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Reply to: Tampa

January 15, 2009

VIA EMAIL & U.S. MAIL

The Honorable Thomas D. Hall
Clerk of the Court
Florida Supreme Court
500 South Duval Street
Tallahassee, Florida 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; NYT Management Services, Inc., publisher of the (Sarasota) *Herald-Tribune*, (Lakeland) *Ledger*, *Gainesville Sun* and (Ocala) *Star-Banner*; Sun-Sentinel Company, d/b/a the *South Florida Sun-Sentinel*; and The Florida Press Association (collectively the "Florida Media Organizations").

The Committee on Access to Court Records (the "Committee") was gracious enough to allow us to attend its meetings and provide input throughout its work. We appreciate the Committee's and the Court's willingness to consider our comments concerning Rule 2.420. By the time the Committee began its drafting work on the rule, it had the benefit of the Rules of Judicial Administration

Committee's proposed revisions to Rule 2.420, the Court's own *sua sponte* revisions to that rule, and public comments addressing both sets of proposed revisions.

The Florida Media Organizations previously commented upon the Court's *sua sponte* proposed revisions to Rule 2.420 and the Rules of Judicial Administration Committee's proposed revisions with respect to criminal records. *See* Letter from C. LoCicero to the Hon. T. Hall, dated March 31, 2008. To avoid a repetition of issues previously discussed in that letter, the Florida Media Organizations refer to their March 2008 comment and incorporate the same comments herein to the extent they apply to the Committee's proposed changes to Rule 2.420. This letter will focus on the Committee's revisions to the prior proposals of the RJAC and the Court.

The Committee's version of the rule best blends the various versions of the rule, the Committee's drafting work in response to the charges by the Court and the concerns raised by a variety of interested parties and rules committees. Its version of Rule 2.420 should be adopted. We propose only a few revisions to that version of the rule. When we cite to the "Proposed Rule," we cite to the various subsections of the Committee's version of Rule 2.420. [1]

SUMMARY OF FLORIDA MEDIA ORGANIZATIONS' COMMENT

The Florida Media Organizations' comments are fairly limited and our main points appear in summary form below:

- The Committee's version of Rule 2.420 best harmonizes the competing versions of the Rule, responds to the Court's charge to the committee and accommodates the competing interests. It is particularly important to note that the Committee's version does not close sealer motions or proceedings themselves, it imposes higher standards before a motion in a criminal proceeding can qualify for the super "restricted" motion process that permits great closure of the sealer process, it contains a limited list of automatic

[1] The Committee's version of the proposed rule shifts each subsection by one section. Accordingly, subsection (d)(1) of the Court's proposed rule is found at subsection (e)(1) of the Committee's proposed rule. Unless otherwise noted in the text (as in the text associated with this footnote), references in this Comment are to the Committee's proposed subsections of the rule.

closure statutes, and it provides a mechanism for expedited consideration when appropriate. That mechanism goes a long way toward ameliorating the automatic delays and temporary closures permitted by the rule when a person tries to file documents under seal.

- The Committee's version, while good, could be improved in a few ways.

- Since the current version of Rule 2.420 was first adopted following the super-sealer problems, it has permitted *in camera* hearing requests for all or a portion of a closure proceeding. Those proceedings have historically been open and can be conducted without disclosing the underlying information at issue. Those proceedings should remain open. Otherwise, such hearings generally become not only *in camera* proceedings but also *ex parte* proceedings – particularly when the media is involved. The rule should permit *in camera* submissions of the records at issue for the trial court's review. The corrected rule would read: "Any hearing held under this subdivision must be an open proceeding, except that any person may request that the court review the court records at issue *in camera*." (This sentence would appear in the current rule at Rule 2.420(d)(2) and in the Committee's version at Rule 2.420((e)(2)).

- The reference to "active criminal investigations" should be deleted from the special restricted motion procedure in the Committee's version at Rule 2.420(f)(2). In the analogous Public Records Act context, the question of whether an active criminal investigation exists, thereby exempting criminal investigative agency records from public disclosure, is routinely litigated in open court – without any reference to the underlying details of the investigation. When court records are involved, that question should be litigated in open court too.

- A few of the statutes cited in the Committee's version of the rule should be removed as the basis for automatic, ministerial records closures. Those provisions can still serve as the basis for the individual motion procedure, if appropriate. Appendix A contains the list of statutes we would urge the Court to remove.

COMMENT

I. Closure of Motions to Make Court Records Confidential (Proposed Rule 2.420(e)(1) and (f)(2)(A))

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

In the March 2008 comment, the Florida Media Organizations urged that such motions *not* be treated as confidential in all cases because the transparency of the motion process is critical to the public's ability to determine whether closure is being properly sought and to interject, when appropriate, to argue against closure. The closure in the *sua sponte* version of the rule extends to all Rule 2.420 motions and proceedings. A closed system for adjudicating access rights creates grave federal and state constitutional issues, as well as fundamental systemic problems in honoring Florida's long commitment to access.[2] For decades, those motions have typically been filed and argued in open court – without exposing the underlying information at issue.

