IN THE SUPREME COURT OF THE STATE OF FLORIDA

IN RE: AMENDMENT TO FLORIDA RULES OF JUDICIAL ADMINISTRATION, PUBLIC ACCESS TO JUDICIAL RECORDS

CASE NO. 80,419

RESPONSE OF THE FIRST AMENDMENT FOUNDATION

Barry Richard
Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A.
101 E. College Ave.
P.O. Drawer 1838
Tallahassee, FL 32302
(904) 222-6891
Florida Bar No. 0105599

IN THE SUPREME COURT OF THE STATE OF FLORIDA

IN RE: AMENDMENT TO FLORIDA RULES OF JUDICIAL ADMINISTRATION, PUBLIC ACCESS TO JUDICIAL RECORDS

CASE NO. 80,419

RESPONSE OF THE FIRST AMENDMENT FOUNDATION

The First Amendment Foundation ["the Foundation"] files this response to the proposed rule relating to public access to records of the judicial branch.

This Court has long recognized and vigorously enforced Florida's strong public policy in favor of open government. In support of that policy, the Court has consistently placed a liberal construction upon the Public Records Law and Government in the Sunshine Law and has strictly construed exemptions from those laws. The Court has imposed a stringent standard upon agencies subject to the open government laws and has required them to carry a heavy burden in justifying closure. See, e.g. Neu v. Miami Herald Pub. Co., 462 So.2d 821 (1985); Wood v. Marston, 442 So.2d 934 (1983); Wait v. Florida Power & Light Co., 372 So.2d 420 (1979); Canney v. Board of Pub. Inst., 278 So.2d 260 (1973); Board of Pub. Inst. v. Doran, 224 So.2d 693 (1969). The Court has generally applied equally stringent standards to its own branch. See, e.g. Barron v. Florida Freedom Newspapers, 531 So.2d 113 (1988). The Foundation recognizes the necessity for an amended rule in anticipation of enactment of the proposed constitutional amendment,

but urges that the Court exercise care to ensure that the rule incorporates that same high standard.

The proposed rule deals with records which fall into two categories: Those which involved records generated in connection with an adjudicatory proceeding; and those generated in connection with the performance of a court's administrative function. The Foundation recognize that the exercise of adjudicatory functions involves unique factors which sometimes require confidentiality that would not be justified in the exercise of non-adjudicatory functions involving the same subject matter. The Foundation further recognizes that all of the situations in which such confidentiality might be justified cannot be spelled out in advance. Consequently, it is reasonable that courts be given some degree of discretion to determine when confidentiality is necessitated in a particular case. Nevertheless, in the exercise of such discretion courts should follow the same basic principles which govern the creation of legislative exemptions from the Public Records Laws. See §119.14(4)(b).

In the exercise of their administrative functions, on the other hand, courts are materially no different than the other branches and the rules should provide them with no greater discretion than is enjoyed by the other two branches in the exercise of similar functions.

With the foregoing principles in mind, the Foundation makes the following comments with respect to the particular provisions of the proposed rule:

1. The Foundation does not dispute the necessity for confidentiality of preliminary drafts of Court opinions and memoranda related to the preparation of such opinions, provided that such drafts or opinions are prepared by the judge or the judge's immediate staff to assist in the formulation of a final opinion. The proposed rule, however, is too broadly worded. Its current wording would encompass proposed opinions submitted by opposing counsel in a case and even briefs and memoranda submitted by counsel. Such proposed opinions, briefs and memoranda have always been public records and it is assumed that the proposed rule was not intended to make them confidential. The provision should be modified to clarify this issue.

2. This provision appears to involve solely administrative functions performed by court committees and judicial conferences. The Foundation sees no substantive distinction between the exercise of such administrative or quasi-legislative functions by members of the judiciary and the exercise of administrative and legislative functions by members of the other two branches. There is no reason why the judicial branch should enjoy any greater confidentiality in the exercise of such functions than do the others and the Foundation urges that this provision be deleted entirely.

