


ORIGINAL

IN THE SUPREME COURT OF FLORIDA

IN RE: IMPLEMENTATION OF  
COMMITTEE ON PRIVACY  
AND COURT RECORDS  
RECOMMENDATIONS –  
AMENDMENTS TO: FLORIDA  
RULES OF CIVIL PROCEDURE;  
FLORIDA RULES OF CRIMINAL  
PROCEDURE; FLORIDA  
PROBATE RULES; FLORIDA  
SMALL CLAIMS RULES; FLORIDA  
RULES OF APPELLATE PROCEDURE;  
AND FLORIDA FAMILY LAW RULES

CASE NO. SC08-2443

FILED  
THOMAS D. HALL  
2009 NOV 30 A 11:10  
CLERK OF THE SUPREME COURT  
BY 

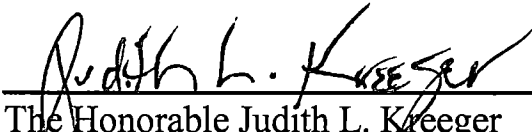
**SUPPLEMENTAL FILING OF APPENDIX I – REPORTS OF SEVERAL  
RULES COMMITTEES AND FAMILY COURT STEERING COMMITTEE  
-- AND MOTION TO ACCEPT AS TIMELY FILED**

In response to the request of the Court issued on November 3, 2009, the Subcommittee on Access to Court Records (the Subcommittee) by and through the undersigned submits the attached Appendix I and requests that the submission be accepted as timely filed.

In its request the Court directed the Subcommittee to provide the original and nine copies of each report. The Subcommittee is unable to fully comply with this request because the Subcommittee is not in possession of the original reports. The original reports were presumably filed with the Court by the various committees over a period of several months in 2007. The Court subsequently forwarded copies of the reports to the Committee on Access to Court Records for review. Further, the Committee on Access to Court Records acquired electronic versions of the reports directly from the various committees. The Subcommittee

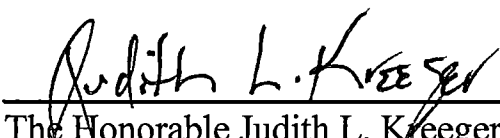
believes but has no way to confirm that the electronic copies of the reports attached are substantially the same as the original reports filed with the Court in 2007.

Respectfully submitted, November 24, 2009.

  
\_\_\_\_\_  
The Honorable Judith L. Kreeger  
Circuit Judge, Eleventh Judicial Circuit  
Chair, Subcommittee on Access to Court Records  
175 N.W. First Avenue, Room 2114  
Miami, Florida 33128  
Florida Bar Number 98600

### **CERTIFICATE OF COMPLIANCE**

I certify that this report was prepared in MS Word using 14 point Times New Roman font.

  
\_\_\_\_\_  
The Honorable Judith L. Kreeger  
Circuit Judge, Eleventh Judicial Circuit  
Chair, Subcommittee on Access to Court Records  
175 N.W. First Avenue, Room 2114  
Miami, Florida 33128  
Florida Bar Number 98600

IN THE SUPREME COURT OF FLORIDA

FILED  
THOMAS D. HALL

2006 NOV 20 P 3:26

IN RE: REPORT AND RECOMMENDATIONS )  
OF THE COMMITTEE ON PRIVACY )  
AND COURT RECORDS )

Case No.  
CLERK, SUPREME COURT

BY \_\_\_\_\_

**REPORT OF THE CRIMINAL PROCEDURE RULES COMMITTEE**

H. Scott Fingerhut, Chair of the Criminal Procedure Rules Committee of The Florida Bar, and John F. Harkness, Jr., Executive Director of The Florida Bar, file this out-of-cycle report of proposed changes to the Florida Rules of Criminal Procedure, pursuant to *Fla. R. Jud. Admin.* 2.140(f).

In its Administrative Order dated June 30, 2006, the Supreme Court asked the various Florida Bar rules committees to study whether changes to the rules were needed to implement Recommendations 7 and 10 of the Report and Recommendation of the Committee on Privacy and Court Records (see Appendix D for the referral letters). The Criminal Procedure Rules Committee reviewed each criminal procedure rule and form and proposes amendments to the rules as shown on the attached table of contents (Appendix A). The voting record of the Committee for the changes is shown on the table of contents. The Committee's report was submitted to the Executive Committee of The Florida Bar Board of Governors, and its voting record is also shown on the table of contents. These proposals have not been published in *The Florida Bar News* or posted on the Bar's website.

The Criminal Procedure Rules Committee has nine subcommittees. Six of those subcommittees are responsible for specific rules. Each of those six subcommittees was asked to review its assigned rules to determine whether any rules required the filing of unnecessary privacy information and if so, the appropriate amendments to remove the requirement. The subcommittees were also asked to determine what privacy information should be redacted if the information is required.

Subcommittees III (rules 3.220–3.240), IV (rules 3.250–3.570), V (rules 3.580–3.790), and VI (rules 3.800–3.995) each determined that no amendments are needed. Those recommendations were approved by the Committee without dissent

at its February 2007 and June 2007 meetings.

Subcommittee I determined that rules 3.125 and 3.140 require information called into question by the referral. The subcommittee decided that no change should be made to rule 3.125 and the notice to appear contained in the rule. The personal data including date of birth, driver's license number, and social security number are necessary to clearly identify the defendant as the person given the notice to appear, particularly in situations such as an in-court appearance or when a notice is served by law enforcement.

A change to rule 3.140(c)(4), however, was recommended by Subcommittee I, to delete the social security number from charging documents. The Committee felt this rule was different from rule 3.125 because the social security number in an information or indictment is surplusage and is rarely used in practice despite the rule requiring it. In addition, it was pointed out that on arrest for or conviction of the crime charged in the information or indictment, fingerprints are taken, which will clearly identify the person.

Because of time constraints, the Fast Track Subcommittee considered these recommendations and unanimously passed them. The change to Rule 3.140(c)(4) was then voted on by the full Committee by electronic vote and was passed by a vote of 27 to 5.

The Committee understands the Court's preference for consistency between rules and would have no objection to leaving the social security number intact in both rules or to using only the last four digits in both rules.

Subcommittee II also proposed several amendments. These fell into two categories. In category one, several rules currently require the filing of notices that include names and addresses of witnesses. Subcommittee II unanimously recommended amending each of those rules to require filing of the notice only, with simultaneous service of the witness list. With this change, personal identifying information regarding witnesses would not be filed. The rules that would have been affected are rules 3.200, 3.201(b), 3.202(c), and 3.216(c) and (e).

These recommendations were rejected by the full Committee by a vote of 28-1, because it was felt there are no privacy interests to protect by such amendment. The Committee felt the notices and pleadings filed under these rules were not of such a sensitive nature that addresses and other pertinent information could not be included in the court file. The one Committee member who supported

the changes felt that (1) many county clerks have scanned pleadings into databases from which anyone with Internet access may retrieve court files and view actual pleadings with personal information and therefore (2) removal of addresses from these pleadings may help to cut down on identity theft cases.

The proposed rule changes in category two relate to mental health evaluations and reports and would require that, because these are confidential documents, they be filed and maintained under seal. Affected rules would be rules 3.211(d), 3.212(d), 3.216(g), 3.218(a), and 3.219(a). All category two subcommittee proposals were approved 21 to 7 by the full Committee. The proposed amendments appear in legislative format in Appendix C.

A summary of the specific changes that the Committee recommends making is as follows:

#### Rule 3.140

The Committee recommends deleting from subdivision (c)(4) the requirement that the social security number be included in charging documents. The subcommittee members noted that, as a matter of practice, social security numbers are rarely included in charging documents in spite of the requirement of the current rule.

#### Rule 3.211

The proposed amendment would require that the written findings of experts described in subdivision (d) “be filed and maintained under seal in the court file.”

#### Rule 3.212

The proposed amendment would require that incompetency evaluation reports described in subdivision (d) “be filed and maintained under seal in the court file.”

#### Rule 3.216

Under the proposed amendments, the report of experts filed under subdivision (g) would “be filed and maintained under seal in the court file.”

#### Rule 3.218

The proposed amendment to subdivision (a) would provide that, when a 6-month report of commitment of a defendant found not guilty by reason of insanity, regarding further commitment, is filed, it will “be filed and maintained under seal in the court file.”

#### Rule 3.219

The proposed amendment to subdivision (a) would provide that periodic reports regarding a defendant’s compliance and his or her treatment progress under a conditional release plan would “be filed and maintained under seal in the court file.”

The Committee respectfully asks that the Rules of Criminal Procedure be amended as outlined in this report.

Respectfully submitted August 1, 2007.

/s/H. Scott Fingerhut

H. Scott Fingerhut

2007–2008 Chair of The Florida Bar  
Criminal Procedure Rules Committee

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## LIST OF APPENDIXES

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# APPENDIX A

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Committee vote: 27 - 5

Board of Governors vote:<sup>1</sup> 9 - 0

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<sup>1</sup> All Board of Governors votes are by the Executive Committee of the Board.

- Committee vote: 21 - 7  
Board of Governors vote: 9 - 0
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Committee vote: 21 - 7  
Board of Governors vote: 9 - 0
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Committee vote: 21 - 7  
Board of Governors vote: 9 - 0
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Committee vote: 21 - 7  
Board of Governors vote: 9 - 0
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Committee vote: 21 - 7  
Board of Governors vote: 9 - 0

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## APPENDIX B

Proposed Changes to Rules in Legislative Format

## **RULE 3.140. INDICTMENTS; INFORMATION**

### **(a) Methods of Prosecution.**

**(1) Capital Crimes.** An offense that may be punished by death shall be prosecuted by indictment.

**(2) Other Crimes.** The prosecution of all other criminal offenses shall be as follows:

In circuit courts and county courts, prosecution shall be solely by indictment or information, except that prosecution in county courts for violations of municipal ordinances and metropolitan county ordinances may be by affidavit or docket entries and prosecutions for misdemeanors, municipal ordinances, and county ordinances may be by notice to appear issued and served pursuant to rule 3.125. A grand jury may indict for any offense. When a grand jury returns an indictment for an offense not triable in the circuit court, the circuit judge shall either issue a summons returnable in the county court or shall bail the accused for trial in the county court, and the judge, or at the judge's direction, the clerk of the circuit court, shall certify the indictment and file it in the records of the county court.

**(b) Nature of Indictment or Information.** The indictment or information on which the defendant is to be tried shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged.

### **(c) Caption, Commencement, Date, and Personal Statistics.**

**(1) Caption.** No formal caption is essential to the validity of an indictment or information on which the defendant is to be tried. Upon objection made as to its absence a caption shall be prefixed in substantially the following manner:

In the (name of court)  
State of Florida versus (name of defendant)

Any defect, error, or omission in a caption may be amended as of course, at any stage of the proceeding, whether before or after a plea to the merits, by court order.

**(2) Commencement.** All indictments or informations on which the

defendant is to be tried shall expressly state that the prosecution is brought in the name and by the authority of the State of Florida. Indictments shall state that the defendant is charged by the grand jury of the county. Informations shall state that the appropriate prosecuting attorney makes the charge.

(3) **Date.** Every indictment or information on which the defendant is to be tried shall bear the date (day, month, year) that it is filed in each court in which it is so filed.

(4) **Personal Statistics.** Every indictment or information shall include the defendant's race, gender, and date of birth, ~~and social security number~~ when any of these facts are known. Failure to include these facts shall not invalidate an otherwise sufficient indictment or information.

(d) **The Charge.**

(1) **Allegation of Facts; Citation of Law Violated.** Each count of an indictment or information on which the defendant is to be tried shall allege the essential facts constituting the offense charged. In addition, each count shall recite the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated. Error in or omission of the citation shall not be ground for dismissing the count or for a reversal of a conviction based thereon if the error or omission did not mislead the defendant to the defendant's prejudice.

(2) **Name of Accused.** The name of the accused person shall be stated, if known, and if not known, the person may be described by any name or description by which the person can be identified with reasonable certainty. If the grand jury, prosecuting attorney, or affiant making the charge does not know either the name of the accused or any name or description by which the accused can be identified with reasonable certainty, the indictment or information, as the case may be, shall so allege and the accused may be charged by a fictitious name.

(3) **Time and Place.** Each count of an indictment or information on which the defendant is to be tried shall contain allegations stating as definitely as possible the time and place of the commission of the offense charged in the act or transaction or on 2 or more acts or transactions connected together, provided the court in which the indictment or information is filed has jurisdiction to try all of the offenses charged.

(4) **Allegation of Intent to Defraud.** If an intent to defraud is required as an element of the offense to be charged, it shall be sufficient to allege an intent to defraud, without naming therein the particular person or body corporate intended to be defrauded.

(e) **Incorporation by Reference.** Allegations made in 1 count shall not be incorporated by reference in another count.

(f) **Endorsement and Signature; Indictment.** An indictment shall be signed by the foreperson or the acting foreperson of the grand jury returning it. The state attorney or acting state attorney or an assistant state attorney shall make and sign a statement on the indictment to the effect that he or she has advised the grand jury returning the indictment as authorized and required by law. No objection to the indictment on the ground that the statement has not been made shall be entertained after the defendant pleads to the merits.

(g) **Signature, Oath, and Certification; Information.** An information charging the commission of a felony shall be signed by the state attorney, or a designated assistant state attorney, under oath stating his or her good faith in instituting the prosecution and certifying that he or she has received testimony under oath from the material witness or witnesses for the offense. An information charging the commission of a misdemeanor shall be signed by the state attorney, or a designated assistant state attorney, under oath stating his or her good faith in instituting the prosecution. No objection to an information on the ground that it was not signed or verified, as herein provided, shall be entertained after the defendant pleads to the merits.

(h) **Conclusion.** An indictment or information on which the defendant is to be tried need contain no formal conclusion.

(i) **Surplusage.** An unnecessary allegation may be disregarded as surplusage and, on motion of the defendant, may be stricken from the pleading by the court.

(j) **Amendment of Information.** An information on which the defendant is to be tried that charges an offense may be amended on the motion of the prosecuting attorney or defendant at any time prior to trial because of formal defects.

(k) **Form of Certain Allegations.** Allegations concerning the following items may be alleged as indicated below:

(1) **Description of Written Instruments.** Instruments consisting wholly or in part of writing or figures, pictures, or designs may be described by any term by which they are usually known or may be identified, without setting forth a copy or facsimile thereof.

(2) **Words; Pictures.** Necessary averments relative to spoken or written words or pictures may be made by the general purport of such words or pictures without setting forth a copy or facsimile thereof.

(3) **Judgments; Determinations; Proceedings.** A judgment, determination, or proceeding of any court or official, civil or military, may be alleged generally in such a manner as to identify the judgment, determination, or proceeding, without alleging facts conferring jurisdiction on the court or official.

(4) **Exceptions; Excuses; Provisos.** Statutory exceptions, excuses, or provisos relative to offenses created or defined by statute need not be negated by allegation.

(5) **Alternative or Disjunctive Allegations.** For an offense that may be committed by doing 1 or more of several acts, or by 1 or more of several means, or with 1 or more of several intents or results, it is permissible to allege in the disjunctive or alternative such acts, means, intents, or results.

(6) **Offenses Divided into Degrees.** For an offense divided into degrees it is sufficient to charge the commission of the offense without specifying the degree.

(7) **Felonies.** It shall not be necessary to allege that the offense charged is a felony or was done feloniously.

(l) **Custody of Indictment or Information.** Unless the defendant named therein has been previously released on a citation, order to appear, personal recognizance, or bail, or has been summoned to appear, or unless otherwise ordered by the court having jurisdiction, all indictments or informations and the records thereof shall be in the custody of the clerk of the court to which they are presented and shall not be inspected by any person other than the judge, clerk, attorney general, and prosecuting attorney until the defendant is in custody or until 1 year has elapsed between the return of an indictment or the filing of an information, after which time they shall be opened for public inspection.

**(m) Defendant's Right to Copy of Indictment or Information.** Each person who has been indicted or informed against for an offense shall, on application to the clerk, be furnished a copy of the indictment or information and the endorsements thereon, at least 24 hours before being required to plead to the indictment or information if a copy has not been so furnished. A failure to furnish a copy shall not affect the validity of any subsequent proceeding against the defendant if he or she pleads to the indictment or information.

**(n) Statement of Particulars.** The court, on motion, shall order the prosecuting attorney to furnish a statement of particulars when the indictment or information on which the defendant is to be tried fails to inform the defendant of the particulars of the offense sufficiently to enable the defendant to prepare a defense. The statement of particulars shall specify as definitely as possible the place, date, and all other material facts of the crime charged that are specifically requested and are known to the prosecuting attorney, including the names of persons intended to be defrauded. Reasonable doubts concerning the construction of this rule shall be resolved in favor of the defendant.

**(o) Defects and Variances.** No indictment or information, or any count thereof, shall be dismissed or judgment arrested, or new trial granted on account of any defect in the form of the indictment or information or of misjoinder of offenses or for any cause whatsoever, unless the court shall be of the opinion that the indictment or information is so vague, indistinct, and indefinite as to mislead the accused and embarrass him or her in the preparation of a defense or expose the accused after conviction or acquittal to substantial danger of a new prosecution for the same offense.

### **Committee Notes**

**1968 Adoption.** Introductory Statement: The contention may be made that the authority of the Supreme Court of Florida to govern practice and procedure in all courts by court rule does not include the power to vary in any way from present statutory law governing the work product of the grand jury, viz., the indictment. Such a contention must, of necessity, be based in part, at least, upon the assumption that the grand jury is not an integral part of the judicial system of Florida but is a distinct entity which serves that system. The Supreme Court of Florida, in *State v. Clemons*, 150 So.2d 231 (Fla. 1963), seems to have taken a position contrary to such an assumption.

Regardless of whether such a contention is valid, it seems beyond controversy that the essentials of the indictment, as in the case of an information, are so intimately associated with practice and procedure in the courts that the individual or group having the responsibility of determining its makeup and use is thus empowered to govern a substantial segment of such practice and procedure. The conclusion seems to be inescapable, therefore, that, since the constitution grants to the supreme court authority over this phase of the judicial scheme, the following material is appropriate for consideration as a part of the proposed rules:

**(a)(1) Capital Crimes.** This recommendation is consistent with present Florida law. See § 10 DR, Fla. Const. (1885, as amended) (now Art. I, § 15, Fla. Const. (1968 as amended)); § 904.01, Fla. Stat. (1963). The terminology “which may be punished by death” is deemed preferable to the terminology “capital crime” of the constitution and “capital offenses” of the statute because of its definitive nature. The recommended terminology is utilized in Federal Rule of Criminal Procedure 7(a) and in the American Law Institute’s Code of Criminal Procedure, section 115. The terminology used in the 1963 Code of Criminal Procedure of Illinois is “when death is a possible punishment.” See § 110-4.

Section 10, DR, Florida Constitution, provides: “No person shall be tried for a capital crime unless on presentment or indictment by a grand jury.” No provision is made in the recommendation for prosecution by presentment. This omission is consistent with the apparent legislative construction placed on this section. Section 904.01, Florida Statutes, provides “All capital offenses shall be tried by indictment by a grand jury.” Since presentments traditionally have not been used as trial accusatorial writs in Florida, there seems little reason, at this date, to question that the constitution authorizes the implementing authority, be it the legislature or the supreme court, to use one of the specified methods of prosecution to the exclusion of the other.

**(a)(2) Other Crimes.** In criminal courts of record and the Court of Record of Escambia County, the constitution of Florida requires that prosecutions be by information. (§§ 9(5) & 10, Art. V). In county judges’ courts having elective prosecuting attorneys, present statutory law permits prosecutions by indictment (§ 904.02) and affidavit (Ch. 937). The additional method of prosecution by information is provided as a step toward attaining uniformity with other courts in the prosecution of noncapital offenses, at least to the extent that a prosecutor desires to use an information. This addition involved consideration of whether a nonelected prosecutor serving in a county judge’s court, which often is the case, has the authority to use an information as an accusatorial writ. Since this question has not



been definitely resolved under present law, caution dictated the specification that the prosecuting attorney be elected as a prerequisite to the use of an information.

In all courts not hereinabove mentioned that have elective prosecuting attorneys, trial by indictment or information is consistent with present Florida constitutional law and most of the statutory law. (See § 10, DR, Fla. Const., §§ 904.01 & 904.02, Fla. Stat.; cf. § 932.56, where an affidavit may be used in cases appealed from a justice of the peace court and which is tried de novo in a circuit court.) In specially created courts having elective prosecutors and which are not otherwise provided for in foregoing provisions of this rule, it was felt that prosecution by indictment or information should be allowed, even though present statutory authority may limit prosecutions in such courts to the use of an information, e.g., the Court of Record of Alachua County.

In courts not having elective prosecutors, prosecution by information is not recommended because of the aforementioned doubt as to the authority of a nonelected prosecutor to use an information as an accusatorial writ. With reference to the present court structure of Florida this part of the proposal applies only to county judges' courts and justice of the peace courts. The only variation from present procedure contemplated by this part of the proposal is the use of an indictment as a basis for prosecution in a justice of the peace court.

Under this proposal a grand jury may indict for any criminal offense. This recommendation is based on the premise that a grand jury's power to indict should not be limited by virtue of levels in a state court structure. A grand jury should be considered as a guardian of the public peace against all criminal activity and should be in a position to act directly with reference thereto. While practicalities dictate that most non-capital felonies and misdemeanors will be tried by information or affidavit, if appropriate, even if an indictment is permissible as an alternative procedure, it is well to retain the grand jury's check on prosecutors in this area of otherwise practically unrestricted discretion.

The procedure proposed for the circuit judge to follow if a grand jury returns an indictment for an offense not triable in the circuit court applies, with appropriate variations, much of the procedure presently used when a grand jury returns an indictment triable in a criminal court of record. See § 32.18, Fla. Stat.

**(b) Nature of Indictment or Information.** This provision appears in rule 7(c) of the Rules of Criminal Procedure for the United States District Court (hereafter referred to as the federal rules for purposes of brevity). It may be

deemed appropriate for incorporation into the recommendations since it preserves to the defendant expressly the right to a formal written accusation and at the same time permits the simplification of the form of the accusation and the elimination of unnecessary phraseology.

**(c) Caption, Commencement, and Date.**

**(1) Caption.** Section 906.02, Florida Statutes, contains the essentials of this proposal. It is well settled at common law that the caption is no part of the indictment and that it may be amended. The caption may be considered as serving the purpose of convenience by making more readily identifiable a particular accusatorial writ. The proposal makes it possible for this convenience to be served if either party wishes it, yet does not provide that the caption be a matter of substance. The essentials of this recommendation also appear in section 149 of the American Law Institute's Code of Criminal Procedure.

