ORIGINAL

IN THE SUPREME COURT OF FLORIDA

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

/

SUPPLEMENTAL REPORT OF THE APPELLATE COURT RULES COMMITTEE

The Florida Appellate Court Rules Committee (the "ACRC") files this Supplemental Report to highlight and to clarify the amendment to Florida Rule of Appellate Procedure 9.100(d) that the ACRC submitted for the Court's consideration in connection with and through the Comment of Special Joint Committee Regarding Changes to Rule 2.420 Proposed by the Florida Supreme Court and the Committee on Access to Court Records filed on September 2, 2008 (the "Joint Comment"). The proposed amendment would govern appellate review of orders denying or granting access to records or proceedings of lower tribunals.

The proposed amendment to Rule 9.100(d) was referenced in the Joint Comment on pages 6 to 8 and at footnote 4, and was presented in full-page format as Appendix F to the Joint Comment. The proposed amendment to Rule 9.100(d) (and an accompanying Committee Note) is attached to this supplemental report in legislative format (Appendix A) and in dual-column format (Appendix B). The ACRC's consideration of this matter in the form of a memorandum was previously filed with this Court as pages E-16 through E-28 in Appendix E of the September

2, 2008 Comment referred to above. As part of this Supplemental Report and to provide additional background, minutes of the June 20, 2008 ACRC meeting are included as Appendix C to reflect the debate and the 30-8 vote in favor of the proposed amendment. The proposed rule was not published due to time constraints, but it was approved by a 10-0 vote of the Executive Committee of The Florida Bar Board of Governors.

By filing this Supplemental Report, the ACRC hopes to direct the Court's attention to the importance of providing and preserving within the Florida Rules of Appellate Procedure the comprehensive review of orders granting or denying public access to court records under Rule 2.420. The work of the ACRC on this issue was consistent with the recommendations of the Committee on Access to Court Records (the "Access Committee") and was performed in conjunction with the Access Committee.

The proposed amendment recommends several important changes to Rule 9.100(d) (as detailed in the ACRC's proposed Committee Note and the memorandum referred to above). Consistent with the Court's dual commitment to public access and privacy, the most important change recommended by the ACRC is the adoption of a new construct that would explicitly recognize the right to review of both orders granting confidentiality as well as orders upholding public access.

In addition, the proposed amendment to Rule 9.100(d) requires the clerk and the lower tribunal to treat the subject records as confidential until any stay request is determined. This procedure is consistent with the approach to confidentiality contained in the main revisions proposed to Rule 2.420.

Because of the sensitivity of these issues, the proposed amendment preserves the "good faith" filing requirement for a stay request, but adds a sanction provision.

Finally, the proposed amendment clarifies three aspects of the general procedure for seeking review under Rule 9.100(d). First, it adds a 30-day filing requirement present in other writ petitions. Second, it eliminates (as unnecessary because of Rule 9.320) any statement regarding oral argument. Third, it reinforces the constitutional importance of these review proceedings by requiring that the review of all such orders — both those upholding public access as well as those preserving confidentiality — be expedited.

Respectfully submitted on July 8, 2009 by

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished by United States mail on July 8, 2009, to

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CERTIFICATION OF COMPLIANCE

I certify that these rules were read against *West's Florida Rules of Court – State* (2009).

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

Krys Godwin, Staff Liaison
Florida Appellate Court Rules Committee
The Florida Bar
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RULE 9.100. ORIGINAL PROCEEDINGS

(a) Applicability. This rule applies to those proceedings that invoke the jurisdiction of the courts described in rules 9.030(a)(3), (b)(2), (b)(3), (c)(2), and (c)(3) for the issuance of writs of mandamus, prohibition, quo warranto, certiorari, and habeas corpus, and all writs necessary to the complete exercise of the courts' jurisdiction; and for review of non-final administrative action.

(b) Commencement; Parties. The original jurisdiction of the court shall be invoked by filing a petition, accompanied by a filing fee if prescribed by law, with the clerk of the court deemed to have jurisdiction. If the original jurisdiction of the court is invoked to enforce a private right, the proceeding shall not be brought on the relation of the state. If the petition seeks review of an order entered by a lower tribunal, all parties to the proceeding in the lower tribunal who are not named as petitioners shall be named as respondents.

