documents during review of an order granting access to those documents.

Rule 9.310 was, first, considered, for the appropriate place to seek a stay of an order granting access. But we noted that Rule 9.310 did not surgically address this particular type of situation. There were also jurisdictional concerns because Rule 2.420 requires that the clerk be allowed 10 days to post the order, then 30 days for posting to ensure notice. As we would be recommending an amendment to provide for 30 days thereafter to file the petition (this was changed following further discussion as set forth below), there were jurisdictional questions regarding filing a traditional motion for review of an order denying a stay of the order granting access under the general Rule 9.310 without the appellate court even having a petition for writ of certiorari to invoke the appellate court's jurisdiction to review the order below denying a stay.

As such, we noted that Rule 9.100(d) provided for a possible stay in the context of denial of access, but did not provide for a stay in the context of access. Therefore, to address the above

issues regarding finding a jurisdictional and expeditious basis to protect rights of privacy and confidentiality during review of an order granting access, we initially looked at amending Rule 9.100(d) to provide for an automatic stay pending review of an order granting access. This was particularly prudent given that Rule 9.310 was a more general rule regarding stays and this was a more fact-specific rule in Rule 9.100(d) regarding access to records and proceedings and the unique posture in which those needed to be raised and reviewed.

However, it was recognized that putting an automatic stay provision in Rule 9.100(d) would require some triggering filing – such as a petition for review of the order granting access or a motion to stay. This would leave a time gap between the entry of an order granting access and the ability of an aggrieved party to file the petition or motion. During this time gap, the information sought to be protected could be obtained and publically disseminated, precluding any meaningful review of the order granting access. Thus, it was ultimately concluded that a short automatic stay provision, i.e., two days, should be included in Rule 2.420 and that Rule 9.100 should include a provision to continue that stay per motion of the court or a party.

Issue 3. Should there be a provision to expedite review?

This was discussed in the context of Rule 9.100 and current appellate practice. Expedited review can always be requested by motion and Rule 2.420 currently envisions some form of expedited review. However, it might be prudent, though not necessary, to include expedited review in both Rule 2.420 and Rule 9.100 to belabor that this review is expedited.

Issue 4. Should there be a special provision for stay?

See discussion in Issue # 2. After extensive discussion of stays, we acknowledged that "d(2)" required a provision that is more consistent with the current technology [the capability today of rapid, widespread dissemination and posting] and amending to do have such a provision

should be considered. Concerns were raised regarding situations where a court denied protection of confidential information under the current Rule 2.420; that is, the material loses protection immediately upon the order denying protection. The most appropriate location to set forth lower tribunal guidance on handling these types of situations was in Rule 2.420, but this could conceivably be addressed in Rule 9.100, if necessary.

The intent behind a stay provision was not to create a provision that blindly favored confidentiality. The intent was to have a provision that reflected the realities of today's access to public records that can be so swift and so extensive that access to records orders might otherwise functionally evade appellate review without some provision for an automatic stay. Thus, in this context, a more finely tuned Rule is more in keeping with the times. *See also* Issue No. 2 discussion, and the idea of a stay that maintains confidentiality until the appellate court has ruled on the issue. To avoid abuse of such a stay provision, it was proposed and agreed that this could be addressed through a sanctions mechanism within the rule itself for any such abuses.

Issue 5. Should there be a special provision for oral argument?

After discussing this issue both with Kathi Giddings, Paul Nettleton and Dorothy Easley, and further discussing this with the Subcommittee, it was agreed that the Rule 9.320 adequately addressed this. As such, there was no need for a special provision for oral argument as currently exists in Rule 9.100(d).

Issue 6. How to handle oral rulings?

After discussing this issue both with Kathi Giddings, Paul Nettleton and Dorothy Easley, and further discussing this with the Subcommittee, it was recognized that Rule 9.100 currently provided for review of oral rulings. This was likely in response to concerns over lower tribunal proceedings going forward with the public and press excluded without a written order being

entered. The ability to obtain review of oral rulings might still be needed for "proceedings" if a judge refuses to enter an order or the proceeding is going to be immediate. But how does one concretely challenge and how does an appellate court review with specificity, for example, the lack of factual findings in an oral pronouncement within a one hour hearing transcript in which any number of findings might be picked?