**(2) Commencement.** This proposal apparently is directly contrary to section 906.02(1), Florida Statutes, which treats the caption and the commencement in the same manner, i.e., that neither is necessary to the validity of the indictment or information but may be present as mere matters of convenience. This legislative assumption may not be a correct one and caution dictates that a meaningful commencement be included. Section 20, article V, of the Constitution of Florida provides that the style of all process shall be: "'The State of Florida' and all prosecutions shall be conducted in the name and by the authority of the State." As contemplated in the proposal, the commencement expressly states the sovereign authority by which the accusatorial writ is issued and the agent of that authority. Section 906.02(2), Florida Statutes, seems to contemplate that there will be included in the indictment an express provision concerning the agency of the state responsible for its presentation, viz., the grand jury, by stating, "It is unnecessary to allege that the grand jurors were empaneled, sworn or charged, or that they present the indictment upon their oaths or affirmations." The American Law Institute's commentary on the commencement (A.L.I. Code of Criminal Procedure, p. 529 et seq.) indicates that there is much confusion between what information should be in the commencement as distinguished from the caption.

**(3) Date.** Since in many cases the beginning of the prosecution is co-existent with the issuance of the indictment or information, the date the writ bears may be of great significance, particularly with reference to the tolling of a statute of limitations. If the date of a grand jury's vote of a true bill or a prosecutor's making oath to an information differs from the date of filing of the

indictment or information with the appropriate clerk, it seems the date of filing is the preferable date for a writ to bear since until the filing transpires there is no absolute certainty that the prosecution actually will leave the province of the grand jury or prosecutor.

**(d) The Charge.**

**(1) Allegation of Facts; Citation of Law Violated.** This proposal is consistent with various sections of chapter 906, Florida Statutes, in that the charge is adequately alleged when based on the essentials of the offense; surplusage should be guarded against. The citation of the law allegedly violated contributes to defining the charge and conserves time in ascertaining the exact nature of the charge. The 1963 Illinois Criminal Code, section 111-3(a)(2), and Federal Rule of Criminal Procedure 7(c) contain similar provisions.

**(2) Name of Accused.** The provision concerning the method of stating the name of the accused is consistent with the very elaborate section 906.08, Florida Statutes, which seems unnecessarily long. It is deemed desirable that when a fictitious name is used the necessity therefor should be indicated by allegation.

**(3) Time and Place.** This provision is consistent with present Florida law. (See *Morgan v. State*, 51 Fla. 76, 40 So. 828 (1906), as to “time”; see *Rimes v. State*, 101 Fla. 1322, 133 So. 550 (1931), as to “place”.) The provision is patterned after section 111-3(4) of the 1963 Illinois Code of Criminal Procedure.

**(4) Joinder of Offenses.** The essence of this proposal is presently found in section 906.25, Florida Statutes, federal rule 8(a), and section 111-4(a) of the 1963 Illinois Code of Criminal Procedure.

**(5) Joinder of Defendants.** This proposal is taken from federal rule 8(b). Its substance also appears in section 111-4(b) of the Illinois Code of Criminal Procedure. Although section 906.25, Florida Statutes, does not expressly contain this provision, there is little doubt that its broad language includes it.

**(6) Allegation of Intent to Defraud.** The language of this proposal presently appears in section 906.18, Florida Statutes, except for the provision concerning affidavit. Its continuation seems advisable as an aid to drawing allegations in charging instruments, although such information if known to the prosecutor may be required to be given in a bill of particulars upon motion of the

defendant. (See subdivision (n) of this rule.) At times such information may be unknown to the prosecutor. A part of the statute is purposely not included in the proposal. The excluded part states “and on the trial it shall be sufficient, and shall not be deemed a variance, if there appear to be an intent to defraud the United States or any state, county, city, town or parish, or any body corporate, or any public officer in his official capacity, or any copartnership or members thereof, or any particular person.” It seems that this part of the statute is stated in terms of the law of evidence rather than practice and procedure and should not be included in the rules, although apparently being a logical conclusion from the part included in the proposal.

(e) **Incorporation by Reference.** Although provision for incorporation by reference appears in federal rule 7(c), the prohibition of such incorporation is recommended with the thought that even though repetition may be minimized by incorporation, confusion, vagueness, and misunderstanding may be fostered by such procedure.

(f) **Endorsement and Signature; Indictment.** The requirement that the indictment be endorsed “A true bill” and be signed by the foreman or acting foreman of the grand jury presently appears in section 905.23, Florida Statutes. There apparently is no valid reason for changing this requirement since it serves the useful purpose of lending authenticity to the indictment as a legal product of the grand jury. The requirement of the foreman’s signature also appears in federal rule 6(c), 1963, Illinois CCP section 111-3(b), and A.L.I. Model Code of Criminal Procedure section 125.

The provision pertaining to the statement and signature of the prosecuting attorney varies from present Florida law and is offered in alternative form. Florida statutes presently provide that an indictment shall be signed by a state attorney (§§ 27.21 & 27.22). Federal rule 7(c) also provides for the signature of the attorney for the government.

No requirement presently is made in Florida necessitating an express explanatory statement preceding such signature. Presumably the justification for the signature appears in the Florida statutes that require the aforementioned officers to wait upon the grand jury as advisors, as examiners of witnesses, and to draw indictments. (See §§ 905.16, 905.17, 905.19, 905.22, 27.02, 27.16, 27.21, & 27.22, Fla. Stat.)

Vagueness remains concerning the significance of the signature, however.

Since the prosecuting attorney cannot be present while the grand jury is deliberating or voting (see section 905.17, Florida Statutes) and has no voice in the decision of whether an indictment is found (see section 905.26, Florida Statutes), a logical question arises concerning the necessity for the prosecuting attorney's signature on the indictment. The provision for the statement is made for the purpose of clarifying the reason for the signature.

**(g) Signature, Oath, and Certification; Information.** Section 10, DR, Florida Constitution, requires that informations be under oath of the prosecuting attorney of the court in which the information is filed. Article V, section 9(5), Florida Constitution, contains the same requirement concerning informations filed by the prosecuting attorney in a criminal court of record. This proposal also does not deviate from present Florida statutory law as found in section 906.04, Florida Statutes. This statute has received judicial approval. (See *Champlin v. State*, 122 So.2d 412 (Fla. 2d DCA 1960).) It should be noted here that the prosecutor's statement under oath is defined as to the purpose served by the signature.

**(h) Conclusion.** A similar provision currently appears in section 906.03, Florida Statutes, and should be included in the rules because of its tendency to minimize unnecessary statements in accusatorial writs. Provision is added for the affidavit as an accusatorial writ.

**(i) Surplusage.** The first part of the proposal, providing for the disregarding of unnecessary allegations as surplusage, is similar to section 906.24, Florida Statutes. The part concerned with striking such material is patterned after federal rule 7(d). The parts are properly complementary.

**(j) Amendment of Information.** This proposal contains no provision for an amendment of an indictment since, presumably, a grand jury may not amend an indictment which it has returned and which is pending, although it may return another indictment and the first indictment may be disposed of by a nolle prosequi. (See 17 Fla. Jur. Indictments and Informations, 9 (1958).) A federal indictment cannot be amended without reassembling the grand jury (see *Ex parte Bain*, 121 U.S. 1 (1887)); consequently the federal rules contain no provision for the amendment of an indictment. (It may be that the Supreme Court of Florida will feel inclined to include in the rules an express statement concerning amendments of an indictment. None is included here, however.)

The proposal is patterned after section 111-5 of the 1963 Illinois Code of Criminal Procedure, with one exception. The exception arises due to the fact that

the Illinois Code provision applies to indictments as well as informations, the position in Illinois apparently being assumed that an indictment may be amended, at least with reference to specified items listed in the statute, as well as other formalities.

**(k) Form of Certain Allegations.** Several statutes in chapter 906, Florida Statutes, are concerned with the manner of making allegations in indictments and informations. Some of these sections are of such general application that it seems advisable to include their substance in the rules; others are so restricted that it may be deemed appropriate to recommend other disposition of them.

The proposals made in (1) through (7) here are based on the substance of the designated Florida statutes:

- Proposal (1): section 906.09.
- Proposal (2): section 906.10.
- Proposal (3): section 906.11.
- Proposal (4): section 906.12.
- Proposal (5): section 906.13.
- Proposal (6): section 906.23.
- Proposal (7): section 906.17.

**(l) Custody and Inspection.** The proposal is taken verbatim from section 906.27, Florida Statutes. The necessity for specific provision for the custody and inspection of accusatorial writs seems to be proper to include here.

**(m) Defendant's Right to Copy of Indictment or Information.** The procedure contained in this proposal is presently required under section 906.28, Florida Statutes, and seems to be unobjectionable.

**(n) Statement of Particulars.** The phrase, "bill of particulars," has been modernized by changing "bill" to "statement." Historically, a "bill" is a written statement. The first sentence of this proposal is taken from section 906.27, Florida Statutes, the only change being the narrowing of the scope of the judicial discretion now granted by the statute. The latter part of the proposal is recommended in order to clarify the requirements of the rule. Provision for the accusatorial affidavit has been added.

**(o) Defects and Variances.** This proposal presently appears in Florida law in the form of section 906.25, Florida Statutes. The statute has been the object of much judicial construction and it seems inadvisable to divide it into parts merely

for convenience in placing these parts under more appropriate titles, such as “Pre-Trial Motions,” “Motion for New Trial,” etc.

The intimate relation the statute has with indictments and informations justifies its inclusion here. The useful purposes served by the court constructions dictate the use of the statutory language without change.

**1972 Amendment.** Substantially the same as prior rule. References to trial by affidavit have been deleted throughout this rule and all Florida Rules of Criminal Procedure because of the passage of the 1972 amendment to article V of the Florida Constitution.

(a)(2) Amended to refer only to circuit courts and county courts. Reference to trial of vehicular traffic offenses transferred to rule 3.010 and made applicable to all rules of criminal procedure.

Former rule (d)(4) and (d)(5) transferred to new rule 3.150. Former rule (d)(6) renumbered as (d)(4).

**1973 Amendment.** The purpose of the amendment is to provide the same method for prosecution of violations of metropolitan county ordinances as for violations of municipal ordinances.

**RULE 3.211. COMPETENCE TO PROCEED: SCOPE OF EXAMINATION AND REPORT**

**(a) Examination by Experts.** Upon appointment by the court, the experts shall examine the defendant with respect to the issue of competence to proceed, as specified by the court in its order appointing the experts to evaluate the defendant, and shall evaluate the defendant as ordered.

(1) The experts shall first consider factors related to the issue of whether the defendant meets the criteria for competence to proceed; that is, whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant has a rational, as well as factual, understanding of the pending proceedings.

(2) In considering the issue of competence to proceed, the examining experts shall consider and include in their report:

(A) the defendant's capacity to:

(i) appreciate the charges or allegations against the defendant;

(ii) appreciate the range and nature of possible penalties, if applicable, that may be imposed in the proceedings against the defendant;

(iii) understand the adversary nature of the legal process;

(iv) disclose to counsel facts pertinent to the proceedings at issue;

(v) manifest appropriate courtroom behavior;

(vi) testify relevantly; and

(B) any other factors deemed relevant by the experts.

**(b) Factors to Be Evaluated.** If the experts should find that the defendant is incompetent to proceed, the experts shall report on any recommended treatment



for the defendant to attain competence to proceed. In considering the issues relating to treatment, the examining experts shall report on:

- (1) the mental illness or mental retardation causing the incompetence;
- (2) the treatment or treatments appropriate for the mental illness or mental retardation of the defendant and an explanation of each of the possible treatment alternatives in order of choices;
- (3) the availability of acceptable treatment. If treatment is available in the community, the expert shall so state in the report; and
- (4) the likelihood of the defendant attaining competence under the treatment recommended, an assessment of the probable duration of the treatment required to restore competence, and the probability that the defendant will attain competence to proceed in the foreseeable future.

(c) **Insanity.** If a notice of intent to rely on the defense of insanity has been filed prior to trial or a hearing on a violation of probation or community control, and when so ordered by the court, the experts shall report on the issue of the defendant's sanity at the time of the offense.

(d) **Written Findings of Experts.** Any written report submitted by the experts shall:

- (1) identify the specific matters referred for evaluation;
- (2) describe the evaluative procedures, techniques, and tests used in the examination and the purpose or purposes for each;
- (3) state the expert's clinical observations, findings, and opinions on each issue referred for evaluation by the court, and indicate specifically those issues, if any, on which the expert could not give an opinion; and
- (4) identify the sources of information used by the expert and present the factual basis for the expert's clinical findings and opinions.

This report shall be filed and maintained under seal in the court file.

**(e) Limited Use of Competency Evidence.**

(1) The information contained in any motion by the defendant for determination of competency to proceed or in any report of experts filed under this rule insofar as the report relates solely to the issues of competency to proceed and commitment, and any information elicited during a hearing on competency to proceed or commitment held pursuant to this rule, shall be used only in determining the mental competency to proceed or the commitment or other treatment of the defendant.

(2) The defendant waives this provision by using the report, or portions thereof, in any proceeding for any other purpose, in which case disclosure and use of the report, or any portion thereof, shall be governed by applicable rules of evidence and rules of criminal procedure. If a part of the report is used by the defendant, the state may request the production of any other portion of that report that, in fairness, ought to be considered.

**Committee Notes**

**1980 Adoption.** This rule provides for appointment of experts and for the contents of the report which the experts are to render. Since the issue of competency has been raised, the experts will, of course, report on this issue. If there is reason to believe that involuntary hospitalization is also required, the court should order the experts to make this evaluation as well during their initial examination. It was felt, however, that the experts should not inquire into involuntary hospitalization as a matter of course, but only if sufficient reasonable grounds to do so were alleged in the motion, comparing the procedure to that required by the civil commitment process.

(a) Certain factors relating to competency to stand trial have been determined to be appropriate for analysis by examining experts. Often, with different experts involved, the experts do not use the same criteria in reaching their conclusions. The criteria used by experts who testify at the competency and commitment hearings may not be the same as those used by persons involved in the treatment process or later hearings after treatment. This subdivision, therefore, addresses those factors which, at least, should be considered by experts at both ends of the spectrum. Additional factors may be considered, and these factors listed may be addressed in different ways. At least the requirement that these specific factors be addressed will give a common basis of understanding for the experts at the competency hearing, the trial judge, and the experts who will later

receive a defendant who is found to be incompetent to stand trial and in need of involuntary hospitalization. The test for determining competency to stand trial is that which has been contained in both the prior rules and statutes developed from *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960).

(1) The factors set forth in this section have been developed by the Department of Health and Rehabilitative Services (HRS) in its Competency Evaluation Instrument, a refinement of the McGarry Competency Evaluation Procedure.

(b) The issue of involuntary hospitalization is to be considered only if the court has ordered the experts to consider this issue; the court would do so if it found that there existed reasonable grounds to believe that the defendant met the criteria for involuntary hospitalization. The factors set forth in order to determine this issue are those that have been developed through prior statutes relating to involuntary hospitalization, from the case of *Jackson v. Indiana*, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972), and *In Re: Beverly*, 342 So.2d 481 (Fla. 1977).

As to criteria for involuntary hospitalization, see chapter 394, Florida Statutes, or, in the case of mental retardation, see chapter 393, Florida Statutes.

Section 394.467(1), Florida Statutes (1979), prescribes criteria for involuntary hospitalization or placement. In case of mental retardation, section 393.11, Florida Statutes (1979), governs.

(c) In most instances, the issues of incompetency at time of trial and insanity at time of the offense will be raised at the same time or, at least, in the same case. In the event that the 2 are not raised in the same case, there would be no reason for the examining experts to inquire into the mental status of the defendant at the time of the offense itself at the incompetency examination. However, if insanity as a defense is raised, it would be most appropriate for judicial efficiency to have the examining experts inquire into all issues at the same time. This provision permits such inquiry by the experts in the event that notice of intent to rely on the defense of insanity has been filed by the defendant.

(d) This provision is meant to permit local circuits to develop their own forms for such reports if they feel that such forms are appropriate. It does not preclude HRS from suggesting a form that would be of particular assistance to them and requesting its adoption, but adoption is not mandated.

(e) This subdivision provides for the confidentiality of the information obtained by virtue of an examination of the defendant pursuant to this subdivision. Cf. § 90.108, Fla.Stat. (1979); Fla.R.Civ.P. 1.330(6).

Section 916.12, Florida Statutes is a companion statute relating to mental competence to stand trial.

**1988 Amendment.** Title. The title is amended to reflect changes in rule 3.210.

(a) This subdivision, which was originally an introductory paragraph, is amended to reflect changes in rule 3.210. The deletions related to the extent of the evaluation and when and to whom the experts' reports are to be submitted have been placed in rule 3.210(4) above.

(1) This subdivision, which was formerly subdivision (a), has been amended to reflect changes in rule 3.210 above.

(2) This provision has been amended to reflect the changes to rule 3.210. In addition, the 11 factors previously numbered (i) through (xi) have been reduced to 6 factors. Numbers (v), (vi), (vii), (x), and (xi) have been removed. Those 5 factors were felt to not be directly related to the issue of a defendant having the mental capacity to communicate with his or her attorney or to understand the proceedings against him or her and may have had the effect of confusing the issues the experts are to address in assessing a defendant's competency to proceed. The terms "ability" and "capacity" which were used interchangeably in the prior version of this provision have been changed to the single term "capacity" for continuity. A provision has been added which allows the appointed expert to also include any other factors deemed relevant to take into account different techniques and points of view of the experts.

(b) This subdivision, including its 4 subdivisions, is amended to reflect the changes in rule 3.210. It also expands the determination from the limited area of whether an incompetent defendant should be voluntarily committed to treatment to recommended treatment options designed to restore or maintain competence. Subdivision (v) has been deleted because consideration of less restrictive alternatives is addressed in other amendments. [See rule 3.212(c)(3)(iv).] The amendments further reflect 1985 legislative amendments to chapters 394 and 916, Florida Statutes.

(ii) Appropriate treatment may include maintaining the defendant on psychotropic or other medication. See rule 3.215.

(c) This provision is amended to take into account the defense of insanity both at trial and in violation of probation/community control hearings.

(d) This provision deletes the old language relating to the use of standardized forms. The new provision, with its 4 subdivisions, outlines in detail what the written report of an expert is to include, to ensure the appointed expert understands what issues are to be addressed, and that the report identifies sources of information, tests or evaluation techniques used, and includes the findings and observations upon which the expert's opinion is based. It requires the expert to specify those issues on which the expert could not render an opinion.

(e) This provision is amended to comply with changes in rule 3.210. In addition, the second paragraph has been expanded to clarify under what circumstances the reports of experts in a competency evaluation may be discovered by the prosecution and used as evidence in a hearing other than the hearing on the issue of a defendant's competency to proceed.

**1992 Amendment.** The purpose of the amendments is to gender neutralize the wording of the rule.

**Introductory Note Relating to Amendments to Rules 3.210 to 3.219.** See notes following rule 3.210 for the text of this note.

## **RULE 3.212. COMPETENCE TO PROCEED: HEARING AND DISPOSITION**

(a) **Admissibility of Evidence.** The experts preparing the reports may be called by either party or the court, and additional evidence may be introduced by either party. The experts appointed by the court shall be deemed court witnesses whether called by the court or either party and may be examined as such by either party.

(b) **Finding of Competence.** The court shall first consider the issue of the defendant's competence to proceed. If the court finds the defendant competent to proceed, the court shall enter its order so finding and shall proceed.

(c) **Commitment on Finding of Incompetence.** If the court finds the defendant is incompetent to proceed, or that the defendant is competent to proceed but that the defendant's competence depends on the continuation of appropriate treatment for a mental illness or mental retardation, the court shall consider issues relating to treatment necessary to restore or maintain the defendant's competence to proceed.

(1) The court may order the defendant to undergo treatment if the court finds that the defendant is mentally ill or mentally retarded and is in need of treatment and that treatment appropriate for the defendant's condition is available. If the court finds that the defendant may be treated in the community on bail or other release conditions, the court may make acceptance of reasonable medical treatment a condition of continuing bail or other release conditions.

(2) If the defendant is incarcerated, the court may order treatment to be administered at the custodial facility or may order the defendant transferred to another facility for treatment or may commit the defendant as provided in subdivision (3).

(3) A defendant may be committed for treatment to restore a defendant's competence to proceed if the court finds that:

(A) the defendant meets the criteria for commitment as set forth by statute;

(B) there is a substantial probability that the mental illness or mental retardation causing the defendant's incompetence will respond to treatment

and that the defendant will regain competency to proceed in the reasonably foreseeable future;

(C) treatment appropriate for restoration of the defendant's competence to proceed is available; and

(D) no appropriate treatment alternative less restrictive than that involving commitment is available.

(4) If the court commits the defendant, the order of commitment shall contain:

(A) findings of fact relating to the issues of competency and commitment addressing the factors set forth in rule 3.211 when applicable;

(B) copies of the reports of the experts filed with the court pursuant to the order of examination;

(C) copies of any other psychiatric, psychological, or social work reports submitted to the court relative to the mental state of the defendant; and

(D) copies of the charging instrument and all supporting affidavits or other documents used in the determination of probable cause.

(5) The treatment facility shall admit the defendant for hospitalization and treatment and may retain and treat the defendant. No later than 6 months from the date of admission, the administrator of the facility shall file with the court a report that shall address the issues and consider the factors set forth in rule 3.211, with copies to all parties. If, at any time during the 6-month period or during any period of extended commitment that may be ordered pursuant to this rule, the administrator of the facility determines that the defendant no longer meets the criteria for commitment or has become competent to proceed, the administrator shall notify the court by such a report, with copies to all parties.

(A) If, during the 6-month period of commitment and treatment or during any period of extended commitment that may be ordered pursuant to this rule, counsel for the defendant shall have reasonable grounds to believe that the defendant is competent to proceed or no longer meets the criteria for commitment, counsel may move for a hearing on the issue of the defendant's

competence or commitment. The motion shall contain a certificate of counsel that the motion is made in good faith and on reasonable grounds to believe that the defendant is now competent to proceed or no longer meets the criteria for commitment. To the extent that it does not invade the attorney-client privilege, the motion shall contain a recital of the specific observations of and conversations with the defendant that have formed the basis for the motion.

(B) If, upon consideration of a motion filed by counsel for the defendant or the prosecuting attorney and any information offered the court in support thereof, the court has reasonable grounds to believe that the defendant may have regained competence to proceed or no longer meets the criteria for commitment, the court shall order the administrator of the facility to report to the court on such issues, with copies to all parties, and shall order a hearing to be held on those issues.

(6) The court shall hold a hearing within 30 days of the receipt of any such report from the administrator of the facility on the issues raised thereby. If, following the hearing, the court determines that the defendant continues to be incompetent to proceed and that the defendant meets the criteria for continued commitment or treatment, the court shall order continued commitment or treatment for a period not to exceed 1 year. When the defendant is retained by the facility, the same procedure shall be repeated prior to the expiration of each additional 1-year period of extended commitment.

(7) If, at any time after such commitment, the court decides, after hearing, that the defendant is competent to proceed, it shall enter its order so finding and shall proceed.

