IN THE SUPREME COURT OF FLORIDA

FILED
THOMAS D. HA
2008 SEP -2 P 2:
CLERK, SUPREME COUR

IN RE: AMENDMENTS TO FLORIDA
RULE OF JUDICIAL ADMINISTRATION
2.420

CASE NO.: SC07-2050

COMMENTS OF
RULES OF JUDICIAL ADMINISTRATION 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 (RJA Committee), and John F. Harkness, Jr., Executive Director, The Florida Bar, submit this response of the RJA Committee to proposals relating to Rule of Judicial Administration 2.420. This response has been approved by members of the Rules of Judicial Administration Committee by a vote of 15-2 with 1 abstention, and approved by the Executive Committee of The Florida Bar Board of Governors by a vote of 10-0.

I. BACKGROUND

This response addresses two proposals:

(1) The "Invitation to Comment" issued by the Supreme Court Committee on Access to Court Records ("Access Committee"), which contains proposed revisions to Rule of Judicial Administration 2.420 (*see* Appendix A). The text of the proposed rule contained in that Invitation has since been amended; the most recent version of the Access Committee's proposed revision to the rule supplied by the Access Committee to members of the RJA Committee is set forth in Appendix B.

(2) The "Publication Notice" issued by this Court on February 8, 2008, that contains the RJA Committee's proposed amendments to Rule 2.420 and this Court's alternative proposed amendments to Rule 2.420. That Notice is set forth in Appendix C. The Notice generated comments from several interested parties. Those comments are set forth in Appendix D and are addressed herein beginning on page 12. In particular, the Notice led to the filing of a

Comment from the Appellate Court Rules Committee (*see* Appendix E) in which the Committee raised numerous questions about the Court's proposed amendments to the rule and requested additional time to study the issue within the framework of a special workgroup (the "Joint Committee") consisting of members of various rules committees (including the RJA Committee) and members of the Access Committee. That Joint Committee met several times over the past month and examined both the Court's February 2008 proposed version of Rule 2.420 and the Access Committee's successive versions of the rule, and is filing a separate report on these issues. Participation by some members of the RJA Committee in the Joint Committee's discussions has resulted in a number of the proposed edits by the RJA Committee to the Access Committee's original version also being incorporated into the Access Committee's latest version that are discussed at length below. However, the Access Committee's latest version had some changes proposed by the Access Committee that the RJA Committee has *not* had the opportunity to review. (As is restated at the conclusion of this Report, the RJA Committee is hopeful that when the Access Committee files its final work product in the near future, the Court will publish that work product for comment.) Those changes by the Access Committee made to date but not yet addressed by the full RJA Committee include, but are not necessarily limited to, the following:

- In subdivision (e)(1), the current Access Committee proposal provides that the motion itself as well as the information subject to the motion must be treated as confidential pending the court's ruling on the motion. The RJA Committee's rule proposal and the Access Committee's original proposal reviewed earlier by the RJA Committee required that only the information subject to the motion, and not the motion itself, be maintained as confidential in a civil matter pending a ruling on the motion. The RJA Committee has consistently concluded that, barring special circumstances, the motion itself should not be maintained as confidential in a civil matter as now suggested by the Access Committee.

- In subdivisions (e)(2) and (e)(5), the RJA Committee's rule proposal and the Access Committee's original proposal allowed

any party to request that the court conduct all or part of a hearing on the respective motions in camera. The current Access Committee proposal changes the term "party" to "person."

- In subdivision (e)(8), the Access Committee's current version created a new provision that was neither in its original proposal nor in the RJA Committee's rule proposal. It provides: "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)."

II. RESPONSE TO INVITATION TO COMMENT

Turning now to the "Invitation to Comment" issued by the Access Committee (Item (1), page 1, *supra*), the RJA Committee proposes various amendments to the Access Committee's proposal. The amendments are discussed immediately below, with the RJA Committee's suggested changes to the Access Committee's suggested changes (as of late July 2008) to the rule noted in ***bold italics***.

- In subdivision (b)(4), the RJA Committee proposes the following changes:

  (4) "Confidential," as applied to information contained within a record of the judicial branch, means that such information is ***either: (i)*** 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***; or (ii) exempt from disclosure under the Florida Public Records Act but subject to no statutory prohibition against the showing of such information.*** 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.

The subcommittee felt that "Confidential" should be defined to incorporate both the concept of materials that are confidential pursuant to Florida's Constitution and those that are subject to similar restrictions under the Florida Public Records Act.

- In subdivision (c), the RJA Committee proposes the following changes:

  (c) [~~Exemptions~~]*Confidential and Exempt Records. Court records recognized as being confidential by law or court rule under subdivision (c)(7) or (c)(8), or deemed confidential by court order pursuant to subdivision (c)(9), shall not be released to any person except as permitted by law, court rule, or order of the court. To the extent reasonably practicable, restriction of court 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.* The following records of the judicial branch shall be confidential: [no change to rest of subdivision]

  The RJA Committee sought to clarify that confidentiality restrictions apply both to records that are confidential by operation of law or statute as provided under subdivision (c)(7) or (c)(8), as well as to records determined to be confidential by a court pursuant to subdivision (c)(9). The Committee further sought to clarify that confidentiality restrictions should be tailored narrowly so as to avoid, to the extent practicable, affecting any information in a particular record that is not confidential.

- In subdivision (d), the RJA Committee proposes the following changes to the title:

  (d) [~~Procedure for Filing Records~~]*Procedures for Determining Confidentiality of Court Records.*

The RJA Committee felt that the proposed new title is more descriptive of the purpose of the subdivision.

- In subdivision (d)(1), the RJA Committee proposes the following changes:

(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.~~]***The following information shall be maintained as confidential:***

(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~~ ***those*** test results. § 381.004(3)(e), Fla. Stat.

(v) Sexually transmitted diseases — test results and identity within ~~the~~***those*** test results. § 384.29, Fla. Stat.

(vi) Birth ~~&~~***and*** death certificates, including court-issued delayed birth certificates and fetal death certificates. §§ 382.008(6), ***382***.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), *119*.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, *744*.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), *985*.045(2), Fla. Stat.

(xix) Information disclosing the identity of persons subject to tuberculosis proceedings and ~~R~~records of the Department of Health in suspected tuberculosis cases. §§ 392.545, *392*.65, Fla. Stat.

The RJA Committee felt that, structurally, a portion of (d)(1) should be included in (d)(2), such that (d)(1) dealt with the obligations of the clerk to recognize confidentiality of the enumerated materials while (d)(2) dealt with the obligation of a litigant filing a document containing any of the enumerated confidential materials. The Committee also is proposing editorial changes to the list of items enumerated in subdivision (d)(1)(B).

- In subdivision (d)(2), the RJA Committee proposes the following rewrite of the material transferred from the Access Committee's version of (d)(1):

(2) Any person filing any document shall, at the time of filing, 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). If the clerk determines that such information is not subject to confidentiality under the identified provision, the clerk shall notify the person who filed the document in writing within 5 days of the filing and thereafter shall maintain the information as confidential for 10 days from the day such notice is served.

The RJA Committee felt that 10 days, rather than 7 days, was a more appropriate notice period in conjunction with a clerk's decision that materials need not be treated with confidentiality. The remainder of the revisions are editorial; for example, the Committee felt that "filer" was inelegant and that the language "person who filed the document" was more proper.

- In subdivision (d)(3) (renumbered from (d)(2) in the Access Committee's version), the RJA Committee proposes the following changes:

[~~(2)~~]***(3)*** Any person filing a document ***with the court*** shall ascertain whether any information contained within the document may be confidential under subdivision (c) of this rule ***notwithstanding that such information is not itemized at subdivision (d)(1) of this rule.*** A person filing information that [~~the filer~~]***he or she*** 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~~]***filing*** a "Motion to Determine the Confidentiality of Court Records" under the procedure [~~provided~~]***set forth*** 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).

These revisions are editorial.

- In subdivisions (e)(1) through (e)(3), the RJA Committee proposes the following changes:

(~~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 ***or portion of a record*** 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~~]***subject to the confidentiality determination***; ~~and~~

(B) specify the bases for ~~making~~determining ***that*** such court records [~~to be~~]***are*** confidential; and

(C) set forth the specific legal authority and any applicable legal standards for determining such court records to be 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 c~~~~Court records that are~~]***Information that is*** the subject 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~~] ***determine that*** the case number, docket number, or other

number used by the clerk's office to identify the case file ***is confidential***.

(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~~]***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~~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 ***the*** information ~~made~~[~~that may be confidential~~]***subject to the confidentiality determination***:

(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~~] ***is*** 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 ***determined*** to be [~~made~~] confidential;

(E) The particular ~~court records~~information that ~~are to be made~~ [~~may be~~]***is*** 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~~]***are*** 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).

The RJA Committee wishes to clarify that, at times, only a portion of a court record would be subject to confidentiality rather than the entire record. The balance of the subcommittee's revisions are editorial or for purposes of clarification.

- In subdivisions (e)(4) and (e)(5), the RJA Committee proposes the following changes:

(4) Except as provided by law or court rule, notice must be given of any order granting ***in whole or in part*** 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. ***This subdivision shall not apply to orders determining that court records are confidential under subdivision (c)(7) or (c)(8).***

(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~~]***If*** the subject order [~~specifies~~]***determines*** 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. ***Regardless of w***~~W~~hether ~~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. ***This subdivision shall not apply to orders determining that court records are confidential under subdivision (c)(7) or (c)(8).***

The RJA Committee wishes to clarify that the clerk's obligations in connection with posting orders apply only when a judicial determination of confidentiality is at issue. The balance of the proposed revisions are editorial.

