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IN THE SUPREME COURT OF FLORIDA

AMENDMENTS TO RULE OF JUDICIAL ADMINISTRATION 2.051 - PUBLIC ACCESS TO JUDICIAL RECORDS

CASE NO. 83,927

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COMMENTS SUBMITTED ON BEHALF OF
TIMES PUBLISHING COMPANY

GEORGE K. RAHDERT
Fla. Bar No. 213365
RAHDERT & ANDERSON
535 Central Avenue
St. Petersburg, FL 33701
(813) 823-4191

Counsel to Times Publishing Co.

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AMENDMENTS TO RULE OF JUDICIAL ADMINISTRATION 2.051 - PUBLIC ACCESS TO JUDICIAL RECORDS	* * * *	**CASE NO. 83,927**

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INTRODUCTION

These comments are submitted on behalf of Times Publishing Company ("Times"), owner and publisher of the St. Petersburg Times, a newspaper of general circulation serving the citizens of West Central Florida. As the public's surrogate in courtrooms throughout this area, the Times recognizes its constitutionally based responsibility to bring timely, accurate and complete information about the Florida judicial system to its readers. It believes, as the United States Supreme Court has recognized, that public scrutiny of the judicial process "enhances the quality and safeguards the integrity of . . . factfinding," thus "foster[ing] an appearance of fairness, [and] heightening public respect for the judicial process." Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982). "Public trials are essential to the judicial system's credibility in a free society." Barron v. Florida Freedom Newspapers, 531 So.2d 113, 117 (Fla. 1988).

In seeking to fulfill its responsibilities to the public it serves, the Times relies heavily on the records of judicial proceedings and, consequently, on the provisions of the Florida Constitution and court rules governing access to those records.

For these reasons, the Times appreciates this opportunity to

provide its comments to the "Committee Commentary" now before the Court. The Times has limited its comments to those areas of the "Committee Commentary" which it believes depart from the requirements of the Florida Constitution and Florida law. The Times believes, as a general matter, that the "Committee Commentary" should reflect the clear mandate of Article I, § 24 of the Florida Constitution, as well as Florida's long-standing commitment to the principle that, except in exigent circumstances, all records and proceedings in Florida courts should be open to the public.

COMMENTS

For its comments to the "Committee Commentary," the Times states as follows:

Commentary to subdivision (b)

The Times believes that the commentary to this new section is helpful and agrees with all of it, with the exception of the final sentence, which currently reads: "Reformatting of information may be necessary to protect copyrighted material. Seigle v. Barry, 422 So.2d 63 (Fla. 4th DCA 1982)."

Public records themselves, for the most part, should not contain "copyrighted" material. And Florida's governmental agencies should not use -- or be encouraged to use -- copyrighted software for the storage of records absent the procurement of a licensing agreement allowing the public to use it, too. See State ex rel. Davidson v. Couch, 158 So.2d 103 (Fla. 1934) (records custodian maintaining records in "code" cannot frustrate or impede

right of inspection by withholding "code book").

Moreover, because the stated purpose of Rule 2.051 is to conform the rule to "Article I, § 24 of the Florida Constitution," the emphasis of the commentary should likewise be on simplifying access, rather than on providing tacit endorsement of the use of devices -- such as copyrighted computer software -- that make access more difficult. Thus, the focus of the commentary to this provision should be on permitting access to records, even if they are stored in a "copyrighted format," and not on the protection of copyrighted material.

Finally, although the Times believes that the decision of the Fourth District Court of Appeal in Seigle v. Barry, 422 So.2d 63 (Fla. 4th DCA 1982) is pertinent to many issues regarding computerized public records, it does not believe that the case stands for the proposition for which it is cited here. Rather, Seigle stands for the proposition that where the available program (a) would not provide access to all of the public records in a database or (b) would provide exempt information or (c) would provide information in a form that did not fairly and meaningfully represent the public records, then a records custodian could be required to provide access by means of a specially designed program. Thus, the emphasis in Seigle is on the provision of access to members of the public -- and not on the protection of copyrighted material. This, too, should be the emphasis of the commentary.

