IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.420

CASE NO.: SC07-2050

FILED
THOMAS D. HALL
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CLERK, SUPREME COURT
BY

COMMENT OF SPECIAL JOINT COMMITTEE REGARDING CHANGES TO RULE 2.420 PROPOSED BY THE FLORIDA SUPREME COURT AND THE COMMITTEE ON ACCESS TO COURT RECORDS

Scott M. Dimond, Chair, Rules of Judicial Administration Committee, John S. Mills, Chair, Appellate Court Rules Committee, and John F. Harkness, Jr., Executive Director, The Florida Bar, submit this response by a special joint committee (the "Joint Committee") comprising members of the Rules of Judicial Administration Committee (the "RJAC") and the Appellate Court Rules Committee (the "ACRC"), assisted by representatives from the Criminal Procedure Rules Committee and from the Supreme Court's Committee on Access to Court Records (the "Access Committee"). This response has been approved by members of the RJAC by a vote of 15-1 with 1 abstention, approved by members of the ACRC by a vote of 26-7 with 1 abstention,[1] and approved by the Executive Committee of The Florida Bar Board of Governors by a vote of 10-0.

This response addresses two proposals:

(1) The "Invitation to Comment" issued by the Access Committee, which presents proposed revisions to Rule of Judicial Administration 2.420 (*see* Appendix A). (The text of the proposed rule set forth in that Invitation to Comment has been revised by the Access Committee. The most current version of the Access Committee's proposed revision to the rule that has been furnished to the Joint Committee is set forth in Appendix B and is the version to which the Joint Committee's Comments are directed.)

[1]Several members of the ACRC expressed concerns that they had insufficient time to fully review the work of the Joint Committee. Thus, many of the "no" votes are not necessarily reflective of substantive disagreement with this response. The matter is being placed on the ACRC's agenda for the September 2008 General Meeting, and if that meeting generates substantive comments likely to assist the Court, the ACRC will seek leave to file a supplemental response.

(2) The "Publication Notice" issued by the Court on February 8, 2008, that reflects the RJAC's proposed amendments to Rule 2.420 and the Court's alternative proposed amendments to Rule 2.420. (*See* Appendix C for the Publication Notice).

When this Court issued the February 8, 2008 Publication Notice, various entities, including the ACRC and the Criminal Procedure Rules Committee, either filed or were planning to file Comments on the proposals presented. The Criminal Procedure Rules Committee filed a Comment recommending deletion of proposed subdivision (g)(4) in the Court's proposal (*see* Appendix D). The ACRC analyzed the Court's proposed amendments and, being advised of the Access Committee's plan to propose additional amendments to Rule 2.420, filed a Comment requesting additional time to study the Court's proposed new subdivisions (f) and (g), and proposing the creation of a Joint Committee to analyze and address 11 separate areas of concern that appeared to warrant further examination by the Joint Committee (*see* Appendix E). The Court granted the ACRC's request and extended the time to respond until September 1, 2008. (The RJAC also requested an extension of time to respond to the issues raised by the ACRC, both through the Joint Committee and separately. This request was also granted and the RJAC is filing a separate report that addresses other aspects of the Access Committee's proposals and that responds to comments filed by interested parties.)

The Joint Committee met several times to study the Court's proposed amendments that presented for comment new subdivisions (f) and (g). Concurrently, the Joint Committee requested that the Access Committee furnish to the Joint Committee the latest version of the Access Committee's proposed changes to Rule 2.420, so that the Joint Committee could address both proposals simultaneously. The Access Committee's most recent version of Rule 2.420 (Appendix B), when overlaid on the Court's proposed version of Rule 2.420 (Appendix A), reveals that the Access Committee's version has redesignated the Court's new subdivisions (f) and (g) as subdivisions (g) and (h), to accommodate a new proposed subdivision (d) relating to the procedure for filing records. This report adopts the latter numbering scheme, so that all references hereinafter will be to subdivisions (g) and (h), rather than to subdivisions (f) and (g), respectively.

Issue 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 hearings and should be the venue of first resort.

As a general matter, Florida law provides that the public shall have access to all records of the judicial branch of government. Rule 2.420(c), however, sets forth several exemptions to this rule.

In certain circumstances, a court will need to take evidence and make factual findings to determine whether records should be made confidential based on the above grounds.

The proposed additions of subdivisions (g) and (h) to Rule 2.420 would afford litigants the right to file with an appellate court motions to determine the confidentiality of a record that was (1) presented or presentable to a lower tribunal without a determination of confidentiality being made by the lower tribunal, or (2) presented to an appellate court in an original proceeding. Because appellate courts typically do not take evidence or make factual findings, the Joint Committee expressed concern that it might be inappropriate for an appellate court to make the initial determination as to the confidentiality of court records; rather, it might be more appropriate for a lower tribunal to address such motions in the first instance. This would be similar to the procedure adopted for motions to stay under Florida Rule of Appellate Procedure 9.310, whereby the lower tribunal is normally the first tribunal to consider the motion to stay and there is a procedure in place for the appellate court, upon the grant or denial of that motion, to review the lower tribunal's ruling on the motion for stay.

The Joint Committee concluded that, similar to the procedure for addressing a motion for stay, appellate courts should have the authority to grant or deny motions to determine confidentiality in the first instance. Although the Joint Committee recognized that appellate courts may refuse, or be unable, to conduct evidentiary hearings, the appellate court could relinquish jurisdiction to allow a lower tribunal to conduct an evidentiary hearing and resolve the factual issues. In original proceedings, the appellate court would be the only, and certainly the most appropriate, court to address the legal issues regarding the request for confidentiality of court records.[2]

[2]Following the submission of this Comment to the members of the RJA and the ACRC for approval, the Joint Committee questioned its own statement that "the appellate court would be the only, and certainly the most appropriate, court to address the legal issues regarding the request for confidentiality of court records" in original proceedings. The Joint Committee also

The Joint Committee also recommends that subdivision (g)(1) be revised to read as follows:

(1) A ~~request~~motion to determine the confidentiality of appellate court records in noncriminal cases under subdivision (c) must be filed in the appellate court and must be in compliance with the guidelines set forth in subdivision (e)(1). Such a ~~request~~motion may be made with respect to a record that was presented or presentable to a lower tribunal, but ~~not determined to be confidential~~no determination concerning confidentiality was made by the lower tribunal, or a record presented to an appellate court in an original proceeding.[3]

Issue 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 (g) should also operate to make records in the lower tribunal confidential.***

The Joint Committee concluded that the order making appellate records confidential under proposed subdivision (g) should also operate to automatically

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identified two concerns that may not have been fully vetted regarding subdivision (g)(1).

First, in its current form, proposed subdivision (g)(1) unintentionally treats appeals and original proceedings dissimilarly by permitting a party in original proceedings to file a motion with the appellate court to determine the confidentiality of a record even if the lower tribunal had previously determined that the same record was not confidential; however, the option of mounting a renewed effort to seek the determination of a record's confidentiality at the appellate level is not made available in appeals. The Joint Committee was not able to articulate a justifiable basis for making a distinction of that nature between original proceedings and appeals.

Second, the proposed subdivision (g)(1) does not address those situations in which there is no lower tribunal to which the confidentiality concerns could be presented or the lower tribunal is not of a nature to render it qualified to make a determination of a record's confidentiality (*e.g.*, code enforcement boards). These situations could be presented to the appellate court either as appeals or as original proceedings and parties should be afforded an opportunity to seek consideration by the appellate court of confidentiality concerns whether the case is an appeal or an original proceeding.

