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Reply to: Tampa

November 9, 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 Rules of Judicial Administration and Rule 9.100 of the Rules of Appellate Procedure, 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").

Before the Court are the Court's published revised Rule 2.420 of September 9, 2009; and the Consolidated Rules Committee's comment, including proposed revisions to the Court's September 9th version of Rule 2.420 and revisions to Rule of Appellate Procedure 9.100. Our comments will be limited:

- The Florida Media Organizations are concerned with two proposals by the Consolidated Committee. First, contrary to the Court's September 9th version of Rule 2.420, the Consolidated Committee continues to urge a super-secret closed motion procedure involving motions under Rule 2.420(f)(3) in the criminal context. The Court's version of Rule 2.420(f)(3) avoids constitutional issues under Article I, Section 24 of Florida's Constitution and is more consistent with Florida case law and judicial transparency policies. After having the benefit of written comments and oral argument, the Court rejected the concept of automatically closing the category of restricted motions, which is once again urged by the Consolidated Committee.

- Second, the language added by the Consolidated Committee to Rule 2.420 (b)(4), permitting redaction only "[t]o the extent reasonably practicable" is inconsistent with Florida law and provides too much discretion to clerks. That language should be stricken.

- The language added by the Consolidated Committee at the Florida Media Organizations' request to Rule of Appellate Procedure 9.100(d), permitting the expedited appeal of oral closure orders is critical and should be included in the rule.

Rule 2.420

Rule 2.420(f)(3): The Court's version of the restricted motion practice in criminal matters permits the movant to seek an order sealing the restricted motion to determine confidentiality if the motion would reveal the identity of a confidential informant or active criminal investigative information. This version is more consistent with Florida law than the Consolidated Committee's proposal – a proposal which the Court already rejected prior to publishing its September 9th version of the rule. In the Consolidated Committee's version, all motions to make court records confidential are automatically sealed – and super sealed with no notation on the docket of any pending motion. As the Florida Media Organizations have discussed at length in prior comments to the Court, 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. For decades, closure motions have typically been filed and argued in open court – without exposing the underlying information at issue. Creating a categoric

exemption for closure motions under Rule 2.420(f)(3) would, at a minimum, violate Article I, Section 24, which permits only the Florida legislature to create records exemptions.

The Rule 2.420(f)(3) motion practice in criminal matters is already highly restrictive. Orders are not published. The motion to vacate procedure does not apply. Those restrictions are troubling enough. The restricted motion practice issues are merely compounded by a rule super sealing such motions from any notation on the docket and automatically closing all restricted motions filed. The Court's version of the rule impinges less on access – while still protecting those potentially at risk. The Court's version of Rule 2.420(f)(3) should be adopted.

Rule 2.420(b)(4): The Consolidated Committee has added the italicized clause to this provision concerning the defined term "confidential":

> *To the extent reasonably practicable*, restriction of access to confidential information shall be implemented in a manner that does not restrict access to any portion of the records that is not confidential.

The only information in court records that may be lawfully sealed is information sealed by appropriate court order or a constitutional legislative exemption. Historically, courts and public agencies have employed redaction of records to ensure that only properly sealed information is withheld, while the remainder of the record remains open. A redaction standard such as "to the extent reasonably practicable" violates court records access law and vests too much discretion in clerks to determine whether a record should be redacted or sealed in its entirety. It is just that type of discretion that the Court and the Committee on Access to Court Records worked so hard, at the Court Clerks' urging, to remove from the rule. That language should not be included in Rule 2.420(b)(4). The Court's version of that provision should be adopted.

Rule of Appellate Procedure 9.100

Rule 9.100(d) concerns the expedited review of both court records closures and court proceedings closures. The revised version of Rule 9.100, however, permits only the expedited review of written closure orders. Rule 2.420 certainly contemplates the entry of an actual written order involving court records closures. However, there will be times in a trial or a critical hearing, for example, where an oral order is entered sealing court records, but a written order will not follow for some time. In the meantime, the closed record could be central to the proceeding that the media is covering and the delay in access and seeking review itself becomes a significant problem. Requiring the media to wait for a written order occasions further delays and a denial of public access to a court record which may be evidence in a trial, for example.