III. RESPONSES TO COMMENTS TO FEBRUARY 2008 PUBLICATION NOTICE

Turning next to the Comments filed by various interested persons (Item (2), page 1, *supra*), the RJA Committee has the following responses:

1. Comments filed April 2, 2008, by Diane Matousek, Clerk, 7th Judicial Circuit (*see* Appx D, pp. D-1—D-7).

   a. Clarify Whether Rule Applies to the Motion Itself. The comment suggests that the current phrasing of the rule creates an ambiguity as to whether the motion itself is subject to confidential treatment by the clerk. The RJA Committee disagrees, and believes that the rule as drafted makes very clear that both the motion itself and any documents referenced in the motion are subject to confidentiality.

   b. Require the Filer to Identify Subject Documents with Greater Specificity. The RJA Committee was amenable to the comment's suggestion that the filer of a motion pursuant to Rule 2.420(e) should be required to identify subject documents with reasonable specificity. And while the Committee felt that it was not necessary to dictate exactly what information need be identified, which might vary depending upon what materials were at issue, the Committee would not oppose some indication in the rule that identification of documents must be made "with sufficient specificity as is necessary for the clerk to identify the subject materials."

   c. Reject the Rule as Unnecessarily Burdensome to Court Clerks. The comment suggests that it is simply too time-consuming and expensive for court clerks to treat existing court records as confidential in response to a motion filed pursuant to proposed Rule 2.420(e). While the RJA Committee is sympathetic to the burden that the rule imposes, the Committee nonetheless believes that it would be impossible to achieve the goals of the proposed rule without requiring that materials subject to a motion filed under this rule be treated as even in the civil context. In short, the Committee does not believe that the concerns expressed in the Clerk's comments outweigh the concerns that prompted the proposed Rule 2.420(e), and does not believe that the Clerk's proposal should be adopted.

2. Comments filed April 1, 2008,on behalf of various Florida Media Organizations (*see* Appx D, pp. D-8–D-20).

a. Reject the proposal to treat as confidential the Rule 2.420(e) motion itself. As an initial matter, it should be noted that the RJA Committee's original proposal in connection with Rule 2.420 dealt with both civil and criminal matters, and that in that first proposal the motion itself was not to be treated as a confidential document by the clerk. But that proposal was rejected by this Court to the extent that it was intended to apply to the criminal arena, and the Court requested that the rule be revised to reflect the particular requirements of criminal practice. As such, the RJA Committee understood its mandate from the Court to be to craft a rule that required that certain types of information in the criminal context be treated differently, *i.e.*, potentially treated with a heightened degree of confidentiality.

During its consideration of the proposed criminal sealing revisions, the Committee has heard from two very distinct camps on this issue. Proponents of public access, of which the Florida Media Organizations are one, together with the Florida Public Defenders Association (as well as criminal defense attorneys generally), represent one camp. The Florida criminal prosecutors represent the other. Generally speaking, the media organizations and the defense attorneys reject the notion that the Rule 2.420(e) motion itself be treated as a confidential document, either because it interferes with constitutionally protected public access to court records (in the case of the media organizations) or because it unfairly (and perhaps unconstitutionally) limits defense counsel's ability to fully defend an accused client (in the case of the defense counsel). The RJA Committee believes that both of those concerns are valid.

On the other hand, the prosecutors have identified a circumstance where the physical safety — and possibly the very lives — of confidential police informants may be jeopardized if certain types of information is not protected from public disclosure. Plainly the Committee — and the Court — consider that concern to be valid as well.

Notwithstanding that both camps raise valid concerns, the RJA Committee believes that the concerns of the two groups are, simply, incompatible.

But in light of the Court's original mandate, the RJA Committee drafted a proposed Rule 2.420(e) that primarily addresses the concerns of the prosecutors, albeit tempered with procedural safeguards that the Committee believes mitigates against the harm to the public access concerns raised by the media organizations and defense counsel. Which is to say, the Committee understood that it had been instructed by the Court to address those circumstances where the mere filing of a motion to determine the confidentiality of court records (e.g., in the case of a motion dealing with a confidential informant) would be enough to alert those who seek to do physical harm to an informant to the existence of the informant. Simply, in such circumstances, if the new rule were intended to protect the well-being of such informants, the motion itself would need to be made confidential subject to the Court's consideration of the issue.

Because the RJA Committee recognizes that, for this limited category of information, the public's access to court records would be compromised, the Committee's proposal includes additional procedural safeguards to ensure that the confidentiality regime is as narrow as is reasonably necessary to protect the safety of the persons whose identity is the subject of the motion. Accordingly, the proposal requires the motion be exempt from public access only for a short period of time until the judge rules on the motion. The proposal also provides the judge with discretion to hold a hearing as necessary, as well as to limit the amount of time criminal court records remain exempt from public access. And the court record would be exempt only for 120 days, unlike civil cases which may be permanently exempt from public access, although that time limit can be periodically extended by the court.

Thus, in proposing the procedure for sealing criminal court records, the RJA Committee sought to balance, as much as possible, those competing and incompatible concerns, *i.e.*,

balance the public's right to access records against the safety concerns that would necessitate a request to exempt criminal records from public access. In doing so, it should be noted that the RJA Committee had assistance from the Rules of Criminal Procedure in crafting a procedure to meet the unique needs of criminal proceedings, and the rule as proposed was approved by the Rules of Criminal Procedures Committee. The RJA Committee believes that — subject to the initial value judgment discussed herein — proposed Rule 2.240(e) addresses the concerns raised by the Court in a fair and balanced fashion.

b. Revise the construction of proposed rule to avoid reference to existing civil rule. In drafting proposed Rule 2.420(e) , the RJA Committee considered the choice of either restating those portions of the civil court records procedures (found in 2.420(e)) that would also apply to criminal court records, or simply referring to the civil procedure. The Committee determined that for the purpose of streamlining the rules and avoiding unnecessary verbiage, it was appropriate simply to refer to the civil procedure to the extent that it was the same as the procedure to be followed in the criminal context, and then specify those potions of the procedure that would be different in the criminal context.

3. Comments filed April 1, 2008, by The First Amendment Foundation (*see* Appx D, pp. D-21–D-25). See the response by the RJA Committee to Item 2.a. above.

4. Comments filed April 7, 2008, by The Reporters Committee for Freedom of the Press (*see* Appx D, pp. D-26–D-29). See the response by the RJA Committee to Item 2.a. above.

5. Comments filed March 28, 2008, by the Florida Public Defender Association (*see* Appx D, pp. D-30–D-39). The Florida Public Defender Association, Inc ("FPDA") was concerned that the rule did not address the alteration of court records and that the failure to do so could be read as implicit permission for some to continue such a practice. The FPDA suggested that the Court incorporate language into the rule similar to the language in section 839.13 of

the Florida Statutes, which expressly prohibits the alteration of court records.

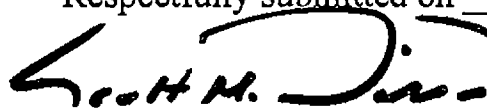
While the RJA Committee agrees the unlawful alteration of court records should be prohibited, the purpose of the amendment to Rule 2.420 proposed by the Committee was the creation of an appropriate process for making certain court records confidential in criminal cases. The Committee was not requested to, and did not undertake to, address the issue of the unlawful alteration of court records and believes the amendment suggested by the FPDA to be beyond the scope of its current efforts and the proposed amendment.

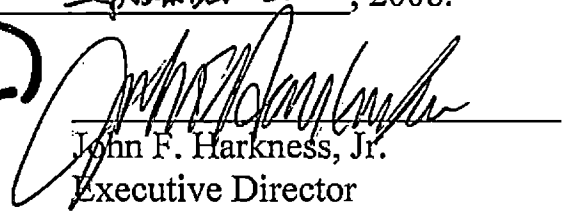
6. Comments filed April 15, 2008, by the Florida Criminal Procedure Rules Committee (*see* Appx D, pp. D-40–D-42). The Criminal Procedure Rules Committee filed a comment recommending that proposed Rule 2.420(g)(4) (in the Court's version of 2.420) be deleted. The RJA Committee concurs with this comment.

7. Comments filed April 15, 2008, by the Florida Prosecuting Attorneys Association (*see* Appx D, pp. D-43–D-57). The Florida Prosecuting Attorneys Association filed a comment recommending adoption of the proposed amendments to Rule 2.420 filed by the RJA Committee as published on February 28, 2008. The RJA Committee concurs with this comment.

WHEREFORE, the RJA Committee requests that the Court consider the response of the Committee to the Access Committee's latest version of Rule 2.420 and to Comments filed to the Court's February 2008 proposal, and amend Rule 2.420 as outlined in this report. However, in view of the fact that the Committee has not had the opportunity to fully review some of the substantive changes made by the Access Committee (as described on pages 2 and 3 of this Report), and because it is the understanding of the RJA Committee that the Access Committee may further amend its proposal before that proposal is finally filed with the Court, the RJA Committee urges the Court to publish the version of the rule as finally submitted by the Access Committee and allow interested parties to comment further on the proposal.

Respectfully submitted on September 2, 2008.





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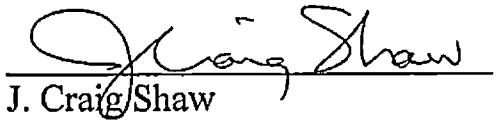
CERTIFICATION OF FONT COMPLIANCE

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 Bar No. 253235

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).

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

(1) Subdivision (de) 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 (ef)(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 (de)(3)(A)-(G), (de)(6), and (de)(7) shall apply to motions made pursuant to this subdivision. The provisions of subdivisions (de)(1), (de)(2), (de)(3)(H), (de)(4), and (de)(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 (de)(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.~~

(gh) 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 (gh)(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.

~~(hi) 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

CASE NO: SC07-2050

IN RE: AMENDMENTS TO
FLORIDA RULE OF JUDICIAL
ADMINISTRATION 2.420
_____/

DIANE M. MATOUSEK'S, CLERK OF THE CIRCUIT COURT IN AND FOR VOLUSIA COUNTY, FLORIDA, COMMENTS TO AMENDMENTS TO FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.420

COMES NOW, Diane M. Matousek, Clerk of the Circuit Court in and for Volusia County, Florida (hereinafter "the Clerk"), by and through undersigned counsel, and files her comments to the proposed amendments to Florida Rule of Judicial Administration 2.420 and would show:

I. Proposed Florida Rule of Judicial Administration 2.420(e)(2)(A) requires clarification in regard to whether the Motion itself is confidential and how the confidential documents are to be identified.

Proposed subdivision Florida Rule of Judicial Administration 2.420(e)(2)(A) provides that: "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." As written, it is unclear whether just the documents subject to the motion are confidential, or if the motion itself is also confidential. It appears the Motion is also confidential due to the fact the word "and" is used. Clarification is required so the clerks will know if the Motion itself is also confidential.

Additionally, there should be some language requiring the filer of the motion to indicate with specificity the document(s) that are allegedly confidential. The Clerk would respectfully request that the party provide the caption of the allegedly confidential document as well as the date the document was filed. Without this type of descriptive information it may be difficult for a clerk to know what document(s) the motion pertains to.