3. This provision also appears to be related solely to administrative court functions. Whereas the confidentiality contemplated by paragraph 1 is related to the protection of

the interests of litigants before the court, the confidentiality involved in paragraph 3 relates solely to protection of a "court interest". The Foundation can conceive of no "compelling court interest" which outweighs the public's right to full access to a court's administrative deliberations. Again, Court's perform precisely the same functions as the Legislature and administrative agencies when they are acting in an administrative or quasi-legislative capacity. This provision should also be deleted entirely.

4. Florida's current law regarding complaints against public servants and licensed professionals is inconsistent. Complaints against most public employees or elected officers are either open from the time of filing or become open upon a finding either way with respect to probable cause. However, in the case of attorneys and professionals regulated by the Department of Professional Regulation, records remain confidential unless and until a determination is made that probable cause does exist.

The Foundation sees no justification for cloaking disciplinary records with respect to one group of public servants with greater secrecy that those of another group. Florida media groups have long advocated the adoption of a uniform policy whereby records relating to the investigation of a complaint become open upon a finding either way with respect to probable cause. The Court is urged to modify this provision accordingly.

5. No comment.

6. It is presumed that the term "volunteer" as used in this paragraph means unpaid. If the person is on the public payroll and is subject to evaluation pursuant to Florida law, such evaluation should be open to public inspection as it is with respect to employees in the other branches. It is suggested that the word "unpaid" be added to clarify this provision.

7. No comment.

8. This provision would more appropriately be placed under paragraph 10 since it would probably require a court review of the document in question and might require a judicial construction of the state or federal provision claimed to provide for confidentiality.

9. The references to "Florida Statutes" and "common law" are unnecessary and problematic and should be deleted. The constitutional amendment would preserve all "rules of court" that are in effect on the date of adoption of the amendment, November 3, 1992 if the amendment passes. It expressly preserves all "laws" that are in effect on Julv 1, 1993, and makes no reference to "common law". The obvious intent of the provision is to give this Court with respect to rules, and the Legislature with respect to statutes, the opportunity to review existing rules and laws on confidentiality and delete or add to them prior to the separate cutoff dates. Thereafter, only the Legislature could

provide for confidentiality, and only in compliance with the new constitutional requirements. Paragraph 9 of the proposed rule would incorporate into court rule all confidentiality statutes in effect on the date of adoption of the provision. Read literally, the rule would empower courts to continue to declare records confidential based upon laws existing on November 3, 1992, even if such laws are repealed prior to July 3, 1993.

In Wait v. Florida Power & Light Co., supra, this Court declared that it would no longer recognize any common law confidentiality. The inclusion of the term "common law" in paragraph 9 of the proposed rule would suggest that the Court is receding from that holding.

10. To the extent that this provision is intended to provide courts with the discretion to close records in appropriately limited circumstances on a case-by-case basis, the Foundation has no objection. However, the Foundation requests three modifications of the rule as worded.

First, the reference to "court rule" should be deleted. The proposed constitutional amendment preserves confidentiality rules adopted by this Court prior to the time of its enactment. After its enactment, records of the judiciary, as those of the other branches, can only be made confidential by the Legislature. By including the term "court rule" in paragraph 10, the Court would be adopting a rule allowing itself to adopt future rules creating

confidentiality, thereby circumventing the clear language of the constitutional amendment. It would be analogous to being given three wishes by a genie and using the third wish to get three more wishes.

Second, it is requested that additional language be added to the beginning of this provision to emphasize the fact that there is a strong presumption of openness and that confidentiality is an exception requiring a clear showing of necessity.

Third, it is requested that the rule be modified to require that a court declaring a record confidential must make specific findings of fact, supported by the record, to justify such declaration.

Appended to this memorandum is a draft of the proposed rule modified to reflect the changes requested.