The Joint Committee recommends that these concerns can be remedied by striking "in an original proceeding," the last four words of subdivision (g)(1).

[3]As to the last four words of this subdivision ("in an original proceeding"), see footnote 2, *supra*.

make records confidential in the lower tribunal — with one caveat: either court should have, upon the filing of an appropriate motion, the authority to revisit whether continued sealing of the records is appropriate when a change of circumstances occurs (of course, this recognizes the legal doctrine that lower tribunals are constrained from doing so to the extent that the lower tribunal's decision to do so would interfere with the appellate court's jurisdiction). For example, upon completion of a case, some public records exemptions expire. Thus, even if it is the appellate court that makes the determination that a record be sealed, the trial court — at the close of the case on remand — should have the authority to open the files if warranted by the change in circumstances.

The Joint Committee also expressed concern regarding the type of review proceeding in which the records were sealed. If an appellate court sealed records during the course of a non-final appeal or original proceeding, those records would remain open in the lower court and the movant should be required to address the sealing in both forums. As a practical matter, this could be accomplished through the filing of a motion in the appellate court asking that court to issue an order directing that the records be sealed in both courts.

To accommodate these concerns, the Joint Committee recommends that subdivision (g) be modified as follows:

(g) Request to Determine the Confidentiality of Appellate Court Records in Noncriminal Cases.

(1) ...

(2) ...

(3) Any order granting in whole or in part a motion filed under subdivision (g)(1) must be in compliance with the guidelines set forth in subdivisions (e)(3)(A)–(G). Any order requiring the sealing of an appellate court record operates to also make those same records confidential in the lower tribunal during the pendency of the appellate proceeding.

(4) Except as provided by law, ~~or court rule, notice must be given of any order granting a motion made under subdivision (g)(1) as follows.~~ w~~W~~ithin 10 days following the entry of ~~the~~an order granting a motion under subdivision (g)(1), the clerk of the appellate court must post a copy of the order on the clerk's website and must provide a copy of the order to the clerk of the lower tribunal, with

directions that the clerk is to seal the records identified in the order. The order must remain posted for no less than 30 days.

(5) ...

(6) The party seeking to have an appellate record sealed under this subdivision has the responsibility to ensure that the clerk of the lower tribunal is alerted to the issuance of the order sealing the records and to ensure that the clerk takes appropriate steps to seal the records in the lower tribunal.

(7) Upon conclusion of the appellate proceeding, the lower tribunal may, upon appropriate motion showing changed circumstances, revisit the appellate court's order directing that the records be sealed.

(8) ...[former subdivision 6]

(9) ...[former subdivision 7]

Issue 3: ***Whether the interplay between proposed Rule of Judicial Administration 2.420(g) and Florida Rule of Appellate Procedure 9.100 should be clarified. Proposed Rule 2.420(g)(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(g) should not conflict with any provision of Rule 9.100. Moreover, as written, proposed Rule 2.420(g) conflicts with and renders moot amendments to Rule 9.100(d) approved by the ACRC in June 2008.***[4]

[4]The ACRC has approved proposed amendments to Rule 9.100(d) (*see* Appendix F) 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(e)(1)(B) (which makes records subject to the motion confidential pending the lower tribunal's ruling), and Rule 2.420(e)(7) (which continues the lower tribunal's confidentiality through appellate proceedings), the ACRC's proposed amendment to Rule 9.100(d) 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 brief automatic stay.

Rule 9.100 outlines the requirements that apply to the extraordinary remedies of mandamus, prohibition, quo warranto, certiorari, habeas corpus, and all writs necessary to the complete exercise of appellate jurisdiction. These are original proceedings initiated by filing a petition directly in the appellate court, not by filing a notice in the lower tribunal.

There are, however, several other types of legal remedies that are also classified as original proceedings. Petitions for review of orders regarding the exclusion of the press or public from access to judicial proceedings or judicial records are treated as original proceedings, and are therefore within the scope of Rule 9.100. Rule 9.130(a)(1), applicable to proceedings for review of nonfinal orders, states that review of nonfinal administrative action "shall be by the method prescribed by Rule 9.100." Rule 9.100 governs original proceedings such as mandamus, prohibition, and certiorari.

A petition for an extraordinary writ in the circuit court to review judicial or quasi-judicial action is subject to the general provisions of Rule 9.100 and the additional requirements of Rule 9.100(f). Likewise, nonfinal administrative orders are reviewed under the procedures established in Rule 9.100. A petition for writ of mandamus to review any other action by a public official is generally governed by Florida Rule of Civil Procedure 1.630.

Rule 9.100 was designed primarily for appellate courts, and it applies to original proceedings in appellate courts. Extraordinary writ proceedings in the circuit courts are governed either by Rule 1.630 or by Rule 9.100, or both, which set additional requirements for original appellate proceedings in circuit courts. *See Hogan v. State*, 983 So. 2d 656 (Fla. 2d DCA 2008), demonstrating the interplay between Rule 1.630 and Rule 2.420, which confirms that a mandamus petition under Rule 1.630 is an appropriate vehicle for challenging the denial of access to judicial records, and concludes that those rules are better left as they are, rather than being amended.

Issue 4: ***Whether the interplay between proposed subdivision (g)(5), proposed subdivision (g) (current subdivision (e)), and Fla. R. App P. 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(g)(5) (and how does a non-party do that), petition for mandamus or "other***

applicable remedy" under proposed subdivision (g), or seek appellate review through Rule 9.100(d)?

The concerns of the ACRC expressed in paragraph 4 of its comments to the Court arose primarily from confusion created by subdivision (i). As originally drafted, subdivision (i) seemed to include a broad authorization for judicial review of orders concerning confidential records. Subdivision (i) has since been rewritten and narrowed considerably so that it now applies only to denials of requests for access to *administrative* records and not to case records. Because a request for administrative records does not generally involve a pending proceeding, the procedures set forth in subdivision (i) now relate only to that distinct set of requests for administrative records.

The Joint Committee believes that, when the confidentiality issue relates to case-related records, subdivision (g)(5) is adequate and appropriate to allow nonparties to understand how and where to address their confidentiality concerns. If a nonparty has not had an opportunity to litigate the issue with respect to the confidentiality of a document, then the nonparty (such as the press) would file a motion under subdivision (e)(5) or subdivision (g)(5), seeking to vacate all or a portion of the court order determining confidentiality. If the nonparty (such as the press) is successful, the matter will become public. If that nonparty is unsuccessful, then upon receipt of an order from the trial court or appellate court denying the nonparty's request, the nonparty could seek review of that order by utilizing the procedures set forth in Rule 9.100(d). The review procedures specified in Rule 9.100(d) are utilized only by a party who has participated in the lower court and been unsuccessful in achieving the desired ruling from the lower tribunal. If the interested entity has not appeared in a court proceeding, that entity must proceed under subdivision (e)(5) or subdivision (g)(5). Accordingly, the Joint Committee believes that no further clarification is necessary to address the interplay between proposed subdivision (g)(5) and Rule 9.100(d).

Issue 5: ***Whether proposed subdivision (g)(7), which speaks to records of a lower tribunal made confidential by that tribunal, is duplicative of subdivision (e)(7), which provides that court records made confidential by a lower tribunal shall remain confidential during appellate proceedings. The language of proposed subdivision (g)(7) implies that a motion must be filed in the appellate court even when the lower tribunal has granted the records confidential status. To***

that extent, is proposed subdivision (g)(7) inconsistent with the plain language of subdivision (e)(7)?