WHEREFORE the Clerk respectfully requests this Honorable Court to clarify the language of Rule 2.420(e)(2)(A) in regard to whether the motion is also confidential and to adopt language requiring the motion to indicate the caption and filing date of the documents that are allegedly confidential.

II. Proposed Florida Rule of Judicial Administration 2.420(e)(2)(A) is inefficient, labor-intensive, unreasonably burdensome and a poor use of the limited resources of the Clerk of Court Offices within the State of Florida

Proposed subdivision Florida Rule of Judicial Administration 2.420(e)(2)(A) provides that: "Any motion made pursuant to this subdivision and ***all court records that are subject of such a motion must be treated as confidential by the clerk*** pending the court's ruling upon the motion." [italics and bold added for emphasis] Therefore, when a motion under this subdivision is filed, the Clerk would have to locate the allegedly confidential document(s) in the file, remove it, secure it and segregate it from the file. This would require the Clerk to create a separate filing system for those documents. Additionally, most Clerks' offices scan the documents that are filed and have them available for online viewing by the judiciary and other authorized judicial agencies. "Treating a document as confidential" would require making the electronic document inaccessible via this forum as well.

Given the current budgetary demands and limited resources in the State of Florida it is clear that this proposed procedure is inefficient, labor intensive, unreasonably burdensome, and a poor use of the Clerks' limited resources. To "treat a document as confidential" would require materials and the man-hours of deputy clerks and information technology employees to be in compliance with this Rule. Additionally, once a determination of confidentiality is made, the Clerk would have to follow one of three procedures:

1) if the motion is granted, keep the document secured and segregated in a separate filing system;

2) if the motion is granted in part, a copy of the original document would have to be made. The original document would be secured and segregated in the separate filing system and the copy would be redacted pursuant to the court's order. The redacted copy would be copied to prevent possible viewing by bleed through. This copy would be placed back in the file according to the filing date of the original.

3) if the motion is denied, the original document would be removed from the separate filing system and placed back into the file according to its filing date.

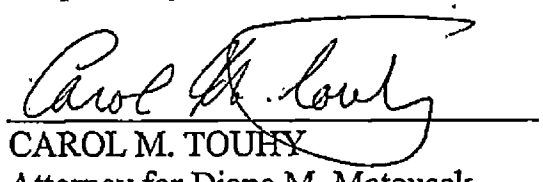
Additional procedures would also have to be performed by the information technology employees of the Clerk's office for the scanned documents. Clearly this rule as proposed, would require the Clerk's employees to maintain and update the file numerous times in regard to the same document(s), thereby creating an inefficient, labor-intensive procedure that squanders the limited resources of the Clerk. Given the budgetary demands

in the State of Florida at this present moment it does not make sense to utilize precious resources in such an inefficient manner.

The Clerk believes a more efficient model for determining confidentiality is found in Florida Rule of Civil Procedure 1.280(b)(5) and (c) which permits the *in camera* inspection of documents that are alleged to be confidential and/or privileged. Therefore, this properly puts the onus on the party seeking the confidential status of the document to seek this confidential status prior to filing the document. This will prevent the unnecessary duplicate and triplicate work Rule 2.420(e)(2)(A), as currently proposed, would place on the Clerks' offices. Therefore, the determination of confidentiality would be made before the document was ever filed. This change is not burdensome upon the courts because a hearing under the proposed Rule is required unless otherwise stipulated to by the parties.

WHEREFORE the Clerk respectfully requests this Honorable Court to adopt a procedure that allows the court to make it's confidentiality determination prior to the document being filed with the Clerk, as this is the most efficient way to preserve limited resources.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to the below listed parties on this 31st day of March, 2008:

John F. Harkness, Jr.
Executive Director
The Florida Bar
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Honorable Robert T. Benton II, Chair
Rules of Judicial Admin. Committee
First District Court of Appeal
301 South Martin Luther King, Jr., Blvd.
Tallahassee, FL 32399-6601

J. Craig Shaw
Bar Staff Liaison, Rules of Judicial Admin. Committee
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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in Diane M. Matousek's, Clerk of the Circuit Court in and for Volusia County, Comments to Amendments to Florida Rule of Judicial Administration 2.420 was prepared in MS Word using 14 point Times New Roman font.

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March 31, 2008

VIA EMAIL & U.S. MAIL

The Honorable Thomas D. Hall
Clerk of the Court
Florida Supreme Court
500 South Duval Street
Tallahassee FL, 32399-1927

Re: Rule of Judicial Administration 2.420
Case No. SC07-2050
Comment on Behalf of the Florida Media Organizations

Dear Mr. Hall,

In response to this Court's invitation to comment upon proposed revisions to Rule 2.420 of the Florida Rules of Judicial Administration, we offer this comment on behalf of Media General Operations, Inc., d/b/a *The Tampa Tribune*, WFLA-TV/News Channel 8 and WMBB-TV/News Channel 13; NYT Management Services, Inc., publisher of the (Sarasota) *Herald-Tribune*, (Lakeland) *Ledger*, *Gainesville Sun* and (Ocala) *Star-Banner*; Sentinel Communications Company, d/b/a the *Orlando Sentinel*; and Sun-Sentinel Company, d/b/a the *South Florida Sun-Sentinel* (collectively the "Florida Media Organizations").

We appreciate the Court's willingness to consider our comments concerning the recommendations of the Rules of Judicial Administration Committee and the Court's *sua sponte* proposed revisions to Rule 2.420. Since the super sealer

problems came to light in 2006, we know that the Court and the Committee have invested much effort in restoring public confidence in the judicial system. The proposed rules, however, threaten those efforts to maintain transparency and rebuild confidence in the system. We submit this comment to address two major areas of concern: the closure of all motions to make court records confidential in all cases and the closure of the entire sealing process in certain criminal cases.[1]

I. Automatic Closure of Motions to Make Court Records Confidential in All Cases

The Court's *sua sponte* proposed amendments to Rule 2.420 require that motions to make court records confidential in civil (subsection (d)(1)) and criminal (subsection (e)(2)(A)) cases be withheld from the public pending the Court's ruling on the motion. In other words, motions seeking closure are themselves automatically and categorically exempt under the proposed amendments.

How the Closure Process Generally Works Today

Under the existing rule, motions seeking closure are open – as they had been for decades prior to the rule's 1992 adoption. In our experience representing the print and broadcast media, the system has historically worked as follows. For example, assume the current rule applies where the defendant wants to file a transcript of a purported confession under seal in support of a motion to suppress the confession. The defendant files a motion with the Court seeking to seal the record containing the confession. The motion generally specifies the basis for the requested closure (typically, fair trial rights) without revealing the specific information sought to be protected from disclosure (the details of the confession).

[1] The Court's amendments propose additional provisions to address the topic of appellate court records. The problems inherent in the application of the proposed rule to trial court records are the same when applied to appellate court records. Therefore, we will not separately comment on the appellate court records provisions, except to state that the problems raised with respect to the Rule's application to trial court records apply with equal force in the appellate context.

This vagueness is permitted by Rule 2.420(d)(1)(A) and was acknowledged in *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988).[2]

Upon review of the motion, the public or the press may intervene for the limited purpose of opposing closure. (At other times, the motion is not opposed after review of the basis for the motion.) The opportunity to review the motion is particularly crucial because if the *parties* agree to closure, no hearing on the issue is held.[3] It is only after this review that the public can legitimately determine whether closure is properly being sought or interject, when appropriate, to prevent closure. If the parties do not agree to closure or if a non-party intervenes and opposes closure, an open hearing is held. The open motion to seal gives intervenors at least some due process notice of the basis for the motion. During the hearing, the parties to the underlying proceeding speak generally of the confession without revealing its substance. They will have the ability to make submissions to the Court *in camera*, if appropriate. Often the confession itself is submitted *in camera*. The public or the press present arguments to the Court that flesh out the public interest in access – sometimes, the substance of the confession is already public or the defendant has made statements to the media that reiterate the substance of the confession. More fully apprised of the relevant facts and legal issues, the Court is then able to decide the motion to seal.

Thereafter, any closure order will be entered and published publicly. If closure is ordered, the public still will not know the substance of the confession. If warranted, the non-party intervenor can appeal the closure of the record on an

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[2] As recognized in *Barron*, the vagueness of motions seeking closure is a problem for intervenors who generally do not have full access to the basis for closure. *Barron*, 531 So. 2d at 118-119 (holding that the burden of proof on the issue of access is "heavy" and rests on the party seeking closure because those challenging closure "will generally have little or no knowledge of the specific grounds requiring closure"). These problems are magnified when the motion seeking closure is itself closed.

[3] As advocated in our January 2007 comment on the initial adoption of Rule 2.420(d), a hearing should be held in all cases requesting closure so that the public has an opportunity -- *before* closure occurs – to argue whether closure is appropriate. *See, e.g., Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988)(affirming public's standing to oppose closure).

expedited basis. Fla. R. Jud. Admin. 2.420(e) & Fla. R. App. P. 9.100(d). If a non-party first learns of closure after the order is entered, the non-party can review the motion, the hearing transcript, and the order and, if appropriate, seek to have the closure order vacated under Rule 2.420(d)(5).

The Proposed Amendments Drastically Alter this System

The proposed amendments wholly alter this system which has operated effectively for decades. The amendments also create an entire category of automatically closed records: motions to seal. In some criminal cases, the entire process for challenging access -- including the motion, related proceedings and the closure order -- will be secret.[4] This closed system for adjudicating access rights creates grave federal and state constitutional issues, as well as fundamental systemic problems.