For these reasons, we recommended that this be revised to require written orders, for purposes of opening this up to further discussion with our Subcommittee and then with our Joint Committee. Given the structure and procedure set forth in Rule 2.420 now, however, this oral rulings language seems unnecessary for issues arising from the denial of access to records. Also, the 1977 Rule 9.100 Committee Notes refer to the requirement of notice being given and the possibility that this may be given before an actual order is entered. The 1977 Committee Notes do, however, suggest the requirement of a written order. So, it appears that, to promote written orders, the following language could be deleted from "d(1)": ", if written, or announcement of the order to be reviewed, if oral."

Issue 7. Time limits to seek review?

Rule 9.100(d) does not have a time limit; it only sets forth filing "as soon as practicable." However, with Rule 2.420 procedures now in place, it seems that a petition to review such an order denying access should, at the latest, be filed within 60 days of the posting of the order by the clerk. Given the posting is required for 30 days, this suggests that it allows 30 days for some aggrieved party to receive notice of it, and that would give the aggrieved party an additional 30 days to file the petition; thus, a total of 60 days. Posting is required for 30 days. To be consistent with other Rule 9.100 review proceedings, a petitioner should be given 30 days, thereafter, to file a petition to review a Rule 2.420(d) order as well. We also considered 60 days from the date that

the order is "rendered" [so it will have been filed with the clerk and presumably posted], rather than posting, so that the Rule is more in keeping with appellate procedure.

Kathi Giddings, Paul Nettleton and Dorothy Easley agreed in principle on these points, but Kathi Giddings raised issues regarding the timelines and the seeming inconsistencies of "expedited" review and providing a total of 70 days for an aggrieved party to file a petition. In addition, Kathi Giddings and Paul Nettleton raised and all agreed that there were concerns surrounding a continued stay for the sealing of records with a total of 70 days to file a petition for appellate review. There needed to be some form of a limited stay-- 2 days, for example, that records being challenged would remain sealed while the appellate court reviewed whether to stay that order--and 70 days to file the petition might impair that.

The special subcommittee later recognized that, pursuant to Rule 2.420(d)(5), a non-party could file a motion at anytime to unseal records. In addition, it would be more prudent, and more in keeping with traditional appellate review, for a non-party to file a motion under Rule 2.420(d)(5) to unseal records before filing a petition for review of the sealing order under Rule 9.100(d). An order denying a motion to unseal records under Rule 2.420(d)(5) would be reviewable under 9.100(d) to the same extent as the original sealing order. Accordingly, our original concern for providing time for non-parties to discover the sealing order and thereafter petition for review of same, commensurate with the posting and notice provisions of 2.420, seemed unnecessary. As such, setting forth timelines as extensive as 60 days was decided to be imprudent. It was decided, instead, that the better course would be to keep "as soon as practicable" in Rule 9.100(d) and add an outer limit of 30 days from rendition of the order sought to be reviewed. This was an attempt to balance between expedited review, sufficient time for

notice, and some stay of disclosure to ensure a meaningful time for the appellate court to review whether a stay of that disclosure should continue.

[Red-lined to existing Rule] 4/3/08 Proposed Amendments to Rule 9.100(d)

9.100

(d) Exception; Orders Excluding or Granting Access to Press or Public.

(1) A petition to review an order excluding or granting access to the press or public from ~~access~~ or to any proceeding, any part of a proceeding, or any ~~judicial~~ records of the judicial branch, ~~if the proceedings or records are not required by law to be confidential,~~ shall be filed in the court as soon as practicable following rendition of the order to be reviewed, ~~if written, or announcement of the order to be reviewed, if oral,~~ but no later than 30 days after rendition of the order. A copy of the petition shall be furnished to the person (or chairperson of the collegial administrative agency) issuing the order~~,~~ and to the parties to the proceedings.

(2) The court shall immediately consider the petition to determine whether a stay of proceedings in the lower tribunal or the order under review is appropriate~~,~~ and, on its own motion or that of any party, the court may order a stay on such conditions as may be appropriate. Any motion to stay an order granting access to a proceeding, any part of a proceeding, or any records of the judicial branch made under this subdivision must include a signed certification by the movant that the motion is made in good faith and is supported by a sound factual and legal basis. Pending the court's ruling on the motion to stay, the clerk of the court and the lower tribunal shall treat as confidential those proceedings or those records of the judicial branch that are the subject of the motion to stay. If the court determines, either upon motion by a party or on its own, that a motion to stay an order granting access made under this subdivision was not made in good faith and not supported by a sound legal and factual basis, the court may impose sanctions upon the party moving for the stay.