The Court's proposed subdivision (g)(7) is duplicative of subdivision (e)(7), insofar as both provide that records deemed confidential below be treated as such on appeal. Although (g)(7) may not "imply" that a new motion must be filed in the appellate court, the problem of redundancy remains.

The Joint Committee recommends that the Court eliminate in its entirety one of these two provisions. As to which provision should be eliminated, the Joint Committee recommends that the Court delete subdivision (e)(7) because the inclusion of the entirely new subdivision (g), specifically addressing appellate issues, is the most appropriate home for the provision.

Issue 6: ***Whether, to the extent proposed subdivision (g)(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:***

> (g)(7) Records of ~~a lower tribunal~~an appellate court determined to be confidential by that ~~tribunal~~court 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 ~~a lower tribunal~~an appellate court making a record confidential.

The Joint Committee was unable to discern any special disparate applications that would require or justify the inclusion of both proposed subdivision (e)(7) and proposed subdivision (g)(7). Therefore, the Joint Committee recommends that proposed subdivision (e)(7) should be deleted as duplicative of the provisions of proposed subdivision (g)(7).

In light of this recommendation for deletion of proposed subdivision (e)(7), the Joint Committee believes that subdivision (g)(7) refer to the "lower tribunal"

rather than to the "appellate court." Accordingly, the Joint Committee recommends that subdivision (g)(7) read as follows:

> Records of a lower tribunal ~~made~~determined to be confidential by that tribunal must be treated as confidential during any review proceedings. In ~~any~~ case where an order ~~making~~determining court records to be confidential remains in effect as of the time of an appeal, the clerk ~~of the lower tribunal shall so indicate in the index~~ must include a statement in the index that an order making court records confidential has been entered ~~in the matter~~ and must identify such order by date or docket number ~~transmitted to the appellate court~~. This subdivision 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~~determining a record to be confidential.

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

The Joint Committee agreed that practitioners should be alerted to the requirements of Rule 2.420 regarding requests to determine the confidentiality of appellate court records. The Joint Committee recommends that this cross-referencing be accomplished by adding a specific provision to Fla. R. App. P. 9.040 and providing a Court Comment to the appellate rules under which appellate proceedings are initiated (Rules 9.100 and 9.110).

Proposed drafts for amendment of Rule 9.040 and for creation of Court Comments to Rules 9.100 and 9.110 are as follows:

Proposed Addition to Rule 9.040:

Rule 9.040. General Provisions.

(i) Requests to Determine Confidentiality of Appellate Court Records. Requests to determine the confidentiality of appellate court records are governed by Florida Rule of Judicial Administration 2.420.

Proposed Court Comment for Rule 9.100 and Rule 9.110:

2008 Committee Note. As provided in Rule 9.040, requests to determine the confidentiality of appellate court records are governed by Florida Rule of Judicial Administration 2.420.

(Note that specific subdivisions of Rules 9.040 and 2.420 are purposely omitted so that future changes to and renumbering of those rules will not alter the cross-references.)

Issue 8: ***Whether, to the extent proposed subdivisions (g) and (h) apply to original proceedings that have no corresponding case in a lower tribunal, their provisions should specifically cross-reference and work in tandem with Fla. R. App. P. 9.100.***

The Joint Committee does not share the concern identified by the ACRC's Criminal Law Subcommittee. The Joint Committee believes that subdivisions (g) and (h) of Rule 2.420 do not overlap and recommends that the Court not cross-reference the provisions.

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

See discussion under Issue 11 *infra*.

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

See discussion under Issue 11 *infra*.

Issue 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 the lower tribunal to seal or expunge criminal history records must be made in accordance with Florida Rule of Criminal Procedure 3.692.

The ACRC's Comments regarding issues 9, 10, and 11 reflect concerns expressed by its Criminal Law Subcommittee and by the Criminal Procedure Rules Committee, about references in proposed subdivision (h) to the sealing of criminal history records.

The Joint Committee notes that "criminal history records" are not records of the judicial branch. Sealing and expunction of these records are governed by sections 943.0585 and 943.059, Florida Statutes (2008), which are mirrored procedurally by Florida Rules of Criminal Procedure 3.692 and 3.989. As such, there is no need for a provision pertaining to these non-judicial, criminal justice agency records in the appellate subdivision of Rule 2.420.

Moreover, the Joint Committee is concerned that the presence of such a provision in a subdivision of Rule 2.420 may cause confusion or mistakenly encourage filing of additional motions to seal appellate records in cases where a party has obtained an order authorizing sealing and/or expunction in the trial court. Although this may not be a common problem, such a motion was filed recently in a pretrial criminal appellate case where a written opinion of the court was published years before the motion to seal or expunge was filed.

Therefore, the Joint Committee recommends that proposed Rule 2.420(h)(4), which cross-references Rule 3.692, be deleted as unnecessary and confusing.

Alternatively, both subdivision (f)(4) and subdivision (h)(4) could be deleted in favor of adding a new subdivision (k), which could provide:

> **Applicability.** This rule does not apply to criminal history records maintained by any ~~executive branch entity~~criminal justice agency. Requests to seal or expunge criminal history

records must be made in accordance with Florida Rule of Criminal Procedure 3.692.

On a more sweeping basis, the Joint Committee believes that proposed subdivisions (f) and (h), as presently drafted, will create confusion and divert limited judicial resources to collateral issues. To address this concern, the Joint Committee recommends that the Court delete in its entirety proposed subdivision (h) and rewrite subdivision (f) to read as follows:

(f) Motion to Determine the Confidentiality of Court Records in Criminal Cases.

(1) Subdivision (e) shall apply to any motion by the state or a defendant to determine the confidentiality of trial court records under subdivision (c), except as provided in subdivision (f). As to any motion filed in the trial court under this subdivision, the procedure set forth in subdivision (f)(3) and the following shall apply:

(A) Unless the motion 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.

(B) The court shall issue a ruling on a motion filed under this subdivision within 10 days of the hearing on a contested motion or within 10 days of the filing of an agreed motion.

(C) In the event of an appeal or review 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 or review proceeding.

(2) Subdivision (g) shall apply to any motion to determine the confidentiality of appellate court records under subdivision (c), except as provided in subdivision (f). As to any motion filed in the appellate court under this subdivision, the procedure set forth in subdivision (f)(3) and the following shall apply:

(A) The motion may be made with respect to a record that was presented or presentable to a lower tribunal, but not determined to be confidential

by the lower tribunal, or a record presented to an appellate court in an original proceeding.

(B) A response to a motion filed under this subdivision may be served within 10 days of service of the motion.

(C) The court shall issue a ruling on a motion filed under this subdivision within 10 days of the filing of a response on a contested motion or within 10 days of the filing of an uncontested motion.

(3) Any motion to determine whether a court record in a criminal case is confidential pursuant to subdivision (c)(9)(A)(i) or (c)(9)(A)(v) of this rule that pertains to a plea agreement, substantial assistance agreement, or similar court record, and that constitutes a serious and imminent threat to 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 Determine Whether a Court Record Is Confidential." As to any motion made under this subdivision, the following procedure shall apply:

(A) The existence of the restricted motion made under this subdivision shall not be indicated on a publicly accessible index or progress docket. 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) 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 or review 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 or review proceeding.

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

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

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

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

In order to eliminate unnecessary cross-referencing within the subdivisions of Rule 2.420, the Joint Committee (based on substantial input from the Criminal Procedure Rules Committee) believes that consideration should be given to re-consolidating the provisions applicable to criminal cases with the general civil and appellate subdivisions. The limited concern addressed in subdivision (f) is crucial and must be included in some fashion within Rule 2.420; however, this provision should be an exception to the general procedure applicable to all cases (both civil and criminal), rather than adopting two separate subdivisions pertaining only to criminal proceedings.