(8) If, after any such hearing, the court determines that the defendant remains incompetent to proceed but no longer meets the criteria for commitment, the court shall proceed as provided in rule 3.212(d).

**(d) Release on Finding of Incompetence.** If the court decides that a defendant is not mentally competent to proceed but does not meet the criteria for commitment, the defendant may be released on appropriate release conditions for a period not to exceed 1 year. The court may order that the defendant receive outpatient treatment at an appropriate local facility and that the defendant report for further evaluation at specified times during the release period as conditions of release. A report shall be filed with the court after each evaluation by the persons appointed by the court to make such evaluations, with copies to all parties. These



reports shall be filed and maintained under seal in the court file.

### **Committee Notes**

**1980 Adoption.** This rule sets forth the procedure for the hearing itself. If other experts have been involved who were not appointed pursuant to this rule, provision is made that such experts may then be called by either party. Those experts appointed by the court to conduct the examination, if called by the court or by either party to testify at the hearing, will be regarded as court experts. Either party may then examine such experts by leading questions or may impeach such experts. If a party calls an expert witness other than those appointed by the court pursuant to these rules, the usual evidentiary rules of examining such witnesses shall then apply. Following the hearing, the court may come to one of 3 conclusions: (a) the defendant is competent to stand trial, rule 3.212(a); (b) the defendant is incompetent to stand trial and is in need of involuntary hospitalization, rule 3.212(b); or (c) the defendant is incompetent to stand trial but is not in need of involuntary hospitalization, rule 3.212(c).

(a) This provision has been contained in every prior rule or statute relating to the issues of competency to stand trial and provides that if the defendant is competent the trial shall commence. No change is recommended.

(b) This subdivision provides for the second possible finding of the court, namely that the defendant is found incompetent to stand trial and is in need of involuntary hospitalization. It is designed to track the provisions of chapter 394, Florida Statutes, relating to involuntary hospitalization and the provisions of chapter 393 relating to residential services insofar as they may apply to the defendant under criminal charges. In this way, the procedures to be set up by the institution to which a criminal defendant is sent should not vary greatly from procedures common to the institution in the involuntary hospitalization or residential treatment of those not subject to criminal charges.

The criteria for involuntary hospitalization are set forth in section 394.467(1), Florida Statutes (1979). As to involuntary hospitalization for mental retardation, see section 393.11, Florida Statutes (1979); definition of treatment facility, see section 394.455, Florida Statutes (1979); involuntary admission to residential services, see section 393.11, Florida Statutes (1979).

(2) The requirement that there be certain contents to the order of commitment is set forth in order to give greater assistance to the personnel of the

treatment facility. The information to be included in the order should give them the benefit of all information that has been before the trial judge and has been considered by that judge in making the decision to involuntarily hospitalize the defendant. This information should then assist the personnel of the receiving institution in making their initial evaluation and in instituting appropriate treatment more quickly. The last requirement, that of supporting affidavits or other documents used in the determination of probable cause, is to give some indication of the nature of the offense to the examining doctors to enable them to determine when the defendant has reached a level of improvement that he or she can discuss the charge with “a reasonable degree of rational understanding.”

(3) This subdivision is designed to correspond with a complementary section of the Florida Statutes. It mandates, as does the statute, that the treatment facility must admit the defendant for hospitalization and treatment. The time limitations set forth in this subdivision are designed to coincide with those set forth in chapter 394, Florida Statutes. If, however, the defendant should regain competence or no longer meets hospitalization criteria prior to the expiration of any of the time periods set, the administrator of the facility may report to the court and cause a re-evaluation of the defendant’s mental status. At the end of the 6-month period, and every year thereafter, the administrator must report to the court. These time periods are set forth so as to coincide with chapter 394, Florida Statutes.

(i) Permits the defendant’s attorney, in an appropriate case, to request a hearing if the attorney believes the defendant to have regained competency. The grounds for such belief are to be contained in the motion, as is a certificate of the good faith of counsel in filing it. If the motion is sufficient to give the court reasonable grounds to believe that the defendant may be competent or no longer meets the criteria for hospitalization, the court can order a report from the administrator and hold a hearing on the issues.

(4) The rule is meant to mandate that the court hold a hearing as quickly as possible, but the hearing must be held at least within 30 days of the receipt of the report from the administrator of the facility.

(c) This rule provides for the disposition of the defendant who falls under the third of the alternatives listed above, that is, one who is incompetent to stand trial but does not meet the provisions for involuntary hospitalization. It is meant to provide as great a flexibility as possible for the trial judge in handling such defendant.

As to criteria for involuntary hospitalization, see section 394.467(1), Florida Statutes (1979).

Section 916.13, Florida Statutes complements this rule and provides for the hospitalization of defendants adjudicated incompetent to stand trial.

**1988 Amendment.** Title. The title has been amended to reflect changes in rules 3.210 and 3.211.

(a) This provision was formerly the introductory paragraph to this rule. It has been labeled subdivision (a) for consistency in form.

(b) This provision was former subdivision (a). It has been amended to reflect changes in rules 3.210 and 3.211. The former subdivisions (b) and (b)(1) have been deleted because similar language is now found in new subdivision (c).

(c) This new provision, including all its subdivisions, is designed to reflect the commitment criteria in section 916.13(1), Florida Statutes, and to reflect that commitment to the Department of Health and Rehabilitative Services is to be tied to specific commitment criteria when no less restrictive treatment alternative is available.

(1) This provision provides for available community treatment when appropriate.

(2) This provision provides for treatment in a custodial facility or other available community residential program.

(3) This provision, and its subdivisions, outlines when a defendant may be committed and refers to commitment criteria under the provisions of section 916.13(1), Florida Statutes.

(4) This provision, and its subdivisions, was formerly subdivision (b)(2). The language has been amended to reflect changes in chapter 916 relating to the commitment of persons found incompetent to proceed and changes in rules 3.210 and 3.211.

(5) This provision, and its subdivisions, was formerly subdivision (b)(3). The amendments are for the same reasons as (4) above.

(6) This provision was formerly subdivision (b)(4). The amendments are for the same reasons as (4) above.

(7) This provision was formerly subdivision (b)(5). The amendments are for the same reasons as (4) above.

(8) This provision was formerly subdivision (b)(6). The amendments are for the same reasons as (4) above.

(d) The amendments to the provision are for the same reasons as (4) above.

**1992 Amendment.** The amendments substitute “shall” in place of “may” in subdivision (c)(5)(B) to require the trial court to order the administrator of the facility where an incompetent defendant has been committed to report to the court on the issue of competency when the court has reasonable grounds to believe that the defendant may have regained competence to proceed or no longer meets the criteria for commitment. The amendments also gender neutralize the wording of the rule.

**Introductory Note Relating to Amendments to Rules 3.210 to 3.219.** See notes following rule 3.210 for the text of this note.

**RULE 3.216.      INSANITY AT TIME OF OFFENSE OR PROBATION  
OR COMMUNITY CONTROL VIOLATION: NOTICE  
AND APPOINTMENT OF EXPERTS**

**(a)    Expert to Aid Defense Counsel.** When in any criminal case counsel for a defendant adjudged to be indigent or partially indigent, whether public defender or court appointed, shall have reason to believe that the defendant may be incompetent to proceed or that the defendant may have been insane at the time of the offense or probation or community control violation, counsel may so inform the court who shall appoint 1 expert to examine the defendant in order to assist counsel in the preparation of the defense. The expert shall report only to the attorney for the defendant and matters related to the expert shall be deemed to fall under the lawyer-client privilege.

**(b)    Notice of Intent to Rely on Insanity Defense.** When in any criminal case it shall be the intention of the defendant to rely on the defense of insanity either at trial or probation or community control violation hearing, no evidence offered by the defendant for the purpose of establishing that defense shall be admitted in the case unless advance notice in writing of the defense shall have been given by the defendant as hereinafter provided.

**(c)    Time for Filing Notice.** The defendant shall give notice of intent to rely on the defense of insanity no later than 15 days after the arraignment or the filing of a written plea of not guilty in the case when the defense of insanity is to be relied on at trial or no later than 15 days after being brought before the appropriate court to answer to the allegations in a violation of probation or community control proceeding. If counsel for the defendant shall have reasonable grounds to believe that the defendant may be incompetent to proceed, the notice shall be given at the same time that the motion for examination into the defendant's competence is filed. The notice shall contain a statement of particulars showing the nature of the insanity the defendant expects to prove and the names and addresses of the witnesses by whom the defendant expects to show insanity, insofar as is possible.

**(d)    Court Appointed Experts.** On the filing of such notice the court may on its own motion, and shall on motion of the state or the defendant, order that the defendant be examined by no more than 3 nor fewer than 2 disinterested, qualified experts as to the sanity or insanity of the defendant at the time of the commission of the alleged offense or probation or community control violation. Attorneys for the state and defendant may be present at the examination. The examination should

take place at the same time as the examination into the competence of the defendant to proceed, if the issue of competence has been raised.

**(e) Time for Filing Notice of Intent to Rely on a Mental Health Defense Other than Insanity.** The defendant shall give notice of intent to rely on any mental health defense other than insanity as soon as a good faith determination has been made to utilize the defense but in no event later than 30 days prior to trial. The notice shall contain a statement of particulars showing the nature of the defense the defendant expects to prove and the names and addresses of the witnesses by whom the defendant expects to prove the defense, insofar as possible. If expert testimony will be presented, the notice shall indicate whether the expert has examined the defendant.

**(f) Court-Appointed Experts for Other Mental Health Defenses.** If the notice to rely on any mental health defense other than insanity indicates the defendant will rely on the testimony of an expert who has examined the defendant, the court shall upon motion of the state order the defendant be examined by one qualified expert as to the mental health defense raised by the defendant. Upon a showing of good cause, the court may order additional examinations upon motion by the state or the defendant. Attorneys for the state and defendant may be present at the examination. When the defendant relies on the testimony of an expert who has not examined the defendant, the state shall not be entitled to a compulsory examination of the defendant.

**(g) Report of Experts to Court.** The experts shall examine the defendant and shall file with the court in writing at such time as shall be specified by the court, with copies to attorneys for the state and the defense, a report that shall contain:

(1) a description of the evaluative techniques that were used in their examination;

(2) a description of the mental and emotional condition and mental processes of the defendant at the time of the alleged offense or probation or community control violation, including the nature of any mental impairment and its relationship to the actions and state of mind of the defendant at the time of the offense or probation or community control violation;

(3) a statement of all relevant factual information regarding the defendant's behavior on which the conclusions or opinions regarding the

defendant's mental condition were based; and

(4) an explanation of how the conditions and opinions regarding the defendant's mental condition at the time of the alleged offense or probation or community control violation were reached.

This report shall be filed and maintained under seal in the court file.

**(h) Waiver of Time to File.** On good cause shown for the omission of the notice of intent to rely on the defense of insanity, or any mental health defense, the court may in its discretion grant the defendant 10 days to comply with the notice requirement. If leave is granted and the defendant files the notice, the defendant is deemed unavailable to proceed. If the trial has already commenced, the court, only on motion of the defendant, may declare a mistrial in order to permit the defendant to raise the defense of insanity pursuant to this rule. Any motion for mistrial shall constitute a waiver of the defendant's right to any claim of former jeopardy arising from the uncompleted trial.

**(i) Evaluating Defendant after Pretrial Release.** If the defendant has been released on bail or other release conditions, the court may order the defendant to appear at a designated place for evaluation at a specific time as a condition of the release provision. If the court determines that the defendant will not submit to the evaluation provided for herein or that the defendant is not likely to appear for the scheduled evaluation, the court may order the defendant taken into custody until the evaluation is completed. A motion made for evaluation under this subdivision shall not otherwise affect the defendant's right to pretrial release.

**(j) Evidence.** The appointment of experts by the court shall not preclude the state or the defendant from calling additional expert witnesses to testify at the trial. The experts appointed by the court may be summoned to testify at the trial, and shall be deemed court witnesses whether called by the court or by either party. Other evidence regarding the defendant's insanity or mental condition may be introduced by either party. At trial, in its instructions to the jury, the court shall include an instruction on the consequences of a verdict of not guilty by reason of insanity.

## **Committee Notes**

### **1980 Adoption.**

(a) This subdivision is based on *Pouncy v. State*, 353 So.2d 640 (Fla. 3d DCA 1977), and provides that an expert may be provided for an indigent defendant. The appointment of the expert will in this way allow the public defender or court-appointed attorney to screen possible incompetency or insanity cases and give a basis for determining whether issues of incompetency or insanity ought to be raised before the court; it will also permit the defense attorney to specify in greater detail in the statement of particulars the nature of the insanity that attorney expects to prove, if any, and the basis for the raising of that defense.

(b) Essentially the same as in prior rules; provides that written notice must be given in advance by the defendant.

(c) Since counsel for indigents often are not appointed until arraignment and since it is sometimes difficult for a defendant to make a determination on whether the defense of insanity should be raised prior to arraignment, a 15-day post-arraignment period is provided for the filing of the notice. The defendant must raise incompetency at the same time as insanity, if at all possible. With the appointment of the expert to assist, the defendant should be able to raise both issues at the same time if grounds for both exist. The remainder of the rule, providing for the statement to be included in the notice, is essentially the same as that in prior rules.

(d) The appointment of experts provision is designed to track, insofar as possible, the provisions for appointment of experts contained in the rules relating to incompetency to stand trial and in the Florida Statutes relating to appointment of expert witnesses. Insofar as possible, the single examination should include incompetency, involuntary commitment issues where there are reasonable grounds for their consideration, and issues of insanity at time of the offense. Judicial economy would mandate such a single examination where possible.

(g) In order to obtain more standardized reports, specific items relating to the examination are required of the examining experts. See note to rule 3.211(a).

(h) Essentially the substance of prior rule 3.210(e)(4) and (5), with some changes. Both prior provisions are combined into a single provision; speedy trial time limits are no longer set forth, but waiver of double jeopardy is mandated.

(i) Same as rule 3.210(b)(3), relating to incompetency to stand trial. See commentary to that rule.



(j) A restatement of former rule 3.210(e)(7). The provision that experts called by the court shall be deemed court witnesses is new. The former provision relating to free access to the defendant is eliminated as unnecessary.

As to appointment of experts, see section 912.11, Florida Statutes.

**1988 Amendment.** The amendments to this rule, including the title, provide for the affirmative defense of insanity in violation of probation or community control proceedings as well as at trial.

**1992 Amendment.** The purpose of the amendment is to gender neutralize the wording of the rule.

**1996 Amendment.** Subdivisions (e) and (f) were added to conform to *State v. Hickson*, 630 So.2d 172 (Fla. 1993). These amendments are not intended to expand existing case law.

**Introductory Note Relating to Amendments to Rules 3.210 to 3.219.** See notes following rule 3.210 for the text of this note

**RULE 3.218. COMMITMENT OF A DEFENDANT FOUND NOT GUILTY BY REASON OF INSANITY**

(a) **Commitment; 6-Month Report.** The Department of Children and Family Services shall admit to an appropriate facility a defendant found not guilty by reason of insanity under rule 3.217 and found to meet the criteria for commitment for hospitalization and treatment and may retain and treat the defendant. No later than 6 months from the date of admission, the administrator of the facility shall file with the court a report, and provide copies to all parties, which shall address the issues of further commitment of the defendant. If at any time during the 6-month period, or during any period of extended hospitalization that may be ordered under this rule, the administrator of the facility shall determine that the defendant no longer meets the criteria for commitment, the administrator shall notify the court by such a report and provide copies to all parties. These reports shall be filed and maintained under seal in the court file.

(b) **Right to Hearing if Committed upon Acquittal.** The court shall hold a hearing within 30 days of the receipt of any report from the administrator of the facility on the issues raised thereby, and the defendant shall have a right to be present at the hearing. If the court determines that the defendant continues to meet the criteria for continued commitment or treatment, the court shall order further commitment or treatment for a period not to exceed 1 year. The same procedure shall be repeated before the expiration of each additional 1-year period in which the defendant is retained by the facility.

(c) **Evidence to Determine Continuing Insanity.** Before any hearing held under this rule, the court may, on its own motion, and shall, on motion of counsel for the state or defendant, appoint no fewer than 2 nor more than 3 experts to examine the defendant relative to the criteria for continued commitment or placement of the defendant and shall specify the date by which the experts shall report to the court on these issues and provide copies to all parties.

**Committee Notes**

**1980 Adoption.** This provision provides for hospitalization of a defendant found not guilty by reason of insanity and is meant to track similar provisions in the rules relating to competency to stand trial and the complementary statutes. It provides for an initial 6-month period of commitment with successive 1-year periods; it provides for reports to the court and for the appointment of experts to

examine the defendant when such hearings are necessary. The underlying rationale of this rule is to make standard, insofar as possible, the commitment process, whether it be for incompetency to stand trial or following a judgment of not guilty by reason of insanity.

For complementary statute providing for hospitalization of defendant adjudicated not guilty by reason of insanity, see section 912.15, Florida Statutes.

**1988 Amendment.** The amendments to this rule, including the title, provide for commitment of defendants found not guilty by reason of insanity in violation of probation or community control proceedings, as well as those so found at trial. The amendments further reflect 1985 amendments to chapter 916, Florida Statutes.

**Introductory Note Relating to Amendments to Rules 3.210 to 3.219.** See notes following rule 3.210 for the text of this note.

## **RULE 3.219.      CONDITIONAL RELEASE**

**(a) Release Plan.** The committing court may order a conditional release of any defendant who has been committed according to a finding of incompetency to proceed or an adjudication of not guilty by reason of insanity based on an approved plan for providing appropriate outpatient care and treatment. When the administrator shall determine outpatient treatment of the defendant to be appropriate, the administrator may file with the court, and provide copies to all parties, a written plan for outpatient treatment, including recommendations from qualified professionals. The plan may be submitted by the defendant. The plan shall include:

- (1) special provisions for residential care, adequate supervision of the defendant, or both;
- (2) provisions for outpatient mental health services; and
- (3) if appropriate, recommendations for auxiliary services such as vocational training, educational services, or special medical care.

In its order of conditional release, the court shall specify the conditions of release based on the release plan and shall direct the appropriate agencies or persons to submit periodic reports to the court regarding the defendant's compliance with the conditions of the release, and progress in treatment, and provide copies to all parties. These reports shall be filed and maintained under seal in the court file.

**(b) Defendant's Failure to Comply.** If it appears at any time that the defendant has failed to comply with the conditions of release, or that the defendant's condition has deteriorated to the point that inpatient care is required, or that the release conditions should be modified, the court, after hearing, may modify the release conditions or, if the court finds the defendant meets the statutory criteria for commitment, may order that the defendant be recommitted to the Department of Children and Family Services for further treatment.

**(c) Discharge.** If at any time it is determined after hearing that the defendant no longer requires court-supervised follow-up care, the court shall terminate its jurisdiction in the cause and discharge the defendant.

### **Committee Notes**

**1980 Adoption.** This rule implements the prior statutory law permitting

conditional release.

For complementary statute providing for conditional release, see section 916.17, Florida Statutes.

**1988 Amendment.** The amendments to this rule are designed to reflect amendments to rules 3.210, 3.211, and 3.218 as well as 1985 amendments to chapter 916, Florida Statutes.

(b) This provision has been amended to permit the court to recommit a conditionally released defendant to HRS under the provisions of chapter 916 only if the court makes a finding that the defendant currently meets the statutory commitment criteria found in section 916.13(1), Florida Statutes.

**1992 Amendment.** The purpose of the amendment is to gender neutralize the wording of the rule.

**Introductory Note Relating to Amendments to Rules 3.210 to 3.219.** See notes following rule 3.210 for the text of this note.

## APPENDIX C

### Proposed Changes to Rules in Two-Column Format

**Proposed rule**

**Reasons for change**

**RULE 3.140 INDICTMENTS; INFORMATION**

(a) [No change]

(b) [No change]

(c) **Caption, Commencement, Date, and Personal Statistics.**

(1) **Caption.** [No change]

(2) **Commencement.** [No change]

(3) **Date.** [No change]

(4) **Personal Statistics.** Every indictment or information shall include the defendant's race, gender, and date of birth, ~~and social security number~~ when any of these facts are known. Failure to include these facts shall not invalidate an otherwise sufficient indictment or information.

Reference to social security number deleted to conform to recommendations of Committee on Privacy and Court Records. Information is currently omitted from charging documents despite current requirements of rule.

(d) [No change]

(e) [No change]

(f) [No change]

(g) [No change]

(h) [No change]

(i) [No change]

(j) [No change]

(k) [No change]

(l) [No change]

(m) [No change]

(n) [No change]

(o) [No change]

**Committee Notes**

[No change]



**Proposed rule**

**Reasons for change**

**RULE 3.211. COMPETENCE TO PROCEED; SCOPE OF EXAMINATION AND REPORT**

(a) [No change]

(b) [No change]

(c) [No change]

(d) **Written Findings of Experts.** Any written report submitted by the experts shall:

(1) identify the specific matters referred for evaluation;

(2) describe the evaluative procedures, techniques, and tests used in the examination and the purpose or purposes for each;

(3) state the expert's clinical observations, findings, and opinions on each issue referred for evaluation by the court, and indicate specifically those issues, if any, on which the expert could not give an opinion; and

(4) identify the sources of information used by the expert and present the factual basis for the expert's clinical findings and opinions.

This report shall be filed and maintained under seal in the court file.

Amended to conform to recommendations of Committee on Privacy and Court Records.

(e) [No change]

**Committee Notes**

[No change]

**Proposed rule**  
**RULE 3.212. COMPETENCE TO PROCEED: HEARING  
AND DISPOSITION**

**Reasons for change**

(a) [No change]

(b) [No change]

(c) [No change]

(d) **Release on Finding of Incompetence.** If the court decides that a defendant is not mentally competent to proceed but does not meet the criteria for commitment, the defendant may be released on appropriate release conditions for a period not to exceed 1 year. The court may order that the defendant receive outpatient treatment at an appropriate local facility and that the defendant report for further evaluation at specified times during the release period as conditions of release. A report shall be filed with the court after each evaluation by the persons appointed by the court to make such evaluations, with copies to all parties. These reports shall be filed and maintained under seal in the court file.

Amended to conform to recommendations of Committee on Privacy and Court Records.

**Committee Notes**

[No change]

**Proposed rule**

**Reasons for change**

**RULE 3.216. INSANITY AT TIME OF OFFENSE OR  
PROBATION OR COMMUNITY  
CONTROL VIOLATION: NOTICE AND  
APPOINTMENT OF EXPERTS**

(a) [No change]

(b) [No change]

(c) [No change]

(d) [No change]

(e) [No change]

(f) [No change]

(g) **Report of Experts to Court.** The experts shall examine the defendant and shall file with the court in writing at such time as shall be specified by the court, with copies to attorneys for the state and the defense, a report that shall contain:

(1) a description of the evaluative techniques that were used in their examination;

(2) a description of the mental and emotional condition and mental processes of the defendant at the time of the alleged offense or probation or community control violation, including the nature of any mental impairment and its relationship to the actions and state of mind of the defendant at

the time of the offense or probation or community control violation;

(3) a statement of all relevant factual information regarding the defendant's behavior on which the conclusions or opinions regarding the defendant's mental condition were based; and

(4) an explanation of how the conditions and opinions regarding the defendant's mental condition at the time of the alleged offense or probation or community control violation were reached.