(c) Exceptions; Petitions for Certiorari; Review of Non-Final Agency Action. The following shall be filed within 30 days of rendition of the order to be reviewed:

(1) A petition for certiorari.

(2) A petition to review quasi-judicial action of agencies, boards, and commissions of local government, which action is not directly appealable under any other provision of general law but may be subject to review by certiorari.

(3) A petition to review non-final agency action under the Administrative Procedure Act.

(4) A petition challenging an order of the Department of Corrections entered in prisoner disciplinary proceedings.

Lower court judges shall not be named as respondents to petitions for certiorari; individual members of the agencies, boards, and commissions of local government shall not be named as respondents to petitions for review of final quasi-judicial action; and hearing officers shall not be named as respondents to petitions for review of non-final agency action. A copy of the

petition shall be furnished to the person (or chairperson of a collegial administrative agency) issuing the order.

(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 proceeding.

(2) The court shall immediately consider the petition to determine whether a stay of proceedings in the lower tribunal or the order under review is appropriate~~,~~ and~~,~~ on its own motion or that of any party, the court may order a stay on such conditions as may be appropriate. Any motion to stay an order granting access to a proceeding, any part of a proceeding, or any records of the judicial branch made under this subdivision must include a signed certification by the movant that the motion is made in good faith and is supported by a sound factual and legal basis. Pending the court's ruling on the motion to stay, the clerk of the court and the lower tribunal shall treat as confidential those proceedings or those records of the judicial branch that are the subject of the motion to stay.

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

(e) Exception; Petitions for Writs of Mandamus and Prohibition Directed to a Judge or Lower Tribunal. When a petition for a writ of mandamus or prohibition seeks a writ directed to a judge or lower tribunal, the following procedures apply:

(1) Caption. The name of the judge or lower tribunal shall be omitted from the caption. The caption shall bear the name of the petitioner and other parties to the proceeding in the lower tribunal who are not petitioners shall

be named in the caption of respondents.

(2) Parties. The judge or the lower tribunal is a formal party to the petition for mandamus or prohibition and must be named as such in the body of the petition (but not in the caption). The petition must be served on all parties, including any judge or lower tribunal who is a formal party to the petition.

(3) Response. The responsibility to respond to an order to show cause is that of the litigant opposing the relief requested in the petition. Unless otherwise specifically ordered, the judge or lower tribunal has no obligation to file a response. The judge or lower tribunal retains the discretion to file a separate response should the judge or lower tribunal choose to do so. The absence of a separate response by the judge or lower tribunal shall not be deemed to admit the allegations of the petition.

(f) Review Proceedings in Circuit Court.

(1) Applicability. The following additional requirements apply to those proceedings that invoke the jurisdiction of the circuit court described in rules 9.030(c)(2) and (c)(3) to the extent that the petition involves review of judicial or quasi-judicial action.

(2) Caption. The caption shall contain a statement that the petition is filed pursuant to this subdivision.

(3) Duties of the Circuit Court Clerk. When a petition prescribed by this subdivision is filed, the circuit court clerk shall forthwith transmit the petition to the administrative judge of the appellate division, or other appellate judge or judges as prescribed by administrative order, for a determination as to whether an order to show cause should be issued.

(4) Default. The clerk of the circuit court shall not enter a default in a proceeding where a petition has been filed pursuant to this subdivision.

(g) Petition. The caption shall contain the name of the court and the name and designation of all parties on each side. The petition shall not exceed 50 pages in length and shall contain

(1) the basis for invoking the jurisdiction of the court;

(2) the facts on which the petitioner relies;

(3) the nature of the relief sought; and

(4) argument in support of the petition and appropriate citations of authority.

If the petition seeks an order directed to a lower tribunal, the petition shall be accompanied by an appendix as prescribed by rule 9.220, and the petition shall contain references to the appropriate pages of the supporting appendix.

(h) Order to Show Cause. If the petition demonstrates a preliminary basis for relief, a departure from the essential requirements of law that will cause material injury for which there is no adequate remedy by appeal, or that review of final administrative action would not provide an adequate remedy, the court may issue an order directing the respondent to show cause, within the time set by the court, why relief should not be granted. In prohibition proceedings such orders shall stay further proceedings in the lower tribunal.

(i) Record. A record shall not be transmitted to the court unless ordered.

(j) Response. Within the time set by the court, the respondent may serve a response, which shall not exceed 50 pages in length and which shall include argument in support of the response, appropriate citations of authority, and references to the appropriate pages of the supporting appendices.