Issue 12: ***(New consideration) Whether proposed subdivision (g) is intended to apply to all appellate proceedings (including appellate proceedings in circuit court) and, if so, whether the title of subdivisions (e) and (f) should be changed.***

The Joint Committee believes that proposed subdivision (g) should govern all appellate proceedings in all courts, including appellate proceedings in circuit court (such as administrative reviews and county-to-circuit appeals). Therefore, the Joint Committee recommends that the title of subdivisions (e) and (f) be changed to refer to "Trial Court Records."

Respectfully submitted on September 2, 2008.

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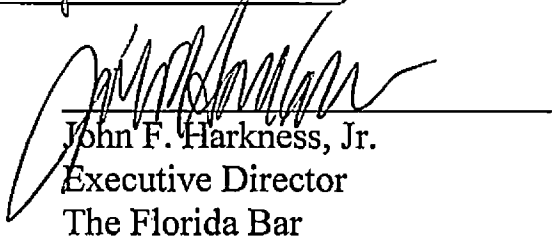

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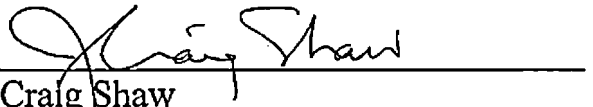
CERTIFICATION OF FONT COMPLIANCE

I certify that this report was prepared in 14-point Times New Roman font.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished by United States mail to The Honorable Judith Kreeger, Chair, Commission on Access to Court Records, c/o Office of the State Court Administrator, Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399-1900; Steve Henley, Office of the State Court Administrator, Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399-1900; Carol M. Touhy, Volusia County Courthouse, 101 N. Alabama Ave., DeLand, FL 32724; Barbara A. Petersen and Adria E. Harper, 336 E. College Ave., Tallahassee, FL 32301; Carol Jean LoCicero and Deanna K. Shullman, 400 N. Ashley Dr., Tampa, FL 33602; Lucy A. Dalglish, Gregg P. Leslie, and Matthew B. Pollack, 1101 Wilson Blvd., Suite 1100, Arlington, VA 22209; Robert Dewitt Trammell, P.O. Box 1799, Tallahassee, FL 32302; Arthur I. Jacobs, P.O. Box 1110, Fernandina Beach, FL 32035-1110; and Penny H. Brill, 1350 N.W. 12th Ave., Miami, FL 33136, on September 2, 2008.



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FLORIDA SUPREME COURT
COMMITTEE ON ACCESS TO COURT RECORDS

INVITATION TO COMMENT ON PRELIMINARY PROPOSAL:

Revisions to Rule of Judicial Administration 2.420 – Public Access to Judicial Branch Records

Summary

This document sets forth a preliminary proposal for revisions to Rule of Judicial Administration 2.420, developed in response to direction to the Committee on Access to Court Records (Access Committee) by the Florida Supreme Court provided in Administrative Order AOSC060-27. The Access Committee has been directed to submit its recommendations to the chief justice by June 1, 2008, and seeks comment regarding this proposal.

Rule of Judicial Administration 2.420 (formerly Rule 2.051) controls access to records of the judicial branch. It provides that the public shall have access to all records of the judicial branch except as provided within the rule. Subdivision (c) of the rule provides exemptions to the general rule. A new subdivision (d) was inserted to the rule on April 5, 2007, that provides a mechanism to request that records be made confidential.[1] Subdivision (e) provides for judicial review.

The proposed revisions are to subdivisions (c), (d) and (e), clarifying the status of confidential records, designating that certain records be kept confidential by the clerk of court, modifying the procedure to make other records confidential, and modifying the process for appeal of decisions.

Any interested person is invited to provide written comments regarding this preliminary proposal. Comments may be in the form of a letter. Comment are requested by March 3, 2008, and may be emailed to HenleyS@flcourts.org, or sent by mail to:

The Honorable Judith L. Kreeger
Committee on Access and Court Records
Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399-1900

[1] In Re: Amendments to Florida Rule of Judicial Administration 2.420 – Sealing of Court Records and Dockets. SC06-2136

Background

In 2005 the Committee on Privacy and Court Records (the Privacy Committee) submitted a report with the Florida Supreme Court (the Court) which recommended that the Florida Courts System adopt as a policy goal the provision of remote electronic access to court records. The Privacy Committee advised the Court that electronic access should not be implemented until a number of conditions are met. Among the recommendations of the Privacy Committee were several calling for revision of Rule 2.420 (then Rule 2.051).

In response to the report of the Privacy Committee, the Supreme Court created the Access Committee, and included among its charges the following:

> The primary purpose of the Committee is to review Florida Rule of Judicial Administration 2.051 and develop proposed revisions to the rule in regard to the following matters:
>
> 1. Recommendation Two: Scope of Confidentiality. Review and explore revisions of rule 2.051 to narrow its application to a finite set of exemptions that are appropriate in the court context and are identifiable. The Committee should note that the Supreme Court has not made a decision as to whether the absorption doctrine applies.
>
> 4. Recommendation Thirteen: Confidential Information. Propose revisions to rule 2.051 to clarify that those records defined in the rule are confidential and may not be released except as provided. Because this requirement is already established in existing law, the Committee is directed to propose a rule amendment or committee note that is consistent with the recognition of the current legal requirements.
>
> 5. Recommendation Sixteen: Unsealing of Records. Propose revisions to rule 2.051 to provide a clear and effective mechanism through which a preliminary determination that a record is exempt or confidential can be challenged and reviewed.
>
> 6. Recommendation Seventeen: Responsibility of Filer. Propose revisions to rule 2.051 to provide for certain responsibilities of the filer of court documents regarding confidential information. (footnotes omitted)[2]

In December, 2006, the Access Committee created the Rule 2.420 Workgroup (the Workgroup) and directed it to undertake these elements of the committee's charge. The Workgroup is chaired by Mr. Jon Kaney of Daytona, and includes the Honorable Mel Grossman, Circuit Judge, Seventeenth Judicial Circuit, the Honorable David

[2] Administrative Order AOSC06-27, p.2-4

Ellspermann, Clerk of Court for Marion County, Ms. Robin Berghorn, Orlando, Professor Tim McLendon, Gainesville, Mr. Paul Regensdorf, Fort Lauderdale, Mr. Murray Silverstein, Saint Petersburg, Mr. Walt Smith, Sarasota, and Ms. Judy Hodor, Miami (non-member).

The Workgroup met in person and by telephone on February 19, April 18, June 15, October 23, and November 9. To assist the Workgroup the Office of the State Courts Administrator contracted with the Center for Governmental Responsibility at the University of Florida Levin College of Law to conduct an analysis of all public records exemptions found in Florida Statutes, and to categorize the exemptions as directed by the Workgroup.

Analysis and Revision of Rule 2.420

The central charge to the Workgroup was to "review and explore revisions of rule [2.420] to narrow its application to a finite set of exemptions that are appropriate in the court context and are identifiable."[3] The assignment to narrow the application of the rule arose in the context of the "absorption" issue, which had been identified by the Privacy Committee. The question of absorption arose out of subdivisions (c)(7) and (c)(8) of Rule 2.420 (Rule 7-8), which provide that the following are confidential court records:

> (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.