This report shall be filed and maintained under seal in the court file.

Amended to conform to recommendations of Committee on Privacy and Court Records.

(h) [No change]

(i) [No change]

(j) [No change]

**Committee Notes**

[No change]

**Proposed rule**

**Reasons for change**

**RULE 3.218. COMMITMENT OF A DEFENDANT  
FOUND NOT GUILTY BY REASON OF  
INSANITY**

(a) **Commitment; 6-Month Report.** The Department of Children and Family Services shall admit to an appropriate facility a defendant found not guilty by reason of insanity under rule 3.217 and found to meet the criteria for commitment for hospitalization and treatment and may retain and treat the defendant. No later than 6 months from the date of admission, the administrator of the facility shall file with the court a report, and provide copies to all parties, which shall address the issues of further commitment of the defendant. If at any time during the 6-month period, or during any period of extended hospitalization that may be ordered under this rule, the administrator of the facility shall determine that the defendant no longer meets the criteria for commitment, the administrator shall notify the court by such a report and provide copies to all parties. These reports shall be filed and maintained under seal in the court file.

Amended to conform to recommendations of Committee on Privacy and Court Records.

(b) [No change]

(c) [No change]

**Committee Notes**

[No change]

## Proposed rule

## Reasons for change

### RULE 3.219. CONDITIONAL RELEASE

(a) **Release Plan.** The committing court may order a conditional release of any defendant who has been committed according to a finding of incompetency to proceed or an adjudication of not guilty by reason of insanity based on an approved plan for providing appropriate outpatient care and treatment. When the administrator shall determine outpatient treatment of the defendant to be appropriate, the administrator may file with the court, and provide copies to all parties, a written plan for outpatient treatment, including recommendations from qualified professionals. The plan may be submitted by the defendant. The plan shall include:

- (1) special provisions for residential care, adequate supervision of the defendant, or both;
- (2) provisions for outpatient mental health services; and
- (3) if appropriate, recommendations for auxiliary services such as vocational training, educational services, or special medical care.

In its order of conditional release, the court shall specify the conditions of release based on the release plan and shall direct the appropriate agencies or persons to submit periodic reports to the court regarding the defendant's compliance with the conditions of the release, and progress in treatment, and provide copies to all parties. These reports shall be filed and maintained under seal in the court file.

Amended to conform to recommendations of Committee on Privacy and Court Records.

(b) [No change]

(c) [No change]

**Committee Notes**

[No change]



## APPENDIX D

Background Documents  
(referral letters)

July 27, 2006

Mr. Keith H. Park  
Chair, Civil Procedure Rules Committee  
P.O. Box 3563  
West Palm Beach, Florida 33402-3563

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Chair, Criminal Procedure Rules Committee  
1104 Bahama Drive  
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Mr. John Fraser Himes  
Chair, Family Law Rules Committee  
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Mr. Gary D. Fox  
Chair, Rules of Judicial Administration Committee  
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Ms. Mary K. Wimsett  
Chair, Juvenile Court Rules Committee  
Guardian Ad Litem Program  
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Mr. Peter A. Sachs  
Chair, Probate Rules Committee  
505 S. Flagler Drive, Suite 1100  
West Palm Beach, Florida 33401

The Honorable Pauline M. Drayton  
Chair, Small Claims Rules Committee  
Duval County Court  
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Jacksonville, Florida 32202-2921

Mr. Peter A. Sartes II  
Chair, Traffic Court Rules Committee  
600 Cleveland Street, Suite 700  
Clearwater, Florida 33755-4158

Re: Report and Recommendations of the Committee on Privacy and Court  
Records — Recommendation Ten: Duty to Protect Discovery Information

Dear Rules Committee Chairs:

I am writing to you in follow up to Administrative Order Implementation of Report and Recommendations of the Committee on Privacy and Court Records, Fla. Admin. Order No. AOSC06-20 (June 30, 2006), which refers to your committee's Recommendation Ten contained in the report of the Committee on Privacy and Court Records. For your convenience, I have enclosed a copy of the administrative order and the report. The full report can be found on the Court's website at [http://www.flcourts.org/gen\\_public/stratplan/privacy.shtml](http://www.flcourts.org/gen_public/stratplan/privacy.shtml).

Recommendation Ten urges the Court to adopt a rule of procedure that would require attorneys and litigants to refrain from filing discovery information with the court until such time as it is filed for good cause. In connection with that recommendation, the committee reported that

[it] considered the problem of the routine and sometimes gratuitous filing of information that has been disclosed pursuant to a discovery order. The Committee notes that compelled discovery is an exercise of state power subject to restraint by the right of privacy provided in Section 23 of Article I of the Florida Constitution, which has been held to protect citizens from intrusion any greater than necessary to achieve the state interest. The Committee urges that parties who gain possession of information pursuant to compelled discovery should protect the fruits of discovery, and should be constrained from

publishing discovery material into a court file unless and until such time as the information may be properly filed for good cause.

Report at 56. Therefore, in order to protect discovery materials, the committee recommended that

the Supreme Court direct the creation of a rule of procedure that would require attorneys and litigants to refrain from filing discovery information with the court until such time as it is filed for good cause. The court shall have authority to sanction an attorney or party for violation of this rule.

Report at 56. In response to this recommendation, Administrative Order No. AOSC06-20 at 16 asks your committees to “study whether rules exist or rules should be adopted that would require attorneys and litigants to refrain from filing discovery information with the court until such time as it is filed for good cause.”

Your committees should work together to study this issue and make recommendations to the Court. Your joint out-of-cycle report or individual reports should be filed with my office by April 1, 2007. If you need more time to consider this matter, please file requests for an extension with my office.

Thank you in advance for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Most cordially,

By: /s/ Barbara Harley-Price  
Deputy Clerk  
Thomas D. Hall

Enclosures

TDH/dm/sb

cc: Chief Justice R. Fred Lewis  
Jon Mills, Chair, Committee on Privacy and Court Records  
Lisa Goodner, State Courts Administrator  
Ellen Sloyer, Bar Staff Liaison

Madelon Horwich, Bar Staff Liaison  
Gerry Rose, Bar Staff Liaison Craig Shaw, Bar Staff Liaison  
Ann Chittenden, Bar Staff Liaison  
Deborah J. Meyer, Director of Central Staff

July 27, 2006

Mr. Edward M. Mullins  
Chair, Appellate Court Rules Committee  
701 Brickell Ave., Floor 16  
Miami, Florida 33131-2801

Mr. Keith H. Park  
Chair, Civil Procedure Rules Committee  
P. O. Box 3563  
West Palm Beach, Florida 33402-3563

Mr. William C. Vose  
Chair, Criminal Procedure Rules Committee  
1104 Bahama Dr.  
Orlando, Florida 32806-1440

Mr. Gary D. Fox  
Chair, Rules of Judicial Administration Committee  
One S.E. 3rd Ave., Suite 3000  
Miami, Florida 33131-1711

Mr. Mary K. Wimsett  
Chair, Juvenile Court Rules Committee  
Guardian Ad Litem Program  
1132 N.W. 58th Terr.  
Gainesville, Florida 32605-4477

Mr. Peter A. Sachs  
Chair, Probate Rules Committee  
505 S. Flagler Dr., Suite 1100  
West Palm Beach, Florida 33401

Hon. Pauline M. Drayton  
Chair, Small Claims Rules Committee  
Duval County Court  
330 E. Bay St.  
Jacksonville, Florida 32202-2921

Peter A. Sartes II

Chair, Traffic Court Rules Committee  
600 Cleveland St., Suite 700  
Clearwater, Florida 33755-4158

Re: Report and Recommendations of the Committee on Privacy and Court Records —Recommendation Seven: Revision of Rules and Forms Leading to Extraneous Personal Information.

Dear Rules Committee Chairs:

I am writing to you in follow up to Administrative Order Implementation of Report and Recommendations of the Committee on Privacy and Court Records, Fla. Admin. Order No. AOSC06-20 (June 30, 2006), which refers to your committee's Recommendation Seven contained in the report of the Committee on Privacy and Court Records. For your convenience, I have enclosed a copy of the administrative order and the report. The full report can be found on the Court's website at [http://www.flcourts.org/gen\\_public/stratplan/privacy.shtml](http://www.flcourts.org/gen_public/stratplan/privacy.shtml).

Recommendation Seven urges the review and revision of all rules and forms to avoid the filing of personal information that is not necessary for adjudication or case management. The committee reported that it

determined that a systematic review of court rules and approved forms would reveal that a number of rules and forms are written in ways that lead to routine filing of personal information which is not needed by the court for purposes of adjudication or case management.

Report at 53. The committee therefore recommended that the Court

direct a comprehensive judicial branch initiative to review and revise rules of court and approved court forms across all case types for the purpose of modifying rules and forms to avoid the filing of personal information which is not necessary for adjudication or case management.

Report at 53.

To implement Recommendation Seven, Administrative Order No. AOSC06-20 at 15 asks your committees to review their respective bodies of rules and forms

and to propose amendments to the rules and forms consistent with this recommendation.

Please file out-of-cycle reports of your proposed amendments with my office by April 1, 2007. If you need more time to consider this matter, please file a request for an extension with my office.

Thank you in advance for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Most cordially,

By: /s/ Barbara Harley-Price  
Deputy Clerk  
Thomas D. Hall

Enclosures

TDH/dm/sb

cc: Chief Justice R. Fred Lewis  
Jon Mills, Chair, Committee on Privacy and Court Records  
Lisa Goodner, State Courts Administrator  
Ellen Sloyer, Bar Staff Liaison  
Joanna Mauer, Bar Staff Liaison  
Madelon Horwich, Bar Staff Liaison  
Gerry Rose, Bar Staff Liaison Craig Shaw, Bar Staff Liaison  
Ann Chittenden, Bar Staff Liaison  
Deborah J. Meyer, Director of Central Staff



## APPENDIX E

Certification that Proposed Rules Have Been Read Against  
West's FLORIDA RULES OF COURT

## **READ-AGAINST CERTIFICATION**

I certify that these rules were read against West's *Florida Rules of Court – State* (2007).

/s/Christian Cox  
Christian Cox, Associate Editor  
Legal Publications  
The Florida Bar

IN THE SUPREME COURT OF FLORIDA

FILED  
THOMAS D. HALL

IN RE: REPORT AND RECOMMENDATIONS )  
OF THE COMMITTEE ON PRIVACY )  
AND COURT RECORDS )

Case No.

2006 NOV 20 P 3:26  
CLERK, SUPREME COURT

BY \_\_\_\_\_

**REPORT OF THE SMALL CLAIMS RULES COMMITTEE**

Judge Pauline Drayton, Chair of the Small Claims Rules Committee of The Florida Bar, and John F. Harkness, Jr., Executive Director of The Florida Bar, file this out-of-cycle report of proposed changes to the Florida Small Claims Rules, pursuant to *Fla. R. Jud. Admin.* 2.140(f).

In its Administrative Order in this case dated June 30, 2006, the Supreme Court asked the various Florida Bar rules committees to study whether changes to the rules were needed to implement Recommendations 7 and 10 of the Report and Recommendation of the Committee on Privacy and Court Records. The Small Claims Rules Committee reviewed each small claims rule and form, and it proposes amendment to the rules and forms as shown on the attached table of contents (Appendix A). The voting record of the Committee for the change is shown on the table of contents. The Committee's report was submitted to The Florida Bar Board of Governors, and its voting record is also shown on the table of contents. At the direction of the court, the proposals have not been published prior to filing.

Before the advent of the Internet, court records in paper format had been broadly accessible to any member of the general public willing to travel to the local courthouse. The policy reasons for this unlimited access included promoting the public trust and education about the results of litigation and the evidence supporting the outcome of these cases. The Internet, among other things, has dramatically altered the potential for the abuse and misuse of information provided to the courts by the public. The Internet, court files, and the plethora of filed documents provide access to large collections of identifying information gathered through the direction of the courts, judiciary, and attorneys working with the court system. The worldwide publication of identifying details that previously were available to only a limited few now exponentially increases the prospect that someone could harvest this information. Moreover, the Internet provides the opportunity for a third party to collect and propagate the identifying information,

making it available for others to exploit. The growing trend of identity theft is a great concern to the Committee. Several Committee members have suggested that certain personal identifiers such as a litigant's social security number, financial account numbers, telephone numbers, and addresses deserve privacy protection. Moreover, some of the forms contain extensive requests for information that could be a virtual gold mine for an identity thief.

The specific changes that the Committee recommends making are as follows:

#### **Rule 7.140**

This rule, titled "Trial," includes a subdivision (e) regarding the court assisting parties not represented by an attorney. The rule provides for assistance on courtroom decorum and the order of presentation of material evidence. The Committee suggests adding a provision that the court will assist unrepresented parties in the handling of private information that could be published in the court file. One Committee member felt this change would not solve the problem of unnecessary information getting into the court file because it would not be effective to put the responsibility of "policing" the public record on judges; judges are too busy to watch the file to ensure that unnecessary, private information is not filed. That Committee member pointed out that while pro se litigants file documents with the judge at trial, they also file them with the clerk through the mail and at the clerk's office, and judges cannot screen all those documents.

#### **Rule 7.300**

This is the general rule that discusses the small claims forms. The Committee recommends adding language to this rule that would alert litigants to not include personal information on documents except when necessary. Although only the Final Judgment form (form 7.340) and the Fact Information Sheet (form 7.343) ask for specific personal information such as social security numbers, frequently small claims litigants put such information on other documents. Often companies put in credit card numbers and driver's license numbers as well in collection and garnishment documents.

The Committee is aware that section 55.01, Florida Statutes, requires in part: "(2) Each final judgment shall contain thereon the address and the social security number, if known to the prevailing party, of each person against whom judgment is

rendered.” In fact, one Committee member voted against the proposed change because he believed that this is a matter for the legislature and not this Committee. Therefore, the Committee does not believe that this requirement can be deleted from the forms, but suggests that a solution would be that the documents show only the last four digits of the defendant’s social security number.

The Committee suggests adding the following sentence to rule 7.300: “Unless specifically required by a particular form, by the court, or by law, a party shall not include personal information such as a social security number, driver’s license number, or bank account number on any form filed with the clerk of the court.” The Committee acknowledges that a party has a right to obtain personal information regarding an individual or business when appropriate; however, the Committee feels that action must be taken to attempt to limit the unnecessary inclusion of personal information on pleadings or documents filed with the clerk’s office.

#### **Form 7.340**

Form 7.340 is problematic in that it requires the defendant’s social security number, if known to the prevailing party. The Committee recommends modifying the form to specify that only the last four digits of the defendant’s social security number should be provided. The Committee is concerned that inclusion of the defendant’s entire social security number in the final judgment, which is recorded in the public records, may increase the potential for misuse of the defendant’s personal information. The Committee is aware that section 55.10, Florida Statutes, currently requires that the defendant’s social security number, if known, be listed on the final judgment. However, the statute also specifies that the failure to include the defendant’s social security number does not affect the validity or finality of the final judgment. The Committee also recommends that a notice be added to the optional enforcement paragraph that the Fact Information Sheet (form 7.343) should not be filed with the court.

#### **Form 7.343**

The divulging of personal information in Fact Information Sheets does not present a problem if the forms are not filed in the clerk’s office. Present form 7.343, however, instructs the defendant to file the completed fact information sheet with the court. The Committee recommends an addition to the form eliminating this instruction and altering it to indicate that the defendant is not to file it with the court. The procedure for what to do with form 7.343 is spelled out in detail to

assist the pro se litigant.

The Committee had discussed adding instructive language, similar to *Fla. R. Civ. P. Form 1.977*, to alert the defendant of the need to file a certificate of compliance of delivery of the fact information sheet, which would have been a new proposed form 7.351. However, the Committee voted 8-6 to not add a certificate of compliance, in order to simplify and streamline the procedure.

The Committee has no further specific recommendations. However, although many of the rules and forms do not require private or confidential information, if such information is being routinely included by litigants there might be a need to revise various rules and forms to specifically state that such information should not be included. Alternatively, there could be some warning or statement in the rules generally indicating what types of confidential information should not be included in documents filed with the court. The Committee is not sure whether there should be a new rule that discourages the filing of personal information that has application to all of the small claims rules, or whether it would be advisable to adopt such a rule that has application to all court rules; *e.g.*, a new rule of judicial administration. The Committee has no recommendations to amend rule 7.020, titled "Applicability of Rules of Civil Procedure," at this time. However, the Committee recommends adopting in this rule any changes recommended by the Civil Procedure Rules Committee that are adopted by the Supreme Court.

The Committee respectfully requests that this Court adopt these proposed amendments to the Florida Small Claims Rules.

Respectfully submitted \_\_\_\_\_, 2007

---

HON. PAULINE DRAYTON  
Chair, Small Claims Rules Committee  
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Jacksonville, FL 32202-2921  
(904) 630-2581  
FLORIDA BAR #562106

---

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651 E. Jefferson St.  
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(850) 561-5600  
FLORIDA BAR #123390

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# APPENDIX A

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Committee vote: 15-1

Board of Governors vote: 26-0

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Committee vote: 15-1

Board of Governors vote: 26-0

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## APPENDIX B

Proposed Changes to Rules and Forms in Legislative Format

## **RULE 7.140. TRIAL**

- (a) **Time.** The trial date shall be set by the court at the pretrial conference.
- (b) **Determination.** Issues shall be settled and motions determined summarily.
- (c) **Pretrial.** The pretrial conference should narrow contested factual issues. The case may proceed to trial with the consent of both parties.
- (d) **Settlement.** At any time before judgment, the judge shall make an effort to assist the parties in settling the controversy by conciliation or compromise.
- (e) **Unrepresented Parties.** In an effort to further the proceedings and in the interest of securing substantial justice, the court shall assist any party not represented by an attorney on:
  - (1) courtroom decorum;~~and~~
  - (2) order of presentation of material evidence; and
  - (3) handling private information.

The court may not instruct any party not represented by an attorney on accepted rules of law. The court shall not act as an advocate for a party.

(f) **How Conducted.** The trial may be conducted informally but with decorum befitting a court of justice. The rules of evidence applicable to trial of civil actions apply but are to be liberally construed. At the discretion of the court, testimony of any party or witness may be presented over the telephone. Additionally, at the discretion of the court an attorney may represent a party or witness over the telephone without being physically present before the court.

### **Committee Notes**

**1984 Amendment.** (a) Changed to conform this rule with the requirement for pretrials.

- (c) Allows the cases to proceed to trial with consent of the parties.

(f) This is similar to the proposed amendment to the Florida Rules of Civil Procedure to allow depositions by telephone. Since the court has discretion to allow this testimony, all procedural safeguards could be maintained by the court. Since the court is also the trier of fact, the testimony could be rejected if unreliable.

**1988 Amendment.** Extends the taking of testimony over the telephone to include parties, deletes the agreement of the parties provision, and adds authorization for an attorney to represent a party or witness over the telephone without being physically present before the court.

**1996 Amendment.** The revised version of subdivision (e) addresses the need to expressly provide that the judge, while able to assist an unrepresented party, should not act as an advocate for that party.

**2007 Amendment.** Subdivision (e)(3) was added so that a judge can assist an unrepresented party in the handling of private information that might otherwise inadvertently become public by placement in the court file.

## **RULE 7.300. FORMS**

The following forms of process are sufficient in all actions.

The following forms of statements of claim and other papers are sufficient for the types of actions which they respectively cover. They are intended for illustration only. They and like forms may be used with such modifications as may be necessary to meet the facts of each particular action so long as the substance thereof is expressed without prolixity. The common counts are not sufficient. The complaint forms appended to the Florida Rules of Civil Procedure may be utilized if appropriate.

Unless specifically required by a particular form, by the court, or by law, a party shall not include personal information such as a social security number, driver's license number, or bank account number on any form filed with the clerk of the court.

The following forms are approved:

**FORM 7.340. FINAL JUDGMENT**

(CAPTION)

FINAL JUDGMENT  
AGAINST (DEFENDANT(S)'S NAME)

It is adjudged that the plaintiff(s), ....., recover from the defendant(s), ....., the sum of \$..... on principal, \$..... as prejudgment interest, \$..... for attorneys' fees, with costs of \$....., all of which shall bear interest at the rate of .....% per year as provided for by Florida Statute, for all of which let execution issue.

ORDERED at ....., Florida, on ....(date).....

\_\_\_\_\_  
County Court Judge

Copies furnished to:  
PLAINTIFF(S)  
DEFENDANT(S)

Plaintiff(s)'s address:

.....  
.....

Defendant(s)'s last known address and  
last four digits of defendant(s)'s Social Security Number (if known):

.....  
.....  
.....

(OPTIONAL ENFORCEMENT PARAGRAPH —  
TO BE INCLUDED UPON REQUEST  
PURSUANT TO RULE 7.221)

It is further ordered and adjudged that the defendant(s) shall complete Florida Small Claims Rules Form 7.343 (Fact Information Sheet) and return it to the plaintiff's attorney, or to the plaintiff if the plaintiff is not represented by an attorney, within 45 days from the date of this final judgment, unless the final judgment is satisfied or a motion for new trial or notice of appeal is filed. **The defendant should NOT file the completed form 7.343 with the court.**

Jurisdiction of this case is retained to enter further orders that are proper to compel the defendant(s) to complete form 7.343 and return it to the plaintiff's attorney, or the plaintiff if the plaintiff is not represented by an attorney.

