FILED
THOMAS D. HALL
2009 JAN 12 A 9:46
CLERK, SUPREME COURT
BY

IN THE SUPREME COURT OF FLORIDA

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 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 these comments of the RJA Committee to a petition filed by the Supreme Court Committee on Access to Court Records ("Access Committee"), which contains proposed revisions to Rule of Judicial Administration 2.420. These comments have been approved by members of the RJA Committee by a vote of 39 to 0 and by the Executive Committee of The Florida Bar Board of Governors by a vote of 10 to 0.

The Access Committee filed the above-referenced petition on September 2, 2008. On October 13, 2008, this Court issued a Publication Notice soliciting comments on the Access Committee's petition. The following comments address the Access Committee's proposed amendments to Rule 2.420 contained in that petition. Many of the RJA Committee's suggested amendments to the Access Committee's proposed version of the rule (set forth in Appendix A attached to these comments[1]) previously were addressed by the RJA Committee in comments on this matter that also were filed on September 2, 2008, which should be read in conjunction with these comments (the RJA Committee's September 2nd comments were addressed to an earlier draft of the Access Committee's proposal, which differs in a few respects from the proposal in the Access Committee's September 2nd filing). These suggested amendments are replicated in Appendix A, together with one additional proposed change to subdivision (e)(8) that is discussed below.

[1]The version of Rule 2.420 set forth in Appendix A is in legislative format and shows the RJA Committee's proposed changes to the Access Committee's September 2nd proposed rule. To illustrate clearly what the proposed changes are, the comparison contains a "clean" version of the Access Committee's proposal (as if it were the current text of the rule) and shows the changes to that version proposed by the RJA Committee.

When examining the proposal submitted by the Access Committee, the RJA Committee revisited three areas of concern that also were discussed in the RJA Committee's comments filed on September 2, 2008. In those comments, the RJA Committee noted it had not yet had an opportunity to fully consider those concerns. In subsequent discussions, the RJA Committee has come to the following conclusions:

- In subdivision (e)(1), the Access Committee proposal provides that only the information subject to the motion, not the motion itself, must be treated as confidential pending the court's ruling on the motion, which represents a change from a prior version of the Access Committee's proposal. The RJA Committee has discussed this matter at several meetings and has consistently concluded that, barring special circumstances, only the information subject to the motion should be maintained as confidential in a civil matter pending a ruling on the motion. Because the Access Committee's latest proposal is consistent with the RJA Committee's previously stated position on this issue, no further amendments are suggested.

- In subdivisions (e)(2) and (e)(5), the Access Committee's proposal allows "any person" (as opposed to the more restrictive term "any party") to request that the court conduct all or part of a hearing on the respective motions in camera. The RJA Committee has concluded that expanding the ability to request an in camera inspection from the parties to also include nonparties does not appear to have any foreseeable disadvantages. Indeed, such broader access could be appropriate and beneficial where a third party's records are the materials under consideration. Therefore, the RJA Committee agrees with the Access Committee's proposal in this regard.

- In subdivision (e)(8), the Access Committee's version of the rule 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)." The RJA Committee recommends that this subdivision be deleted in its entirety. The Committee believes the number of cases in which priority case status is to be granted under Rule 2.215(g) is already too expansive and

that Rule 2.420 already contains time requirements specifically designed to address any potential concerns regarding the timeliness of the process.

WHEREFORE, the RJA Committee requests that the Court consider the comments of the RJA Committee to the Access Committee's petition, and amend Rule 2.420 as outlined in Appendix A attached hereto.

Respectfully submitted on January 12, 2009.

Scott M. Dimond
Chair, Rules of Judicial
Administration Committee
2665 S. Bayshore Dr., #PH-2B
Miami, FL 33133-5448
305/374-1920
Florida Bar No.: 995762

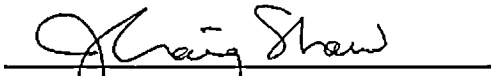
John F. Harkness, Jr.
Executive Director
The Florida Bar
651 East Jefferson St.
Tallahassee, FL 32399-2300
850/561-5600
Florida Bar No.: 123390

CERTIFICATION OF FONT COMPLIANCE

I certify that these comments were 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 January 12, 2009.