(k) Reply. Within 20 days thereafter or such other time set by the court, the petitioner may serve a reply, which shall not exceed 15 pages in length, and supplemental appendix.

***(l)* General Requirements; Fonts.** The lettering in all petitions, responses, and replies filed under this rule shall be black and in distinct type, double-spaced, with margins no less than 1 inch. Lettering in script or type made in imitation of handwriting shall not be permitted. Footnotes and quotations may be single spaced and shall be in the same size type, with the same spacing between characters, as the text. Computer-generated petitions, responses, and replies shall be submitted in either Times New Roman 14-

point font or Courier New 12-point font. All computer-generated petitions, responses, and replies shall contain a certificate of compliance signed by counsel, or the party if unrepresented, certifying that the petition, response, or reply complies with the font requirements of this rule. The certificate of compliance shall be contained in the petition, response, or reply immediately following the certificate of service.

Committee Notes

1977 Amendment. This rule replaces former rule 4.5, except that the procedures applicable to supreme court review of decisions of the district courts of appeal on writs of constitutional certiorari are set forth in rule 9.120; and supreme court direct review of administrative action on writs of certiorari is governed by rule 9.100. This rule governs proceedings invoking the supreme court's jurisdiction to review an interlocutory order passing on a matter where, on final judgment, a direct appeal would lie in the supreme court. The procedures set forth in this rule implement the supreme court's decision in *Burnsed v. Seaboard Coastline R.R.*, 290 So.2d 13 (Fla. 1974), that such interlocutory review rests solely within its discretionary certiorari jurisdiction under article V, section 3(b)(3), Florida Constitution, and that its jurisdiction would be exercised only when, on the peculiar circumstances of a particular case, the public interest required it. This rule abolishes the wasteful current practice in such cases of following the procedures governing appeals, with the supreme court treating such appeals as petitions for the writ of certiorari. This rule requires that these cases be prosecuted as petitions for the writ of certiorari.

This rule also provides the procedures necessary to implement the Administrative Procedure Act, section 120.68(1), Florida Statutes (Supp. 1976), which provides for judicial review of non-final agency action "if review of the final agency decision would not provide an adequate remedy." It was the opinion of the advisory committee that such a right of review is guaranteed by the statute and is not dependent on a court rule, because article V, section 4(b)(2), Florida Constitution provides for legislative grants of jurisdiction to the district courts to review administrative action without regard to the finality of that action. The advisory committee was also of the view that the right of review guaranteed by the statute is no broader than the generally available common law writ of certiorari, although the statutory remedy would prevent resort to an extraordinary writ.

Subdivisions (b) and (c) set forth the procedure for commencing an extraordinary writ proceeding. The time for filing a petition for common law certiorari is jurisdictional. If common law certiorari is sought to review an order issued by a lower tribunal consisting of more than 1 person, a copy of the petition should be furnished to the chairperson of that tribunal.

Subdivision (d) sets forth the procedure for appellate review of orders excluding the press or public from access to proceedings or records in the lower tribunal. It establishes an entirely new and independent means of review in the district courts, in recognition of the decision in *English v. McCrary*, 348 So.2d 293 (Fla. 1977), to the effect that a writ of prohibition is not available as a means to obtain review of such orders. Copies of the notice must be served on all parties to the proceeding in the lower tribunal, as well as the person who, or the chairperson of the agency that, issued the order.

No provision has been made for an automatic stay of proceedings, but the district court is directed to consider the appropriateness of a stay immediately on the notice being filed. Ordinarily an order excluding the press and public will be entered well in advance of the closed proceedings in the lower tribunal, so that there will be no interruption of the proceeding by reason of the appellate review. In the event a challenged order is entered immediately before or during the course of a proceeding and it appears that a disruption of the proceeding will be prejudicial to 1 or more parties, the reviewing court on its own motion or at the request of any party shall determine whether to enter a stay or to allow the lower tribunal to proceed pending review of the challenged order. See *State ex rel. Miami Herald Publishing Co. v. McIntosh*, 340 So.2d 904, 911 (Fla. 1977).

This new provision implements the "strict procedural safeguards" requirement laid down by the United States Supreme Court in *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977). In that case the Court held that state restraints imposed on activities protected by the First Amendment must be either immediately reviewable or subject to a stay pending review.

