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January 17, 2007

The Honorable Thomas D. Hall
Clerk of the Court
Florida Supreme Court
500 South Duval Street
Tallahassee, FL 32399-1927

RE: Florida Media Organizations' Comment
In re: Sealing of Court Records and Dockets, Case No. 06-2136

Dear Mr. Hall:

Media General Operations, Inc., d/b/a The Tampa Tribune and WFLA-TV; NYT Management Services, Inc., publisher of the (Sarasota) Herald-Tribune, (Lakeland) Ledger, Gainesville Sun and (Ocala) Star-Banner; Sentinel Communications Company, d/b/a the Orlando Sentinel; and Sun-Sentinel Company, d/b/a the South Florida Sun-Sentinel (collectively the "Florida Media Organizations"), hereby file this comment concerning the proposed changes to Florida Rule of Judicial Administration 2.420, governing public access to judicial branch records. Attached as Exhibit A to this comment are suggested changes to the proposed rule, offered by the Florida Media Organizations for the Court's consideration. We offer these suggestions in the spirit of continuing to work constructively with both the Committee and the Court on this issue. The proposed rule contains requirements that should assist in discouraging improper closures. We are concerned, however, that, in operation and without additional modifications, the proposed rule will not achieve the Court's goal of promoting public confidence in the system by protecting the principle of judicial transparency under this Court's mandates 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).

As drafted, the rule permits a party to obtain the closure of court records and removal of a party's name from the docket, with no public notice and no hearing based on the parties' mere stipulation to closure. This very scenario is what caused many of the secret docket problems which the Court now seeks to rectify. Moreover, if an access proponent then seeks to open the records or obtain the party name, the proponent may actually bear the burden under a good cause standard for justifying access which, in essence, reverses the *Barron* and *Lewis* principles. Likely, the motion to vacate will be the first time the access principles have been advocated to the trial court. To rectify this problem and ensure that the principles of openness are championed, the Florida Media Organizations' most fundamental proposal is that Rule 2.420 specify that the presumption of openness applies on a motion to vacate.

Background

Several of the organizations represented here have experienced firsthand the sealed docket problems that prompted the Court to direct the Rules of Judicial Administration Committee to consider revisions to Rule 2.420 on an expedited basis. The practical problems caused by sealed dockets are perhaps best illustrated by a matter in Sarasota County involving Vernon Buchanan, now a the newly-elected United States Congressman for District 13.

Mr. Buchanan, a businessman in Sarasota, sued the developers of the Sarasota Ritz-Carlton Hotel and condominiums in 2001. After extended litigation that resulted in volumes of pleadings, the parties ultimately settled the matter. Mr. Buchanan specifically negotiated a settlement provision concerning closure of the entire court file. Later, the parties jointly stipulated to the closing. (The joint stipulation and stipulated order are included on one document, which is attached as Exhibit B.) Based on that stipulation, an order was entered. No hearing occurred; no compelling interests justifying closure were presented. The entire court file was closed, as well as the progress docket for the case. From the standpoint of someone searching for cases involving Mr. Buchanan, the matter never even existed. In reviewing docket closure issues in the Twelfth Judicial Circuit in the wake of the discoveries in South Florida, the Sarasota Herald-Tribune discovered the wholesale closure in the Buchanan case. The paper then bore the burden of

overturning a closure order that had not properly been entered in the first place. After two hearings, a status conference call and several memoranda of law, Mr. Buchanan finally withdrew his objection to releasing the records, and the trial court entered an order permitting access to them.

Had no one caught wind of the broad closure in Buchanan, those records and even the existence of the lawsuit might well be concealed today. Unfortunately, the proposed rule would not necessarily prevent the Buchanan situation from recurring and does not fully serve the principles of access set forth in *Barron, Lewis*, and Article I, § 24 of the Florida Constitution.

The Presumption of Openness

This Court, of course, has zealously protected the strong presumption in favor of public access to all records of court proceedings. Indeed, the public's right of access to Florida state court records, including dockets, is solidly rooted in the First Amendment to the United States Constitution, Article I, Section 24 of the Florida Constitution, the Florida common law and Rule of Judicial Administration 2.420(a).

In *Barron*, this Court remarked:

> . . . [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 examination . . . The burden of proof in [closure] proceedings shall always be on the party seeking closure.

Barron, 531 So. 2d at 118.

Significantly, the presumption of openness continues throughout the trial and the appellate review process, with "the party seeking closure continu[ing] to have the burden to justify closure." *Barron*, 531 So. 2d at 118. This Court has characterized that burden as "heavy," both because of the presumption of openness and because the party seeking access generally has little or no knowledge of the specific grounds requiring closure. *Id*.