The Privacy Committee defined the issue in these terms: "The question is whether the rule incorporates, or absorbs, state exemptions and federal confidentialities, thus making them confidentialities under court rule."[4] After considerable discussion and debate, the Privacy Committee concluded that the rule effects absorption: "[O]n its face [subdivision (c)(8)] incorporates state statutory exemptions, making exempt information confidential within judicial branch records. The Committee believes that this is the interpretation given to the rule by the Florida Supreme Court in *State v. Buenoano*, 707 So. 2d 714, 718 (Fla. 1998)."[5]

When charging the Access Committee to narrow the rule, however, the Court stated: "The Committee should note that the Supreme Court has not made a decision as to whether the absorption doctrine applies."[6] The Court later expressed that, "Rule 2.420 recognizes a narrow category of court records where public access is automatically

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[3] Id, p.2.
[4] Privacy, Access and Court Records, Report and Recommendations of the Committee on Privacy and Court Records, August, 2005. p.29.
[5] Id., p.29-30.
[6] Administrative Order AOSC06-27, p.2.

restricted by operation of state or federal law or court rule. See Fla. R. Jud. Admin. 2.420 (c)(7)-(8)."[7]

In keeping with its mandate the Workgroup sought to identify the limited exemptions that would be apply categorically, or "automatically," and beyond that did not attempt to resolve the absorption question, but rather attempted to create a workable approach to dealing with the issue on a case-by-case basis as it may arise. The draft revision of Rule 2.420 is primarily a revision of subdivision 2.420(d) as promulgated by the Court on April 5, 2007, with revisions to address the sealing of records and dockets.

Under the proposed revisions, subdivision (d)(1) would identify, within a referenced appendix, those statutory exemptions that the Workgroup has identified that it believes are appropriate within a court context and apply to records that are readily identifiable by the clerk of court. The draft rule would direct the clerk to maintain these records as confidential. This is a ministerial act. To make information confidential under any other statutory exemption a filer or third party must assert that an exemption applies, as set forth in subdivision (d)(2), through the motion process currently provided.

Non-criminal versus criminal cases: at present the rule is restricted to "non-criminal cases" and so does not allow for motions in criminal cases. This distinction was incorporated into the rule as revised in April, 2007, in order to avoid certain disclosures and disruptions related to a limited number of cases involving confidential informants and cooperation agreements. This issue is currently under consideration by the Rules of Judicial Administration Committee and it is hoped that this particular matter can be resolved though another mechanism. The Access Committee anticipates that if it not resolved prior to the finalization of its report the Access Committee will advance an alternative recommendation so that the motion process will be available to make certain records confidential in criminal cases which are not affected by the confidential informant issue.

Other changes to the rule are made to conform changes and to respond to the other components of the workgroup charge.

[7] SC06-2136, p.2.

PROPOSED REVISIONS

Rule 2.420 PUBLIC ACCESS TO JUDICIAL BRANCH RECORDS

(a) – (b) (No change)

(c) ~~Exemptions~~ Confidential Records. Records made confidential by law or court rule, or sealed by court order, shall not be released to any person except as permitted by law, court rule, or order of the court. Restriction of access to information made confidential shall be implemented in a manner that does not restrict access to any portion of the record that is not confidential. The following records of the judicial branch shall be confidential:

(1) – (6) No changes.

(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 Judicial Ethics Advisory Committee.

(d) Procedures for Determining Confidentiality of Court Records ~~Request to Make Circuit and County Court Records in Noncriminal Cases Confidential~~.

(1) The clerk of the court shall maintain as confidential any information contained within a court record that is described in Appendix A of this rule. A filer at the time of filing shall: indicate whether any information described in Appendix A is included within the document being filed; identify the provision of Appendix A that applies to the identified information; and identify the precise location of the confidential information within the document being filed. In the event the clerk determines that the information is not subject to confidentiality under the identified provision, the clerk shall notify the filer in writing within 5 days and shall maintain the record as confidential for 10 days. The record shall not be held as confidential for more than 10 days, unless the filer has filed a motion pursuant to subdivision (d)(3).

(2) Any person filing a document shall ascertain whether any information contained within the document may be confidential pursuant to subdivision (c) of this rule. A person filing information that the filer believes to be confidential but that is not described in Appendix A may request that the information be maintained as confidential by submitting a "Motion to Make Court Records Confidential" under the procedure provided in subdivision (d)(3). Any interested person may request that information within a court file be maintained as confidential by filing a motion as provided in subdivision (d)(3).

~~(1)~~(3) A request to make circuit and county court records ~~in non-criminal cases~~[8] confidential under subdivision (c)~~(9)~~[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 or portion of a record 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~~ Information that is 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.

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[8] See paragraph headed "Non-criminal versus criminal cases" on page 4.

[9] The present rule limits motions to grounds under sub-division (c)(9). The proposed revision would allow motions under all subdivisions, including (c)(7)-(8), which implicate statutory exemptions.

~~(2)~~(4) Except when a motion filed under subdivision (d)~~(1)~~(3) 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)~~(3) 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) or applicable law. 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)~~(6) or by providing such other public notice as the court deems appropriate.

~~(3)~~(5) Any order granting in whole or in part a motion filed under subdivision (d)~~(1)~~(3) 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) or applicable law 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~~ are no broader than necessary to protect the interests set forth in subdivision (c)(9)(A) or applicable law; and (ii) no less restrictive measures are available to protect the interests set forth in subdivision (c)(9)(A) or applicable law; and

(H) That the clerk of the court is directed to publish the order in accordance with subdivision (d)~~(4)~~(6).

~~(4)~~(6) Except as provided by law or court rule, notice must be given of any order granting a motion made under subdivision (d)~~(1)~~(3) 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)~~(7) If a nonparty requests that the court vacate all or part of an order issued under subdivision (d)~~(3)~~(5), 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) or applicable law. 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)~~(8) If the court determines that a motion made under subdivision (d)~~(1)~~(3) was not made in good faith and supported by a sound legal and factual basis, the court may impose sanctions upon the movant.

~~(7)~~(9) Court records made confidential under this rule must be treated as confidential during any appellate 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) **Judicial Review of Orders on Motions to Make Court Records Confidential or Denial of Access Request.** Expedited review of denials of access to records of the judicial branch and of orders rendered on motions to make court records confidential 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~~ All actions shall be filed in the court having appellate jurisdiction to review the decisions of the ~~judge denying access~~ court in which the records access was raised. Upon order issued by the appellate court, the clerk 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 the ~~denial of access~~ records access was raised.

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

(1) – (3) (No Change)

APPENDIX

(A) information described by any of subdivisions (c)(1) through (c)(6) of this rule,

(B) information subject to subdivision (c)(7) or (c)(8) of this rule that is currently confidential or exempt from Florida Statute 119.07 and Florida Constitution article I, section 24(a) under any of the following statutes or as they may be amended or renumbered:

1. Chapter 39 records
   a. Dependency matters
   b. Termination of parental rights
   c. Guardian ad litem records
   d. Child abuse, neglect & abandonment
   e. Information about clients of domestic violence centers

2. Adoption records
   FLA. STAT. ch. 63

3. Social Security, bank account, charge, debit & credit card numbers in court records.
   FLA. STAT. § 119.0714(2)(e)

4. HIV test results & patient identity within the HIV test results
   FLA. STAT. ch. 381.004, ch. 384

5. Sexually transmitted diseases - test results & identity
   FLA. STAT. § 384.29

6. Original birth & death certificates, including fetal death certificates
   FLA. STAT. ch. 382

7. Identifying information in petition by minor to terminate pregnancy
   FLA. STAT. § 390.01116

8. Baker Act records
   FLA. STAT. ch. 394

9. Estate inventories
   FLA. STAT. § 733.604(1)

10. A separate confidential filing of a victim's address in a petition for an injunction for protection against domestic violence