Proposed Substitute Language

"Access to public records should not be hampered by the use of copyrighted software. Op. Fla. Att'y Gen. 92-38 (1992). Where the use of copyrighted software requires reformatting before access can be provided, only a fee representing the actual cost of duplication of the records may be charged."

Commentary to subdivision (c)(9)

This commentary states that the subdivision was adopted "to incorporate the holdings of judicial decisions establishing that confidentiality may be required to protect the rights of defendants, litigants, or third parties, to further the administration of justice, or to otherwise promote a compelling governmental interest." The commentary cites this Court's decisions in Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113 (Fla. 1988) and Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982) in support of this proposition.

This section of the commentary appears to reflect a misunderstanding of the significance of this Court's holdings in Barron and Lewis. Specifically, these cases, by their own words, do not stand for the proposition that "confidentiality may be required" in some instances. Instead, they stand for the proposition that, in a certain narrow category of cases, confidentiality (closure) may be permitted. Indeed, as this Court held in Lewis, "The trial court should begin its consideration with the assumption that a pretrial hearing be conducted in open court unless those seeking closure carry their burden to demonstrate a

strict and inescapable necessity for closure." 426 So.2d at 8. See Barron, 531 So.2d at 118 ("[A] strong presumption of openness exists for all court proceedings. A trial is a public event, and the filed records of court proceedings are public records available for public inspection").

The commentary, like the case law upon which it relies, should reflect the settled principles (a) that openness is the rule and closure the exception, and (b) that while closure may be appropriate in exceptional cases, the burden of proving that closure is necessary is always upon the party seeking it. See Barron, 531 So.2d at 119. Indeed, even in cases where the basis for closure is statutory, the Florida judiciary has inherent power, upon a showing of good cause, to render particular proceedings -- and records -- open to the public. See, e.g., Order, In re Gregory K, Case No. JU90-5245 (9th Jud. Cir. Sept. 1992) (opening termination of parental rights proceeding upon showing of good cause by news media). See generally In re Amendments to Florida Rules of Judicial Administration -- Public Access to Judicial Records, 608 So.2d 472, 473 (Fla. 1992) ("However, the Court is desirous of further input on these additional requests to assess their impact on the integrity of the judicial system. This will permit further analysis of these requests and give the Court flexibility to open such additional records in future as may be in the best interest of the public and the judicial system").

Proposed Substitute Language

"Subdivision (c)(9) has also been amended. Subdivision (c)(9)

was adopted to incorporate the holdings of judicial decisions establishing that, in certain exceptional circumstances, access to some court records may be restricted. Specifically, where a court has determined, based on evidence, that restrictions on access are the only means to protect one of the enumerated interests, then restrictions, tailored to the specific facts of the case, may be imposed. Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113 (Fla. 1988); Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982). As the Supreme Court of Florida has held, in such cases, "The judge's goal is to balance the countervailing interests, restricting each as little as possible while still serving the ends of justice." Lewis, 426 So.2d at 8. In some cases, confidentiality also may be imposed by statute or court rule, where necessary to the effective administration of justice. See, e.g., Rule 3.470, Florida Rules of Criminal Procedure (Sealed Verdict); Rule 3.712, Florida Rules of Criminal Procedure (Presentence Investigation Reports); Rule 1.280(c), Florida Rules of Civil Procedure (Protective Orders). The fact that records are made confidential by statute or court rule does not preclude a court from opening such records upon a finding of good cause."

Commentary to subdivision (c)(9)(D)

This commentary seeks to impose disparate standards for the closure of court records than those traditionally imposed on the closure of court proceedings. Specifically, the commentary states that "Unlike closure of court proceedings that has been held to require notice and hearing prior to closure, see Miami Herald

Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982), closure of court records has not required prior notice."

The distinction drawn in this portion of the commentary is not supported by the case law.

Indeed, this Court has expressly held that the presumption of openness -- and the burdens and responsibilities inuring to that presumption -- apply with equal force to both court proceedings and court records. In Barron, for example, this Court held:

> First, a strong presumption of openness exists for all court proceedings. A trial is a public event, and the filed records of court proceedings are available for public examination. Second, both the public and news media shall have standing to challenge any closure order. . . . Third, closure of court proceedings or records should occur only when necessary . . . .