The Committee has proposed a rule that makes motions to seal (which the Committee refers to as requests to determine the confidentiality of records) open in most cases. As stated in their March 2008 comment, the Florida Media Organizations believe that the rule can operate effectively and efficiently if the motion to seal is open in all cases and, therefore, urge the Court to adopt the Committee version of this subsection. The Committee's approach also avoids the constitutional issues.[3]

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[2] Article I, Section 24(c) of the Florida Constitution permits only the Legislature to create categoric records exemptions. The categoric closure of all closure motions could violate this provision.

[3] After review of the various versions of the rule, the RJAC also supports the Committee's version of this subsection in its January 12, 2008, comment.

II. Special Procedures for Court Records in Certain Criminal Cases (Proposed Rule 2.420(f))

The RJAC and the *sua sponte* 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, both versions establish a separate, even more secret procedure for seeking closure. The Florida Media Organizations, while respectful of the sensitive issues addressed by this provision, previously urged the Court to adopt standards that would more effectively address legitimate safety and investigation concerns without unnecessarily impacting the transparency of criminal proceedings.

The Committee's version of the rule attempts to strike the correct balance by engrafting standards rooted in First Amendment jurisprudence before a matter qualifies for closure in certain criminal cases under the "restricted" motion process. Specifically, the Committee narrows the class of motions to which the exceptions apply (contained in the Committee's subsection 2.420(f)(2)) to motions pertaining to three categories of information: pleas agreements, substantial assistance agreements, and similar court records. These categories are directly derived from the concerns expressed by the Criminal Rules Procedure Committee. Moreover, closure of the closure process itself is allowed only in circumstances in which there also exists a "serious and imminent threat to either the safety of a person or an active criminal investigation."

The Committee has largely addressed the concerns the Florida Media Organizations raised in their March 2008 comment with respect to individual safety. Unlike the RJAC version, the Committee version contains standards for closure of sealer motions premised upon individual safety. Specifically, threats to safety must be "serious and imminent" and not premised upon mere speculation, conjecture or unsubstantiated fears. If the Court is going to establish a separate procedure in any criminal cases for safety concerns, the Florida Media Organizations urge the Court to adopt the more stringent requirements of the Committee's proposal.

However, the Florida Media Organizations do not believe that records seeking closure ought to be closed in circumstances in which an active criminal investigation exists. Even with the caveat that the Committee has included that the

threat be "serious and imminent," the Florida Media Organizations believe that measures to restrict access to closure-related materials are unnecessary and provide fertile ground for abuse by litigants seeking to shield the criminal process from public view. As set forth more fully in our March 2008 comment, an active criminal investigation is at the heart of any pending criminal case and existing measures already are in place to protect the integrity of that process no matter how serious or imminent the threat to the process may be. In the Public Records Act context, the application of the active criminal investigative exemption under Section 119.071(2)(c) is routinely litigated in open court. It can be litigated openly with respect to court records.

If the Court is inclined to provide a more restrictive process for certain criminal proceedings, the Florida Media Organizations urge the Court to refine the procedures applicable in these excepted criminal cases. Under the present proposals, the entire process of closure is closed in these situations (motion, hearing and order). Moreover, the rules as presently drafted do not require the proponent of closure to set forth the evidentiary basis for closure. The public generally will not be notified of any such order, and even if the public knows about the order, it may lack standing to challenge it under the current proposals. In combination, these procedures allow a process wherein closure is sought and obtained without the public ever knowing about it and without the opportunity for the public to challenge closure – even in the most generic terms. The Florida Media Organizations urge the Court to constrain these super-secret procedures by adopting procedures designed to ensure that the public is provided as much access as is possible and that these exceptions are not abused. While not perfect, the Committee's version of Rule 2.420 best accommodates the competing interests. It too should be refined to at least delete active criminal investigations from the restricted motion process.

III. Court Records for Which Automatic Closure is Provided (Proposed Rule 2.420(d)(1)(B))

The Florida Media Organizations agree with the Committee that only a limited number of statutory exemptions apply to court records. For the sake of clarity and the proper and efficient operation of the rule, it is necessary to enumerate those court records which are subject to automatic closure specifically – as recognized by the Court in its charge to the Committee. The Florida Media Organizations further agree that if an existing statute requires closure of a *court*

record, then the Clerk of the Court can treat a covered record as automatically sealed in accordance with its ministerial duties. If, however, no statute calls for automatic closure of a court record, then the proponent of closure must file a motion in accordance with the procedures set forth elsewhere in the rule and obtain a closure order prior to the Clerk's sealing of such a record.