FLA. STAT. § 741.30(3)(b)

11. Gestational surrogacy records
FLA. STAT. ch. 742.16(9)

12. Guardianship reports and orders appointing court monitors in guardianship cases.
FLA. STAT. §§ 744.1076 & 744.3701

13. Grand jury records (indictments, testimony, reports, identities of people being investigated)
FLA. STAT. ch. 905

14. Applications and orders re interception of wired, oral or electronic communications; identifying information sealed by court order
FLA. STAT. § 934.09(8)(c)

15. Criminal history and other records sealed by court order
FLA. STAT. ch. 943

16. Information acquired by courts and law enforcement regarding family services for children
FLA. STAT. § 984.06(3) & (4)

17. Juvenile delinquency records
FLA. STAT. § 985.045

Supreme Court Proposed Rule 2.420 of February, 2008,
with amendments to be proposed by
Committee on Access to Court Records in legislative format

RULE 2.420. PUBLIC ACCESS TO JUDICIAL BRANCH RECORDS

(a) [No change]

(b) (1)-(3) [No change]

(4) "Confidential," as applied to information contained within a record of the judicial branch, means that such information is exempt from the public right of access under article I, section 24(a) of the Florida Constitution and may be released only to the persons or organizations designated by law, statute, or court order. As applied to information contained within a court record, the term "exempt" means that such information is confidential. Confidential information includes information that is confidential under this rule or under a court order entered pursuant to this rule. Restriction of access to confidential information shall be implemented in a manner that does not restrict access to any portion of the record that is not confidential.

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

(1)-(8) [No change]

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

(A)-(B) [No change]

(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 Judicial Ethics Advisory Committee.

(d) Procedure for Filing Records.

(1) The clerk of the court shall designate and maintain the confidentiality of any information contained within a court record that is described in subdivision (d)(1)(A) or (d)(1)(B) of this rule. A filer at the time of filing shall: indicate whether any confidential information described in subdivision (d)(1)(B) of this rule is included within the document being filed; identify the provision of subdivision (d)(1)(B) of this rule that applies to the identified information; and identify the precise location of the confidential information within the document being filed. The clerk of court shall review filings identified by filers as containing confidential information to determine whether the purported confidential information is facially subject to confidentiality

under the identified provision in subdivision (d)(1)(B). In the event the clerk determines that such information is not subject to confidentiality under the identified provision, the clerk shall notify the filer in writing within 5 days of filing and shall maintain the information as confidential for 7 days from the day such notice is served.

(A) information described by any of subdivisions (c)(1) through (c)(6) of this rule,

(B) information subject to subdivision (c)(7) or (c)(8) of this rule that is currently confidential or exempt from section 119.07, Florida Statutes, and article I, section 24(a) of the Florida Constitution under any of the following statutes or as they may be amended or re-numbered:

(i) Chapter 39 records relating to dependency matters, termination of parental rights, guardians ad litem, child abuse, neglect, and abandonment. § 39.0132(3), Fla. Stat.

(ii) Adoption records. § 63.162, Fla. Stat.

(iii) Social Security, bank account, charge, debit and credit card numbers in court records.

§ 119.0714(1)(i)–(j), (2)(a)-(e), Fla. Stat. *(Unless redaction is requested pursuant to 119.0714(2), this information is exempt only as of January 1, 2011.)*

(iv) HIV test results and patient identity within the HIV test results. § 381.004(3)(e), Fla. Stat.

(v) Sexually transmitted diseases - test results and identity within the test results. § 384.29, Fla. Stat.

(vi) Birth & death certificates, including court-issued delayed birth certificates and fetal death certificates. §§ 382.008(6), .025(1)(a), Fla. Stat.

(vii) Identifying information in petition by minor for waiver of parental notice when seeking to terminate pregnancy. § 390.01116, Fla. Stat.

(viii) Identifying information in clinical mental health records under the Baker Act. § 394.4615(7), Fla. Stat.

(ix) Records of substance abuse service providers which pertain to the identity, diagnosis, and prognosis of and service provision to individual clients of substance abuse service providers. § 397.501(7), Fla. Stat.

(x) Identifying information in clinical records of detained criminal defendants found incompetent to proceed or acquitted by reason of insanity. § 916.107(8), Fla. Stat.

(xi) Estate inventories. § 733.604(1), Fla. Stat.

(xii) Victim's address in domestic violence action on petitioner's request. § 741.30(3)(b), Fla. Stat.

(xiii) Information identifying victims of sexual offenses, including child sexual abuse. §§ 119.071(2)(h), .0714(1)(h), Fla. Stat.

(xiv) Gestational surrogacy records. § 742.16(9), Fla. Stat.

(xv) Guardianship reports and orders appointing court monitors in guardianship cases. §§ 744.1076, .3701, Fla. Stat.

(xvi) Grand jury records. Ch. 905, Fla. Stat.

(xvii) Information acquired by courts and law enforcement regarding family services for children. § 984.06(3)-(4), Fla. Stat.

(xviii) Juvenile delinquency records. § 985.04(1), .045(2), Fla. Stat.

(xix) Information disclosing the identity of persons subject to tuberculosis proceedings and Records of the Department of Health in suspected tuberculosis cases. §§ 392.545, .65, Fla. Stat.

(2) Any person filing a document shall ascertain whether any information contained within the document may be confidential under subdivision (c) of this rule. A person filing information that the filer believes to be confidential but that is not described in subdivision (d)(1) of this rule may request that the information be maintained as confidential by submitting a "Motion to Determine the Confidentiality of Court Records" under the procedure provided in subdivision (e). Any interested person may request that information within a court file be maintained as confidential by filing a motion as provided in subdivision (e).

(d~~e~~) Request to ~~Make~~ Determine the Confidentiality of Circuit and County Court Records in Noncriminal Cases ~~Confidential~~.

(1) A request to ~~make~~ determine the confidentiality of 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~~ Determine the Confidentiality of Court Records ~~Confidential~~." A motion made under this subdivision must:

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

(B) specify the bases for ~~making~~ determining such court records to be confidential; and

(C) set forth the specific legal authority and any applicable legal standards for making such court records confidential.

Any motion made under this subdivision must include a signed certification by the party or the attorney for the party making the request that the motion is being made in good faith and is supported by a sound factual and legal basis. 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 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~~e)(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~~e)(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~~ person 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~~ 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. 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~~e)(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)~~(e) must state the following with as much specificity as possible without revealing information ~~made~~ that may be confidential:

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

(B) The particular grounds under subdivision ~~(c)(9)(A)~~ (c) for ~~making~~ determining the ~~court records~~ information to be confidential:

(C) Whether any party's name ~~is to be made~~ may be determined to be 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~~ information that ~~are to be made~~ may be determined to be confidential;

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

(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)~~ (c); and; (ii) no less restrictive measures are available to protect the interests set forth in subdivision ~~(c)(9)(A)~~ (c); and

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

(4) Except as provided by law or court rule, notice must be given of any order granting a motion made under subdivision (~~d~~e)(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~~e)~~(3)~~, the request must be made ~~in the form of~~ by a written motion, filed in that court, that states with as much specificity as possible the bases for the request. The motion must set forth the specific legal authority and any applicable legal standards supporting 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 to 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~~ person 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~~ designation made under subdivision (d)~~(1)~~ or a motion made under subdivision (~~d~~e)~~(1)~~ was not made in good faith and was not supported by a sound legal ~~and~~ or factual basis, the court may impose sanctions ~~upon~~ the movant after notice and an opportunity to respond.