**Committee Notes**

**1992 Amendment.** The optional enforcement paragraph was added to facilitate discovery.



## FORM 7.343. FACT INFORMATION SHEET

(a) For Individuals

(CAPTION)

### FACT INFORMATION SHEET — INDIVIDUAL

Full Legal Name: \_\_\_\_\_  
Nicknames or Aliases: \_\_\_\_\_  
Residence Address: \_\_\_\_\_  
Mailing Address (if different): \_\_\_\_\_  
Telephone Numbers: (Home) \_\_\_\_\_ (Business) \_\_\_\_\_  
Name of Employer: \_\_\_\_\_  
Address of Employer: \_\_\_\_\_  
Position or Job Description: \_\_\_\_\_  
Rate of Pay: \$ \_\_\_\_\_ per \_\_\_\_\_. Average Paycheck: \$ \_\_\_\_\_ per \_\_\_\_\_  
Average Commissions or Bonuses: \$ \_\_\_\_\_ per \_\_\_\_\_. Commissions or bonuses are based on \_\_\_\_\_  
Other Personal Income: \$ \_\_\_\_\_ from \_\_\_\_\_  
(Explain details on the back of this sheet or an additional sheet if necessary.)  
Social Security Number: \_\_\_\_\_ Birthdate: \_\_\_\_\_  
Driver's License Number: \_\_\_\_\_  
Marital Status: \_\_\_\_\_ Spouse's Name: \_\_\_\_\_  
Spouse's Address (if different): \_\_\_\_\_  
Spouse's Social Security Number: \_\_\_\_\_ Birthdate: \_\_\_\_\_  
Spouse's Employer: \_\_\_\_\_  
Spouse's Average Paycheck or Income: \$ \_\_\_\_\_ per \_\_\_\_\_  
Other Family Income: \$ \_\_\_\_\_ per \_\_\_\_\_ (Explain details on back of this sheet or an additional sheet if necessary.)  
Names and Ages of All Your Children (and addresses if not living with you): \_\_\_\_\_  
\_\_\_\_\_  
Child Support or Alimony Paid: \$ \_\_\_\_\_ per \_\_\_\_\_  
Names of Others You Live With: \_\_\_\_\_  
Who is Head of Your Household? \_\_\_\_\_ You \_\_\_\_\_ Spouse \_\_\_\_\_ Other Person  
Checking Account at: \_\_\_\_\_ Account # \_\_\_\_\_  
Savings Account at: \_\_\_\_\_ Account # \_\_\_\_\_  
(Describe all other accounts or investments you may have, including stocks, mutual funds, savings bonds, or annuities, on the back of this sheet or an additional sheet if necessary.)  
  
For Real Estate (land) You Own or Are Buying:  
Address: \_\_\_\_\_  
All Names on Title: \_\_\_\_\_  
Mortgage Owed to: \_\_\_\_\_  
Balance Owed: \_\_\_\_\_  
Monthly Payment: \$ \_\_\_\_\_

(Attach a copy of the deed or mortgage, or list the legal description of the property on the back of this sheet or an additional sheet if necessary. Also provide the same information on any other property you own or are buying.)

For All Motor Vehicles You Own or Are Buying:

Year/Make/Model: \_\_\_\_\_ Color: \_\_\_\_\_

Vehicle ID #: \_\_\_\_\_ Tag No: \_\_\_\_\_ Mileage: \_\_\_\_\_

Names on Title: \_\_\_\_\_ Present Value: \$ \_\_\_\_\_

Loan Owed to: \_\_\_\_\_

Balance on Loan: \$ \_\_\_\_\_

Monthly Payment: \$ \_\_\_\_\_ (List all other automobiles, as well as other vehicles, such as boats, motorcycles, bicycles, or aircraft, on the back of this sheet or an additional sheet if necessary.)

Have you given, sold, loaned, or transferred any real or personal property worth more than \$100 to any person in the last year? If your answer is "yes," describe the property and sale price, and give the name and address of the person who received the property.

Does anyone owe you money? Amount Owed: \$ \_\_\_\_\_

Name and Address of Person Owing Money: \_\_\_\_\_

Reason money is owed: \_\_\_\_\_

Please attach copies of the following:

- a. Your last pay stub.
- b. Your last 3 statements for each bank, savings, credit union, or other financial account.
- c. Your motor vehicle registrations and titles.
- d. Any deeds or titles to any real or personal property you own or are buying, or leases to property you are renting.

UNDER PENALTY OF PERJURY, I SWEAR OR AFFIRM THAT THE FOREGOING ANSWERS ARE TRUE AND COMPLETE.

\_\_\_\_\_  
Judgment Debtor

STATE OF FLORIDA  
COUNTY OF .....

The foregoing instrument was acknowledged before me on ....(date)...., by ....., who is personally known to me or has produced ..... as identification and who .....did/did not..... take an oath.

WITNESS my hand and official seal, on ....(date).....

\_\_\_\_\_  
Notary Public  
State of Florida

My Commission expires: .....

~~MAIL OR DELIVER THIS FORM TO THE CLERK OF THE COURT, AND MAIL OR DELIVER A COPY OF THE COMPLETED FORM TO THE JUDGMENT CREDITOR OR THE CREDITOR'S ATTORNEY. DO NOT FILE THIS FORM WITH THE COURT.~~

(b) For Corporate Entities

(CAPTION)

### FACT INFORMATION SHEET — BUSINESS ENTITY

Name/Title of person filling out this form: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone Number: Home: \_\_\_\_\_ Business: \_\_\_\_\_

Address of Business Entity: \_\_\_\_\_

Type of Entity: (Check One) ☐ Corporation ☐ Partnership ☐ Limited Partnership ☐ Sole Proprietorship ☐ Limited Liability Corporation (LLC) ☐ Professional Association (PA) ☐ Other: (Please Explain)

Does Business Entity own/have interest in any other business entity? If so please explain.

Gross/Taxable income reported for Federal Income Tax purposes last three years:

\$ \_\_\_\_\_ \$ \_\_\_\_\_ \$ \_\_\_\_\_

Taxpayer Identification Number: \_\_\_\_\_

List Partners (General or Limited and Designate Percentage of Ownership): \_\_\_\_\_

Average No. of Employees/Month: \_\_\_\_\_

Names of Officers and Directors: \_\_\_\_\_

Checking Account at: \_\_\_\_\_ Account No: \_\_\_\_\_

Savings Account At: \_\_\_\_\_ Account No: \_\_\_\_\_

Does the Business Entity own any vehicles: \_\_\_\_\_

Years/Makes/Models: \_\_\_\_\_

Vehicle I.D. Nos.: \_\_\_\_\_

Tag Nos.: \_\_\_\_\_

Loans Outstanding: \_\_\_\_\_

Does the Business Entity own any real property: YES \_\_\_\_\_ NO \_\_\_\_\_

If Yes: Address: \_\_\_\_\_

Please check if the business entity owns the following:

\_\_\_\_\_ Boat

\_\_\_\_\_ Stocks/Bonds

\_\_\_\_\_ Other Personal Property

\_\_\_\_\_ Camper

\_\_\_\_\_ Other Real Property

\_\_\_\_\_ Intangible Property

UNDER PENALTY OF PERJURY, I SWEAR OR AFFIRM THAT THE FOREGOING ANSWERS ARE TRUE AND COMPLETE.

\_\_\_\_\_  
Defendant's Designated Representative  
Title: .....

STATE OF FLORIDA  
COUNTY OF .....

The foregoing instrument was acknowledged before me on .....(date)....., by .....,  
who is personally known to me or has produced ..... as identification and who  
.....did/did not..... take an oath.

WITNESS my hand and official seal, on .....(date).....

\_\_\_\_\_  
Notary Public  
State of Florida

My Commission expires: .....

~~MAIL OR DELIVER THIS FORM TO THE CLERK OF THE COURT, AND MAIL OR  
DELIVER A COPY OF THE COMPLETED FORM TO THE JUDGMENT CREDITOR OR  
THE CREDITOR'S ATTORNEY. DO NOT FILE THIS FORM WITH THE COURT.~~

## APPENDIX C

Proposed Changes to Rules in Two-Column Format

Proposed changes:	Reasons for change:
<p><b>RULE 7.140. TRIAL</b></p> <p>(a) [NO CHANGE]</p> <p>(b) [NO CHANGE]</p> <p>(c) [NO CHANGE]</p> <p>(d) [NO CHANGE]</p> <p>(e) <b>Unrepresented Parties.</b> In an effort to further the proceedings and in the interest of securing substantial justice, the court shall assist any party not represented by an attorney on:</p> <p>(1) courtroom decorum; <del>and</del></p> <p>(2) order of presentation of material evidence; <u>and</u></p> <p>(3) <u>handling private information.</u></p> <p>The court may not instruct any party not represented by an attorney on accepted rules of law. The court shall not act as an advocate for a party.</p> <p>(f) [NO CHANGE]</p>	<p></p> <p>This change would ensure that pro se litigants could get assistance from the court in making sure private information is not unnecessarily published in the court file.</p>

### Committee Notes

**1984 Amendment.** (a) Changed to conform this rule with the requirement for pretrials.

(c) Allows the cases to proceed to trial with consent of the parties.

(f) This is similar to the proposed amendment to the Florida Rules of Civil Procedure to allow depositions by telephone. Since the court has discretion to allow this testimony, all procedural safeguards could be maintained by the court. Since the court is also the trier of fact, the testimony could be rejected if unreliable.

**1988 Amendment.** Extends the taking of testimony over the telephone to include parties, deletes the agreement of the parties provision, and adds authorization for an attorney to represent a party or witness over the telephone without being physically present before the court.

**1996 Amendment.** The revised version of subdivision (e) addresses the need to expressly provide that the judge, while able to assist an unrepresented party, should not act as an advocate for that party.

**2007 Amendment.** Subdivision (e)(3) was added so that a judge can assist an unrepresented party in the handling of private information that might otherwise inadvertently become public by placement in the court file.

Proposed changes:	Reasons for change:
<p><b>RULE 7.300. FORMS</b></p> <p>The following forms of process are sufficient in all actions.</p> <p>The following forms of statements of claim and other papers are sufficient for the types of actions which they respectively cover. They are intended for illustration only. They and like forms may be used with such modifications as may be necessary to meet the facts of each particular action so long as the substance thereof is expressed without prolixity. The common counts are not sufficient. The complaint forms appended to the Florida Rules of Civil Procedure may be utilized if appropriate.</p> <p><u>Unless specifically required by a particular form, by the court, or by law, a party shall not include personal information such as a social security number, driver's license number, or bank account number on any form filed with the clerk of the court.</u></p> <p>The following forms are approved:</p>	<p></p> <p>This language is added to alert small claims litigants to not include unnecessary personal information in documents that will be filed with the court. When a social security number is required (e.g., in judgments under § 55.10, Fla. Stat.), the use of the last four digits of that number is sufficient.</p>



## APPENDIX D

Background Documents  
(referral letters and § 55.10, Fla. Stat.)

July 27, 2006

Mr. Keith H. Park  
Chair, Civil Procedure Rules Committee  
P.O. Box 3563  
West Palm Beach, Florida 33402-3563

Mr. William C. Vose  
Chair, Criminal Procedure Rules Committee  
1104 Bahama Drive  
Orlando, Florida 32806-1440

Mr. John Fraser Himes  
Chair, Family Law Rules Committee  
Himes & Boire, P.A.  
101 E. Kennedy Boulevard, Suite 2430  
Tampa, Florida 33602-5895

Mr. Gary D. Fox  
Chair, Rules of Judicial Administration Committee  
One S.E. 3rd Ave., Suite 3000  
Miami, Florida 33131-1711

Ms. Mary K. Wimsett  
Chair, Juvenile Court Rules Committee  
Guardian Ad Litem Program  
1132 N.W. 58th Terrace  
Gainesville, Florida 32605-4477

Mr. Peter A. Sachs  
Chair, Probate Rules Committee  
505 S. Flagler Drive, Suite 1100  
West Palm Beach, Florida 33401

The Honorable Pauline M. Drayton  
Chair, Small Claims Rules Committee  
Duval County Court  
330 E. Bay Street  
Jacksonville, Florida 32202-2921

Mr. Peter A. Sartes II  
Chair, Traffic Court Rules Committee  
600 Cleveland Street, Suite 700  
Clearwater, Florida 33755-4158

Re: Report and Recommendations of the Committee on Privacy and Court  
Records — Recommendation Ten: Duty to Protect Discovery Information

Dear Rules Committee Chairs:

I am writing to you in follow up to Administrative Order Implementation of Report and Recommendations of the Committee on Privacy and Court Records, Fla. Admin. Order No. AOSC06-20 (June 30, 2006), which refers to your committee's Recommendation Ten contained in the report of the Committee on Privacy and Court Records. For your convenience, I have enclosed a copy of the administrative order and the report. The full report can be found on the Court's website at [http://www.flcourts.org/gen\\_public/stratplan/privacy.shtml](http://www.flcourts.org/gen_public/stratplan/privacy.shtml).

Recommendation Ten urges the Court to adopt a rule of procedure that would require attorneys and litigants to refrain from filing discovery information with the court until such time as it is filed for good cause. In connection with that recommendation, the committee reported that

[it] considered the problem of the routine and sometimes gratuitous filing of information that has been disclosed pursuant to a discovery order. The Committee notes that compelled discovery is an exercise of state power subject to restraint by the right of privacy provided in Section 23 of Article I of the Florida Constitution, which has been held to protect citizens from intrusion any greater than necessary to achieve the state interest. The Committee urges that parties who gain possession of information pursuant to compelled discovery should protect the fruits of discovery, and should be constrained from

publishing discovery material into a court file unless and until such time as the information may be properly filed for good cause.

Report at 56. Therefore, in order to protect discovery materials, the committee recommended that

the Supreme Court direct the creation of a rule of procedure that would require attorneys and litigants to refrain from filing discovery information with the court until such time as it is filed for good cause. The court shall have authority to sanction an attorney or party for violation of this rule.

Report at 56. In response to this recommendation, Administrative Order No. AOSC06-20 at 16 asks your committees to "study whether rules exist or rules should be adopted that would require attorneys and litigants to refrain from filing discovery information with the court until such time as it is filed for good cause."

Your committees should work together to study this issue and make recommendations to the Court. Your joint out-of-cycle report or individual reports should be filed with my office by April 1, 2007. If you need more time to consider this matter, please file requests for an extension with my office.

Thank you in advance for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Most cordially,

By: /s/ Barbara Harley-Price  
Deputy Clerk  
Thomas D. Hall

Enclosures

TDH/dm/sb

cc: Chief Justice R. Fred Lewis  
Jon Mills, Chair, Committee on Privacy and Court Records  
Lisa Goodner, State Courts Administrator  
Ellen Sloyer, Bar Staff Liaison

Madelon Horwich, Bar Staff Liaison  
Gerry Rose, Bar Staff Liaison Craig Shaw, Bar Staff Liaison  
Ann Chittenden, Bar Staff Liaison  
Deborah J. Meyer, Director of Central Staff

July 27, 2006

Mr. Edward M. Mullins  
Chair, Appellate Court Rules Committee  
701 Brickell Ave., Floor 16  
Miami, Florida 33131-2801

Mr. Keith H. Park  
Chair, Civil Procedure Rules Committee  
P. O. Box 3563  
West Palm Beach, Florida 33402-3563

Mr. William C. Vose  
Chair, Criminal Procedure Rules Committee  
1104 Bahama Dr.  
Orlando, Florida 32806-1440

Mr. Gary D. Fox  
Chair, Rules of Judicial Administration Committee  
One S.E. 3rd Ave., Suite 3000  
Miami, Florida 33131-1711

Mr. Mary K. Wimsett  
Chair, Juvenile Court Rules Committee  
Guardian Ad Litem Program  
1132 N.W. 58th Terr.  
Gainesville, Florida 32605-4477

Mr. Peter A. Sachs  
Chair, Probate Rules Committee  
505 S. Flagler Dr., Suite 1100  
West Palm Beach, Florida 33401

Hon. Pauline M. Drayton  
Chair, Small Claims Rules Committee  
Duval County Court  
330 E. Bay St.  
Jacksonville, Florida 32202-2921

Peter A. Sartes II  
Chair, Traffic Court Rules Committee  
600 Cleveland St., Suite 700  
Clearwater, Florida 33755-4158

Re: Report and Recommendations of the Committee on Privacy and Court Records —Recommendation Seven: Revision of Rules and Forms Leading to Extraneous Personal Information.

Dear Rules Committee Chairs:

I am writing to you in follow up to Administrative Order Implementation of Report and Recommendations of the Committee on Privacy and Court Records, Fla. Admin. Order No. AOSC06-20 (June 30, 2006), which refers to your committees Recommendation Seven contained in the report of the Committee on Privacy and Court Records. For your convenience, I have enclosed a copy of the administrative order and the report. The full report can be found on the Court's website at [http://www.flcourts.org/gen\\_public/stratplan/privacy.shtml](http://www.flcourts.org/gen_public/stratplan/privacy.shtml).

Recommendation Seven urges the review and revision of all rules and forms to avoid the filing of personal information that is not necessary for adjudication or case management. The committee reported that it

determined that a systematic review of court rules and approved forms would reveal that a number of rules and forms are written in ways that lead to routine filing of personal information which is not needed by the court for purposes of adjudication or case management.

Report at 53. The committee therefore recommended that the Court

direct a comprehensive judicial branch initiative to review and revise rules of court and approved court forms across all case types for the purpose of modifying rules and forms to avoid the filing of personal information which is not necessary for adjudication or case management.

Report at 53.

To implement Recommendation Seven, Administrative Order No. AOSC06-20 at 15 asks your committees to review their respective bodies of rules and forms

and to propose amendments to the rules and forms consistent with this recommendation.

Please file out-of-cycle reports of your proposed amendments with my office by April 1, 2007. If you need more time to consider this matter, please file a request for an extension with my office.

Thank you in advance for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Most cordially,

By: /s/ Barbara Harley-Price  
Deputy Clerk  
Thomas D. Hall

Enclosures

TDH/dm/sb

cc: Chief Justice R. Fred Lewis  
Jon Mills, Chair, Committee on Privacy and Court Records  
Lisa Goodner, State Courts Administrator  
Ellen Sloyer, Bar Staff Liaison  
Joanna Mauer, Bar Staff Liaison  
Madelon Horwich, Bar Staff Liaison  
Gerry Rose, Bar Staff Liaison  
Craig Shaw, Bar Staff Liaison  
Ann Chittenden, Bar Staff Liaison  
Deborah J. Meyer, Director of Central Staff



**55.01 Judgments; general form.--**

(1) In all actions where either party recovers a sum of money, the amount to which he or she is entitled may be awarded by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of debt or damages.

(2) Each final judgment shall contain thereon the address and the social security number, if known to the prevailing party, of each person against whom judgment is rendered. Errors in names, addresses, or social security numbers or failure to include same shall in no way affect the validity or finality of a final judgment.

**History.**--s. 40, ch. 1096, 1861; RS 1171; GS 1598; RGS 2800; CGL 4486; s. 9, ch. 67-254; s. 1, ch. 79-387; s. 9, ch. 93-250; s. 293, ch. 95-147.

## APPENDIX E

Certification that Proposed Rules Have Been Read Against  
West's FLORIDA RULES OF COURT

## READ-AGAINST CERTIFICATION

I certify that these rules and forms were read against West's *Florida Rules of Court – State* (2006).

---

Madelon Horwich, Legal Editor  
Legal Publications  
The Florida Bar

IN THE SUPREME COURT OF FLORIDA

FILED  
THOMAS O. HALL

IN RE: REPORT AND RECOMMENDATIONS  
OF THE COMMITTEE ON PRIVACY  
AND COURT RECORDS

2011 NOV 20 P 3:26  
CLERK, SUPREME COURT  
BY \_\_\_\_\_

CASE NO:

REPORT OF THE FLORIDA  
APPELLATE COURT RULES COMMITTEE

Edward Maurice Mullins, Chair, Florida Appellate Court Rules Committee, and John F. Harkness, Jr., Executive Director, The Florida Bar, file this report of the Appellate Court Rules Committee (“ACRC”) under *Fla. R. Jud. Admin.* 2.140(f), as requested by the Court in AO SC06-20, regarding the implementation of the recommendations set forth in the Report on Privacy and Court Records (“Privacy Report”), specifically Recommendation 7 of the Privacy Report.

Attached is a two-column chart setting forth the proposed new rule contained in this Report as Appendix A, and a copy of the new rule in full-page legislative format is set forth as Appendix B.

As required by *Rule* 2.140, the proposed new rule was reviewed by the Board of Governors of The Florida Bar, which voted 34-0 to approve the proposed amendment. The ACRC’s final numerical voting record on the proposal is indicated below as part of the discussion detailing the explanation of the proposal.

## Proposed Rule 9.050

The proposed rule arose in response to this Court's Administrative Order SC06-20, regarding the implementation of the recommendations set forth in the Privacy Report. Specifically, Recommendation 7 in the Privacy Report provides, in relevant part, that each of the rules committees "review and revise rules of court and approved court forms across all case types for the purpose of modifying rules and forms to avoid the filing of personal information which is not necessary for adjudication or case management."

To implement Recommendation 7, Florida Supreme Court Clerk Thomas Hall sent a letter to the chairs of the various Florida Bar rules committees, asking the committees to review their respective bodies of rules and forms, and to propose amendments to the rules and forms, consistent with the recommendation to "avoid the filing of personal information which is not necessary for adjudication or case management." The ACRC's Record on Appeal Subcommittee (the "Subcommittee"), chaired by Robert Biasotti, was assigned the task of recommending a proposed rule.

The Subcommittee met five times by conference call to discuss the recommendation on November 28, December 1, December 5, December 12, and December 19, 2006. Additionally, the Subcommittee conferred a sixth time, on

December 20-21, 2006, by electronic mail, to finalize its report and the proposed rule, and to vote on the proposal.

The Subcommittee Chair contacted his counterparts on several other rules committees to review what action the other rules committees were undertaking in response to this Court's Administrative Order SC06-20 and Recommendation 7. Specifically, the Subcommittee chair contacted his counterparts on the Juvenile, Family, Criminal, Civil, Probate and Judicial Administration Rules Committees. He provided the Record Subcommittee with the Civil Rules Committee's interim draft rule for consideration as well as with the information he gleaned from his counterparts on the other rules committees listed above.

The Subcommittee had extensive discussion regarding the types of privacy data that potentially may be contained in records on appeal and in designated transcripts. Additionally, the Subcommittee researched and vigorously debated those issues and the feedback provided by other rules committees.

The Subcommittee also discussed and acknowledged the need for additional limitations with respect to the information maintained in the records of the lower tribunals and, by extension, the records that will appear in either the appellate records or an appendix. However, the Subcommittee chose not to address these issues in its proposed rule because:

- the other rules committees presumptively would address the use of personal privacy data in their corresponding rules at the lower court level and thus would cover any issues with respect to appendices;
- no appellate court currently permits (or has the capability to permit) on-line access to the underlying appellate records or appendices; and
- the Florida Supreme Court recently created the Committee on Access to Court Records, Administrative Order AOSC06-27, which will be addressing many of the concerns raised by the members of the Subcommittee regarding what would be redacted from court records and how that redaction will be accomplished.

Based on the above discussions, the Subcommittee concluded that, at some point in the future, the appellate rules may require additional modification to facilitate the redaction of private information in the appellate record and appendices if, and particularly when, electronic filing and internet access make appellate records accessible to the public. Unless and until that happens, the Subcommittee concluded it would be premature to craft a rule addressing the redaction of this information in the appellate records and appendices.

Thus, in drafting a new appellate rule, the Subcommittee limited its consideration to maintaining privacy of personal data contained in briefs, petitions, replies, motions, and responses. The Subcommittee voted unanimously to propose

a new appellate rule, Rule 9.050, Maintaining Privacy of Personal Data. The Subcommittee's report, as well as the minutes of the Subcommittee's meetings, are set forth as Appendix C.