The Committee has worked diligently and deliberately in preparing the list of "automatic" exemptions presented in proposed Rule 2.420(d)(1)(B), and the Florida Media Organizations largely do not dispute the application to court records of those statutes included on the list. The Florida Media Organizations do note, however, a handful of included statutes for which clarification is appropriate. Proposed changes will be discussed by statutory provision in Appendix A attached to this comment.

It is important to note that the Florida Media Organizations are not suggesting that the information discussed in Appendix A be publicly accessible in all circumstances. Rather, we merely suggest that the motion procedure described elsewhere in the rule apply to requests seeking closure of court records based on the statutes listed in Appendix A. As this Court is aware, the motion procedure protects the confidentiality of proffered records while the trial court considers the motion, thereby alleviating any concern that records determined by the court to be confidential will be released to the public while the motion seeking a closure determination is pending.

2.420(d)(1)(B)

The prefatory language to subdivision (d)(1)(B) anticipates amendments or re-numbering of the statutes enumerated in the listed statutes. However, this language should be amended to include language specifying that court orders may allow for inspection notwithstanding that the information falls within one of the enumerated statutes. For example, orders appointing court monitors in guardianship cases are made open upon a showing of good cause or after the expiration of certain exemptions. Fla. Stat. § 744.1076. Accordingly, the opening sentence of subdivision (d)(1)(B) should be amended to begin, "except as provided by court order. . ." to anticipate those circumstances when records ordinarily subject to closure under this provision have been deemed open for inspection.

IV. Expedited Consideration (Proposed Rule 2.420(d)(8))

The expedited consideration provision is critical and should be adopted. The procedures for determining whether closure of court records is warranted in any given case are drafted so that records that are the subject of closure (whether by motion or by automatic operation under subsection (d)(2)(B)) are often *de facto* closed for extended periods of time, often exceeding a month or more – even when the records should never have been sealed. To minimize the problems associated with the automatic short term closure of records allowed under the proposed rules, the Committee has proposed subdivision (d)(8) to provide for an expedited procedure, upon request, for determining motions for closure or motions to vacate closure. The Florida Media Organizations agree with the Committee that such a procedure is essential in minimizing the risk of abuse in obtaining short term closures under the rule and lessening the detrimental impact of the rule on Florida's rights of access to court records. Otherwise, the timing provisions of the rule should be revisited and substantially shortened.

V. Only *In Camera* Records Inspections Should be Permitted – Not *In Camera, Ex Parte* Proceedings

Since the super-sealer issues generated the first sweeping revisions to Rule 2.420, the Rule has provided: "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 . . . " *See* Current Rule 2.420(d)(2). *In camera*, often *ex parte* hearings on closure motions should not be permitted. Closure hearings are routinely held in open court, and the parties are circumspect in revealing the underlying information at issue.

The parties should be permitted only to make *in camera* submissions of the records at issue for the court to inspect in chambers without the parties. *In camera* proceedings – proceedings which will necessarily also be *ex parte* because the media and its counsel cannot attend – are unnecessary and inappropriate in our system of justice. An *in camera* records submission process should be more than sufficient. It has long worked in the analogous Chapter 119 agency records context. Rule 2.420 should be amended to permit only *in camera* records submissions – not *in camera* proceedings.

VI. Conclusion

The Florida Media Organizations again thank this Court for the time and resources it has devoted to ensuring that the judicial branch is transparent and open to Florida citizens. The effort that the Court has invested in Rule 2.420 – in light of the super-sealer problems and the electronic access to court records issues – has been substantial. We appreciate the repeated opportunities that we have been afforded to voice our comments on Rule 2.420 and each Justice's willingness to listen to those concerns. The Florida Media Organizations understand that this Court faces a daunting task in adopting a rule that addresses the various committees' and public commentators' concerns. In the spirit of cooperation and with the goal of creating a rule that honors Florida's commitment to open government, the Florida Media Organizations urge the Court to adopt the Committee's version of the rule, with the suggestions made here.

We would be remiss not to comment on the work of the members of the Committee on Access to Court Records and Staff Liaison Steve Henley. Several of those committee members also volunteered their time to serve on the predecessor Committee on Privacy and Court Records. We have long observed their work. They have intensely deliberated on the tasks charged to them by this Court. They have served this Court and the citizens of this State honorably and well. We appreciate their service and their willingness to consider our comments during the committee process.

Respectfully submitted,

THOMAS & LOCICERO PL

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished via United States mail on January 15, 2008, to the following:

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APPENDIX A

2.420(d)(1)(B)(iv) HIV test results and patient identity under Section 381.004(e)

The referenced statutory basis for this automatic closure of a court record is Fla. Stat. 381.004, which does not specifically apply to court records. Instead, it applies generally to state agencies in possession of HIV test-related information. While the statute does include specific provisions on obtaining a court order allowing for access to an agency's HIV test results under certain conditions (Fla. Stat. § 381.004(3)(e)(9)), the statute does not provide for automatic closure of HIV test results contained in court files. This section is, therefore, not appropriately included on the list of automatic exemptions.