(7) Records of a lower tribunal ~~made~~ determined to be confidential by that tribunal must be treated as confidential during any review proceedings. In any case where ~~an order making court records~~ information is confidential under this rule ~~remains in effect as of the time of an appeal~~, the clerk~~'s~~ of the lower tribunal shall so indicate in the index transmitted to the appellate court ~~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~~.

(8) Upon the request of persons seeking access, any Motion to Determine the Confidentiality of Court Records or any Motion to Vacate under this rule shall be deemed a priority case under rule 2.215(g).

(~~d~~e) Request to Determine the Confidentiality of ~~Make~~ Circuit and County Court Records in Criminal Cases ~~Confidential~~.

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

(2) Any ~~request~~ motion to ~~make~~ determine whether a circuit or county court records is confidential pursuant to subdivision (c)(9)(A)(i) or (c)(9)(A)(v) of this rule that pertains to a plea agreement, substantial assistance agreement, or similar court record, and that ~~may jeopardize either~~ constitutes a serious and imminent threat to 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~~ Determine Whether a Court Records is Confidential." As to any motion made pursuant to this subdivision (e)(2), the following procedure shall apply:

(A) ~~Any~~ The existence of a motion made ~~pursuant to~~ under this subdivision shall not be indicated on a publicly accessible index or progress docket. ~~and a~~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~~e)(3)(A)-(G), (~~d~~e)(6), and (~~d~~e)(7) shall apply to motions made pursuant to this subdivision. The provisions of subdivisions (~~d~~e)(1), (~~d~~e)(2), (~~d~~e)(3)(H), (~~d~~e)(4), and (~~d~~e)(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~~e)(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.

(~~f~~g) Request to ~~Make~~ Determine the Confidentiality of Appellate Court Records in Noncriminal Cases ~~Confidential~~.

(1) A request to ~~make~~ determine the confidentiality of appellate court records in noncriminal cases ~~confidential~~ under subdivision (c)~~(9)~~ must be filed in the appellate court and must be in compliance with the guidelines set forth in subdivision (~~d~~e)(1). Such a request may be made with respect to a record that was presented or presentable to a lower tribunal, but not ~~made~~ determined to be confidential by the lower tribunal, or a record presented to an appellate court in an original proceeding.

(2) A response to a motion filed under subdivision (~~f~~g)(1) may be served within 10 days of service of the motion.

(3) Any order granting in whole or in part a motion filed under subdivision (~~f~~g)(1) must be in compliance with the guidelines set forth in subdivisions (~~d~~e)(3)(A)-(G).

(4) Except as provided by law or court rule, notice must be given of any order granting a motion made under subdivision (~~f~~g)(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. The order must remain posted for no less than 30 days.

(5) If a nonparty requests that the court vacate all or part of an order issued under subdivision (~~f~~g)(3), the request must be made in the form of a written motion, filed in that court, that states with as much specificity as possible the bases for the request. The motion must set forth the specific legal authority and any applicable legal standards supporting 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. A response to a motion may be served within 10 days of service of the motion.

(6) If the court determines that a motion made under subdivision (~~f~~g)(1) was not made in good faith and supported by a sound legal ~~and~~or factual basis, the court may impose sanctions upon the movant after notice and an opportunity to respond.

(7) Records of a lower tribunal ~~made~~ determined to be confidential by that tribunal must be treated as confidential during any review proceedings. In any case where ~~an order making court records~~ information has been determined to be confidential under this rule ~~remains in effect as of the time of an appeal~~, the clerk~~'s~~ of the lower tribunal shall so indicate in the 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~~ transmitted to the appellate court. ~~This subdivision 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.~~

(~~f~~g) Request to ~~Make~~ Determine the Confidentiality of Appellate Court Records in Criminal Cases ~~Confidential~~.

(1) Subdivision (~~f~~g) shall apply to any request ~~by the state or a defendant to make~~ to determine the confidentiality of appellate court records ~~confidential pursuant to~~ under subdivision (c)(~~9~~), except as provided in subdivision (~~g~~h)(2).

(2) Any request to ~~make~~ determine whether an appellate court records is confidential ~~that may jeopardize either~~ pursuant to subdivision (c)(9)(A)(i) or (c)(9)(A)(v) of this rule that pertains to a plea agreement, substantial assistance agreement, or similar court record, and that constitutes a serious and imminent threat to 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~~ Determine Whether a Court Records is Confidential" and must be filed in the appellate court. The existence of the restricted motion shall not be indicated on a publicly accessible index. Such a request may be made with respect to a record that was presented or presentable to a lower tribunal, but not ~~made~~ determined to be confidential by the lower tribunal, or a record presented to an appellate court in an original proceeding. As to any motion made pursuant to this subdivision (g)(2), the following procedure shall apply:

(A) Any motion made pursuant to this subdivision and all appellate 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) A response to a motion filed under this subdivision may be served within 10 days of service of the motion. The court shall issue a ruling on motions filed under this subdivision within 10 days of the filing of a response on contested motions or within 10 days of the filing of uncontested 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.

(D) The provisions of subdivisions (~~d~~e)(3)(A)-(G), (~~d~~e)(6), and (~~d~~e)(7) shall apply to motions made pursuant to this subdivision. The provisions of subdivisions (~~d~~e)(1), (~~d~~e)(2), (~~d~~e)(3)(H), (~~d~~e)(4), and (~~d~~e)(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 (~~f~~g)(4) unless directed by the court.

(3) This subdivision (g) 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.

(~~h~~i) ~~Judicial Review of~~ Denial of Access Request for Administrative Records. Expedited

review of denials of access to administrative records of the judicial branch shall be provided through an action for mandamus~~,~~ or other appropriate ~~appellate remedy~~ relief, in the following manner:

(1)-(2) [No Change]

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

(1)-(3) [No Change]

Pursuant to the Court's request in In re Amendments to Florida Rule of Judicial Administration 2.420—Sealing of Court Records and Dockets, 954 So. 2d 16 (Fla. 2007), the Rules of Judicial Administration Committee has filed with the Florida Supreme Court a report and proposed amendments to rule 2.420, Public Access to Judicial Branch Records, addressing the sealing of circuit and county court records in criminal cases. The Committee proposes adoption of new rule 2.420(e), Request to Make Circuit and County Court Records in Criminal Cases Confidential, as well as several minor changes to subdivisions (c), Exemptions, and (d), Request to Make Circuit and County Court Records in Noncriminal cases Confidential. In addition to the Committee's proposals, the Court sua sponte has drafted proposed amendments to rule 2.420 addressing the sealing of appellate court records in both non-criminal and criminal cases and addressing several additional matters as well. The Court has incorporated some, but not all, of the Committee's proposals into its own proposals. The Committee's proposals are listed below under Part One: "The Rules of Judicial Administration Committee's Proposed Amendments." The Court's proposals are listed below under Part Two: "The Florida Supreme Court's Proposed Amendments."

The Court invites all interested persons to comment on the proposed amendments, which are reproduced in full below, as well as online at http://www.floridasupremecourt.org/decisions/proposed.shtml. An original and nine paper copies of all comments must be filed with the Court on or before April 1, 2008, with a certificate of service verifying that a copy has been served on the committee chair, Honorable Robert T. Benton II, First District Court of Appeal, 301 South Martin Luther King, Jr., Blvd., Tallahassee, FL 32399-6601, as well as a separate request for oral argument if the person filing the comment wishes to participate in oral argument, which may be scheduled in this case. The committee chair has until April 22, 2008, to file a response to any comments filed with the Court. Electronic copies of all comments also must be filed in accordance with the Court's administrative order In re Mandatory Submission of Electronic Copies of Documents, Fla. Admin. Order No. AOSC04-84 (Sept. 13, 2004).