Subdivision (e) sets forth the contents of the initial pleading. The party seeking relief must file a petition stating the authority by which the court has jurisdiction of the case, the relevant facts, the relief sought, and argument supported by citations of authority. This rule does not allow the petitioner to

file a brief. Any argument or citations of authority that the petitioner desires to present to the court must be contained in the petition. This change in procedure is intended to eliminate the wasteful current practice of filing repetitive petitions and briefs. Under subdivision (g) no record is required to be filed unless the court so orders, but under subdivision (e) the petitioner must file an appendix to the petition containing conformed copies of the order to be reviewed and other relevant material, including portions of the record, if a record exists. The appendix should also contain any documents that support the allegations of fact contained in the petition. A lack of supporting documents may, of course, be considered by the court in exercising its discretion not to issue an order to show cause.

Under subdivisions (f), (h), and (i), if the allegations of the petition, if true, would constitute grounds for relief, the court may exercise its discretion to issue an order requiring the respondent to show cause why the requested relief should not be granted. A single responsive pleading (without a brief) may then be served, accompanied by a supplemental appendix, within the time period set by the court in its order to show cause. The petitioner is then allowed 20 days to serve a reply and supplemental appendix, unless the court sets another time. It should be noted that the times for response and reply are computed by reference to service rather than filing. This practice is consistent throughout these rules except for initial, jurisdictional filings. The emphasis on service, of course, does not relieve counsel of the responsibility for filing original documents with the court as required by rule 9.420(b); it merely affects the time measurements.

Except as provided automatically under subdivision (f), a stay pending resolution of the original proceeding may be obtained under rule 9.310.

Transmittal of the record under order of the court under subdivision (g) shall be in accordance with the instructions and times set forth in the order.

1980 Amendment. The rule was amended by deleting its reference to former rule 9.030(a)(2)(B) to reflect the 1980 revisions to article V, section 3(b), Florida Constitution that eliminated supreme court review by certiorari of non-final orders that would have been appealable if they had been final orders. The procedures applicable to discretionary supreme court review of district court decisions under rule 9.030(a)(2)(A) are governed by rule 9.120. The procedures applicable to supreme court discretionary review of trial court orders and judgments certified by the district courts under rule

9.030(a)(2)(B) are set forth in rule 9.125.

Subdivision (d) was amended to delete references to the district courts of appeal as the proper court for review of orders excluding the press and public, because the appropriate court could also be a circuit court or the supreme court.

1992 Amendment. Subdivision (b) was amended to add 2 provisions clarifying designation of parties to original proceedings. The first change eliminates the practice of bringing original proceedings on the relation of the state and instead requires that if a private right is being enforced, an action must be brought in the names of the parties. Second, this subdivision now requires that all parties not named as petitioners be included in the style as respondents, consistent with rules 9.020(f)(3) and (f)(4).

Subdivision (c) was amended to eliminate the practice of naming lower court judges, members of administrative bodies, and hearing officers as respondents in petitions for certiorari and for review of non-final agency action. Such individuals still are to be served a copy of the petition, but the amendment is to eliminate any suggestion that they are parties or adverse to the petitioner.

Subdivision (c) also was amended to reflect that review of final administrative action, taken by local government agencies, boards, and commissions acting in a quasi-judicial capacity, is subject to the requirement that the petition for writ of certiorari be filed within 30 days of rendition of the order to be reviewed.

Subdivision (e) was amended to require that the petition, the jurisdictional document, identify all parties on each side to assist the court in identifying any potential conflicts and to identify all parties to the proceeding as required by subdivision (b) of this rule. Additionally, this subdivision was amended to require, consistent with rule 9.210(b)(3), that the petition make references to the appropriate pages of the appendix that is required to accompany the petition.

Subdivision (f) was amended to add the existing requirement in the law that a petition must demonstrate not only that there has been a departure from the essential requirements of law, but also that that departure will cause material injury for which there is no adequate remedy by appeal. This

subdivision, without amendment, suggested that it established a standard other than that recognized by Florida decisional law.

Subdivision (h) was amended to require that any response, like the petition, contain references to the appropriate pages of appendices, consistent with subdivision (f) of this rule and rules 9.210(b)(3) and 9.210(c).

1996 Amendment. The reference to "common law" certiorari in subdivision (c)(1) was removed so as to make clear that the 30-day filing limit applies to all petitions for writ of certiorari.