Certainly, in many cases it may be appropriate to seek closure of HIV status-related information contained in court files, but the motion procedure set forth elsewhere in the rule is adequately suited to address those situations in a manner that does not compromise the secrecy of the underlying information. (Remember, the motion procedure allows for temporary closure of the proposed record until the court rules upon the motion.) In many other contexts, however, it will not be appropriate to seal HIV test results and patient information, such as where the test results are central to the litigation. Section 381.004 does not specifically close the test results in a lawsuit, for example, in which a plaintiff sues a former boyfriend for infecting her with HIV so that the test results of the parties become central to the case. We also do not read this provision as closing the test results in a defamation action in which a plaintiff sues, claiming the defendant spread lies that the plaintiff was infected with HIV/AIDS. Again, the test results (which presumably show the plaintiff does not have HIV/AIDS) would be the central evidence in the matter. For these reasons, Section 381.004 (proposed Rule 2.420(d)(1)(B)(iv)) ought not be included in the rule as an exemption to which automatic closure of a court record applies. Instead, the standard motion procedure should apply to litigants seeking closure of these materials.

2.420(d)(1)(B)(v) STD test results and patient identity under Section 384.29

The sexually transmitted disease exemption enumerated by the Committee expressly applies to Department of Health records, not court records, and generally governs *the Department's* disclosure of such information. In circumstances in which a subpoena has compelled the Department to disclose such information, the court is directed to seal the information, except "as deemed necessary by the court

to reach a decision, unless otherwise agreed to by all parties." Fla. Stat. § 384.29(2). In other words, closure is not proper if the court has used the proffered information in reaching a decision on a matter before the court. Clerks are not equipped to determine whether the proffered information is "deemed necessary by the court to reach a decision" or whether one of the many other enumerated exceptions to secrecy apply (for example, consent). Only the trial court is in a position to determine the public status of these materials, and, therefore, the standard motion procedure (which protects the confidentiality of the underlying records while the motion is pending) should apply to requests seeking closure of STD-related information pursuant to Section 384.29.

2.420(d)(1)(B)(ix) records of substance abuse providers under Section 397.501

Section 397.501(7) specifically applies to records of substance abuse providers and makes no reference to court files. There are also exceptions to the confidentiality of these provider records. Substance abuse providers, if intending to file their records in a court file, should use the standard motion procedure for seeking closure. As a practical matter, these records are likely often to be deemed confidential and not subject to disclosure. However, clerks are not readily able to identify whether the proffered records fall within the exemption or one of its exceptions, and the court should make that determination.

2.420(d)(1)(B)(x) certain information in clinical records of some detained criminal defendants under Section 916.107

Section 916.107(8) applies to records of the Agency for Persons with Disabilities and the Department of Children and Families and these agencies' receipt and maintenance of the subject records. It is not expressly applicable to court records. Moreover, the statutory scheme contains numerous exceptions that make application of the exemption impossible as a matter of a clerk's ministerial duties. These records likely are properly designated as confidential in many cases; however, the best method for determining their status is through the motion procedure applicable elsewhere in the rule.

2.420(d)(1)(B)(xv) guardianship reports and orders under Section 744.1076

These records are initially confidential and thus appropriate for inclusion in the list of automatic exemptions. However, both of the statutes enumerated in this section provide a court with the discretion to make these records public under

certain circumstances. For example, orders appointing court monitors in guardianship cases are made open upon a showing of good cause or after the expiration of certain exemptions. Fla. Stat. § 744.1076. (The exceptions are set forth in §§ 744.1076(1)(b), (1)(c), (2)(b), (2)(c), and (3)). Additionally, guardianship reports are available in connection with real property transactions or as the court otherwise allows. Fla. Stat. § 744.3071. (The exceptions are set forth in §§ 744.3701(1) and (2)). So as not to suggest that these records are confidential in all cases, it would be helpful to note the exceptions in the text of the rule or to change the prefatory language of subdivision (d)(1)(B) to anticipate these situations as suggested in our comment.

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January 15, 2009

VIA OVERNIGHT MAIL

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500 S. Duval Street
Tallahassee, FL 32399

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

Dear Clerk:

Enclosed for filing are an original and nine copies of the Florida Media Organizations' Comment in the above-referenced matter. I also enclose an original and three copies of Florida Media Organizations' Request for Oral Argument.

Thank you for your assistance.

Very truly yours,

THOMAS & LOCICERO PL

Tina Gilley

Tina Gilley
Assistant to Carol Jean LoCicero