(3) ~~If requested by the petitioner or any party, or on its own motion, the court may allow oral argument.~~ Review of orders under this subdivision shall be expedited.

2008 Committee Note. Subdivision (d) is revised to allow review of orders that not only deny access to records of the judicial branch or judicial proceedings, but also those orders that deny motions to seal or otherwise grant access to such records or proceedings claimed to be confidential. This revision is intended to recognize and balance the equal importance of the constitutional right of privacy, which includes confidentiality, and the constitutional right of access to judicial records and proceedings. The previous rule allowed review of orders denying access only "if the proceedings or records are not required by law to be confidential." This provision is eliminated because it is unworkable in that such a determination of what is required by law to be confidential usually concerns the merits of whether the proceedings or records should be confidential in the first instance. Outer time limits for seeking review are added. The provision for allowing review of oral rulings denying access is eliminated to conform to the general requirement of a written order for an appellate court to review and in light of the factual

findings required by Florida Rule of Judicial Administration 2.420 to be included in an order granting a motion to make court records confidential. Subdivision (d)(2) is revised to provide continued confidentiality of judicial proceedings and records to which the order under review has granted access upon the filing of a motion to stay that order until the court rules on the motion to stay. The former subdivision (d)(3) concerning oral argument is deleted as unnecessary in light of Rule 9.320. New subdivision (d)(3) is a recognition of the public policy that favors expedited review of orders denying access and the provision for expedited review in Florida Rule of Judicial Administration 2.420.

APPENDIX C

memo

To: Stanford Solomon, Chair, Record on Appeal Subcommittee
From: Tom Young
Date: April 21, 2008
Re: Report and Recommendation Concerning Proposed Florida Rule of Judicial Administration 2.420(f), (g)

In October 2007, The Rules of Judicial Administration (RJA) Committee filed proposed amendments to Florida Rule of Judicial Administration 2.420 concerning requests to make circuit and county court records in criminal cases confidential. In February 2008, the Florida Supreme Court published the proposals, along with two additional proposals of its own, for comment. (Publication attached.) The court's proposals appear as subdivisions (f) and (g) and are titled "Request to Make Appellate Court Records in Noncriminal Cases Confidential" and "Request to Make Appellate Court Records in Criminal Cases Confidential."

Appellate Court Rules Committee (ACRC) Chair Steve Brannock referred the proposals to the criminal and record on appeal subcommittees for review. Sandy Solomon, Chair of the ACRC record on appeal subcommittee, asked Beth Coleman, Henry Gyden, and me, as members of the record on appeal subcommittee, to review the proposals in conjunction with the ACRC criminal law subcommittee.

Prior to the criminal law subcommittee's conference call, Calianne Lantz, who chairs the criminal subcommittee, forwarded a report prepared on the same subject by a subcommittee of the Criminal Procedure Rules Committee. Beth, Henry, and I reviewed the proposals published by the supreme court as well as the action report prepared the Criminal Procedure Rules Committee's subcommittee.[7] Each of us also submitted written questions and comments in advance of the ACRC criminal law subcommittee's meeting. (Email attached.)

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[7] The action report prepared by the Criminal Procedure subcommittee appears to be based on the vote of less than a quorum, which was later ratified by one of the absent members of that subcommittee.

The ACRC criminal law subcommittee convened its meeting by conference call on Friday, April 11, 2008. (Minutes attached.) Discussion focused almost exclusively on proposed subdivision 2.420(g); no suggestions were made concerning 2.420(f), which pertains to appellate court records in noncriminal cases. In the end, the criminal law subcommittee voted to lay out its concerns and to "recommend that proposed rule 2.420 be returned to the RJA Committee for consideration of the concerns and suggestions discussed." Minutes at 3-4. Henry and I concurred; Beth was unable to join the conference call.

Beth, Henry, and I touched base after the ACRC criminal law subcommittee's conference call to determine whether the three of us needed to meet again, and we concluded that this report should suffice to bring the full ACRC record on appeal subcommittee up to speed. We are comfortable taking the course recommended by the ACRC criminal law subcommittee. If, however, the ACRC record on appeal subcommittee wishes to study the issue for the purpose of submitting comments in addition to those of the ACRC criminal law subcommittee, we recommend that the subcommittee consider points three, four, and five in Beth's email of April 9, 2008, and point (a) in Henry's email of April 10, 2008.