Subdivision (c)(4) is new and pertains to review formerly available under rule 1.630. It provides that a prisoner's petition for extraordinary relief, within the original jurisdiction of the circuit court under rule 9.030(c)(3) must be filed within 30 days after final disposition of the prisoner disciplinary proceedings conducted through the administrative grievance process under chapter 33, Florida Administrative Code. See *Jones v. Florida Department of Corrections*, 615 So.2d 798 (Fla. 1st DCA 1993).

Subdivision (e) was added, and subsequent subdivisions re-lettered, in order to alter the procedural requirements placed or apparently placed on lower court judges in prohibition and mandamus proceedings. The duty to respond to an Order to Show Cause is expressly placed on the party opposing the relief requested in the petition, and any suggestion of a duty to respond on the part of the lower court judge is removed. The lower court judge retains the option to file a response. In those circumstances in which a response from the lower tribunal is desirable, the court may so order.

Subdivision (f) was added to clarify that in extraordinary proceedings to review lower tribunal action this rule, and not Florida Rule of Civil Procedure 1.630, applies and to specify the duties of the clerk in such proceedings, and to provide a mechanism for alerting the clerk to the necessity of following these procedures. If the proceeding before the circuit court is or may be evidentiary in nature, then the procedures of the Florida Rules of Civil Procedure should be followed.

1999 Amendment. Page limits were added to impose text limitations on petitions, responses and replies consistent with the text limitations applicable to briefs under Rule 9.210.

2009 Amendment. 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.

Court Commentary

2000. As to computer-generated petitions, responses, and replies, strict font requirements were imposed in subdivision (*l*) for at least three reasons:

First and foremost, appellate petitions, responses, and replies are public records that the people have a right to inspect. The clear policy of the Florida Supreme Court is that advances in technology should benefit the people whenever possible by lowering financial and physical barriers to public record inspection. The Court's eventual goal is to make all public records widely and readily available, especially via the Internet. Unlike paper documents, electronic documents on the Internet will not display properly on all computers if they are set in fonts that are unusual. In some instances, such electronic documents may even be unreadable. Thus, the Court adopted

the policy that all computer-generated appellate petitions, responses, and replies be filed in one of two fonts—either Times New Roman 14-point or Courier New 12-point—that are commonplace on computers with Internet connections. This step will help ensure that the right to inspect public records on the Internet will be genuinely available to the largest number of people.

Second, Florida's court system as a whole is working toward the day when electronic filing of all court documents will be an everyday reality. Though the technology involved in electronic filing is changing rapidly, it is clear that the Internet is the single most significant factor influencing the development of this technology. Electronic filing must be compatible with Internet standards as they evolve over time. It is imperative for the legal profession to become accustomed to using electronic document formats that are most consistent with the Internet.

Third, the proliferation of vast new varieties of fonts in recent years poses a real threat that page-limitation rules can be circumvented through computerized typesetting. The only way to prevent this is to establish an enforceable rule on standards for font use. The subject font requirements are most consistent with this purpose and the other two purposes noted above.

Subdivision (*l*) was also amended to require that immediately after the certificate of service in computer-generated petitions, responses, and replies, counsel (or the party if unrepresented) shall sign a certificate of compliance with the font standards set forth in this rule for computer-generated petitions, responses, and replies.

Proposed rule	Reasons for change
RULE 9.100. ORIGINAL PROCEEDINGS	
(a) Applicability. [NO CHANGE]	
(b) Commencement; Parties. [NO CHANGE]	
(c) Exceptions; Petitions for Certiorari; Review of Non-Final Agency Action. [NO CHANGE]	
(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 proceeding.	Subdivision (d)(1) and the title of the subdivision are amended to clarify that the scope of the rule encompasses both orders that deny access to records of the judicial branch and orders that deny motions to seal records claimed to be confidential. Reference to review of an oral order is deleted because of the general requirement in Fla.R.Jud.Admin. 2.420 to include factual findings in an order granting a motion to make court records confidential. A 30-day requirement for the filing of the petition is added, and clarifying editorial changes are also made.
(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	Subdivision (d)(2) is amended to require any person moving to stay an order granting access to a proceeding or any relevant records to execute a certification that the motion is made in good faith and supported by both the law and the facts. The subdivision is also amended to provide continuing

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.

confidentiality of the proceedings and records pending the court's ruling on the motion.