Rule 2.420, moreover, has nothing to do with issues involving the closure of court proceedings. The trial court does not have to enter an order in writing closing a court proceeding. If an oral order is entered during a trial that excludes the press from certain testimony, how does the media seek expedited review of that order if Rule 9.100(d) is revised to permit only the review of written orders? Is the media and the public denied an expedited appeal for proceedings when oral closure orders are entered? To illustrate the problem generally, we have attached an opinion from the Second District Court of Appeal involving expedited review of an oral order from the trial court in a criminal matter.

The same problem is presented for parties seeking closure. If an oral order is entered, can the party seeking closure not petition for expedited review of an oral order opening a proceeding or record? If not, the information will likely be made publicly available before review can occur. To remedy the problems described here, we request that the Court adopt the language in the Consolidated Committee's version of the rule which reinserts the language including oral orders within Rule 9.100. The corresponding language concerning written orders in the comment should also be stricken.

Again, we deeply appreciate both the Court's and the Consolidated Committee's willingness to hear our concerns and include us throughout the rulemaking process. If we can provide any additional information to the Court, please let us know.

Respectfully submitted,

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I certify that a copy of the foregoing was furnished via United States mail on November 9, 2009, to the following:

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Source: Media Law Reporter Cases > Florida > Times Publishing Co. v. Florida, 26 Med.L.Rptr. 2567 (Fla. Dist. Ct. App. 1998)

26 Med.L.Rptr. 2567
Times Publishing Co. v. Florida
Florida District Court of Appeal, Second District

Nos. 98-02892 and 98-02893

July 31, 1998

718 So2d 1246

TIMES PUBLISHING COMPANY, petitioner v. STATE OF FLORIDA, THOMAS MILLER, CHRISTOPHER COLE, and NISSA BAILLIE, Respondents; TAMPA TELEVISION INC., et al., petitioners v. STATE OF FLORIDA, THOMAS MILLER, CHRISTOPHER COLE, and NISSA BAILLIE, respondents

Headnotes

NEWSGATHERING

[1] Access to places — Public institutions — Courtrooms — Criminal actions — Post-trial (▶40.1105.0503)

Trial court's order of closure in post-conviction proceedings is reversed, since trial court did not analyze need for closure, and there are no on-record findings to justify closure.

Case History and Disposition

Appeal from Florida Circuit Court, Hillsborough County.

Consolidated petitions challenging closure of post-conviction proceedings.

Petitions granted.

Attorneys

Gregg D. Thomas and Susan Tillotson Mills, of Holland & Knight, Tampa, Fla., for petitioner Tampa Tribune.

Alison M. Steele, of Rahdert, Anderson, McGowan & Steele, St. Petersburg, Fla., for petitioner St. Petersburg Times.

Michael Hayes, Paul D. Johnson, and Leland Baldwin, assistant state attorneys, for State of Florida.

Joe Episcopo, Tampa, for defendant Miller.

Daniel M. Hernandez, Tampa, for defendant Baillie.

Caroline J. Tesche, assistant public defender, Tampa, for defendant Cole.

Opinion Text

Full Text of Opinion

[1] We consolidate these petitions filed pursuant to Florida Rule of Appellate Procedure 9.100(d) which ask this court to review the trial court's oral order of closure in postconviction proceedings in State v. Miller, Cole, and Baillie, case number 96-4105 in the Circuit Court for Hillsborough County. We have provided all interested parties an opportunity to respond to these petitions, and none has posted any objection to the relief sought. Petitioners represent that the trial judge has failed to

analyze the need for closure and apply the test adopted in *Miami Herald Publishing v. Lewis*, 426 So. 2d 1 [8 Med.L.Rptr. 2281] (Fla. 1982), and that there are no findings of record to justify the closure. Petitioner Times Publishing Company claims that the transcript of any hearing at which closure was addressed has been denied them by the trial court, and both petitioners assert that the trial court has declined their invitation to articulate any findings on the record in support of the order of closure. As these allegations are unrefuted, and we have nothing before us to support the extraordinary measure of closure, we grant the petitions.

We quash the oral orders of the trial court issued July 29, 1998, closing the proceedings to the public and press alike and directing witnesses Diane Jones and Cheryl Rauch not to discuss their testimony. We direct the trial court to make available to interested parties, including the petitioners herein, the transcripts of all proceedings held in which the public and press were excluded, costs to be born by those interested parties.

Petitions granted.

- End of Case -

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