More than two decades ago, in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the United States Supreme Court recognized the public's First Amendment right to open courtrooms. In *Press-Enterprise Company v. Superior Court*, 464 U.S. 501 (1984), that Court extended the constitutional right of access to encompass the transcript of closed voir dire proceedings. Two years later, in *Press-Enterprise Company v. Superior Court*, 478 U.S. 1 (1986), the Court found the right of access included the transcript of a closed preliminary hearing in California. *See also Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989)(First Amendment violated by law that mandates the automatic sealing of court files in cases ending in acquittals, dismissals, nolle prosequi or no probable cause findings). The United States Supreme Court has clearly articulated a presumptive right of access to court records. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). This Court has also recognized the historically open nature of court records and the public benefits of transparency. *Barron*, 531 So. 2d at 118 ("A trial is a public event, and the filed records of court proceedings are public records available for public examination"); and *Miami Herald Publishing Co. v. Lewis*, 426 So. 2d 1 (Fla. 1982) (public access to the criminal justice system promotes confidence in the system, assures the fairness of the proceedings, encourages participants to be conscientious in the performance of their roles and serves as a check on corrupt practices by exposing the process to

[4] We address the proposed amendments that relate to certain Rule 2.420(e)(2) criminal records more thoroughly in Part II below.

public scrutiny). Categorically sealing all closure motions opens Rule 2.420 to a Section 1983 federal challenge. The automatic exemption of a category of court records also places Rule 2.420 in conflict with Article I, Section 24 of the Florida Constitution, which mandates that only the Legislature can create records exemptions for the three branches of government and details the strict requirements that must be satisfied prior to enacting any exemption.

Equally important, the proposed exemption runs afoul of this Court's own pronouncements in *Barron* and *Lewis*. Closure motions not only impact the right of access, but are also court records themselves. The categorical closure of sealer motions, thus, has a double impact. Because of the presumption of openness, the party seeking closure has a "heavy" burden to justify closure. *Barron*, 531 So. 2d at 118. Before any closure of court records can occur, closure must be supported by a demonstrated compelling state interest, and the Court must find that no reasonable alternatives to closure exist. *Id.* Any closure order must be narrowly tailored to protect that compelling interest. *Id.* Instead, under the proposed amendments, motions seeking closure are automatically closed without satisfying any of these standards. And that closure then impacts the application of those same standards to the documents that are the subject of the motion to seal.

Many of the legal implications also carry with them practical problems. Without the ability to review the motion seeking closure, the public is denied any meaningful opportunity to ascertain for itself whether the closure is warranted and is provided no real opportunity to contest closure before it occurs.[5] Practically, the public would not even be aware of the nature of the records sought to be closed under a system that seals the motion seeking closure. The problem of a lack of access to the motion itself is amplified in "agreed" cases in which the litigants all stipulate to closure. In such cases, a closure order may be entered without any hearing, and with no opportunity for the public to review the request for closure.[6]

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[5] The proposed amendments do not make clear whether there would be a docket entry (in civil or criminal cases) indicating that a motion for closure was filed. Surely, the public would have no opportunity at all to assess the propriety of closure and object if there is no public indication that a closure motion has been filed. Such a system would mimic the super sealer system in Broward that the Court has so diligently worked to eradicate.

[6] The Florida Media Organizations support the proposed amendments that require movants to set forth the specific legal authority and legal standards upon

Likewise, in certain criminal cases, the order itself would also be sealed – leaving nothing open in the entire process of sealing court records, which are supposed to be presumptively open. Under that process, the favored policy is secrecy, and the presumption is closure.

If there is going to be a hearing on closure (none is even required if the parties agree) and if the public is fortunate enough to learn about any hearing on the motion (the rule does not provide for prior notice of hearings), then the public first gains some insight into the type of closure sought at the closure hearing itself. This lack of notice of the closure grounds provided impedes the public (and press) in offering written papers to the Court, informed argument and citations of authority relevant to the Court's decision on the motion. Under such a system, any attempt to intervene by a non-party (as *Barron* and *Lewis* clearly provide standing to do) is likely to result in a significant disruption of the proceedings, even a rescheduling of the motion for closure until such time as the person seeking to intervene can obtain counsel, prepare for argument and file any helpful papers. In short, sealing the motions for closure effectively shuts the public out of the access process and deprives trial courts of healthy adversarial proceedings. Opposing closure under these circumstances is equivalent to defending a lawsuit without access to the complaint.

The automatic sealing of motions is wholly unnecessary, undermines the transparency policies this Court has so zealously protected and jeopardizes the very validity of Rule 2.420.

II. Special Procedures for Court Records in Certain Criminal Cases

Both versions of the proposed rule establish that the procedure applicable to seeking closure of court records in civil cases generally applies to criminal cases, except in two circumstances: where the release of records may "jeopardize" (1) the "safety of a person" or (2) an "active criminal investigation." In these circumstances, the proposed rule sets forth a separate, even more secret procedure for seeking closure.

(cont'd) which a request for closure is premised. *See* Proposed Amendments § 2.420(d)(1), (5). However, without access to the motion, the public has no opportunity to determine for itself whether the cited law truly justifies the closure sought.

Under the applicable procedure, the motion for closure is closed (subdivision (e)(2)(A)), any hearing on such a motion is closed (subdivision (e)(2)(B)), and all orders on these motions are closed (subdivision (e)(2)(E)). Moreover, because subdivision (d)(1) is expressly made inapplicable to these motions, there is no requirement of good faith in seeking closure nor is there a requirement that the motion set forth the legal basis for the requested secrecy.[7] Notification of the order is also generally not required. *See* Proposed Rule 2.420 (e)(2)(E). Additionally, nonparties are not granted standing to challenge orders entered in these contexts because subdivision subsection (d)(5), which addresses non-party challenges to closure orders, is expressly inapplicable. *See* Proposed Rule 2.420(e)(2)(D). In short, the entire process of closing a presumptively open court record is shielded from public view in situations where the proponent of closure vaguely alleges either "the safety of a person" or "an active criminal investigation" is jeopardized. The public may never know closure was sought or obtained, and throughout the process, the public is afforded no opportunity to challenge the motion or provide the Court with argument.

Safety Concerns

The Florida Media Organizations certainly do not wish to jeopardize the safety of persons in the name of open access. Without workable parameters on what this concept means, however, it is easy to imagine a system in which court records in criminal cases are often closed. For example, any witness who testifies against a criminal defendant fears at least some risk of potential retaliation by the defendant or another person hoping to prevent a conviction. Would the rule protect records identifying all adverse witnesses in a criminal prosecution because of generalized safety fears?

There may be some contexts in which safety issues warrant a limited, brief closure. Records revealing the identity of a confidential informant or cooperating co-conspirator are two such instances in which closure *may* be appropriate for a limited amount of time. *But only when an actual and imminent threat to human*

[7] This creates a drafting ambiguity. Orders granting closure in response to a restricted motion must comply with subdivisions (d)(3)(A)-(G), which contain the requirements for orders granting closure. Judges are required to provide the legal basis for granting closure, but the proponent of closure is not required to provide the Court with that legal basis in its motion.

life exists.[8] Generalized, unsupported fears should not be sufficient to warrant the automatic closure of all proceedings related to safety issues. Even here, an open process should control. *E.g., In re Petition Post-Newsweek Florida, Inc.*, 370 So. 2d 764, 775-76 (Fla. 1979) (unsubstantiated concern that jurors and witnesses would fear for their safety if cameras were allowed in courtrooms not sufficient to prevent camera access).

The closure process already is designed to protect sensitive information by permitting movants to provide only the level of specificity necessary to support the motion without revealing the contents of the subject records and by allowing for *in camera* records submissions. The automatic closure of motions and hearings on these matters unconstitutionally presupposes that the requirements of *Lewis* have been met in all cases. Presumptive openness is the way requests for closure have been handled post-*Lewis*, presumptive openness is required by the federal and state constitutions, and there is no evidence that actual harm has occurred as a result of this existing open process. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982)(deeming unconstitutional statute that provided for mandatory closure of courtrooms during the testimony of minor victims of sexual violence and finding that First Amendment required a case-by-case closure analysis). By contrast, a secret closure process threatens the establishment of secrecy as the norm in many criminal cases and does not honor Florida's commitment to and presumption in favor of open court records and proceedings. In exceptional circumstances, trial courts always retain the power to fashion appropriate measures to guard against imminent violence.

Active Criminal Investigations

Nor should there be a special, secret process for situations involving active criminal investigations. Litigating closure of these materials should occur in the open, again with the understanding that the current Rule 2.420 already provides protection for sensitive information by allowing for less specificity in motions to

[8] Moreover, closure orders entered for safety reasons ought to be lifted automatically once the danger no longer exists or the information that is the subject of the closure is provided to the defendant in the discovery process or the subject of testimony in open court. For example, once the identity of a confidential informant has been disclosed to the defendant, safety concerns cannot justify continued denial of public access to that information.

avoid disclosure of the matters sought to be closed and for *in camera* submissions when appropriate. To allow an active criminal investigation exception to the usual open process threatens to shield judicial activity in many, if not all, criminal cases, because an active criminal investigation is usually at the heart of any pending criminal case. Such issues are often litigated in open court without revealing the details of law enforcement's avenues of investigation.

Such an approach would create a major disparity between how litigation over access to records in the hands of police or other law enforcement agencies is conducted versus access to the very same records when they are in court files. For example, if a police department refuses to turn over requested records on the basis of the active criminal investigation exemption contained in Chapter 119, then any ensuing lawsuit seeking access to the records is open. *See, e.g., Downs v. Austin*, 522 So. 2d 931 (Fla. 1st DCA 1988) (state attorney required to release polygraph test results from an investigation to person who took tests and requested the results pursuant to Chapter 119); *Tribune Co. v. Public Records*, 493 So. 2d 480 (Fla. 2d DCA 1986), *rev. denied*, 503 So. 2d 327 (Fla. 1987) (investigation only deemed "active" through direct appeal and exemption not applicable during post-conviction proceedings); *Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775 (Fla. 4th DCA 1985), *rev. denied*, 488 So. 2d 67 (Fla. 1986) (state attorney required to turn over information furnished to defense counsel in a criminal investigation); *State v. Blankenship*, 407 So. 2d 396 (Fla. 4th DCA 1981), *rev. denied*, 413 So. 2d 877 (Fla. 1982) (newspaper reporter entitled to access tape recordings concerning a defendant in criminal prosecution where recordings had been disclosed to defendant). In contrast to the open Chapter 119 proceedings above, under the proposed amendments, litigation over public access to the same records – once in the hands of the Court – would be shrouded in complete secrecy. The motion seeking closure would be closed, any hearing on the motion would be closed, and the order would be closed. The Chapter 119 process demonstrates that such issues can safely be decided in open proceedings. The proposed closed process cannot be constitutionally justified.