(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.

Subdivision (d)(3) is amended to delete the reference to allowance of oral argument, which is addressed in rule 9.320, and to provide for expedited review of orders, balanced against the Committee's intent not to instruct appellate courts on the time by which they should have reviews completed.

(e) Exception; Petitions for Writs of Mandamus and Prohibition Directed to a Judge or Lower Tribunal. [NO CHANGE]

(f) Review Proceedings in Circuit Court. [NO CHANGE]

(g) Petition. [NO CHANGE]

(h) Order to Show Cause. [NO CHANGE]

(i) Record. [NO CHANGE]

(j) Response. [NO CHANGE]

(k) Reply. [NO CHANGE]

***(l)* General Requirements; Fonts.** [NO CHANGE]

2009 Amendment. 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.

PERTINENT PORTION OF THE MINUTES

APPELLATE COURT RULES COMMITTEE

FRIDAY, JUNE 20, 2008
Called to Order at 9:00 a.m.

* * *

G. Record on Appeal Subcommittee — Chair, Sandy Solomon

1. Rule 9.100 – Review of orders affecting public access to proceedings or records.

(1) Along with the Criminal Practice Subcommittee, the Record on Appeal Subcommittee is considering amendments to Rule 2.420(f) and (g) , Rules of Judicial Administration (Public Access to Judicial Branch Records). (See pp. 336-366).

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Subcommittee Chair Solomon reported that the Record on Appeal Subcommittee, along with the Criminal Practice Subcommittee is considering amendments to Rule 2.420(f) and (g), Rules of Judicial Administration and referred the ACRC to pages 336-366 of the Agenda Materials.

Subcommittee Chair Solomon continued that the Subcommittee reported its study of the interaction between Fla. R. Jud. Admin. 2.420 and Fla. R. App. P. 9.100 (Original Proceedings). Rule 9.100(d) does not provide for bilateral review of orders that concern access to court records. Rule 2.420 provides for review whether the lower tribunal granted or denied access. There is an issue of whether a party opposing access, whose privacy rights may be affected, may seek review when the lower court grants access.

As to the second issue, Subcommittee Chair Solomon reported on a proposed amendment and comment to Rule 9.100(d) regarding problems in the way that Rule 2.420(e) is currently drafted, the confidentiality of documents and what is placed in the court file and how review of those types of orders is obtained.

Subcommittee Chair Solomon referred to Rule 2.420(e) and commented that it appeared to establish a procedure for Rule. 9.100(d), but the language of that Rule 2.420, itself, discusses documents withheld by the judge that appear to be administrative records, and records alone, which does not address the appellate review issues that we see arising out of this Rule. Subcommittee Chair Solomon continued that the Subcommittee

has prepared a report and proposed rule language in Rule 9.100(d) in that regard, and thanked Co-Vice Chairs Paul Nettleton and Dorothy Easley for their extensive work on Rule 9.100(d) amendments and comment.

Subcommittee Chair Solomon added that this Rule 2.420 issue is an issue that has to be addressed and the ACRC has formed a joint committee with the Rules of Judicial Administration to address these issues and provide for appellate review in a bilateral way, such that review can be had for orders granting or denying access.

Subcommittee Chair Solomon then invited Secretary and Subcommittee Co-Vice Chair Dorothy Easley to speak more on these issues, the proposed rule amendment and comments that she and Co-Vice Chair Nettleton prepared with the Subcommittee.

Secretary Easley commented that Co-Vice Chair Paul Nettleton, who was unable to be here today because of a prior commitment that could not be rescheduled, and Kathi Giddings, of the Rules of Judicial Administration and a former ACRC Chair, had been instrumental in thoroughly evaluating the appellate issues raised by Rule 2.420(e) and crafting proposed appellate rule language and comments to address those issues. Secretary Easley reported that Rule 2.420(e) affects both the appellate process and court records in terms of how Rule 9.100 can be utilized to obtain review of orders granting or denying access to court records or proceedings. Rule 2.420(e) also triggers an issue of timing of requests for review of orders and what happens between the order and obtaining review, triggering the need for some form of a stay to avoid the "cat out of the bag" situation that frustrates Rule 9.100 jurisdiction.

