O.A. 10-5-94 097

IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,927

IN RE AMENDMENT TO RULE OF)
JUDICIAL ADMINISTRATION 2.051 -)
PUBLIC ACCESS TO JUDICIAL RECORDS)
_____)

CORRECTED RESPONSE OF THE FLORIDA SOCIETY OF NEWSPAPER EDITORS

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CORRECTED RESPONSE OF THE FLORIDA SOCIETY OF NEWSPAPER EDITORS

The Florida Society of Newspaper Editors ("FSNE") files this response to the proposed amendments to the Rules of Judicial Administration, which amendments modify the existing rules governing public access to the records of the judicial branch and its agencies as adopted by this Court on October 29, 1992, In Re Amendment to the Florida Rules of Judicial Administration - Public Access to Judicial Records, 608 So. 2d 472 (Fla. 1992).

INTRODUCTION

FSNE generally approves of the amendments proposed by the Court's Study Committee on Confidentiality of Records of the Judicial Branch. FSNE has, however, two specific comments on the proposed amendments; FSNE also wishes to bring to the Court's attention two additional matters.

COMMENTS ON PROPOSED CHANGES TO FLORIDA RULES OF JUDICIAL ADMINISTRATION

1. **Rule 2.051(a)(9)**. The relevant portions of this Rule presently provide:

> . . . The following records of the judicial branch and its agencies shall be confidential:

. . .

> (9) any court record that upon judicial determination in case decision or court rule establishes that
>
> (A) confidentiality is required to...

This language is preserved in the proposed amendments as Rule 2.051(c)(9).

FSNE recommends that the language of (9) be changed to read:

> (9) any court record that upon judicial determination in a final case decision or court ruling ~~[rule]~~ establishes that

The term "case decision" is ambiguous and should be clarified and amended to include only the final case decision. As currently proposed, the term "case decision" could be interpreted broadly to include any ruling at any time, which cannot be the intent of the proposed amendment.

Also, the term "court rule" is ambiguous, and could be interpreted as a "general rule of court," rather than (as intended) a ruling by a judge in a specific case meeting the criteria of the tests set forth in (A) - (C). The tests set forth in (A) - C) can only be met on a case by case basis, not by a general rule of the court.

Article I, Section 24 of the Florida Constitution, "Access to public records and meetings" (the "Amendment"), mandates great vigilance by this Court in protecting the public's right of access to all government functions. The Amendment preserved all confidentiality rules adopted by this Court prior to its enactment. Now that the Amendment has been enacted, however, records of the judiciary, as those of other branches, can only be made confidential by the Legislature. By including the term "court rule" in subparagraph (9), the Court might be deemed to have adopted a rule allowing itself to adopt future rules creating confidentiality, thereby circumventing the clear language of the Constitutional Amendment.

For both these reasons the clarification suggested herein is requested.

2. **Rule 2.051(c)(9)(D)**. The proposed amendments add a new subparagraph (D) to Rule 2.051(c)(9) [presently 2.051(a)(9)]:

> (D) except as provided by law or rule of court, reasonable notice shall be given to the public of any order closing any court record or proceeding.

We suggest that the following words be added to the end of the proposed "(D)":

A decision not to give prior reasonable notice to the public must be made by the chief judge of the court involved with the concurrence of the chief judge of the next highest appellate court of the Chief Justice.

This proposed addition parallels the last sentence of Rule 2.051(a)(2) as proposed to be amended (and renumbered 2.051(c)(2)) in the proposed amendments. It will prevent an individual trial judge from declaring some emergency and acting without consultation. A failure to give prior reasonable notice to the public should be extraordinarily rare, if not non-existent, and every effort should be made to ensure this.

MATTERS FOR ADDITIONAL CONSIDERATION

On July 8, 1994 the decision in Times Publishing Company v. Ake, 19 Fla. Law. Wkly. D1407 (2d DCA 1994) was issued. This case involved a demand for public records filed by the Times with the Clerk of the Circuit Court of Hillsborough County. The clerk initially refused to comply with the demand, and the Times filed a complaint for declaratory judgment. Although the bulk of the information requested (copies of magnetic computer tapes comprising the probate, guardianship, trust and mental health databases held by the Clerk) was eventually furnished to the Times, the issue on appeal involved the trial court's denial of the Times' request for

attorneys' fees under Chapter 119 (the "Act"). The Second District concluded that "chapter 119 does not apply to judicial records nor to the clerk [of the circuit court] in such capacity [acting in the exercise of his duties derived from article V . . . as an arm of the court], and the access to judicial records under his control is governed exclusively by Rule 2.051." The Second District thus held the Clerk could not be penalized (by paying the Times' legal fees) for having initially withheld official court records, based upon its decision that the court records were requested under the Act. A court clerk should be just as liable for refusal to produce judicial records as is any other records custodian.

FSNE believes that this Court in its rules should remind the court clerks that their custodial obligation is no different than that of any other public records custodian -- if they deny a member of the public legitimate access to records, they are, as custodians of those records, subject to the requirement that they pay the legal fees that the citizen has incurred in pursuing a constitutional right of access.

Second, the 1994 Legislature has recently amended Chapter 28, Florida Statutes, which covers fees that are charged by court clerks. In the matter of copying fees, some clerks are now relying upon the revisions to Chapter 28 to claim they are entitled to

charge $1 per page for copies of all records in their possession. In doing so, they rely upon two new paragraphs:

> 28.001 (1) "Official records" means each instrument that the clerk of the circuit court is required or authorized to record in a series of books called "official records" as provided for in § 28.222
>
> (2) "Public records" has the same meaning as in § 119.011 and includes each official record.

FSNE believes these revisions are being incorrectly interpreted and that the Legislature did not intend to modify the fee structure that had long existed for copies of public records. It is a sidenote of some significance, FSNE believes, that representatives of the clerks' association, in seeking, and getting, FSNE support of the revisions, assured that there was nothing contained in the language that would increase copying costs for public records.

Moreover, the Legislature also added another new section, Section 28.24(33), which states that the cost of furnishing an electronic copy of any information contained in a computer database would be in accordance with Chapter 119, Florida Statutes, which provides this should be no more than the "actual cost of copying." It is not rational to suggest that the Legislature intended to set one standard for paper copies and another for electronic copies.

We recognize that the fee provisions in Chapter 28 are intended to be revenue-producing, but we believe the Legislature never intended this to include the copying of general judicial records, and certainly not any other records in the possession of the clerk as of a result of collateral duties.

FSNE encourages the Court to resolve this matter by stating, as rule, its policy that a citizen requesting a copy of a public document within the judicial system's custody, should pay no more than the actual cost of copying. This is the clear intent of Chapter 119. It is also in the spirit of the recent Constitutional Amendment establishing the right of access to public records, a right that should not be indirectly denied by cost.

CONCLUSION

For the foregoing reasons, the Florida Society of Newspaper Editors requests the proposed amendments to Rule 2.051 be further amended and clarified as suggested herein.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Corrected Response of the Florida Society of Newspaper Editors was served by mail this 15th day of August, 1994, upon the following:

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