Moreover, this approach is unnecessary. As explained more fully above, the present Rule 2.420 framework allows for lack of specificity in the motion seeking closure (see subdivision (d)(1)(A)) and for *in camera* review of certain materials (see subdivision (d)(2)). At present, the proponent of closure (typically the prosecutor's office) generally explains in the closure motion that an investigation is ongoing and that the State is following additional leads in the matter. At any

hearing, the proponent of closure will generally provide the same broad explanation of what is sought to be closed and may even provide the subject records to the Court for *in camera* review. The process does not reveal specifics. For example, no suspects or details of the crime scene are disclosed and, as a result, there is no need for total secrecy. The present system adequately addresses any concerns about the integrity of criminal investigations without entirely shutting the public out from the process of closure of court records. Additional secrecy measures simply are not necessary.

III. Conclusion

The Florida Media Organizations again thank this Court for providing them the opportunity to comment on the proposed amendments to Florida Rule of Judicial Administration 2.420. This Comment is presented in the spirit of cooperation to assist this Court in addressing the undoubtedly tricky task of striking the proper balance between the public's right of access with any legitimate interests supporting closure. The Florida Media Organizations urge the Court to reconsider the proposed revisions in light of the issues raised in this comment.

Respectfully submitted,

THOMAS & LOCICERO PL

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Comment has been delivered via U.S. Mail on this 31st day of March, 2008, to:

Rules of Judicial Administration Committee
c/o Honorable Robert T. Benton, II
First District Court of Appeal
301 S. Martin Luther King, Jr., Blvd.
Tallahassee, FL 32399-6601

Carol Jean LoCicero
Florida Bar No. 603030

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO
FLORIDA RULE OF JUDICIAL
ADMINISTRATION 2.420 CASE NO. 07-2050

REQUEST FOR ORAL ARGUMENT

By and through undersigned counsel, Media General Operations, Inc., d/b/a *The Tampa Tribune*, WFLA-TV and WMBB-TV; NYT Management Services, Inc., publisher of the (Sarasota) *Herald-Tribune*, (Lakeland) *Ledger*, *Gainesville Sun*, and (Ocala) *Star-Banner*; Sentinel Communications Company, d/b/a the *Orlando Sentinel*; and Sun-Sentinel Company, d/b/a the *South Florida Sun-Sentinel* (collectively the "Florida Media Organizations"), hereby file this request for oral argument, as directed by the Court in its Invitation to Comment.

Respectfully submitted,

THOMAS & LoCICERO PL

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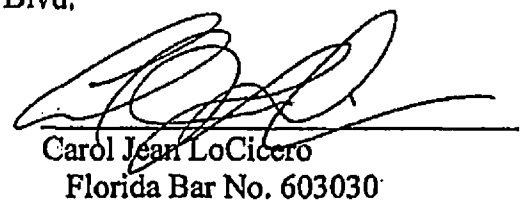
Honorable Robert T. Benton, II
First District Court of Appeal
301 South Martin Luther King, Jr., Blvd.
Tallahassee, FL 32399-6601



Carol Jean LoCicero
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FIRST AMENDMENT FOUNDATION
336 East College Avenue, Suite 101 Tallahassee, Fl 32301 www.floridafaf.org

April 1, 2008

VIA E-Mail and Hand-Delivery

The Honorable Thomas D. Hall
Clerk of Court
Florida Supreme Court
500 South Duval Street
Tallahassee, FL 32399-1927

Re: Proposed Amendments to the Florida Rule of Judicial Administration 2.420, Case No. SC07-2050

Dear Mr. Hall:

In response to this Court's invitation to comment upon the Proposed Amendments to the Florida Rule of Judicial Administration 2.420, Case No. SC07-2050, we file this comment on behalf of the First Amendment Foundation (FAF), a Florida not-for-profit corporation. The FAF is a public interest organization formed for the purpose of helping preserve and advance freedom of speech and of the press as provided in the United States Constitution and the Florida Constitution, and acting as an advocate and defender of the public's right of access to the records and meetings of its government. The Foundation represents more than 200 members, including most of Florida's daily and weekly newspapers, other media organizations, First Amendment and media law attorneys, students, private citizens, and public interest organizations. *See* http://www.floridafaf.org.

Florida has a long, rich history guaranteeing the public's right of access to government records. In 1992, the Florida voters overwhelmingly – 87% of the voters, the largest margin of approval ever given to effect a constitutional change – passed a constitutional amendment, Article I, Section 24, guaranteeing the public's right of access to government records and meetings.

Efforts were also made by this Court to preserve the public right of access to records in order to advance the public's right of governmental oversight. In response to press investigations uncovering the "supersealing" of hundreds of court records, the Florida Supreme Court recently ruled that state courts may not keep the existence of civil and divorce cases off public dockets. [In re Amendments to Florida Rule of Judicial Administration 2.420 – Sealing of Court Records and Dockets, Apr. 5, 2007] In addition to the revision of Rule 2.420, the Court adopted a related amendment making it more difficult for parties to seal records. The Court explicitly banned the practice of keeping a civil case completely off the public docket and asserted, "the public's constitutional right of access to court records must remain inviolate;" in an effort to eliminate supersealing and to preserve the public's rights of access to court records.

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Most recently, however, the Rules of Judicial Administration Committee (RJAC) filed a report and proposed amendments to Rule 2.420, to address sealing of criminal records. In addition to the RJAC's proposed revision, the Court has proposed amendments to Rule 2.420. The First Amendment Foundation believes the Court's proposed rule amendment stands in direct conflict with its recent strides to enhance transparency in Florida courts, and we believe the proposed amendments to the rule raise serious constitutional issues.

This comment addresses the sealing process of criminal records at the trial court level. While we have concerns pertaining to the proposed rule's revisions relating to sealing criminal records at the appellate level, we believe our concerns are inherently similar in regards to records at the trial and appellate court level. We will not, therefore, comment on the appellate court records provisions except to ask the Court to consider the application of the concerns raised in the following comments when considering the revisions to the provisions for appellate records.

I. The Proposed Rule Amendment Creates an Exemption in Direct Conflict with Article I, section 24, Florida Constitution

The Court's recommendations and proposed revisions to Rule 2.420 allow a party to seal criminal records when such records contain information that "*may* jeopardize either the safety of a person or an active criminal investigation." [Proposed Rule Amendment 2.420 (e)(2)] The effect of the proposed rule amendment is to create an exemption to public records requirements by allowing for automatic closure of criminal records pending a court ruling or order.[1] The result is a shifting of the burden of accessing records from the party requesting confidentiality to the person requesting to view the records, a shift which is contrary to the public interest and the constitutional right of access guaranteed under Article I, section 24, Fla. Con.

II. The Standard Created by the Proposed Rule Amendment is Unconstitutionally Vague

While we understand the need to protect certain information contained in criminal records, the Foundation believes it is critically important that the Court strike the appropriate balance between protecting the safety of persons involved in a criminal case and the public's overriding interest in accessing court records as articulated in Article I, section 24, of the Florida Constitution. We believe the standard for closure as provided by the proposed rule amendment does not adequately afford protection of individuals nor does it allow sufficient opportunity for the constitutionally-protected right of access to court records. The proposed rule amendment provides for confidentiality – and closure – of records that "*may* jeopardize either the safety of a

[1] Of equal concern is the proposed change to section (d)(1)(C) which would make *any* motion and *all* court records in non-criminal cases confidential and thus exempt from public disclosure. It is our position that the proposed rule amendment allowing closure of both criminal and non-criminal records is an unwarranted expansion of current rule and policy, and runs contrary to the constitutional standard for creation of new exemptions under Article I, section 24.

Constitution. We believe the standard for closure as provided by the proposed rule amendment does not adequately afford protection of individuals nor does it allow sufficient opportunity for the constitutionally-protected right of access to court records. The proposed rule amendment provides for confidentiality – and closure – of records that "*may* jeopardize either the safety of a person or an active criminal investigation" pending the court's ruling upon a motion for closure. The phrase "*may* jeopardize" is too permissive, allowing any party to assert a potential rather than an actual threat of harm. It allows virtually any party involved in a criminal matter to assert that closure is necessary and all motions relating to criminal matters would be closed to the public. The effect of the proposed rule amendment precludes public oversight of the criminal process.

Additionally, the proposed rule amendment provides that motions to make criminal records confidential "*may* be made in the form of a written motion," which lessens the requirement for a written motion and presumably allows a party the *option* of making a written motion rather requiring that all such motions be made in writing. This is extremely problematic in terms of public notice – if the rule change is adopted, the public would not have the opportunity to view a motion for oversight purposes. The permissive "may" renders the standard for closure vague and ambiguous. This not only presents a constitutional flaw in terms of Article I, section 24, it also thwarts the intent of the proposed rule amendment – to provide for the safety of individuals.

III. The Proposed Rule Amendment Does Not Afford Public Notice or Public Oversight

The First Amendment Foundation takes exception to the notice provisions of the proposed rule amendment. Under section 2.420(e)(2)(B) of the amendment, hearings on motions to seal a criminal record are closed to the public. In addition, section 2.420(e)(2)(C) provides that an order granting a motion to seal a record can be closed for up to 120 days and at the end of the initial 120-day period, allows for extensions of up to 60 days. Additionally, the proposed rule amendment does not limit the number of extensions which can be sought and granted. Without limiting the number of extensions that can be filed, criminal court records could be closed in perpetuity, thereby precluding any meaningful opportunity for public oversight of the criminal process.[2]

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[2] It's important to note that the current version of Rule 2.420 provides a higher standard for sealing *non-criminal* records than the proposed rule amendment would provide for sealing criminal records. As it relates to motions to make non-criminal court record confidential, Rule 2.420 currently allows for an opportunity for motions to be heard in open proceedings, provides for a copy of an order granting a motion to seal to be posted for public notice, and provides non-parties the opportunity to challenge an order to seal. [*See* Fla. R. Jud. Admin. 2.420 (d)(1) – (5)]

faith by a party requesting the closure; the opportunity for a hearing on a motion to seal criminal records; the requirement to post the order for public notice; and the opportunity for a nonparty to request to vacate a court's order. The proposed rule amendment thus effectively eliminates any and all opportunity for public notice.

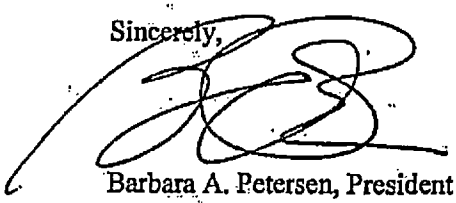
IV. The Construction of the Proposed Rule Amendment is Confusing

Finally, we would like to express our concerns regarding the overall structure of the proposed rule amendment. By referencing back to the current rule for sealing noncriminal records rather than specifically restating the standards and criteria that are meant to be applied to requests to seal criminal records, the amended version of the rule is extremely difficult to follow. The result will be confusion and frustration among those who must refer to the rule, most particularly Florida citizens who such rules are meant to serve.