Proposed Rule 9.050 can trace its genesis back to a rule previously proposed to the ACRC by the Family Law Subcommittee of the ACRC in 2004-2005. That rule, in turn, was based on the then-equivalent Eleventh Circuit Rule, 11th Cir. R. 31-6 (2004) (which was later renumbered as 11th Cir. R. 25-5 (2006)), and the underlying federal statute, the E-Government Act of 2002, 44 U.S.C. §3601-06. The ACRC debated the Family Law Subcommittee's proposal in 2005. As explained at that time by Mr. Hall, an ad hoc ACRC member and member of the Standing Committee on Privacy, because the Privacy Committee had not yet completed its report any ACRC proposal would be premature. However, the Family Law Subcommittee proposal was voted on; it failed, 18-27. Although the minutes of that meeting's discussion were sent to the Privacy Committee, they also are attached here for ease of reference as Appendix D.

The new appellate rule was proposed at the ACRC's January 17, 2007, meeting. Preliminarily to the ACRC's discussion, Subcommittee Chair Biasotti noted that the Subcommittee included the term "including but not limited to" in the definition of "Personal Identifying Numbers" in case the drafter of an appellate document thinks other information should be redacted for privacy reasons. The



Subcommittee had decided not to attempt to define the extent of a redaction (for example, how many digits of a social security number or a driver's license number should be redacted).

Biasotti also reported that, with regard to the introduction and the inclusion of the language "unless otherwise required by another rule or permitted by leave of court," the Subcommittee wanted to account for the possibility that other Florida rules committees may adopt additional, and possibly more specific, rules regarding privacy concerns, and to avoid any conflicts with those rules.

During discussion at the ACRC meeting, no one expressed any objection to adopting a new rule. The ACRC discussed and approved various stylistic and formatting amendments to the Subcommittee's proposal including:

- combining the home address and date of birth sections into the personal identifying data subdivision;
- changing the title "personal identifying numbers" to "personal identifying data";
- striking the word "financial" as redundant;
- adding notices as part of the included items.

Much discussion was had at the ACRC meeting as to whether appendices should be included in the coverage of the rule, but the view of the majority of the ACRC was to follow the recommendation of the Subcommittee to not include appendices for the reasons stated above. Discussion also was had as to whether

attachments should be included. The sense of the majority of the ACRC was that attachments should be included as this material was in the control of the appellate practitioner who could be expected to redact the personal identifying data just as the practitioner could be expected to do with respect to a brief or motion. The ACRC approved an amendment to the proposed rule to clarify that appendices are not included in the rule, but attachments are.

The proposal as amended passed 37-2. The ACRC minutes concerning this proposal are set forth as Appendix E.

The proposed rule mandates that, unless otherwise required by another rule of court, or permitted by leave of court, certain personal data must be excluded from, or redacted in, all briefs, petitions, motions, notices, responses, and any attachments to these documents, before filing them in the appellate court. Thus, the application of the proposed rule is limited specifically to the documents described in the rule. Subdivision (b) explains that the rule's reach does not extend to require redaction of personal identifying data from the record, or appendices.

The rule describes "personal identifying data" to include the names of minor children and data used to identify a person for governmental or business purposes. Implicit in the rule is the understanding that the data that must be redacted is the type of information that is unnecessary for adjudication or case management purposes.

The rule provides a nonexclusive list of what is considered personal identifying data. If a practitioner must refer to personal identifying data, the rule mandates that, to the extent possible, the practitioner redact the information in a manner that protects the privacy of the referred-to person.

WHEREFORE, the Appellate Court Rules Committee respectfully requests the Court to amend the Florida Rules of Appellate Procedure as proposed in this report.

Dated: \_\_\_\_\_

Respectfully submitted

---

Edward M. Mullins, Chair  
Appellate Court Rules Committee  
Fla. Bar No. 863920  
Astigarraga, Davis, Mullins & Grossman, P.A.  
701 Brickell Avenue, 16<sup>th</sup> Floor  
Miami, FL 33131  
305-372-8282

---

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

## **CERTIFICATE OF SERVICE**

I certify that copy of the foregoing was furnished by United States mail to: Lisa Goodner, Office of the State Courts Administrator, 500 S. Duval St., Tallahassee, FL. 32399-6556; and Jon Mills, Chair, Committee on Privacy and Court Records, P.O. Box 2099, Gainesville, FL., 32602-2099, on April 2, 2007.

## **CERTIFICATE OF COMPLIANCE**

I certify that this report was prepared in MS Word using 14 point Times New Roman font.

---

Joanna A. Mauer  
Staff Liaison, Florida Appellate Court Rules Committee  
The Florida Bar

## Proposed rule

### **Rule 9.050. MAINTAINING PRIVACY OF PERSONAL DATA**

(a) **Application.** Unless otherwise required by another rule of court or permitted by leave of court, the following personal data shall be excluded from or redacted in all briefs, petitions, replies, motions, notices, and responses and any attachments thereto filed with the court:

(1) **Names of Minor Children.** If a minor child must be referred to, either a generic reference or the initials of that child shall be used. For purposes of this rule, a minor child is any person under the age of 18 years, unless otherwise provided by statute or court order.

(2) **Personal Identifying Data.** Personal identifying data includes data used to identify a specific person for governmental or business purposes, including but not limited to dates of birth, home addresses, social security numbers, driver's license numbers, passport numbers, telephone numbers, email addresses, computer user names, passwords, and financial, bank, brokerage, and credit card account numbers. If personal identifying data must be referred to, it shall be redacted to the extent possible to protect the privacy of the referenced person.

(b) **Limitation.** This rule does not require redaction

## Reason for change

Provides that, to protect a person's privacy, the filing of personal information that is not necessary for adjudication or case management in appellate briefs, petitions, replies, motions, notices, responses and attachments to these documents, may be omitted from these documents.

of personal data from the record or appendices.

**Committee note**

2007. This new rule was added to protect personal privacy and other legitimate interests, such as the prevention of identity theft, with the advent of appellate court records being made electronically available on a wide scale. This new rule recognizes that the listed information must sometimes be referred to, but provides that when it is, the information must be redacted in a way that protects the privacy of the referenced person. For example, if a particular credit card account number must be disclosed to distinguish among multiple accounts, the last four digits of the account number may be sufficient to uniquely identify the account at issue. In some contexts, no redaction would be possible, such as the identifying information of an attorney or pro se litigant, required to be provided by Florida Rule of Judicial Administration 2.515(a) and (b).

## **Rule 9.050. MAINTAINING PRIVACY OF PERSONAL DATA**

(a) **Application.** Unless otherwise required by another rule of court or permitted by leave of court, the following personal data shall be excluded from or redacted in all briefs, petitions, replies, motions, notices, and responses and any attachments thereto filed with the court:

(1) **Names of Minor Children.** If a minor child must be referred to, either a generic reference or the initials of that child shall be used. For purposes of this rule, a minor child is any person under the age of 18 years, unless otherwise provided by statute or court order.

(2) **Personal Identifying Data.** Personal identifying data includes data used to identify a specific person for governmental or business purposes, including but not limited to dates of birth, home addresses, social security numbers, driver's license numbers, passport numbers, telephone numbers, email addresses, computer user names, passwords, and financial, bank, brokerage, and credit card account numbers. If personal identifying data must be referred to, it shall be redacted to the extent possible to protect the privacy of the referenced person.

(b) **Limitation.** This rule does not require redaction of personal data from the record or appendices.

### **Committee note**

2007. This new rule was added to protect personal privacy and other legitimate interests, such as the prevention of identity theft, with the advent of appellate court records being made electronically available on a wide scale. This new rule recognizes that the listed information must sometimes be referred to, but provides that when it is, the information must be redacted in a way that protects the privacy of the referenced person. For example, if a particular credit card account number must be disclosed to distinguish among multiple accounts, the last four digits of the account number may be sufficient to uniquely identify the account at issue. In some contexts, no redaction would be possible, such as the identifying information of an attorney or pro se litigant, required to be provided by Florida Rule of Judicial Administration 2.515(a) and (b).

To: Edward Mullins [emullins@astidavis.com]  
Joanna Mauer [jmauer@flabar.org]

From: Robert E. Biasotti

Date: December 21, 2006

Re: Status Report: Record On Appeal Subcommittee, Report for the  
January 2007 Meeting of The Florida Bar Appellate Rules  
Committee

---

The Record On Appeal subcommittee addressed one issue since the September meeting of the full committee-- the Florida Supreme Court's Administrative Order AOSC06-20, regarding the implementation of the recommendations set forth in the Report on Privacy and Court Records.

Specifically, Recommendation 7 in that report provided, in relevant part, that each of the rules committees:

review and revise rules of court and approved court forms across all case types for the purpose of modifying rules and forms to avoid the filing of personal information which is not necessary for adjudication or case management.

AOSC06-20 at 15.

In order to implement that recommendation, Tom Hall sent a letter to the chairs of all of the Florida rules committees, asking the committees to review their respective bodies of rules and forms, and to propose amendments to the rules and forms, consistent with the committee's recommendation, that would "avoid the filing of personal information which is not necessary for adjudications or case management." Report at 53; see also AOSC06-20 at 15.

That task was assigned to this subcommittee. The report to the Supreme Court is due by April 2007 (out of cycle), so the subcommittee was directed to address this matter, if possible, before the January 2007 meeting of the full committee.

### **Actions Taken**

The subcommittee met five (5) times by conference call to discuss this issue--November 28; December 1; December 5, December 12, and December 19; and conferred a sixth time by e-mail, finalizing this report and the proposed rule, and voting by email on December 20-21.



Additionally, the subcommittee chair contacted our counterparts on several of the other rules committees:

Juvenile Rules	David Silverstein	Will not likely propose any specific rules, since confidentiality of juvenile records is governed by statute.
Family Rules	Ronald Bornstein	Did not obtain a response
Criminal Rules	Robert Dillinger	Committee plans to take no action; deem the requested changes to be for the Legislature or the Clerks of Court
Civil Rules	Robert Mansback	Committee is working on this project; he provided me with an interim draft rule change, which I circulated to our subcommittee and is included in our minutes.
Probate Rules	n/a	No one specific is working on this issue--per bar liaison Craig Shaw.
Rules of Judicial Administration	Judge Lisa Davidson	Expects sub-committee will propose one catch-all rule that would reinforce the specific rules adopted by the other rules committees.

Copies of the minutes of the sub-committee meetings are attached hereto and are incorporated by reference into this report. Also attached are two e-mails addressing changes and modifications to the proposed rule and/or committee note that were requested but not adopted.

### **Proposed Rule Change**

The sub-committee proposes a rule that addresses the use of personal privacy data in briefs, petitions, replies, motions, and responses. Those documents are currently accessible on-line in the Florida Supreme Court, and may be on-line soon in other Florida appellate courts.

The sub-committee had extensive discussions regarding privacy data that may be contained in records on appeal and in designated transcripts. It researched and vigorously debated those issues, and conferred with the chairs of numerous other rules sub-committees--including our criminal rules and civil rules counterparts. We received very little feedback from the other rules committees.

The sub-committee acknowledged the need for additional limitations with respect to the information maintained in the records of the lower tribunals and, by extension, the records that will appear in either the appellate record or an appendix. However, the committee did not address those issues for three reasons:

- first, the other rules committees will presumptively address the use of personal privacy data in their corresponding rules;
- second, no appellate court currently permits (or has the capability to permit) on-line access to the underlying appellate records or appendices; and
- third, the Florida Supreme Court recently created the Committee on Access to Court Records, Administrative Order AOSC06-27, which will be addressing many of the concerns that our subcommittee raised regarding what will be redacted from court records and how that redaction will be accomplished.

Based on the above, the sub-committee concluded that, at some point in the future, the appellate rules may require additional modifications to facilitate the redaction of private information in appellate records and appendices -- particularly if and when electronic filing and internet access make appellate records accessible to the public online. Unless and until that happens, the sub-committee felt it would be premature to craft any rule addressing the redaction of private information contained in appellate records or appendices.

Attached is a copy of our proposed rule 9.050--Maintaining Privacy of Personal Data. The rule proposed below had its genesis from a rule previously proposed to this committee by the Family Law subcommittee in 2004. That rule was based on the then-equivalent Eleventh Circuit Rule, 11th Cir. R. 31-6 (2004) (which was thereafter re-numbered as 11th Cir. R. 25-5 (2006)), and the underlying federal statute, the E-Government Act of 2002--44 U.S.C. § 3601-06.

The sub-committee approved this report and the proposed rule by e-mail vote, held on December 20-21. The results were: 9 for; 0 against.

Respectfully Submitted,

Robert E. Biasotti, of behalf of  
the Record On Appeal Issues Subcommittee

cc: Siobhan Shea

## **Minutes, Conference Call, Tuesday, November 28, 2006**

Present: Bob Biasotti (chair), Brandon Vesely, Tom Young, Paul Nettleton, Siobhan Shea

The conference call meeting was called to order at 4:05 pm.

We had a brief discussion of the scope of the task before us.

I stated that I thought the appellate rules should not require much change, since virtually all court documents that are the subject of an appeal or writ will have already been filed in another court (criminal or civil), and will have been subject to whatever rules are implemented by those rules committees (civil, family, probate, criminal, etc). In fact, it would be confusing to litigants if our appellate rules conflicted or imposed different confidentiality requirements for the appeal than the rules required for documents filed in the underlying case that is being appealed.

Siobhan Shea observed that we have a responsibility to make sure that the supreme court's order is implemented, and that our rules make clear that briefs and writs do not contain confidential information. Moreover, trial and hearing transcripts--which are original products prepared as a result of an appellate rule and form--the designations to the court reporter-- are really appellate documents, prepared in the first instance for an appeal; and our rules may need to provide guidance for court reporters preparing designated transcripts.

Tom Young observed that he works on many appeals involving termination of parental rights, where there already exists a rule (Fla. R. App. P. 9.146(e)) which requires parties to exclude the names of children from all briefs and papers filed in dependency cases. Even with such a rule in place, appellate litigants routinely ignore that rule.... He felt our proposal should include an enforcement provision, or indication of consequences for violating the rule.

Paul Nettleton suggested that we focus on implementing precisely what the court asked us to do--no more no less-- perhaps proposing a rule that tracks the supreme court's order.

Brandon Vesely observed that a prior subcommittee had addressed this issue before, and had even proposed a specific rule; but the full committee at that time decided to put that rule on hold pending the supreme court's privacy committee review that was underway at the time.

Brandon agree to obtain a copy of that report for us to review.

I agreed to contact the other rules committees to see what steps they have takes so far in complying with the supreme court's order.

Siobhan Shea asked if I would re-circulate the document we were discussing-- i.e., the supreme court's order.

The meeting adjourned at 4:40pm.

### **Minutes, Conference Call Friday, December 1, 2006**

Present: Bob Biasotti (chair), Brandon Vesely, Tom Young, David Gemmer, Carol Dittmar, Dorothy Easley

The conference call meeting was called to order at 11:05 am.

We began the meeting discussing the forms that were circulated with the minutes of the first meeting; in particular, the rule that had previously been proposed by the Family Law subcommittee in 2004 (Brandon obtained a copy of this proposed rule from John Mills).

I reported that I had been contacting our counterparts on the other rules committees, who were looking into this same issue (i.e., the implementation of SCAO-05-20):

Juvenile: David Silverstein

Family: Ron Bornstein

Criminal: Bob Dillinger

Civil: Robert Mansback

Probate: no one on this subcommittee is currently working on this issue

Judicial Administration: Judge Lisa Davidson

None of the committees had formulated a proposed rule as of yet. The Criminal Rules Committee (Bob Dillinger) reported that their official position is that the changes requested by the supreme court could not be accomplished by rules changes, but instead must be implemented by the Legislature or the Clerks of Court. Accordingly, the Criminal Rules Committee is not proposing any changes.

The subcommittee had an extended discussion regarding the scope of the proposed rule(s) we should consider.

The majority of the members present felt that our review and proposed rule should be limited to original documents that are prepared in the first instance for

or by the appellate court--such as briefs, writs, motions, orders, and appellate decisions. I reported that, at our last meeting, Siobhan Shea raise the question of whether designated transcripts should be included in this group, since they are documents that prepared specifically for an appeal. We also discussed whether an appendix would fall into this category.

Dorothy Easley dissented, noting that, in the past, parts of records on appeal have been redacted when trial counsel failed to do so in the first instance and the record was on its way to the District Court of Appeal. Ms. Easley is of the opinion, based on her experience representing health plans, that in those instances, appellate lawyers have an obligation to assist the appellate courts and take the lead in those unique instances when records on appeal are traveling with sensitive information that someone has to take the responsibility to correct. Ms. Easley proposed the following: 1. allow the record on appeal to be assembled in its "pristine" form as is referred to; and 2. file an agreed motion, as Ms. Easley has done in the past, to accept the redacted record on appeal as the record that will be online and/or available to the general public.

I stated that, in my experience, that represents an extremely small percentage of appellate records. The vast majority of appellate records are prepared by the clerks of the lower tribunals, and forwarded directly to the appellate courts.

No votes were taken on these issues at this meeting, but the general consensus arising from the discussion was that any rule we propose should limit its reach to writs, briefs, motions, orders, and appellate decisions. Unless and until the appellate courts undertake to put electronic transcripts and appendices on line, the redaction of those documents will not be an issue. On the other hand, the supreme court already puts briefs, writs, orders and decisions on line; so we need a rule to address those documents.

I asked that the committee members review the specific text of the rule proposed by the Family Law subcommittee in 2004, to determine if we could use or adapt that language as a starting point for any rule we propose.

Still to be discussed is where any such new rule would go. (One possibility: in rule 9.040, General Provisions).

After the meeting, David Gemmer submitted some written thoughts for our consideration (a copy of which is attached).

The meeting adjourned at 12:05 pm.

## GEMMER MEMO

### Assumptions

Trial record is presumed pristine. This includes all pleadings, depositions, and other material in the clerk's file, as well as all evidence retained by the court. The duty to ensure the record to the point of appeal is pristine lies with the trial attorneys and the trial court, pursuant to the mechanisms in place in the trial court rules (civil and criminal).

If a trial or appellate attorney wishes to have additional material redacted or wishes to have trial-level redactions removed, i.e. the original information placed in the record, a mechanism should be created to allow counsel to seek relief in the trial court.

This could be in the form of an appellate rule, as an adjunct to the record provisions already in place.

Appellate counsel bears no burden to ensure the record below is pristine. That burden lies with the trial court and counsel who are creating that record.

One way to ensure a clean record vis-a-vis all transcripts prepared by court reporters would be to have a laundry list of information which would automatically be redacted in every transcript, whether deposition or hearing. The reporters would prepare two electronic copies of the transcript, one redacted pursuant to the laundry list, the other completely unredacted, with the information which was redacted marked electronically to permit easy manipulation of the unredacted electronic file for purposes of unredacting information pursuant to any order of the court. The unredacted electronic version and a hard copy would be prepared and subject to sealing if made a part of the public court record (e.g. depositions not necessarily filed with the court, but with the potential that they would be filed). Any transcript filed by the reporter directly would be filed as a sealed unredacted version and an unsealed redacted version.

Presumably, with automatic redaction of transcripts and a mechanism to unredact information essential to resolution of the cause, the trial record will be pristine. Pleadings and other materials would be redacted pursuant to the trial rules.

All materials generated by appellate counsel will be redacted. Any transcripts not already in the court file would be prepared pursuant to the same laundry list and procedures for adjustment, unless someone can think of a variant list relevant specifically to appellate purposes (e.g. more restrictive since many facts might no longer be necessary to understand the outcome of the case).

Appendices which include materials on file in the trial court would already be presumed pristine (and counsel would have the duty to file the redacted version). Any original materials not already subject to the trial court redaction process would have to be redacted by appellate counsel, subject to a procedure to allow opposing counsel to seek redaction or un-redaction as appropriate.

While records on appeal and transcripts are not yet online, the requirement that reporters provide electronic filing of same appears to be a step toward that end, pending resolution of the privacy issues.

To implement the assumptions etc. above, the appellate rules subcommittee would need to develop proposed rules for the following:

1. Rule re materials generated by appellate counsel or at the direction of appellate counsel – designated transcripts generated because they were never prepared at the trial level, briefs, motions, etc.
2. Mechanism to allow adjustment of the record, i.e. redaction/unredaction for appellate purposes, with the presumption that the record below as it exists before the addition of designated transcripts is in a state of appropriate redaction not requiring any action by appellate counsel. Adjustments should be permitted by trial or appellate counsel. It would be the responsibility of the trial and appellate counsel to coordinate this effort as between themselves. This gives the parties the opportunity to correct any errors at the conclusion of the trial proceedings, and to adjust the record when necessary to allow full appellate review while redacting additional material if desired at the close of the trial proceedings if it becomes clear that information essential at the trial level is not relevant to appellate issues. However, there should be no duty to do anything beyond accepting the presumptively pristine trial record.
3. Any laundry list information unique to appeals which needs to be added or removed from the court reporters' list. This is contingent on the trial-level rules subcommittees develop vis-a-vis transcripts below.

# 1 is the most straightforward task, and the one requiring the most immediate attention.

#2 is collateral to #1 and should travel with or follow closely.

#3 is for the trial rules subcommittees, except for any matters unique to appeals. It is also contingent on whatever mechanisms the trial rules committees come up with to ensure that transcripts filed in the trial court proceedings as redacted ab initio.

I suspect the laundry list concept has already been around the block with the committees directly responsible for same. Or the list idea might prove unworkable as too rigid, etc – however the draft rule we are looking at was able to come up with a short list which should pose no problems for court reporters to implement.

Hope this helps.

David Gemmer  
Assistant CCRC-Middle

### **Minutes, Conference Call Tuesday, December 5, 2006**

Present: Bob Biasotti (chair), Brandon Vesely, Tom Young, David Gemmer, Carol Dittmar, Dorothy Easley, Siobhan Shea

The conference call meeting was called to order at 4:10 pm.

The committee members discussed the proposed rule. We reviewed the rule proposed by the Family Law subcommittee in 2004, to determine if we could use or adapt that language as a starting point for any rule we propose.

We also reviewed 11th Cir. R. 31-6 (2005), which was thereafter re-numbered as 11th Cir. R. 25-5 (2006).

After discussion, Bob Biasotti indicated he would circulate a proposed rule, consistent with our discussion.

The next meeting is scheduled for December 12, at 3:00 pm (the meeting time for the next meeting was changed to accommodate the members' schedules).

The meeting adjourned at 4:50 pm.

### **Minutes, Conference Call Tuesday, December 12, 2006**

Present: Bob Biasotti (chair), Brandon Vesely, Tom Young, David Gemmer, Henry Gyden, Paul Nettleton, Siobhan Shea

The conference call meeting was called to order at 3:10 pm.

We reviewed the proposed report and the draft rule that was circulated after the last meeting.

After discussion, two changes were made to the proposed rule:

a) the would "should" in sub-paragraphs (a-d) was changed to "shall," to better align with the introductory paragraph;

b) the last sentence in paragraph (c) was moved to be the last paragraph in the introductory paragraph, and modified slightly to fit the relocation.