Secretary and Subcommittee Co-Vice Chair Easley continued that Rule 9.100(d) does not provide for bilateral review of orders that concern access to court records. Rule 2.420 provides for review whether the lower tribunal granted or denied access. There is an issue of whether a party opposing access, whose privacy rights may be affected, may seek review when the lower court grants access. There is also a suggestion in Rule 2.420 that review of orders concerning access to records should be by writ of mandamus, which does not appear to be the best mechanism for review.

Secretary Easley continued that a second issue concerned stays pending appeal of an order granting or denying access to records. The existing rule does not address the stay issue, which is significant in light of the rapid transmission of information in the electronic format today. The Subcommittee proposed that a minimal stay be in place to preserve the issue for appellate review for orders granting either access or denial. The stay itself would be immediately reviewable. The Subcommittee had concerns about possible delay. There is a hefty sanction

proposed if the Rule is abused in using stay for delay of access. Some terms used in the proposed Rule 9.100 are there to conform to those in Rule 2.420.

As part of this proposed amendment, the Subcommittee also debated the time for proceeding for appellate review, whether it should be 60 days, 30 days, or 70 days after rendition of the order. The rule of judicial administration provides ten days for the clerk to post a notice of an order granting a motion to make court records confidential and the order must remain posted for at least 30 days. Anyone, whether a party or not, can file a motion with the court on rendition of the order making records confidential. The Subcommittee's recommendation is not entirely consistent with Rule 2.420, but the Subcommittee did not feel it could sit back and delay making a presentation on this issue.

Secretary Easley continued that, as to the stay issue, the lower tribunal may order a stay on conditions as may be appropriate. The proposal includes a requirement for signed certification of good faith and a sound basis that includes sanction language for abuse of the stay.

Secretary Easley further reported that, although the appellate court reviews these orders quickly, the Subcommittee added the words "shall be expedited" in subdivision (3) to balance emphasizing the need for expedited review against the desire not to instruct appellate courts on the time by which they should have their reviews completed.

The Subcommittee proposed an amendment to Rule 9.100(d) that provided for bilateral review because the Subcommittee strongly felt that bilateral review was needed to balance the constitutional right of privacy with the constitutional right of access to records and proceedings.

Subcommittee Chair Solomon added that it is important to underscore that we met with and worked very closely with the Rules of Judicial Administration on the amendment and comments to Rule 9.100(d) and, because of the urgency with which the Florida Supreme Court needs rules in place, we need to vote on this or to get some mechanism to address this today. Subcommittee Chair Solomon gave strong praise to Co-Vice Chairs Paul Nettleton and Dorothy Easley, who worked very hard on this, as well as strong praise to Henry Gyden, Tom Young, and Carol Dittmar. It was a very large task to accomplish, and the Subcommittee worked tirelessly to do this. We still have more to do, and if we delay, one of problems is the time lag between the Supreme Court's referral and our response. So, whether the ACRC wants to address this by vote today or by email vote after the meeting, this is an issue that the ACRC needs to resolve in the next 30 days.

Subcommittee Chair Solomon moved the proposed amendments to Rule 9.100(d) on pages 362 be approved by the ACRC.

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Rule 9.100. Original Proceedings.

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(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, 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 clerks 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.

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Kristy Gavin commented that the ACRC, under the ACRC IOPs, could not address this today because it was not placed on the agenda.

Subcommittee Chair Solomon moved to suspend the IOPs, and Chair Brannock asked that the ACRC go ahead and discuss and vote today, if for just informational purposes in the event further revisions were needed. Chair Brannock placed this issue before the full ACRC on the floor for discussion and for a vote.

Bob Pritt questioned whether "otherwise" in the 2008 Committee Note on page 362 was necessary. Secretary Easley responded that she thought the current proposal was consistent. Subcommittee Chair Solomon commented that he had no objection to Pritt's proposed amendment to delete "otherwise", but concluded that it should remain because it is grammatically more correct. Chair Solomon added that this is potentially confusing and Pritt's point is well taken, but we could wordsmith it.

Secretary Easley moved to take out word "otherwise." Vice Chair Mills commented that he believed Bob Pritt might have misread the words "denied motion to seal" which is the same as "grant access," and that no amendment was needed.

Subcommittee Chair Solomon responded that Vice Chair Mill's point is well taken. Secretary Easley withdrew her motion to amend to delete "otherwise."