V. Conclusion

The First Amendment Foundation is grateful for the opportunity to comment on the Court's recommendations, Mr. Hall. We would greatly appreciate the Court's consideration of our concerns and suggestions. If we can answer any questions or provide additional information, please don't hesitate to contact us.

Sincerely,



Barbara A. Petersen, President
Florida Bar No. 914207

Adria E. Harper, Director
Florida Bar No. 0026198

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Comment has been hand-delivered on this, the first day of April, 2008, to:

Rules of Judicial Administration Committee
c/o The Honorable R.T. Benton II
First District Court of Appeal
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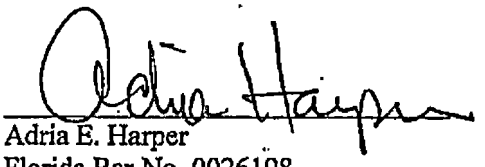
Tallahassee, FL 32399-6607



Adria E. Harper
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Affiliations appear only for purposes of identification.

April 1, 2008

VIA E-MAIL

The Honorable Thomas D. Hall
Clerk of the Court
Florida Supreme Court
500 South Duval Street
Tallahassee, FL 32399-1927

Re: Rule of Judicial Administration 2.420
Case No. SC07-2050
Comments on behalf of the Reporters Committee for Freedom of the Press

The Reporters Committee submits these comments in response to the Court's invitation to comment on the proposed revisions to Rule 2.420 of the Florida Rules of Judicial Administration. We thank the Court for this opportunity to comment and take the occasion to urge the state to continue to provide public access to important court records.

General Interest of Signatory

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors working to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970, and frequently files amicus curiae briefs in significant media law cases.

The Reporters Committee also serves as a First Amendment clearinghouse, monitoring and compiling information about significant legal and statutory developments affecting journalists and the public's right to know and produces several publications to inform journalists and lawyers about media law issues, including a quarterly magazine, a bi-weekly newsletter and podcast, and a web log, which is updated several times daily.

The Reporters Committee also operates a hotline to assist journalists with legal problems as they arise in their work. Often, these legal defense requests come from journalists who seek access to court records and information. This contact with reporters, editors and media lawyers around the country drives home the importance that court access plays in the everyday performance of journalism.

As both a news organization and an advocate of free press issues, the Reporters Committee has a strong interest in the policies governing the rights of reporters to maintain access to court records. It is through this dual role that the Reporters Committee can offer a unique prospective on the need for access to the judicial system.

The Court should not accept a rule that provides for the automatic closure of all motions to make criminal court records confidential.

The Court's sua sponte proposed amendments to rule 2.420(e)(2)(A) require that all motions to seal and any and all court records subject to such motions be treated as confidential by the court clerk. Because this change would run afoul of the U.S. Constitution, established court precedent and the state constitution, the Court should strongly consider abandoning these proposed changes.

Notably, the proposed rule violates established procedures mandated by the First Amendment of the United States Constitution. The Supreme Court has long held that there is a First Amendment right of access to a criminal trial, *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980), a right that extends to documents submitted in the course of a trial as well as other pretrial proceedings and filings. *See In re Washington Post Co.,* 807 F.2d 383, 388-390 (4th Cir.1986). Because that constitutional right of access attaches, "a court *must assess* whether sealing documents is 'necessitated by a compelling government interest, and ... narrowly tailored to serve that interest.'" *In re Time Inc.* 182 F.3d 270, 271 (4th Cir. 1999) (quoting *Press-Enterprise I,* 464 U.S. 501, 510 (1984) (emphasis added). These procedures require a court – prior to sealing criminal court records – to "(1) provide public notice that the sealing of documents may be ordered; (2) provide interested persons an opportunity to object before sealing is ordered; (3) state the reasons, supported with specific findings, for its decision if it decides to seal documents; and (4) state why it rejected alternatives to sealing." *Id.* By automatically sealing both the motion to seal and any additional records implicated by the motion to seal, the proposed rule blatantly ignores these constitutionally mandated procedures.

These procedures are supported by valuable public policy that has already been recognized by Florida's courts. This Court has long identified its commitment to open government, *see In re Petition of Post-Newsweek Stations, Florida, Inc.,* 370 So.2d 764 (Fla.1979), and has long noted that public access to the criminal justice system promotes confidence in the system, assures the fairness of the proceedings, encourages participants to be conscientious in the performance of their roles and serves as a check on corrupt practices by exposing the process to public scrutiny. *Miami Herald Publishing Co. v. Lewis,* 426 So. 2d 1 (Fla. 1982). It is on these grounds that this Court has held that "the public should generally have unrestricted access to all judicial proceedings," *State ex rel. Miami Herald Publishing Co. v. McIntosh,* 340 So.2d 904 (Fla.1977), and that "*all* trials, civil and criminal, are public events" that feature "a strong presumption of public access

to these proceedings and their records." *Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113, 114 (Fla.1988).

Beyond violating recognized public policy though, the proposed rule contravenes precedent established by this Court. In considering the proposed rule, the Court should look to its own pronouncements in cases that addressed restricting the public's access to other pretrial records and proceedings. Specifically, this Court noted that, as the public's surrogate on issues of access, the media "must be given an opportunity to be heard on the question of closure prior to the court's decision," and that implicit in that role is media's "right to be notified that a motion for closure is under consideration." *Lewis*, 426 So. 2d at 7. Moreover, the Court held that before ordering a closure, the "trial court shall determine that no reasonable alternative is available to accomplish the desired result, and, if none exists, the trial court must use the least restrictive closure necessary to accomplish its purpose." *Barron*, 531 So. 2d at 118. The procedures outlined in the proposed rule again ignore these procedures, presumptively closing all motions to seal without making any such determinations.

Rather than seal these records as a matter of rule, the Court should continue to allow for members of the press and the public to intervene upon a motion to seal criminal court records. Such a procedure allows the court to continue to protect the potentially sensitive materials found within those court records while giving due diligence to the due process rights of the intervenors. The constitutionally mandated procedures provide ample room to allow those drafting the motion to protect the contents of the records that they hope to seal and, when necessary and appropriate, the Court can review the records *in camera* to determine the whether the situation demands keeping the records from public view.

Finally, the judicial rule violates the separation of powers among the three government branches as dictated by the state constitution. The state constitution provides that "[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf." F.S.A. Const. Art. 1 § 24(a). The only public records outside its reach are those that the legislature "by general law passed by a two-thirds vote of each house for the exemption of records from the requirements of subsection (a)." *Id.* at § 24(c). Exempting an entire class of records by judicial rule would stand in violation of the constitutional demand that any exemptions be made by the state's legislative body.

We thank you for the opportunity to provide comments on this important matter. The Reporters Committee strongly urges Florida to continue to provide the public as much information as possible regarding sealed court records. We urge the Court to adopt a rule that will allow more open access to its judicial system.

Respectfully submitted,

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Executive Director

Gregg P. Leslie, Esq.
Legal Defense Director

Matthew B. Pollack, Esq.
Reporters Committee Legal Fellow

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IN THE SUPREME COURT OF FLORIDA

IN RE: SC07-2050
AMENDMENTS TO FLORIDA
RULE OF JUDICIAL
ADMINISTRATION 2.420
_____/

COMMENTS OF FLORIDA PUBLIC DEFENDER ASSOCIATION

The Florida Public Defender Association, Inc. ("FPDA") respectfully offers the following comments on the proposed amendments to Florida Rules of Administrative Procedure 2.420. The FPDA consists of the twenty elected public defenders, hundreds of assistant public defenders and support staff. As appointed counsel for indigent criminal defendants, FPDA members are deeply interested in the rules of procedure designed to ensure the integrity and accessibility of court records.

The FPDA's interest in this issue peaked when The Miami Herald revealed that prosecutors had been removing the criminal records of defendants who had agreed to become confidential informants. *See* Dan Christensen & Patrick Danner, *Bogus Dockets Shield Informants*, The Miami Herald, Nov. 18, 2006, at A1.

The specific case that led to this discovery was a federal criminal prosecution in which federal prosecutors had revealed that a witness had a state criminal conviction. The circuit court's computer records, however, showed that

the state had entered a *nolle prosequi* in the case. The physical court file had also disappeared. When questioned by the newspaper, a high-level assistant state attorney admitted that altering court documents had been an "established practice in this Circuit" for two decades.

This media discovery came after the separate media uncovering of "secret dockets" in civil cases, which led to this Court's "interim, emergency" adoption of the 2007 amendments to rule 2.420. *See In re Amendments to Florida Rule of Judicial Administration 2.420—Sealing of Court Records and Documents*, 954 So. 2d. 16, 17 (Fla. 2007). At the oral argument on that rule, the committee admitted the proposed rule had not been designed for criminal cases, and this Court modified the proposed language to make clear that it did not apply in criminal cases. *Id.* at 21.

The proposal before this Court now would modify the rules in civil cases to make them more applicable to criminal cases. The FPDA has no objection to the major modifications that make confidential the written request for confidentially, close the hearing on any such request, and prohibit the clerk from publishing any orders on these requests unless ordered by the trial court. The FPDA agrees that these are reasonable precautions to protect clients or sign substantial assistance agreements with the state.

The FPDA has two major concerns with the proposed rules: they do not address the altering of court documents, and they would allow criminal convictions to be kept secret from defendants in other cases. The FPDA would also suggest that the committee was too quick to jettison some of the protections applicable to civil cases that would have no impact on the safety of confidential informants.

ALTERING COURT DOCUMENTS SHOULD BE EXPLICITLY PROHIBITED.

The proposed amendments to the rule fail to address the situation that created this issue in the first place—the alteration of court records. Given that history, the failure to mention altering court documents could be read as an implicit permission for state attorneys to continue doing so.

Section 839.13, Florida Statutes, provides that if any "judge . . . clerk . . . or any person whatsoever, shall . . . alter . . .[or] falsify . . . any record . . . or any paper filed in any judicial proceeding in any court of this state," "the person so offending shall be guilty of a misdemeanor of the first degree." § 838.13(1), Fla. Stat. (2006). Nevertheless, this statute did not deter the establishment of a long-standing practice of doing just that.