GREENBERG, TRAURIG, **HOFFMAN**,
LIPOFF, ROSEN & QUENTEL
101 East College Avenue
Post Office Drawer 1838
Tallahassee, Florida 32301
(904) **222-6891**

BARRY RICHARD
Florida Bar No. **0105599**

CJM\BSR\AMEND.MEM

ADDENDUM

Public Access to Judicial Records

The public shall have access to all records of the judicial branch of government and its agencies, except as provided below. There is a presumption of openness and, except as otherwise specifically provided, confidentiality shall be imposed only upon a clear and convincing showing of necessity for the reasons stated below.

The following record of the judicial branch and its agencies shall be confidential:

1. Trial and appellate memoranda, drafts of opinions and orders, court conference records, notes, and other written materials of a similar nature prepared by judges, or court staff ~~other persons~~ acting on behalf of or at the direction of the court as part of the court's judicial decision-making process utilized in disposing of cases and controversies before Florida courts.

~~2. Preliminary drafts, notes, or other written materials which reflect the tentative thought processes of court committees and judicial conferences, and the members thereof, assigned to perform functions affecting the administrative of justice in Florida.~~

~~3. Memoranda or advisory opinions prepared by the office of the court administrator that relate to the administration of the court and that require confidentiality to protect a compelling court interest which cannot be adequately protected by less restrictive measures. The degree of confidentiality imposed shall be no broader than necessary to protect the compelling court interest involved. The decision that confidentiality is required with respect to such administrative memorandum or written advisory opinion shall be made by the chief judge of the court involved, subject to review as provided below.~~

4. Complaints alleging misconduct against judges and other entities or individuals licensed or regulated by the courts until a finding is made with respect to probable cause ~~is established unless otherwise provided~~

5. Periodical evaluations implemented solely to assist judges in improving their performance, all information gathered to form the bases for the evaluations, and the results generated therefrom.

6. Applications by and evaluations of persons applying to serve as unpaid "volunteer" personnel to assist the court, at the court's request and direction, unless made public by court arder based on a showing of materiality in a pending court procedure.

ADDENDUM 1

7. Copies of arrest and search warrants and supporting affidavits retained by judges, clerks, or other court personnel until execution of said warrants or a determination is made by law enforcement authorities that such execution cannot be made.

~~8. All records made confidential under the Florida and United States Constitutions and Federal law.~~ [The essence of this provision has been incorporated into paragraph a)(7) below.]

9. All court records presently deemed to be confidential by court rule, ~~Florida statutes, or common law of the state of Florida~~.

~~10. Any court record upon judicial determination, in case decision or court rule that:~~

A court record may be declared confidential upon judicial determination in a particular case, based upon specific findings of fact supported by clear and convincing evidence in the record that:

a) Confidentiality is required:

(1) To prevent a serious and imminent threat to the fair, impartial and orderly administration of justice; or

(2) To protect trade secrets; or

(3) To protect a compelling governmental interest; or

~~(4) To obtain evidence to determine legal issues in a case; or~~

~~(5) To avaid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of proceeding sought to be closed; or~~

~~(6) To avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of proceeding sought to be closed; or~~

(7) To comply with established public policy set forth in the Florida or United States constitution, or ~~federal~~ statutes, or Florida rules or case law;

~~b)~~No less restrictive measures are available to protect the interests set forth in Subsection (a) above.

ADDENDUM 2

~~b)~~ The degree and manner of confidentiality ordered by the court ~~is~~ shall be no broader than necessary to protect the interests set forth in Subsection (a) above.

1. Advertisements, correspondence, and other written material made or received by personnel of the judicial branch or its agencies which do not relate to a closed or pending case or proceeding or to the administration of the courts and which are not used or considered in the performance of official duties and responsibilities, shall be retained for a period of 30 days.

2. Where a document or other writing is a public record, a duplicate of such document or writing need not be retained.

3. Other public records of the judicial branch shall be retained for such periods as set forth in Rule 2,075 of the Rules of Judicial Administration.

4. Additional rules governing the retention of public records of the judicial branch or its agencies may be promulgated from time to time.

This court shall issue all orders reasonable or necessary for the proper implementation of this rule.

ADDENDUM 3