J. Craig Shaw
Staff Liaison to Rules of Judicial Administration Committee
The Florida Bar
Florida Bar No. 253235

APPENDIX A

Text of Access Committee's Proposed Amendments
to Rule 2.420 (Clean Version)
Showing Changes Proposed by
Rules of Judicial Administration Committee

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 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.

(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:

(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~~Procedures for Determining Confidentiality of Court 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.~~The following information shall be maintained as confidential:

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

(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.

(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.

(~~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).

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

(1) A request to determine the confidentiality of circuit and county court records in noncriminal cases under subdivision (c) must be made in the form of a written motion captioned "Motion to Determine ~~the~~ Confidentiality of Court Records." A motion made under this subdivision must:

(A) identify the particular court records or a portion of a record that the movant seeks to have determined as confidential with as much specificity as possible without revealing the information ~~to be determined confidential~~subject to the confidentiality determination;

(B) specify the bases for 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 made in good faith and is supported by a sound factual and legal basis. ~~The court records that are~~Information that is subject to 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~~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 (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 (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 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 ~~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 (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 (e) must state the following with as much specificity as possible without revealing the information ~~that may be confidential~~subject to the confidentiality determination:

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

(B) The particular grounds under subdivision (c) for determining the information to be confidential:

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

(F) Identification of persons who are permitted to view the confidential 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); and~~;~~ (ii) no less restrictive measures are available to protect the interests set forth in subdivision (c); and

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

(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 (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 (e), the request must be made 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 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 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 on the motion. Regardless of w~~W~~hether 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 person may request that the court conduct all or part of the hearing in camera to protect the interests set forth in subdivision (c). 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).

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

(7) Records of a lower tribunal determined to be confidential by that tribunal must be treated as confidential during any review proceedings. In any case where information is confidential under this rule, the clerk of the lower tribunal shall so indicate in the index transmitted to the appellate court.

~~(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).~~

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

(1) Subdivision (e) shall apply to any request to determine the confidentiality of circuit or county court records under subdivision (c), except as provided in subdivision (f)(2).

(2) Any motion to determine whether a circuit or county court record is confidential pursuant to subdivision (c)(9)(A)(i) or (c)(9)(A)(v) of this rule that pertains to a plea agreement, substantial assistance agreement, or similar court record, and that constitutes a serious and imminent threat to either the safety of a person or an active criminal investigation, may be made in the form of a written motion captioned "Restricted Motion to Determine Whether a Court Record is Confidential." As to any motion made under this subdivision, the following procedure shall apply:

(A) The existence of the motion made under this subdivision shall not be indicated on a publicly accessible index or progress docket. All court records that are the subject of such a motion must be treated as confidential by the clerk pending the court's ruling on 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 on 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 (e)(3)(A)–(G), (e)(6), and (e)(7) shall apply to motions made under this subdivision. The provisions of subdivisions (e)(1), (e)(2), (e)(3)(H), (e)(4), and (e)(5) shall not apply to motions made under this subdivision.

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

(3) This subdivision does not apply to records of the judicial branch determined to be 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.

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

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

(2) A response to a motion filed under subdivision (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 (g)(1) must be in compliance with the guidelines set forth in subdivisions (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 (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 (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 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 not to 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 (g)(1) was not made in good faith and supported by a sound legal or factual basis, the court may impose sanctions on the movant after notice and an opportunity to respond.

(7) Records of a lower tribunal determined to be confidential by that tribunal must be treated as confidential during any review proceedings. In any case where

information has been determined to be confidential under this rule, the clerk of the lower tribunal shall so indicate in the index transmitted to the appellate court.

(h) Request to Determine ~~the~~ Confidentiality of Appellate Court Records in Criminal Cases.

(1) Subdivision (g) shall apply to any request to determine the confidentiality of appellate court records under subdivision (c), except as provided in subdivision (h)(2).

(2) Any motion to determine whether an appellate court record is confidential under subdivision (c)(9)(A)(i) or (c)(9)(A)(v) of this rule that pertains to a plea agreement, substantial assistance agreement, or similar court record, and that constitutes a serious and imminent threat to either the safety of a person or an active criminal investigation, may be made in the form of a written motion captioned "Restricted Motion to Determine Whether a Court Record is Confidential" 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 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 under this subdivision, the following procedure shall apply:

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

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

(3) This subdivision does not apply to records of the judicial branch determined to be 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.

(i) 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 relief in the following manner:

(1)–(2) [No Change]

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

(1)–(3) [No Change]