The FPDA respectfully suggests that this Court incorporate similar language into this Rule of Judicial Administration to remove any suggestion that altering court documents, as opposed to keeping them secret, is ever acceptable. This

Court has often promulgated rules that echo and even copy constitutional and statutory provisions.

Additionally, the proposed rules allow the trial courts to make confidential any court records, including records of criminal convictions. The rule defines "court records" very broadly to include everything "which are the contents of the court file, including the progress docket and other similar records generated to document activity in a case." Fla. R. Judicial Admin. 2.420(b)(1)(A). That definition would include records showing that a trial court entered a criminal conviction against a person.

Criminal convictions are different from other court records because they can affect other cases, not just the case in which the record was created. The state sometime enters into substantial assistance agreements while the confidential informant's criminal case is still pending, but other times they are part of a plea the closes the case and results in a conviction. Florida Rule of Criminal Procedure 3.170(g) explicitly contemplates that these agreements will close cases with convictions and allows the state reopen them if the confidential informant does not fulfill the terms of the agreement.

Under the proposed rule, the state would then request that the trial court make confidential records of the substantial assistance agreement and the conviction. The confidential informant would presumably agree and the trial court

would enter the confidentiality order without a hearing. A confidential informant's substantial assistance agreement will often require the person to take actions resulting in a certain number of arrests. When the first arrests are made, the state and the confidential informant will want to keep the confidential informant's criminal conviction secret because of the potential for additional arrests. At this point, the confidentiality order creates constitutional, legal and ethical problems.

Criminal history records are important evidence because convictions for prior felonies and crimes involving dishonesty or a false statement are admissible as impeachment evidence. *See* § 90.610, Fla. Stat. (2006). Experienced trial attorneys know the effect that a prior felony conviction can have on a jury's evaluation of a witness. Even pretrial, an attorney needs to be able to investigate the potential witnesses against a client to assist the client in evaluating the strength of the state's case and, therefore, the advisability of entering into a plea.[1] The state or the court can make these plea offers as early as the twenty-first day arraignments, long before the 120-day (or longer)[2] confidentiality order expires. A

[1]The state need not always reveal the names of their confidential informants. *See Roviaro v. United States*, 353 U.S. 53, 60-61 (1957). Often, however, a defendant will know the identities of other persons who are witnesses, even if the person does not know the witness is a confidential informant. Therefore, defense attorneys need to investigate the prior conviction of not just confidential informants the state lists, but also the persons their clients tell them have information.

[2] The proposed rule limits any extensions of this 120-day period to 60 days each, but allows an *ad infinitum* number of extensions. Cookie-cutter requests for

defense attorney and the defendant have very strong interest in the court records being complete and accurate.

The due process clauses of the state and federal constitutions include "'what might loosely be called the area of constitutionally guaranteed access to evidence.'" Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system." *California v. Trombetta*, 467 U.S. 479, 485 (1984) (*quoting United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)); *see also Taylor v. Illinois*, 484 U.S. 400, 408-09 (1988); *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987).

Keeping the confidential informant's conviction secret after the institution of a criminal case against someone else violates that defendant's right to know the criminal histories of the witnesses in the case. Such action would also violate Florida law. Section 918.13, Florida Statutes, criminalizes the concealing of court documents to keep them from being used in a court case: "No person, knowing that a criminal trial or proceeding or an investigation by a duly constituted prosecuting authority . . . is about to be instituted, shall: (a) Alter, destroy, conceal

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extension, printed from a word processor, are not so taxing of resources as to ensure that these confidentiality orders will not continue for very long periods.

or remove any record, document, or thing with the purpose to impair its verity or availability in such proceeding or investigation." § 918.13(1), Fla. Stat. (2006). Violation of this statute is a third degree felony. *See* § 918.13(2), Fla. Stat. (2006).

Maintaining confidentially of a confidential informant's conviction after an arrest and institution of criminal proceedings would also be unethical. The ethical rules provide that: "A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act." R. Regulating Fla. Bar 4-3.4. By the time a confidential informant assists in making an arrest, the state attorney and defense attorney for the confidential informant would know that the confidential informants conviction is relevant to this new criminal case.

The state, of course, can avoid all these problems if it simply makes substantial assistance agreements while the confidential informant's case is still pending. As long as the state does not conceal the existence of the pending case against the confidential informant, concealing the existence of the substantial assistance agreement would not result in any constitutional, legal or ethical violation.

Therefore, the FPDA proposes modifying the proposed rules specify that "court records" under proposed Florida Rule of Judicial 2.420 do not include records of criminal convictions.

CONCLUSION

This Court should modify the proposed rules to explicitly prohibit the alteration of court records. This Court should also modify the proposed rules to specify that "court records" that may be held confidential do not include criminal convictions.

Respectfully submitted,

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Florida Bar No. 309524

General Counsel for
Florida Public Defender
Association, Inc.

CERTIFICATES

I hereby certify that a copy of these comments were served by mail on Honorable Robert T. Benton II, First District Court of Appeal, 301 South Martin Luther King, Jr., Blvd., Tallahassee, FL 32399-6601,on this first day of April 2008.

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

Robert Dewitt Trammell

IN THE SUPREME COURT OF FLORIDA

IN RE: SC07-2050
AMENDMENTS TO FLORIDA
RULE OF JUDICIAL
ADMINISTRATION 2.420
_____/

REQUEST FOR ORAL ARGUMENT

The Florida Public Defender Association hereby requests to participate in any oral argument in this case.

Respectfully submitted,

_____
Robert Dewitt Trammell
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Tallahassee, Florida 32302
(850) 510-2187
Florida Bar No. 309524

General Counsel for
Florida Public Defender
Association, Inc.

CERTIFICATES

I hereby certify that a copy of these comments were served by mail on Honorable Robert T. Benton II, First District Court of Appeal, 301 South Martin Luther King, Jr., Blvd., Tallahassee, FL 32399-6601,on this first day of April 2008.

_____
Robert Dewitt Trammell

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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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

NO. SC07-2050

IN RE: AMENDMENT TO FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.420

COMMENTS OF THE TWENTY STATE ATTORNEYS ACTING TOGETHER
THROUGH THE FLORIDA PROSECUTING ATTORNEYS ASSOCIATION

COMES NOW, THE FLORIDA PROSECUTING ATTORNEYS ASSOCIATION [FPAA], representing the elected State Attorneys for the twenty judicial circuits of Florida, and files these comments to the Florida Bar's Rules of Judicial Administration (RJA) Committee's Proposed Amendments to Florida Rule Of Judicial Administration 2.420 as published on this Court's website on February 8, 2008, stating as follows:

1. The issue of protecting confidential informants, and the propriety of the procedure that has been utilized in the Eleventh Judicial Circuit, was first referred on December 6, 2006, to the Criminal Procedure Rules Committee (CPRC) by Chief Justice Wells in a letter to William Vose, Esquire, the then-Chair of that Committee. After this Court reviewed the Comments and heard oral argument on the amendments to Rule 2.420 of the Rules of Judicial Administration, this Court determined that the rule as proposed should not apply to criminal cases, and sent the issue back to the Florida Bar's Rules of Judicial Administration Committee in conjunction

with the Criminal Procedure Rules Committee to draft a rule which would apply to criminal cases. See In re Amendments to Florida Rule of Judicial Administration 2.420 – Sealing of Court Records and Documents, 954 So. 2d 16 (Fla. 2007). This Court sent a formal referral letter to both Committee chairs on April 19, 2007. Numerous subcommittee and committee meetings were held on this issue. On October 25, 2007, the Criminal Procedure Rules Committee voted 24-0 to endorse the amendments to subdivision (e) submitted with the RJA's report on the proposed amendments. Among, the members of the CPRC are sixteen (16) criminal defense attorneys, including one elected Public Defender and three Assistant Public Defenders and one Assistant Capital Collateral Regional Counsel. Only eight (8) members are prosecutors. At no time did any member of the CPRC raise the issues as set forth in the FPDA's Comment.

2. The concerns expressed in the FPDA's present Comment are similar to those raised by the FPDA in their prior Comment filed in Case No. 06-2136. The FPDA's concerns that judges, clerks, prosecutors, and defense attorneys who participate in proceeding involving cooperating criminal defendants would be acting criminally and unethically are unfounded. The FPDA asserts that there is a prohibition in section 839.13, Florida Statutes (2007), that was ignored by the state attorneys, against altering or falsifying

any court record. However, the FPDA left out a critical requirement of the statute, i.e., that the falsification of the court records must be done with a "corrupt" intent. Such an intent requires that the act be done "dishonestly for a wrongful purpose." See s. 838.014(4), Fla. Stat. (2007). This is precisely why neither the state attorney nor this Court committed any crime when it approved the creation of false court records in two criminal investigations involving members of the judiciary in the Eleventh Judicial Circuit (Operation Court Broom and State v. Howard Gross).[1] Similarly because there was no criminal intent, any temporary alterations of the court record was not illegal. See, e.g., United States v. Murphy, 768 F. 2d 1518, 1528-29 (7th Cir. 1985). Thus, there is no reason to include any prohibition in Rule 2.420, which tracks the language of section 838.13(1).

3. The FPDA's Comment attempts to show that the practice of having the docket entries of defendants who agree to act as confidential informants reflect that the case is not closed,[2] as opposed to showing that the defendant was convicted of a crime, during the limited period of cooperation

[1] The facts of Operation Court Broom can be found in United States v. Shenberg, 89 F. 3d 1461 (11th Cir. 1996) (of interest is the fact that Judge Shenberg was willing to provide the identity of an alleged confidential informant who he was told would be killed). The arrest of Judge Gross is mentioned in Maharaj v. State, 778 So. 2d 944, 950 (Fla. 2000).

[2] In the Eleventh Judicial Circuit, the cases would show an open Status.

is also criminal and unethical. The FPDA's Comment concerning the need for defense attorneys to know about the convictions of the cooperating defendant is based on a false assumption that the prosecutors involved in these pleas will act unethically and criminally in that the FPDA states that the prosecutor will continue to conceal the existence of convictions and substantial assistance agreements of a cooperating defendant who is a confidential informant, after arrests have been made based on the assistance of the cooperating defendant. The FPDA also suggests that the prosecutors will not provide defense attorneys with accurate criminal history records for witnesses or prevent them from having access to such evidence.