Attached to these minutes is version 2 of the amended rule.

A last meeting to finalize the proposed rule was tentatively set for next Tuesday, 12/19 at 3:00 pm, pending availability of the conference call line.



The meeting adjourned at 3:45 pm.

**Minutes, Conference Call Tuesday, December 19, 2006**

Present: Bob Biasotti (chair), Brandon Vesely, Henry Gyden, Paul Nettleton, Carol Dittmar, Dorothy Easley

The conference call meeting was called to order at 3:10 pm.

We reviewed the previously-circulated proposed rule 9.050 , in light of the comments received from Paul Nettleton, Dorothy Easley, and Siobhan Shea and circulated to the subcommittee.

After extensive discussion, several changes were made to the proposed rule:

a) the last sentence in the introduction was moved (back) to be the last sentence in paragraph (c) and modified slightly.

b) the term "personally identifying numbers" was changed to "personal identifying numbers"

c) the first sentence of the introduction was modified in two ways: 1) remove the reference to 'where inclusion is necessary', and 2) add the term "or permitted by leave of court"

d) paragraph a was modified to delete the words "by name."

Attached to these minutes is version 3 of the amended rule.

Dorothy Easley drafted a sentence that is to be incorporated into the report.

A request was made by the chair that each member of the subcommittee review the final draft report and rule one final time before it is submitted for consideration by the full committee.

The meeting adjourned at 3:45 pm.

**Notes, Final Revision, Draft Rule, Circulated Wednesday, December 20, 2006**

**Subject:** Vote On Final Version Of Sub-Committee Report

Thank you all for your thoughts and comments.

The extensive e-mail discussion that has gone on during the last 24 hrs. supports my earlier conclusion--this discussion could go on for many weeks. But we need

to cut it off somewhere. Accordingly, discussion is now closed (for the purpose of finalizing this report and rule).

I have obtained a one-day extension from Ed Mullins for submitting our report.

What I would like to do now is this: circulate one final version of the report and proposed rule, in a form that I view represents the consensus of this sub-committee (based on the latest round of comments), and ask everyone who is eligible to vote: yes or no.

Following are the changes to the last report/rule circulated yesterday:

1) I have incorporated Paul Nettleton's suggestions (which were accepted by all who have replied) as follows: a) change the words "must be included" in b and d, to "must be referred to", consistent with the similar change we already made to a and c; b) change the second sentence in the committee note from "must sometimes be disclosed" to "must sometimes be referred to".

2) I have incorporated into the minutes several typo corrections caught by Carol Dittmar.

3) Our proposed rule currently refers to "briefs, petitions, motions, and responses." It did not include a reference to "replies" because, as I stated at one of our meetings, replies are briefs. That is not correct. Rule 9.100(k) refers to a "Reply" which is not technically a brief. Accordingly, I changed the reference in the introduction paragraph of the proposed rule from "briefs, petitions, motions, and responses" to "briefs, petitions, replies, motions, and responses"

4) On my own motion, I modified the report reference regarding the response I received from the Civil Rules sub-committee, which response I previously circulated to our sub-committee.

5) I added a reference in our report to the latest changes we made to the report and rule.

6) I have declined to modify the committee notes, but will attach Siobhan Shea's last request to my report. As Carol Dittmar pointed out (a comment with which I fully agree), the committee notes should be used to guide the practitioner in interpreting the rule, not to memorialize what we recognize as needing possible revision in the future.

7) Finally, I have declined Brandon Vesely's suggestion to include all the e-mails I received in the course of this project in my report. By my count, I have sent and received over 200 e-mails in the last month on this topic. Most are highly repetitive. In my view, the draft report sufficiently addresses all of the material factors we considered in our deliberations. I do not believe that adding

several hundred pages of e-mails will advance the committee's "institutional knowledge" on this point.

If you disagree with any of the above: either-- (a) vote "no," or (b) vote "yes" and raise your concerns when the matter is presented to the full committee in January 2007. Please do not circulate any further discussion (other than typos or scrivener's errors). It is essential at this point that we finalize this report. We have a hard deadline to meet for submitting a final report--tomorrow--and it is my responsibility as chair to meet that deadline.

Thank you all again for your hard work on this project, and for putting up with my eagerness and pushiness to reach a consensus on this matter.

Regards,

Bob

**MINUTES**  
**APPELLATE COURT RULES COMMITTEE**  
**Friday, January 21, 2005**  
**8:30 a.m.**  
**Tuttle North/Center Hyatt Regency Miami**  
**Miami, Florida**

**I. CALL TO ORDER - ACRC Chair Siobhan Helene Shea**

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**D. Family Law Rules Subcommittee**

*1. Confidentiality in matters affecting children.*

Family Law Rules Chair John Mills reported that, pursuant to the Florida Bar's Report on the Legal Needs of Children and the request of past Bar President Miles McGrane, the Family Law Subcommittee was referred the matter of considering amending the rules to provide for confidentiality with respect to children. The subcommittee met and proposed a rule to maintain the privacy of personal information not merely with respect to children, but in general. While the Florida Bar's Report on the Legal Needs of Children's concern was protecting children's names from appearing in briefs, the subcommittee also was concerned about identity theft. There are computer programs on the internet scouring for identify theft.

Mills reported that a rule was proposed at the June 2004 meeting, but on motion referred back to the subcommittee for refinement and further consideration by all of the subcommittees. The subcommittee has reconvened, refined the rule and published it for comment by all the other ACRC subcommittees. The subcommittee is proposing a revised rule. The issue is currently being addressed by the Supreme Court of Florida Committee on Privacy. The Supreme Court of Florida imposed a moratorium on the placement of court materials on the internet, but excluded appellate briefs. Currently,

appellate briefs are available on WESTLAW.

The proposed rule was the following:

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**9.210(a)(6) References to Children and Personal Information.**

The following shall be excluded or, where inclusion is necessary, partially redacted to the extent practical from all briefs filed with the court:

- A. The names of any person known to be under the age of eighteen years at the time of the proceedings were initiated in the lower tribunal. If the child must be identified by name, only the initials of that child should be used.
- B. Personally identifying numbers, which include all numbers used to identify a specific person for governmental and business purposes, including, but not limited to social security numbers, passport numbers, telephone numbers, e-mail addresses, computer user names, passwords, and the numbers of financial accounts of all types, including but not limited to, bank and credit union accounts, checking, savings, and money market accounts, cash management accounts, brokerage accounts, and credit card and charge accounts including their expiration dates. If one of these numbers must be included, it should be redacted to the extent possible to protect the privacy of the referenced person.
- C. Dates of birth. If an individual's date of birth must be included, only the year should be used if possible.

**Committee Note**

**2004 Amendment.** Subdivision (a)(6) was added to protect personal privacy and other legitimate interests, such as the prevention of identity theft, with this advent of briefs being made electronically available on a wide scale. The amendment recognizes that the listed information must sometimes be

disclosed, but provides that when it is, the information should be redacted in such a way as to protect the privacy of the referenced person. For example, if a credit card account number must be disclosed to distinguish between accounts, the last four numbers of a credit card number may be sufficient. In some contexts, no redaction would be possible, such as the identifying information for the attorney required to be provided by Rule 9.2060(c), Florida Rules of Judicial Administration.

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Subcommittee Chair Mills noted that the proposed rule would not be a flat prohibition on including the subject information in briefs. The proposed rule provides for guidelines. It recognizes that it is not always possible to omit the subject information.

The proposed addition would be a new subdivision in Rule 9.210. The subcommittee is unanimously proposing the amendment.

Mills moved that the amendment be approved. ACRC Vice Chair Barbara Egan seconded the motion.

Doug Stein asked if the word brief excluded petitions. In addition, he wondered about appendices, which had been discussed at the June 2004 meeting.

Mills responded that the subcommittee had discussed these issues. The proposed rule is in the rule addressing briefs, so the requirements will be limited to briefs. The requirements will not apply to appendices, petitions, or motions. Those items are not excluded in the moratorium.

David Gemmer wondered when the briefs are available on the Internet. If immediate, the rule will be difficult to enforce. He wondered what a reasonable redaction was. He questioned why they did not have a flat ban.

Mills responded that the subcommittee had considered all these issues. The rule should not place an undue burden on the clerks. To the extent the clerks enforce the

rules, they may decide to enforce this one. The rule is directed to lawyers. A lawyer who violates the rule will be subject to sanction. A violation of the rule likely will have to be brought to the Court's attention by the opponent.

The subcommittee chose redaction where practical over a flat ban. The court might need this information. The lawyers will need to police themselves. Only a violation that actually matters will be sanctioned when there is prejudice or irreparable harm to the other side. The rule will serve as a deterrent on the lawyer, and the court will resolve violations causing actual prejudice.

David Miller raised a technical question. In the introduction of the proposed rule it says "practical," but later (in part B) the term is "possible."

Tom Hall, Clerk of the Supreme Court of Florida, noted that he was not a member of the ACRC, but that he is a member of the Standing Committee on Privacy. The Standing Committee is going to make a recommendation to the Supreme Court of Florida. This proposed rule is premature until there is a final report by the Standing Committee. For example, there may be a recommendation to the Rules of Judicial Administration Committee to make broad-based changes.

At the Supreme Court of Florida, the briefs go online immediately, Hall reported. Currently, litigants are required to transmit an electronic copy of the brief. Once the paper copy is filed, the electronic copy is put on the Internet. The clerks do not screen the briefs for these types of rule violations now, and they probably would not screen under the proposed rule.

Hall also raised the issue of who would have the burden to screen information that is exempt from the public record. The clerks want the lawyers to, and lawyers want the

clerks to. The proposed rule puts the burden on the lawyers, which is a large policy decision that is being heavily debated. Hall also said it would be premature for ACRC to propose a rule prior to the Standing Privacy Committee completing its task.

Mills responded that the subcommittee did consider these issues.

Vice Chair Jack Reiter responded that the rule suggests that any violation would be sanctioned. He felt it unlikely that attorneys will be able to police themselves in that manner.

He would be more definitive as to when a violation would be sanctioned. He also wondered if appendices should be included.

Mills responded that the subcommittee considered all these issues. As far as the subcommittee being premature, they had been hopeful to bring the issue to the Committee in September. The subcommittee wants to hurry the process up. Due to the moratorium, the briefs are already on the Internet. There is some additional urgency. We already have a specific rule as to what needs to be in a brief, this is just an exclusion.

The subcommittee recognizes that the Committee only can recommend a rule change. The Board of Governors will have a say and the Supreme Court will resolve.

The subcommittee submitted the initial draft to the Standing Committee, chaired by Jon Mills. The proposed rule covers the same policy issues, but is narrower and more urgent.

The subcommittee is still unanimous. It is not attempting to tread on the turf of the Standing Committee. The issue can be handled diplomatically.

The subcommittee only had one clerk on the subcommittee. This is not an undue burden on attorneys as they can review the rule. The attorney can have a paralegal make



sure the rule is complied with. There will be no burden on the clerk.

Mills recognized that Vice Chair Reiter raised important issues. There has to be flexibility. There cannot be strict refusal in including this information. They cannot seal the appendix without a hearing under government in the sunshine laws. The subcommittee felt that more specific guidance on when it is impractical to redact subject information should be developed on a case-by-case basis as the courts interpret this rule.

Past Chair Katherine Giddings stated that she had to abstain because she represented a client before the Standing Committee. She did want to note that the Florida Supreme Court knew what was in briefs when they promulgated the moratorium. This rule will not come up until next year in the two-year cycle. Thus, there is no reason to address it now. In the hearings before the Standing Committee, there has been no showing of harm by the absence of restrictions.

Randall Reder predicted that, if the rule passed, what would happen is that the appellate courts will be inundated with motions to strike briefs. Reder suggested, in order to stop this, there should be a requirement that, before any motions to strike are filed for violation of this rule, the movant must file an affidavit of harm.

Shannon Carlyle stated that the harm caused is that there is a brief sitting on the Internet with private information included.

Ed Guedes reiterated David Miller's question as whether the rule is wise as there are no standards provided. The rule is internally inconsistent between the words "possible" and "practical." Mills stated he would entertain a friendly amendment to change the word "practical" to "possible" in the introduction. David Miller so moved. James Middleton seconded. Veronica Donnelly noted that, when it came to the names of

children, some had the same initials. That is why we used the word “practical.”

Middleton asked whether the subcommittee considered how to remedy breaches of the rule.

Mills responded that the clerk would be directed to take the brief off the website. You would have to send an amendment to Westlaw. As for sanctions, it is for the judiciary to decide.

Maria McGuinness wanted to know why the subcommittee wanted to change the order of the title. The title seems to limit it to children.

Mills said the subcommittee had thought through that issue but he did not remember the reasons for why they did it that way.

Vice Chair Reiter wanted to know if the rule contemplated two briefs. He wondered why this information would be going in the brief anyway unless it was required due to subject matter at which point the rule would allow the information to be included.

Mills responded that he personally had had cases in the Florida Supreme Court in which the attorney on the other side had included this information, or it had been done by a pro se litigant. Inclusion of the information causes problems with the opponent.

Secretary Edward Mullins then stated that he felt that the rule was not a good idea at the time. The Standing Committee was looking at the issue and he believed that the thoughts expressed in the room today could be provided to the Standing Committee. He cautioned that the Committee should wait until the Standing Committee acts.

Former Judge Sorondo agreed with Secretary Mullins that we should wait.

Past Chair Katherine Giddings also stated that they had tried to bring this issue to the Court, and the Court said it should go to the Standing Committee. The Court likely

would kick back this rule to the Standing Committee.

Kristy Gavin called the question. John Mills seconded.

Robert Pritt noted, that under Roberts of Rules of Order, the call of the question had to be voted on and that the amendment had to be voted on.

The call of the question was voted on. It passed unanimously.

The amendment was voted on. It passed unanimously. The word “practical” was changed to “possible” in the introduction.

The ruled as amended was voted on. **The motion FAILED 18-27.**

Finally, on this issue, Chair Shea asked if it would be appropriate to send the minutes to the Standing Committee. Tom Hall stated that it would be appropriate and welcome.

**MINUTES**  
**APPELLATE COURT RULES COMMITTEE**  
**FRIDAY, January 19, 2007**  
**8:30 am to 12:00 pm**  
**Hyatt Regency Hotel**  
**Miami, Florida**

**I. CALL TO ORDER**

Chair Edward M. Mullins called the meeting to order welcoming members and Judge Michael Gordon, from the Caribbean Appellate Court, who appeared as a special guest to review how the Committee works. Chair Mullins circulated the attendance sheet, email sheets, and subcommittee sign-up sheets.

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**g. Record on Appeal Subcommittee – Robert Biasotti**

Robert Biasotti reported that the Subcommittee is proposing the following new appellate Rule 9.050 for a full vote by the full Committee:

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**Rule 9.050. Maintaining Privacy of Personal Data**

Unless otherwise required by another rule or permitted by leave of court, the following personal data shall be excluded from or redacted in all briefs, petitions, replies, motions, and responses filed with the court.

a. **Names of Minor Children.** If a minor child must be referred to, only the initials of that child shall be used. For purposes of this rule, a minor child is any person under the age of eighteen years, unless otherwise provided by statute or court order.

b. **Dates of Birth.** If an individual's date of birth must be referred to, only the year shall be used.

c. **Personal Identifying Numbers.** Personal identifying numbers include all numbers used to identify a specific person for governmental or business purposes, including but not limited to,

social security numbers, drivers license numbers, passport numbers, telephone numbers, e-mail addresses, computer user names, passwords, and all financial, bank, brokerage, and credit card account numbers. If one of these personal identifying numbers must be referred to, it shall be redacted to the extent possible to protect the privacy of the referenced person.

d. **Home Addresses.** If a home address must be referred to, only the city and state shall be used.

### **Committee Note**

**2007 Amendment.** This rule was added to protect personal privacy and other legitimate interests, such as the prevention of identity theft, with the advent of appellate court records being made electronically available on a wide scale. The amendment recognizes that the listed information must sometimes be referred to, but provides that when it is, the information shall be redacted in such a way as to protect the privacy of the referenced person. For example, if a particular credit card account number must be disclosed to distinguish among multiple accounts, the last four digits of the account number may be sufficient to uniquely identify the account at issue. In some contexts, no redaction would be possible, such as the identifying information of an attorney or pro se litigant, required to be provided by Florida Rule of Judicial Administration 2.060(c), (d).

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Since publication of the proposed amendment in the agenda, Biasotti recommended a change to subsection C of the proposed Rule, to state “if one of these personal identifying numbers....” to “if a personal identifying number.” Without objections, the proposal was accepted as a modification of the recommendation.

Biasotti added that the Subcommittee contacted its counter-part subcommittees on the other Florida Rules committees who were addressing the privacy report and analyzing similar proposals.

An issue came up with the Subcommittee as to whether the rules should address the “scrubbing” of the files and records of the lower tribunals before those

files become part of an appellate record or appendix. Since the electronic filing procedure for appellate records has not been completed, Biasotti noted it was difficult to resolve that issue. For that reason, the Subcommittee does not recommend an appellate rule that would require “scrubbing” of the records of the lower tribunals.

In terms of fashioning the rule, the Subcommittee was guided by the ACRC Family Law subcommittee’s 2005 rule proposal and the Eleventh Circuit’s rule.

Biasotti further explained that the Subcommittee included the term “including but not limited to” in the definition of “Personal Identifying Numbers” in case the drafter of an appellate document feels other information should be redacted for privacy reasons. The Subcommittee did not get into the extent of a redaction (for example, how many digits of a social security number or a driver’s license number should be redacted).

With regard to the introduction and adding “unless otherwise required by another rule or leave of court,” the Subcommittee wanted to account for the possibility that other Florida rules committees may adopt additional, more specific rules regarding privacy concerns, and to avoid any conflicts with those rules.

Chair Mullins expressed his appreciation of the hard work of the Subcommittee on proposing the new rule, and asked the Committee first if there were any typographical errors in the Rule.

David Miller expressed his concern that the Committee Note says that it is a 2007 Amendment when it would be an adoption of a new Rule, and that the introduction sentence is too broad by stating “unless otherwise required by another rule” because litigators will not know where to look.

Chair Mullins responded that the Committee does not vote on Committee Notes and recommended to leave the Committee Note language as “Amendment.” The Bar will determine if the appropriate term should be “Adopted” or “Amendment.”

Stanford Soloman questioned the necessity of using the word “otherwise” in the introduction, and suggested to delete the word “all” in front of “numbers” and to strike “financial.” Chair Mullins accepted the recommendation to strike the term “all” as a typographical error, and made a motion to accept the typographical changes to the proposal as amended. No objections.

Chair Mullins asked for any objections to adopting a new rule generally. No objections were raised.

Chair Mullins asked whether there were any substantive comments to the new Rule.

Soloman asked whether the proposal affects the appendix rules. Biasotti responded that it did not, and that the Subcommittee specifically had addressed that issue.

Soloman made a motion to amend the proposal to make clear that the redaction rule does not apply to appendices. James Daniel seconded the motion.

With respect to that amendment, Paul Nettleton pointed out that the rule is already clear that it does not include appendices because the introduction clarifies that it applies only to briefs, petitions, replies etc. Jaime Moses suggested that the rule should clarify that appendices are not included. Soloman recommended that language be added at the end of the introduction saying “not included in appendices.”

John Mills argued that if the Committee specifically excluded appendices, he was concerned that other documents would not fall within the ambit of the rule.

Chair Mullins asked for proposed language to exclude appendices such that the Committee would have an amendment on which to vote.

Maria McGuinness offered to add an introduction as subsection (a), to change the subsection paragraphs to numbers, and to add a new subsection (b) with language to exclude appendices.

David Gemmer argued that attachments also should be added as an exclusion.

Susan Wright voiced her concern against the amendment because an appendix is part of the record.

Tom Hall added that the biggest problem is in attachments to motions and not appendices. Denise Powers recommended the following language: “this rule applies to attachments, but does not apply to content describe in rules 9.200 and 9.220.”

David Gemmer responded that there is a proposal to change 9.220 already and that we may be in conflict with that. Chair Mullins responded that that was only a proposal for now and the Committee should not be concerned with that.

The following amendment to the proposed rule was presented to the Committee: Add Subsection (a) to introduction, change the subsection paragraphs to numbers, and add language “and attachment thereto” after the word “responses” in the introduction. McGuinness moved to amend the proposal as stated. Soloman seconded the motion.

Biasotti argued against the proposed amendment, noting that the subcommittee addressed the issue at length in conjunction with amendments to 9.200 for electronic



filing. He did not think it made sense for the Committee to mandate what to redact from the lower tribunal's original records without more guidance from the Supreme Court in connection with the preparation of an electronic record. The focus of the subcommittee's effort was to require redaction of original appellate documents that were within the control of the party. He opposed any rule that mandates litigants to change the lower tribunal record.

Jennifer Carroll questioned the difference between an attachment and an appendix since attachments need to be part of the record. Tom Hall clarified that attachments do not need to be part of the record. Mr. Hall cited as an example that litigants in the supreme court routinely attach copies of airline tickets to motions for extensions, where the attachment includes the movant's home address and credit card number.

Michael Korn was concerned because the rule is undermined by excluding the appendix. Biasotti responded that appendices are not available online, only briefs and motions, etc., which is why appendices are not to be redacted. He added that this issue is on review on an accelerated basis by an administrative order of the Supreme Court and that it ultimately needed to be addressed after that review is completed.

Powers asked whether the purpose of the Rule was to address what is available now versus what would be available in the future.

Dorothy Easley added that the subcommittee recognized that this was important, and that the Supreme Court was also addressing this precise issue and that the Committee should not craft rules for a system that is not even online yet and no

one understands yet. She was concerned that, if we start tweaking with rules that are not concrete yet – we would be doing more damage than good.

Mills clarified that we are only excluding appendices, nothing more, and that attachments also must be excluded. John Crabtree requested a new amendment.

Mullins indicated that the former subsection d regarding home addresses could be incorporated into the new paragraph 3 definition for “Personal Data.” The same argument was made with respect to the former subsection b, “Dates of Birth.”

Maria McGuinness withdrew her motion for amendment on the table, and requested new language for new Paragraph B stating, “this rule does not require redaction of personal data from the record or appendices.”

McGuinness’s proposed amendment to the rule was passed by the Committee.

The term “personal identifying numbers” was also criticized for not being consistent with the title which referred to “personal data.” It was changed by acclimation.

The proposal submitted to full committee. The following new rule as amended passed 37-2.

\*\*\*\*\*

#### **Rule 9.050. Maintaining Privacy of Personal Data**

(a) Unless otherwise required by another rule or permitted by leave of court, the following personal data shall be excluded from or redacted in all briefs, petitions, replies, motions, notices, and responses and attachments thereto filed with the court:

**(1) Names of Minor Children.** If a minor child must be referred to, either a generic reference or the initials of that child shall be used. For purposes of this rule, a minor child is

any person under the age of eighteen years, unless otherwise provided by statute or court order.