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.420, CASE NO. SC07-2050

PART ONE

"The Rules of Judicial Administration Committee's Proposed Amendments."

RULE 2.420. PUBLIC ACCESS TO JUDICIAL BRANCH RECORDS

(a) [No change]

(b) [No change]

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

(1)-(8) [No change]

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

(A)-(B) [No change]

(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)-(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 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)-(2) [No change]

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

(1)-(3) [No change]

Committee Note
[No change]

2002 Court Commentary
[No change]

2005 Court Commentary
[No change]

2007 Court Commentary
[No change]

2007 Committee Commentary
[No change]

PART TWO

"The Florida Supreme Court's Proposed

Amendments."

RULE 2.420. PUBLIC ACCESS TO JUDICIAL BRANCH RECORDS

(a) [No change]

(b) [No change]

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

(1)-(8) [No change]

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

(A)-(B) [No change]

(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~~.~~; and

(C) set forth the specific legal authority and any applicable legal standards for making such court records confidential.

Any motion made under this subdivision must include a signed certification by the party or the attorney for 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~~Any motion made pursuant to this subdivision and all court records that are the subject ~~to~~of such 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)-(4) [No change]

(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, filed in that court, that states with as much specificity as possible the bases for the request. The motion must set forth the specific legal authority and any applicable legal standards supporting 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 after notice and an opportunity to respond.

(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. This subdivision 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.

(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.

(f) Request to Make Appellate Court Records in Noncriminal Cases Confidential.

(1) A request to make appellate court records in noncriminal cases confidential under subdivision (c)(9) must be filed in the appellate court and must be in compliance with the guidelines set forth in subdivision (d)(1). Such a request may be made with respect to a record that was presented or presentable to a lower tribunal, but not made confidential by the lower tribunal, or a record presented to an appellate court in an original proceeding.

(2) A response to a motion filed under subdivision (f)(1) may be served within 10 days of service of the motion.

(3) Any order granting in whole or in part a motion filed under subdivision (f)(1) must be in compliance with the guidelines set forth in subdivisions (d)(3)(A)-(G).

(4) Except as provided by law or court rule, notice must be given of any order granting a motion made under subdivision (f)(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. The order must remain posted for no less than 30 days.

(5) If a nonparty requests that the court vacate all or part of an order issued under subdivision (f)(3), the request must be made in the form of a written motion, filed in that court, that states with as much specificity as possible the bases for the request. The motion must set forth the specific legal authority and any applicable legal standards supporting 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. A response to a motion may be served within 10 days of service of the motion.

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

(7) Records of a lower tribunal made confidential by that 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 a lower tribunal making a record confidential.

(g) Request to Make Appellate Court Records in Criminal Cases Confidential.

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

(2) Any request to make appellate 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" and must be filed in the appellate court. Such a request may be made with respect to a record that was presented or presentable to a lower tribunal, but not made confidential by the lower tribunal, or a record presented to

an appellate court in an original proceeding. As to any motion made pursuant to this subdivision (g)(2), the following procedure shall apply:

(A) Any motion made pursuant to this subdivision and all appellate 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) A response to a motion filed under this subdivision may be served within 10 days of service of the motion. The court shall issue a ruling on motions filed under this subdivision within 10 days of the filing of a response on contested motions or within 10 days of the filing of uncontested 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.

(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 (f)(4) unless directed by the court.

(3) This subdivision (g) 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.

(eh) 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)-(2) [No Change]

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

(1)-(3) [No Change]

Committee Commentary
[No change]

1995 Amendment.
[No change]

2002 Court Commentary
[No Change]

2005 Court Commentary
[No Change]

2007 Court Commentary
[No Change]

2007 Committee Commentary
[No Change]

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.420 **CASE NO.: SC07-2050**

COMMENT OF THE CRIMINAL PROCEDURE RULES COMMITTEE

On February 8, 2008, this Court issued a "Publication Notice" in the above-referenced matter, inviting comment on proposals from the Rules of Judicial Administration Committee to amend *Fla. R. Jud. Admin.* 2.420 and proposals from this Court for additional amendments to that rule. Comments were to be filed by April 1, 2008.

The matter was assigned to a subcommittee, which met and made its recommendation to the full committee. On March 20, 2008, the committee voted unanimously to submit a comment to one of the proposals in the Notice, but did not have the opportunity to have the proposed comment approved by the Florida Bar Board of Governors by the April 1, 2008, deadline. Accordingly, the committee filed a Motion for Extension of Time to File Comments by the Criminal Procedure Rules Committee, which motion was granted. The Executive Committee of the Board of Governors voted 11-0 to approve the committee's recommendation.

This comment concerns Rule 2.420(g) in the Court's proposal, which concerns the procedure to be used in sealing appellate court records in criminal cases. The CPRC recommends that proposed Rule 2.420(g)(4) be deleted. The reason for this recommendation is the failure of the proposed rule to address situations in which an interlocutory appeal or writ proceeding results in a published opinion, after which a criminal trial court proceeding is subsequently dismissed or a *nolle prosequi* is announced. In such a case, a

criminal defendant could be eligible to seek sealing or expunction of his or her judicial and non-judicial (agency) criminal history records, pursuant to Florida Rule of Criminal Procedure 3.692. However, neither proposed Rule 2.420(g)(4) nor Rule 3.692 contemplates the fact that a published appellate court opinion in such a case would still have precedential value, beyond its effect in an individual defendant's case. Therefore, the Court and the rules committees should evaluate whether to authorize complete sealing or expunction in cases involving published opinions, and if so, how to accomplish sealing and expunction.

For the foregoing reasons, the Criminal Procedure Rules Committee respectfully requests that the Court delete proposed Rule 2.420(g)(4).

Respectfully submitted April 15, 2008.

H. SCOTT FINGERHUT
Chair
Criminal Procedure Rules Committee
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Miami, FL 33133-3156
305/285-0500
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished by United States mail to The Honorable Robert T. Benton II, Chair, Florida Rules of Judicial Administration Committee, 301 South Martin Luther King, Jr., Blvd., Tallahassee, FL 32399-6601 on April 15, 2008.

_____

Jodi B. Jennings
Staff Liaison, Criminal Procedure Rules Committee

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,

/s/ Steven L. Brannock
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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).

/s/ Joanna A. Mauer
Joanna A. Mauer
Bar Staff Liaison, Florida Appellate Court Rules Committee
The Florida Bar
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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.

/s/ Joanna A. Mauer
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.

Proposed 9.100(d)

(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.

(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.

The Florida Bar

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2008 SEP -2 P 2:28
CLERK, SUPREME COURT
BY

September 2, 2008

Clerk, Supreme Court of Florida
500 S. Duval St.
Tallahassee, FL 32399-1927

VIA HAND DELIVERY

Re: Case No. SC07-2050 — Rules of Judicial Administration Committee and Special Joint Committee Comments on Proposed Changes to Rule 2.420

Dear Sir:

Enclosed are an original and nine copies of comments from the RJA Committee and from a special Joint Committee in the above-referenced matter. These documents have also been electronically filed with the Court today.

Sincerely yours,

J. Craig Shaw
Staff Liaison to RJA Committee

cc: The Hon. Judith Kreeger
Steve Henley
Carol M. Touhy
Barbara A. Petersen
Adria E. Harper
Carol J. LoCicero
Deanna K. Shullman
Lucy A. Dalglish
Gregg P. Leslie
Matthew B. Pollack
Robert D. Trammell
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encls.