Vice Chair Mills commented that he had serious concerns about Rule 9.100(d)'s reference to sanctions because Rule 9.410 (Sanctions) deals with sanctions already. This Rule 9.100(d) language indicated that it would be harder to get sanctions under this Rule than under normal circumstances in Rule 9.410, which provides that if a filing is frivolous or in bad faith. Vice Chair Mills continued that there are really two concerns: one is that the court should issue a notice to the potential offender of the possibility of sanctions; and there are different standards because Rule 9.410 says "bad faith or frivolous," and this proposal requires both bad faith and frivolous. He recommended deleting the language on sanctions.

Secretary Easley responded that the Subcommittee was, in drafting in that language, responding to concerns by some that filing these motions to stay and for writs under Rule 9.100(d) may delay the process, and this language was there to

address the need to make it clear that this Rule will subject the movant to sanctions if the motion is not well founded. Secretary Easley added that we could relegate it to a Committee Note, but underscored that some voiced concerns about any automatic stay of the access to court records.

Michael Korn commented that, when you use the sanctions under Florida Statutes 57.105, you are required to send a letter to the opponent. Rule 9.410 sanctions are imposed on the court's own motion. This proposed amendment creates a substantive remedy and penalty, but he is concerned about the connective steps and imposing new extra-rule sanctions. Korn asked if the Subcommittee considered and discussed § 57.105.

Subcommittee Chair Solomon responded that the question we had was how to counter balance the automatic stay. This approach had the broadest appeal to most of the people involved in the drafting of this amendment, but no one is wedded to it. Everyone shared the concerns raised by Korn and Vice Chair Mills. The Subcommittee wanted an *in terrorem* effect because newsworthiness may be lost and the public interest may be harmed.

Korn responded that he is concerned about the free form rule on sanctions creating a cottage industry on how to do sanctions if we don't tell how to do it.

Secretary Easley responded that we did consider and discuss § 57.105 and Rule 9.410, precisely to avoid the cottage industry concern you raise. To mitigate against that, we established criteria for sanctions. We are happy to entertain more appropriate language or to delete that provision altogether.

Vice Chair Mills moved to amend to delete the last sentence of the proposed Rule 9.100(d)(2). The Rule serves its purpose without that sentence; and Vice Chair Mills is very concerned that this Rule, as worded, presents a different sanctions standard.

Vice Chair John Crabtree responded that, as a point of procedure, we need a second to Subcommittee Chair Solomon's motion to suspend the IOP's to allow debate on this proposed rule. There were multiple seconds to his motion. The ACRC then voted on that point of order and motion to suspend IOP's, which **motion to suspend the IOP's carried with 25 voting in favor, and 14 voting against.**

Vice Chair Mills asked Tom Hall what the Supreme Court's position was on this issue in terms of timing, and he responded that the Supreme Court needs a vote on this promptly.

Michael Korn seconded Vice Chair Mills' motion to delete the last sentence of Rule 9.100(d)(2) set forth on page 362 of the Agenda Materials.

David Gemmer suggested that the second sentence be placed in the 2008 Committee note set forth on page 362 of the Agenda Materials.

Ed Mullins commented that he opposed the proposal on First Amendment grounds, and tempered his comments with the disclosure that he represented many in the media sector. Mullins added that a stay by motion should be in very limited circumstances.

The ACRC voted on the motion to delete the last sentence of proposed Rule 9.100(d)(2) set forth on page 362 of the Agenda Materials, and the **motion carried with 33 in favor of the motion, and 5 voting in opposition to the motion.** Thus, the proposal, as amended, is as follows:

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Rule 9.100. Original Proceedings.

....

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(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 clerks of the court and the lower tribunal shall treat as confidential those proceedings or those records of the judicial branch that are the subject of the motion to stay.

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

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.

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Ed Mullins added that the State of Florida had been at the forefront of right of access and this Rule was a dramatic step back because of creating a procedure to allow appeals if access is given. Mullins expressed First Amendment concerns and revealed that there is media opposition to this amendment.

Chair Brannock called the proposed amendment and committee note for a vote and the **motion to amend with the proposed amendment and committee note, as set forth on page 362-363 of the Agenda Materials carried with 30 voting in favor, and 8 voting against.**

Subcommittee Chair Solomon advised the ACRC that the complete materials were set forth on pages 336-342, and that this was a pressing matter with numerous issues upcoming.