Barron, 531 So.2d at 118 (emphasis added). Significantly, this Court's holding Barron followed its pronouncement in Lewis that: "The news media has been the public surrogate on the issue of courtroom closure. Therefore, the news media must be given an opportunity to be heard on the question of closure prior to the court's decision." Lewis, 426 So.2d at 7 (emphasis added). Read together, then, these cases appear to stand for the proposition that prior notice is required of "any closure order" regardless of whether the requested closure is of proceedings or of records. Because the case law does not draw a distinction between court proceedings and court records, the commentary should not do so, either. See In re Amendments, 608 So.2d at 473 (Overton, J., concurring) ("I concur and write separately only to emphasize that,

as I read these rules . . . there is no change regarding the presumption of openness of court records, as set forth in Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113 (Fla. 1988)").

The commentary also states that: "Requiring prior notice of closure of a court record may be impractical and burdensome in emergency circumstances or when closure of a court record requiring confidentiality is requested during a judicial proceeding."

Florida's strict discovery rules -- in both civil and criminal proceedings -- render the possibility of "emergency" closure of a court record exceedingly unlikely. In nearly all cases, at least one party's counsel would be aware that s/he planned to request that certain records be closed in advance of the request -- just as at least one party's counsel would likely be aware that s/he planned to request closure of a court proceeding in advance. Florida law requires that prior notice be given in the latter instance; no good reason exists why such notice should not be required in the former.

Most federal courts require prior notice of closure of a record or file in a judicial proceeding. See, e.g., In re Washington Post Co., 807 F.2d 383, 390 (4th Cir. 1986) (trial courts are required to "give adequate notice that the closure of a hearing or the sealing of documents may be ordered"); In re Knoxville News-Sentinel Co., 723 F.2d 470, 475-76 (6th Cir. 1983) (where a motion is made to seal a record, the filing of the motion must be made "'sufficiently in advance of any hearing on or disposition of the [motion] to afford interested members of the

public an opportunity to intervene and present their views to the court'").

The citizens of Florida have a constitutional right of access to records of this State's courts. This right should not be denied to them without prior notice, and the timely opportunity to be heard.

The commentary also states that: "Providing reasonable notice to the public of the entry of a closure order and an opportunity to be heard on the closure issue adequately protects the competing interests of confidentiality and public access to judicial records." For this proposition, the commentary cites State ex rel Tallahassee Democrat v. Cooksey, 371 So.2d 207 (Fla. 1st DCA 1979); Florida Freedom Newspapers v. Sirmons, 508 So.2d 462 (Fla. 1st DCA 1987), approved by Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113 (Fla. 1988).

Rather than relying on these appellate cases, the commentary should reflect the holdings of this Court Barron and Lewis, in which no distinction is drawn between proceedings and records.

Proposed Substitute Language

"Subdivision (c)(9)(D) requires that, except where otherwise provided by law or rule of court, reasonable notice shall be given to the public of any order closing a court record. Additionally, following the rule enunciated in Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113 (Fla. 1988) and Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982), prior notice of a motion to close a court record must be given by the party

desiring closure except in exceptional, emergency situations where the giving of such notice is both impractical and unduly burdensome. Where a closure order is entered in such circumstances, the court shall, in addition to the other written findings required by law, make additional written findings specifying the nature of the emergency and the reasons why prior notice could not be given. Except where otherwise provided by law or rule of court, all orders closing a court record must be entered on the public docket, together with a generic description of the record itself."

CONCLUSION

For all these reasons, the Times respectfully requests that the Court consider and adopt its proposed revisions to the "Committee Commentary."

Respectfully submitted,

George K. Rahdert
GEORGE K. RAHDERT
Fla. Bar No. 213365
RAHDERT & ANDERSON
535 Central Avenue
St. Petersburg, FL 33701
(813) 823-4191

Counsel to Times Publishing Co.

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