**(2) Personal Identifying Data.** Personal identifying data include data used to identify a specific person for governmental or business purposes, including but not limited to, dates of birth, home addresses, social security numbers, driver's license numbers, passport numbers, telephone numbers, email addresses, computer user names, passwords, and all financial, bank, brokerage, and credit card account numbers. If personal identifying data must be referred to, it shall be redacted to the extent possible to protect the privacy of the referenced person.

(b) This rule does not require redaction of personal data from the record or appendices.

#### **Committee Note**

**2007 Amendment.** This rule was added to protect personal privacy and other legitimate interests, such as the prevention of identity theft, with the advent of appellate court records being made electronically available on a wide scale. The amendment recognizes that the listed information must sometimes be referred to, but provides that when it is, the information shall be redacted in such a way as to protect the privacy of the referenced person. For example, if a particular credit card account number must be disclosed to distinguish among multiple accounts, the last four digits of the account number may be sufficient to uniquely identify the account at issue. In some contexts, no redaction would be possible, such as the identifying information of an attorney or pro se litigant, required to be provided by Florida Rule of Judicial Administration 2.060(c), (d).

\*\*\*\*\*

**IN THE SUPREME COURT OF FLORIDA**

FILED  
THOMAS D. HALL

**CASE NO:**

2009 NOV 20 P 3:26

**IN RE: RESPONSE TO RECOMMENDATIONS OF THE  
COMMITTEE ON PRIVACY AND COURT RECORDS**

CLERK, SUPREME COURT

BY \_\_\_\_\_

**RESPONSE OF JUVENILE COURT RULES COMMITTEE**

Mary Katherine Wimsett, Chair, Juvenile Court Rules Committee, and John F. Harkness, Jr., Executive Director, The Florida Bar, file this response to the recommendations of the Committee on Privacy and Court Records, as required by Mr. Thomas D. Hall's letters of July 27, 2006 (see Attachment A) and the Court's Administrative Order No. AOSC06-20 (June 30, 2006), under *Fla. R. Jud. Admin.* 2.140(f). The committee's response was approved by the committee by a vote of 18-0-0. Because no rule or form amendments were recommended, the proposal was not reviewed by The Florida Bar Board of Governors.

The committee first brings to the Court's attention that court files in both delinquency and dependency cases are confidential and not subject to public disclosure or publication on the Internet. *See* §§ 39.0132, 985.04, and 985.045, Fla. Stat. (2006).

Recommendation Seven of the Committee on Privacy and Court Records asked the Court to "direct a comprehensive judicial branch initiative to review and revise rules of court and approved forms across all case types

for the purpose of modifying rules and forms to avoid the filing of personal information which is not necessary for adjudication or case management.” Chapters 39 and 985, Florida Statutes, require the filing of certain personal information. *See, e.g.*, § 39.402(8)(e), Fla. Stat. (2006) (law enforcement, medical, professional, and abuse registry reports); § 39.407(3)(c), Fla. Stat. (2006) (reports regarding provision of psychotropic medications to a dependent child); § 39.407(6)(d), Fla. Stat. (2006) (assessment report on placement of child in residential mental health treatment center); § 39.521(2), Fla. Stat. (2006) (predisposition study); §§ 39.701(6)(a), (7)(a), Fla. Stat. (2006) (judicial review hearing report); § 985.43, Fla. Stat. (2006) (predisposition report); and § 985.483(11), Fla. Stat. (2006) (assessment and treatment records for intensive residential treatment programs). The committee does not believe that it can propose rules that would limit or restrict statutory mandates. The committee also believes that any personal information is necessary for case management.

Recommendation Ten of the Committee on Privacy and Court Records proposed that “the Supreme Court direct the creation of a rule of procedure that would require attorneys and litigants to refrain from filing discovery information with the court until such time as it is filed for good cause. The court shall have authority to sanction an attorney or party for

violation of this rule.” *Fla. R. Juv. P.* 8.245(d)(4) prohibits filing of discovery documents unless required by the court in dependency proceedings. Documents or things may be filed when they should be considered by the court in determining a matter pending before it. *Id.* Although the delinquency rules do not contain a similar provision, the committee did not believe a rule was necessary because the filing of discovery documents with the court is not a normal practice.

Respectfully submitted \_\_\_\_\_.

---

MARY KATHERINE WIMSETT

Chair

Juvenile Court Rules Committee

7219 S.W. 86th Ter.

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---

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## **ATTACHMENT A**



July 27, 2006

Mr. Keith H. Park  
Chair, Civil Procedure Rules Committee  
P.O. Box 3563  
West Palm Beach, Florida 33402-3563

Mr. William C. Vose  
Chair, Criminal Procedure Rules Committee  
1104 Bahama Drive  
Orlando, Florida 32806-1440

Mr. John Fraser Himes  
Chair, Family Law Rules Committee  
Himes & Boire, P.A.  
101 E. Kennedy Boulevard, Suite 2430  
Tampa, Florida 33602-5895

Mr. Gary D. Fox  
Chair, Rules of Judicial Administration Committee  
One S.E. 3rd Ave., Suite 3000  
Miami, Florida 33131-1711

Ms. Mary K. Wimsett  
Chair, Juvenile Court Rules Committee  
Guardian Ad Litem Program  
1132 N.W. 58th Terrace  
Gainesville, Florida 32605-4477

Mr. Peter A. Sachs  
Chair, Probate Rules Committee  
505 S. Flagler Drive, Suite 1100  
West Palm Beach, Florida 33401

The Honorable Pauline M. Drayton  
Chair, Small Claims Rules Committee  
Duval County Court  
330 E. Bay Street  
Jacksonville, Florida 32202-2921

Mr. Peter A. Sartes II  
Chair, Traffic Court Rules Committee  
600 Cleveland Street, Suite 700  
Clearwater, Florida 33755-4158

Re: Report and Recommendations of the Committee on Privacy and  
Court Records — Recommendation Ten: Duty to Protect Discovery  
Information

Dear Rules Committee Chairs:

I am writing to you in follow up to Administrative Order  
Implementation of Report and Recommendations of the Committee on  
Privacy and Court Records, Fla. Admin. Order No. AOSC06-20 (June 30,  
2006), which refers to your committees Recommendation Ten contained in  
the report of the Committee on Privacy and Court Records. For your  
convenience, I have enclosed a copy of the administrative order and the  
report. The full report can be found on the Court's website at  
[http://www.flcourts.org/gen\\_public/stratplan/privacy.shtml](http://www.flcourts.org/gen_public/stratplan/privacy.shtml).

Recommendation Ten urges the Court to adopt a rule of procedure  
that would require attorneys and litigants to refrain from filing discovery  
information with the court until such time as it is filed for good cause. In  
connection with that recommendation, the committee reported that

[it] considered the problem of the routine and sometimes  
gratuitous filing of information that has been disclosed pursuant  
to a discovery order. The Committee notes that compelled

Thomas D. Hall

Enclosures

TDH/dm/sb

cc: Chief Justice R. Fred Lewis  
Jon Mills, Chair, Committee on Privacy and Court Records  
Lisa Goodner, State Courts Administrator  
Ellen Sloyer, Bar Staff Liaison  
Madelon Horwich, Bar Staff Liaison  
Gerry Rose, Bar Staff Liaison Craig Shaw, Bar Staff Liaison  
Ann Chittenden, Bar Staff Liaison  
Deborah J. Meyer, Director of Central Staff

July 27, 2006

Mr. Edward M. Mullins  
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Mr. Mary K. Wimsett  
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Hon. Pauline M. Drayton  
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Jacksonville, Florida 32202-2921

Peter A. Sartes II  
Chair, Traffic Court Rules Committee  
600 Cleveland St., Suite 700  
Clearwater, Florida 33755-4158

Re: Report and Recommendations of the Committee on Privacy and  
Court Records —Recommendation Seven: Revision of Rules and  
Forms Leading to Extraneous Personal Information.

Dear Rules Committee Chairs:

I am writing to you in follow up to Administrative Order  
Implementation of Report and Recommendations of the Committee on  
Privacy and Court Records, Fla. Admin. Order No. AOSC06-20 (June 30,  
2006), which refers to your committees Recommendation Seven contained  
in the report of the Committee on Privacy and Court Records. For your  
convenience, I have enclosed a copy of the administrative order and the  
report. The full report can be found on the Court's website at  
[http://www.flcourts.org/gen\\_public/stratplan/privacy.shtml](http://www.flcourts.org/gen_public/stratplan/privacy.shtml).

Recommendation Seven urges the review and revision of all rules and  
forms to avoid the filing of personal information that is not necessary for  
adjudication or case management. The committee reported that it

determined that a systematic review of court rules and approved  
forms would reveal that a number of rules and forms are written  
in ways that lead to routine filing of personal information which  
is not needed by the court for purposes of adjudication or case  
management.

Report at 53. The committee therefore recommended that the Court

direct a comprehensive judicial branch initiative to review and revise rules of court and approved court forms across all case types for the purpose of modifying rules and forms to avoid the filing of personal information which is not necessary for adjudication or case management.

Report at 53.

To implement Recommendation Seven, Administrative Order No. AOSC06- 20 at 15 asks your committees to review their respective bodies of rules and forms and to propose amendments to the rules and forms consistent with this recommendation.

Please file out-of-cycle reports of your proposed amendments with my office by April 1, 2007. If you need more time to consider this matter, please file a request for an extension with my office.

Thank you in advance for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Most cordially,

By: /s/ Barbara Harley-Price  
Deputy Clerk  
Thomas D. Hall

Enclosures

TDH/dm/sb

cc: Chief Justice R. Fred Lewis  
Jon Mills, Chair, Committee on Privacy and Court Records  
Lisa Goodner, State Courts Administrator  
Ellen Sloyer, Bar Staff Liaison  
Joanna Mauer, Bar Staff Liaison  
Madelon Horwich, Bar Staff Liaison  
Gerry Rose, Bar Staff Liaison Craig Shaw, Bar Staff Liaison  
Ann Chittenden, Bar Staff Liaison  
Deborah J. Meyer, Director of Central Staff

**IN THE SUPREME COURT OF FLORIDA**

FILED  
THOMAS D. HALL

2009 NOV 20 P 3:26

**IN RE: REPORT AND RECOMMENDATIONS  
OF THE COMMITTEE ON PRIVACY  
AND COURT RECORDS**

CLERK, SUPREME COURT

**CASE NO.**

BY \_\_\_\_\_

**REPORT OF THE FLORIDA RULES OF JUDICIAL  
ADMINISTRATION COMMITTEE**

Gary D. Fox, Chair, Florida Rules of Judicial Administration Committee, and John F. Harkness, Jr., Executive Director, The Florida Bar, file this report of the Rules of Judicial Administration Committee (RJAC) under *Fla. R. Jud. Admin.* 2.140(f), as requested by the Court in two letters from Thomas D. Hall, Clerk, Supreme Court of Florida, dated July 27, 2006. In those letters (see Appendix A), the Court requested that the RJAC review Recommendation Seven and Recommendation Ten of the Report and Recommendations of the Committee on Privacy and Court Records. These recommendations are addressed in separate sections below.

**RECOMMENDATION SEVEN**

Recommendation Seven urges a review and revision of rules of court and forms across all case types to avoid the filing of personal information not necessary for adjudication or case management. A subcommittee of the RJAC reviewed all the rules and concluded that there were no Rules of Judicial Administration that were affected by Recommendation Seven, as there are no rules that require the filing of personal information. On January 18, 2007, the RJAC voted 34-0 in favor of accepting the recommendation of the subcommittee that no action on any Rule of Judicial Administration is required with reference to Recommendation Seven.

**RECOMMENDATION TEN**

Recommendation Ten urges the Court to adopt a rule of procedure that would require attorneys and litigants to refrain from filing discovery information with the court until such time as it is filed for good cause. The RJAC does not disagree with the conceptual underpinnings of this rule, but

does not believe a blanket or umbrella rule should be adopted. Instead, on January 18, 2007, the RJAC voted 34-0 to recommend that each committee in the respective practice areas draft a rule for that practice area, but that an umbrella rule not be adopted.

The Florida Bar Board of Governors reviewed this report and concurred in the recommendations by a vote of 30-0 on March 30, 2007.



Respectfully submitted on April 2, 2007.

/s/ Gary D. Fox

GARY D. FOX

Chair

Rules of Judicial Admin. Committee

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/s/ John F. Harkness, Jr.

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## **CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a copy of the foregoing was furnished by United States mail to: Lisa Goodner, Office of the State Courts Administrator, 500 S. Duval St., Tallahassee, FL 32399-6556; and Jon Mills, Chair, Committee on Privacy and Court Records, P.O. Box 2099, Gainesville, FL 32602-2099, on April 2, 2007.

## **CERTIFICATE OF FONT COMPLIANCE**

I certify that this report was prepared in MS Word using 14 point Times New Roman font.

/s/ J. Craig Shaw

J. CRAIG SHAW

Bar Staff Liaison, Rules of Judicial Administration Committee

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IN THE SUPREME COURT OF FLORIDA

FILED  
THOMAS D. HALL

IN RE: SEALING OF COURT RECORDS

CASE NO.

2009 NOV 20 P 3: 26

REPORT OF THE STEERING COMMITTEE ON  
FAMILIES AND CHILDREN IN THE COURT

CLERK, SUPREME COURT

Judge Nikki Ann Clark, Chair of the Steering Committee on Families and Children in the Court (Steering Committee), files this report to comply with the fourth charge assigned to the Steering Committee by the Florida Supreme Court.

In AOSC06-30 the Court tasked the Steering Committee with several charges, the fourth charge read as follows:

Consistent with the requirements of In re: Implementation of Report and Recommendation of the Committee on Privacy and Court Records No. AOSC06-20 (Fla. June 30, 2006):

a. Consider and make recommendations on the sealing of psycho-social evaluations, psychological evaluations, and guardian ad litem reports in family court cases and, if necessary, propose amendments to the rules of court procedure to effectuate those recommendations; and

b. Review the Supreme Court Approved Family Law Forms to determine if personal information that is not necessary for adjudication or case management is being required in the forms.

To address this charge, the Charge Four Subcommittee (Subcommittee) was formed with Judge Marci Goodman appointed as chair.

The Subcommittee met several times to address this charge. They recognize that Florida has a long history of open courts and open records. Keeping records open to the public is beneficial to all by ensuring public trust and confidence in the judicial system as well as necessary public oversight. Such openness of records, however, can also be used for abuse, ridicule, or even illegal purposes. With the advent of electronic records, commercial uses of public information, abuses to personal privacy such as data mining and identity theft comes a need to reevaluate what is essential

for public oversight and accountability of government and what is necessary to maintain the essential privacy rights of all citizens.

The subcommittee concluded that it would be appropriate to seal the listed psycho-social evaluations, psychological evaluations, and guardian ad litem reports in family court cases. These reports have little value to the public in terms of the accountability of the judicial branch, and, to the contrary, contain highly sensitive personal information which strongly supports making them confidential.

***The same public policy considerations that led to the confidentiality of dependency, adoption, and delinquency records equally applies to family law cases and specifically to the enumerated reports. Consider a unified family court case where a psychological report generated for a dependency case also gets filed in a related divorce case; while the report is confidential in the dependency case it suddenly becomes public and open to anyone by the mere fact that it is filed in the divorce case. This is a glaring inconsistency among similarly situated case types and there appears to be no rational basis for this distinction. As such, the Subcommittee recommends that psycho-social evaluations, psychological evaluations, and guardian ad litem reports in family court cases be sealed and made confidential.***

The subcommittee notes that our specific charge was to address the sealing of psychosocial evaluations, psychological evaluations, and Guardian ad Litem reports<sup>1</sup>. The names for the three enumerated reports may differ in different circuits, and there are several other types of reports filed in family cases which should also be sealed and made confidential. To expand upon the strict language of the charge, the subcommittee **suggests** that the Court also consider exploring the confidentiality of the following reports in its analysis of this issue: psychiatric evaluations, psychosexual evaluations, home studies, substance abuse evaluations, custody evaluations, other mental health evaluations, parental fitness evaluations, and other similar reports that contain sensitive material of a highly personal or medical nature, including social investigations.

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<sup>1</sup> No section of Chapter 61 makes psychosocial evaluations, psychological evaluations, and Guardian ad Litem reports confidential *per se*. However, a party may file a motion to seal those records which also results in them being sealed while the court considers the motion.

Looking at the options for sealing such records, the Subcommittee first considered a mechanism whereby a court would make a determination on sealing the records. Such a process would require the records to be filed, unsealed and not confidential, and only become sealed after a hearing. This would leave the records open to the public (and potentially published to the internet in an electronic records situation) and only sealed after they have already been made public. **Especially in an age of electronic records and internet databases, it is practically impossible to “put the genie back in the bottle” once it has been released. For these reasons, the Subcommittee determined that the only way to make and keep such records confidential was for them to be sealed upon filing.**

The Subcommittee then proposed a rule and presented it to the full Steering Committee. After comment and an amendment, the following rule was unanimously approved by the Steering Committee.

*Family Law Rule 12.400(d). Sealing of Psychosocial Evaluations, Psychological Evaluations, and Guardian ad Litem Reports*

*(1) The custodian of records shall seal psychosocial evaluations, psychological evaluations, and guardian ad litem reports upon filing. A docket entry shall be made noting the type of document filed and that it was sealed pursuant to this rule.*

*(2) Any such sealing of information pursuant to this rule is conditional in that the information shall be disclosed to any person who establishes pursuant to proper motion that disclosure of the information is necessary for government or judicial accountability or has a proper first amendment right to the information.*

*(3) Upon receipt of a motion to open records sealed pursuant to this section, the court shall schedule a hearing on the motion with notice provided to the movant and parties.*

The proposed rule endeavors to make these records sealed upon filing, however, that leaves a burden on the clerks or other custodians of record to ensure that the enumerated records are immediately sealed. The role of the responsibility of the clerks is an issue that will be very difficult to effectively address. This particular aspect of making sensitive records confidential is frequently one wherein the suggestion to make all family cases confidential

arises, however, that is a matter beyond the scope of this Subcommittee's charge.

Next, pursuant to the terms of the administrative order that formed the Steering Committee, the proposed rule was submitted to the Florida Bar Family Law Rules Committee for their consideration and comment. Fraser Himes, Chair of the Florida Bar Family Law Rules Committee provided time on the committee's June 29, 2007 agenda to address proposed Family Law Rule 12.400(d). The committee members provided many thoughtful and beneficial suggestions with regard to the rule. The following comments were noted:

The rule should include custody evaluations, psychiatric evaluations, psychosexual evaluations, home studies, and parental fitness evaluations.

Placing a burden on the clerk opens the process to errors and possible legal actions against the clerks.

May be better to put the burden on the filer to note "sealed pursuant to Rule" on the front of any protected document.

Another way to get this result is to require that a court order for whichever type of evaluation or report that should be sealed upon filing, would contain a provision to that effect directly in the initial order.

May be better to seal the records based on the sender instead of the type of record, i.e. reports from psychologists, psychiatrists, GALs, etc.

It's not clear from the rule that the parties and attorneys of record should still have access to these records.

Any filing that should be sealed should have a notice at the top that clearly labels it as confidential and to be filed under seal.

Does not address similar documents that are filed in the course of a hearing or at trial. Should judges be directed to order such records sealed upon introduction?

It was suggested that all Family Law Rule cases should be closed and their records kept confidential. It was also agreed that this is a very controversial suggestion, however, one that would be beneficial in practice.

In accordance with the instructions of AOSC06-30, it would be fair to say that the committee's comments suggest a need for further study of this issue which would likely lead to modifications of the proposed rule.

Additional events have taken place during the Subcommittee's term that also suggest this issue requires further study. In SC06-2136 (Fla. April 5, 2007) this Court adopted amendments to Judicial Administration Rule 2.420. This rule deals with the sealing of records that meet certain criteria which could include psychosocial evaluations, psychological evaluations, and guardian ad litem reports in family law cases. This rule, however, deals with records after they have been filed instead of sealing them upon filing.

Though proposed Family Law Rule 12.400(d) was not on the agenda of the Florida Bar Rules of Judicial Administration Committee (the Subcommittee did not request to include it on their agenda), the recent amendments to Rule of Judicial Administration 2.420 were discussed. Several members of the Rules of Judicial Administration Committee noted that it would be best to have all matters dealing with sealing or confidentiality of records addressed under the Rules of Judicial Administration. This is certainly an understandable position, and it would be beneficial for this charge of the Steering Committee to be considered by the Florida Bar's Rules of Judicial Administration Committee.

Due to the comments from both of these Florida Bar committees, it is premature to recommend that this Court adopt the proposed rule as drafted by the Subcommittee and initially approved by the Steering Committee. The subcommittee recommends that this issue and proposed Family Law Rule 12.400(d) be submitted to both the Florida Bar Rules of Judicial Administration Committee and the Florida Bar Family Law Rules Committee for their joint consideration. Additionally, the Court may wish to inquire whether the Legislature would be inclined to make such records confidential pursuant to statute.

The second charge given to this subcommittee was, "Review the Supreme Court Approved Family Law Forms to determine if personal

information that is not necessary for adjudication or case management is being required in the forms.”

In general, the family law forms require information such as drivers license numbers, financial information, addresses, name and location information of children, birth certificates, etc. Much of this information is subject to abuse if someone seeks to use it for improper purposes, however, it is also necessary or at least helpful for adjudication or case management purposes.

As this entire field of electronic records, internet access to records, and the use and abuse of information through technological means evolves, changes are ever present. The recent amendments to Judicial Administration Rule 2.420, the comments from the Florida Bar Family Law Rules Committee, the role of legislation with respect to confidentiality, and the Subcommittee’s own concerns over the workability and effectiveness of a single rule to deal with such a complex issue all lead to the recommendation that advances in this area need to take place with due time, deliberation, and coordination with all related entities. As such, this issue should be granted more time for consideration by the appropriate Florida Bar committees and the Florida Legislature.

In summary, the same public policy considerations that led to the confidentiality of dependency, adoption, and delinquency records equally applies to family law cases and specifically to the enumerated reports. Consider a unified family court case where a psychological report generated for a dependency case also gets filed in a related divorce case; while the report is confidential in the dependency case it suddenly becomes public and open to anyone by the mere fact that it is filed in the divorce case. This is a glaring inconsistency among similarly situated case types and there appears to be no rational basis for this distinction. **As such, the Subcommittee recommends that psycho-social evaluations, psychological evaluations, and guardian ad litem reports in family court cases be sealed and made confidential.**

WHEREFORE, the Steering Committee on Families and Children in the Court respectfully submit this Report to the Court on July \_\_, 2007.

---

Judge Nikki Ann Clark, Chair



Steering Committee on Families and Children in the Court

CERTIFICATE

I certify that this report was prepared in MS Word using 14 point Times New Roman font, this \_\_\_\_ day of July, 2007.

---

Nikki Ann Clark, Circuit Judge  
Leon County Courthouse  
301 South Monroe Street  
Tallahassee, Florida 32302