4. There is no basis to assume that prosecutors are unaware of their discovery obligations under Florida Rule of Criminal Procedure 3.220, as well their duty to provide favorable evidence under Brady v. Maryland, 373 U.S. 83 (1963). There may have been rare cases in which a prosecutor has failed to abide by that obligation. However, those infrequent failures do not allow the FPDA to paint all prosecutors with the same broad brush, any more than one could claim that because some assistant public defenders or defense attorneys have been found to provide ineffective assistance to their clients, that all assistant public defenders or defense attorneys are ineffective.

5. The FPDA's Comment asking that this Court require the conviction of the cooperating defendant, who is a confidential informant, to not be sealed, even during the time the defendant is still acting as a confidential informant, puts the cart before the horse and would endanger the informant's life. It should be noted that just because a cooperating defendant, acting as a confidential informant, provides assistance or information that resulted in an arrest, does not automatically require that such person's identity be disclosed to the arrested defendant, such that it would be necessary to reveal the confidential informant's prior convictions. Under Rule 3.220(b)(1)(G) of the Florida Rules of Criminal Procedure, the State is required to inform a defendant if it has "any material or information that has been provided by a confidential informant." Thus, defense counsel will know during his or her investigation of the case whether a confidential informant was involved in the case.

6. Under Rule 3.220(g)(2) of the Florida Rules of Criminal Procedure, the State is not required to disclose the identify of the confidential informant unless "the confidential informant is to be produced at a hearing or trial or a failure to disclose the informant's identity will infringe on the constitutional rights of the defendant." Thus, if the confidential informant is to be a "produced" witness, i.e., a witness who testifies in the case, then the

State would be required to disclose the identity, and with that disclosure, any Brady material, which would include the informant's prior convictions and any plea agreements or other benefits given to the informant.

7. If a defendant thinks he or she knows the identity of the confidential informant, that does not automatically mean that the State has to confirm such knowledge with the revelation of the informant's identity. See State v. Angeloff, 474 So. 2d 13 (Fla. 1st DCA 1985). Rather, the defendant must ask the court to order the disclosure of the identity of confidential informant because the failure to disclose the informant's identity would infringe on the constitutional rights of the defendant. In making the determination that disclosure of the confidential informant's identity is required, the courts looks to such factors as whether it is necessary for the prosecution to refer to the informer in the presentation of the case, whether the informer was an "active participant" in the offense with which the defendant is charged or is a "mere informer" who supplies a "lead;" or whether the informant is a material witness to a specific defense alleged by the defendant. See Treverrow v. State, 194 So. 2d 250, 252 (Fla. 1967); State v. Zamora, 534 So. 2d 864 (Fla. 3d DCA 1988). If the court orders the revelation of the informant's identity, then the State would be obligated to provide to the defendant any Brady material, which would include the

informant's prior convictions and any plea agreements or other benefits given to the informant.

8. The fact that the defendant gives his or her attorney the names of persons who are witnesses, even if the defendant does not know the witness is a confidential informant, is not a reason to place the confidential informant in danger by revealing the conviction so that defense counsel can "investigate" it. This is precisely why the conviction needs to remain sealed during the pendency of the cooperation (unless otherwise required by law to be revealed).[3] Criminal organizations have become much more savvy and finding out who among them are cooperating with law enforcement has become a top priority. Websites are now devoted to uncovering confidential informants. It does not take much imagination to envision the circumstance where a defendant tells his attorney that John Doe is a witness to his drug trafficking. The attorney investigates John Doe and finds out that he has a conviction for drug trafficking, but he has not yet been sentenced. The defense attorney will discern that the reason for John Doe not being

[3] The FPDA's statement that proposed rule's allowance for extension for the sealing orders would allow an "ad infinitum" number of extensions because it would be easy for prosecutors to "cookie-cut" the requests on their word processors, is a not only a slap to the prosecutors, but to the judiciary, as it implies that the judges will not perform their obligations under the proposed rule to determine if the requests should be granted.

sentenced is due to the fact that he is probably a cooperating confidential informant. In fact, the defendant does not even have to involve his defense attorney – he could get other persons to get that information for him and he could come to that same conclusion, which would not only endanger the life of the confidential informant, but those of law enforcement officers who are involved in the ongoing criminal investigation.

9. The FPAA submits that the proposed amendments of Florida Rules of Judicial Administration 2.420 address what is literally a matter of life or death. The proposed amendments recognize the significant difference between civil cases and criminal cases when there is an issue of confidentiality of court records. The FPAA believes that with the proposed amendments the lives of cooperating defendants or confidential informants, as well as their families and the law enforcement officers who work with them, will be saved. These amendments would permit the state attorneys, along with counsel for the cooperating defendants, to request that the plea agreement, which has to also include the conviction, as well as the progress docket or similar records generated to document activity in the case are to be made confidential for the relatively short duration that it would take for the cooperating defendant to comply [or in some cases, not comply] with the plea agreement. Once there is a determination that the plea agreement has been or

has not been complied with, such that there is no longer a need for the court records to be confidential, the records, which will include the plea agreement and the order which granted the motion to have the court records be kept confidential, would be open for public review.

10. The proposed amendments of Florida Rules of Judicial Administration 2.420, address the concerns expressed by this Court in the prior proceedings, and balanced the need to protect confidential informants and ongoing criminal investigations, with a criminal defendant's constitutional rights, as well as the public's right to have access to judicial records.

Wherefore, the State Attorneys of the Twenty Judicial Circuits of Florida, by and through the Florida Prosecuting Attorneys Association, respectfully request that this Court adopt the proposed amendments of Florida Rules of Judicial Administration 2.420.

Respectfully submitted,

By:_____

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General Counsel
Florida Prosecuting Attorneys
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By:

PENNY H. BRILL
Assistant State Attorney
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing has been served on the John F. Harkness, Jr., Executive Director, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Fl 32399; The Honorable Robert T. Benton II, Chair, Rules of Judicial Administration Committee, First District Court of Appeal, 301 South Martin Luther King, Jr., Blvd., Tallahassee, Fl 32399; J. Craig Shaw, Bar Staff Liason, Rules of Judicial Administration Committee, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Fl 32399; Carol Jean LoCicero, Esquire, and Deanna K. Shullman, Esquire, Thomas & LoCicero, PL, Counsel for Florida Media Organizations, 400 N. Ashley Drive, Suite 1100, Tampa, Fl 33602; Barbra A. Peterson, Esquire and Adria E. Harper, Esquire, First Amendment Foundation, 335 East College Avenue, Suite 101, Tallahassee, Fl 32301; Lucy A. Daglish, Esquire, Gregg P. Leslie, Esquire, and Matthew B. Polack, Esquire, The Reporters Committee for Freedom of the Press, 1101 Wilson Boulevard, Suite 1100, Arlington, Va 22209; H. Scott Fingerhut, Esquire, Chair, Criminal Procedure Rules Committee, 2400 S. Dixie Highway, Fl.2, Miami, Fl 33133; 1104; Carol M. Touhy, Esquire, Counsel for Diane M. Matousek, Clerk of the Circuit Court, Volusia County Courthouse, 101 N. Alabama Avenue, DeLand, Fl 32724; and Robert DeWitt

Trammell, General Counsel for the Florida Public Defender Association, Inc., Post Office Box 1799, Tallahassee, Fl 32302, on this the ___ day of April, 2008.

By: _____
ARTHUR I. JACOBS
General Counsel

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Comment complies with the font requirements of Fla.R.App.P. 9.210(c)(2).

By: _____
ARTHUR I. JACOBS
General Counsel

IN THE SUPREME COURT OF FLORIDA

NO. SC07-2050

IN RE: AMENDMENT TO FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.420

REQUEST FOR ORAL ARGUMENT ON THE COMMENTS OF THE TWENTY STATE ATTORNEYS ACTING TOGETHER THROUGH THE FLORIDA PROSECUTING ATTORNEYS ASSOCIATION

THE FLORIDA PROSECUTING ATTORNEYS ASSOCIATION [FPAA], representing the elected State Attorneys for the twenty judicial circuits of Florida, by and through the undersigned counsel, respectfully requests oral argument on their comment to the Florida Bar's Rules of Judicial Administration (RJA) Committee's Proposed Amendments to Florida Rule Of Judicial Administration 2.420 as published on this Court's website on February 8, 2008.

Respectfully submitted,

By:_____

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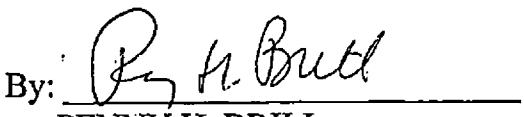
By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing has been served on the John F. Harkness, Jr., Executive Director, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Fl 32399; The Honorable Robert T. Benton II, Chair, Rules of Judicial Administration Committee, First District Court of Appeal, 301 South Martin Luther King, Jr., Blvd., Tallahassee, Fl 32399; J. Craig Shaw, Bar Staff Liason, Rules of Judicial Administration Committee, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Fl 32399; Carol Jean LoCicero, Esquire, and Deanna K. Shullman, Esquire, Thomas & LoCicero, PL, Counsel for Florida Media Organizations, 400 N. Ashley Drive, Suite 1100, Tampa, Fl 33602; Barbra A. Peterson, Esquire and Adria E. Harper, Esquire, First Amendment Foundation, 335 East College Avenue, Suite 101, Tallahassee, Fl 32301; Lucy A. Daglish, Esquire, Gregg P. Leslie, Esquire, and Matthew B. Polack, Esquire, The Reporters Committee for Freedom of the Press, 1101 Wilson Boulevard, Suite 1100, Arlington,

Va 22209; H. Scott Fingerhut, Esquire, Chair, Criminal Procedure Rules Committee, 2400 S. Dixie Highway, Fl.2, Miami, Fl 33133; 1104; Carol M. Touhy, Esquire, Counsel for Diane M. Matousek, Clerk of the Circuit Court, Volusia County Courthouse, 101 N. Alabama Avenue, DeLand, Fl 32724; and Robert DeWitt Trammell, General Counsel for the Florida Public Defender Association, Inc., Post Office Box 1799, Tallahassee, Fl 32302, on this the ___ day of April, 2008.

By: _____
ARTHUR I. JACOBS
General Counsel

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
Steven L. Brannock, Chair
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/s/ John F. Harkness
John F. Harkness, Jr.
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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
Florida Bar No. 0763251

CERTIFICATE OF SERVICE

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

/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.