Before any closure of court records can occur, closure generally must be supported by a demonstrated compelling state interest, and the court must find that no reasonable alternatives to closure exist. *Id.* Any closure order must be narrowly tailored to protect that compelling interest. *Id.*

Without a contested hearing at which the principles favoring access are advocated, it is virtually impossible to satisfy the standards prescribed by this Court. That very scenario, however, is inadvertently sanctioned by the proposed rule.

Honoring the Presumption of Openness

The proposed rule undermines the presumption of openness firmly entrenched in Florida by effectively shifting the burden away from the proponent of closure onto the proponent of access. The rule allows for secret and uncontested closures followed by procedures for vacating orders that may be interpreted to place the burden on the party seeking access to demonstrate that access is warranted. The Florida Media Organizations intend their suggested changes to the proposed rule to facilitate addressing the concerns identified.

As discussed, the proposed rule does not require notice of the filing of a motion to seal. Further, no hearing is required when all parties agree to the motion (which often happens and did happen in the Buchanan matter). Thus, when the parties agree to closure, closure may be obtained without any notice to the public and without serious consideration of *Barron* or the strictures of Rule 2.420(c)(9).[1] The proposed rule should require a hearing in all cases – held in open court – so that the trial court has at least an opportunity to test the basis for the closure motion. The Florida Media Organizations proposed rule would require such hearings.

But even when a hearing is required – in contested cases – such hearings need not occur for 30 days after the filing of the motion. Because the rule further provides that all records that are subject to the motion be held confidential until the Court rules on the motion, closure is ensured for at least 30 days with no showing

[1] The proposed rule does require a court to enter an order at least conclusorily reciting that the requirements of *Barron* have been met. While such orders appear on their face to comply with *Barron*, they do not necessarily evidence that the strict requirements of *Barron* have been met and cannot be meaningfully reviewed by a nonparty wishing to challenge the order.

at all. This procedure may provide fruitful ground for abuse. If a litigant desires not necessarily to prevent access but merely to delay it, he may file a motion for closure, set the hearing for the thirtieth day or notify the court of the agreement of the parties on that date, thereby obtaining closure for 30 days even in contested cases. Such closures are, thus, obtained without having to make any showing at all.[2] Moreover, the motion itself should never be sealed so that there is at least a notation on the docket and, therefore, an opportunity to receive pre-closure notice for those who inquire. Some of the concerns presented by the procedure can be partially alleviated by a specific requirement in the rule that access requests be treated as priority cases under Rule of Judicial Administration 2.215(g). The revised rule attached as Exhibit A contains such a provision numbered Rule 2.420(d)(9).

Post-closure, the public may also be denied a meaningful opportunity to assert its right of access. Under the Committee's proposed rule, notice of closure orders need only be provided within 10 days *after entry of the closure order required by the proposed rule* and must be posted for only 15 days somewhere on the clerk's website and at a prominent place in the courthouse. There are several problems with this approach. First, requiring notice within 10 days of a written order allowing for closure ignores the possibility that closure orders may be entered orally and take effect well in advance of the court's release of a written opinion. Failing to take account of this lag time between the issuance of an oral order and a written opinion creates the potential for a situation where the existence of the closure order is unknown for some time and then is, in effect, immune from challenge until the trial court releases its opinion as required by the rule. By the time notice of closure is required under the rule, the reasons for closure may have subsided, allowing litigants to accomplish short term closures while evading challenge. Either way, a court record remains inaccessible for a lengthy period. Again, requiring expedited consideration of access requests will alleviate some of the problems recited here – at least when the public stumbles upon the oral order. The rule provided in Exhibit A also requires the posting of such orders via links from the clerks' home pages and mandates that they remain posted in this fashion for at least thirty days, making them easier to discover. They should, of course, be permanently docketed in the progress docket for the underlying case, and the

[2] The "good faith" requirement, though important, is not alone sufficient to prevent this abuse. The Florida Media Organizations urge this Court to strengthen that certification by requiring that the movant certify that the motion is supported by a sufficient factual and legal basis.

Florida Media Organization's proposed rule contains such a requirement in Rule 2.051(d)(4).

The continuing docket notice is particularly important. Often, access to a matter will not become important or necessary until well after a closure order has been entered. The Buchanan case is one such example: records of the litigation became of public interest when Mr. Buchanan ran for United States Congress, years after the lawsuit was sealed. An open docket that notes the filing of the closure orders and motions should assist in preventing closed cases to go unnoticed.

Most critically, the procedures for vacating closure orders must make clear that the burden of establishing a right to closure continues to rest on the party seeking it. To allow the rule to operate otherwise would sanction situations in which closure is obtained by agreement of the parties or with little or no aggressive opposition and consideration of the *Barron* factors. Under such circumstances, *Barron* is undone by placing the burden on nonparties seeking access to overturn closures that were not properly entered in the first place. This is precisely what occurred in the Buchanan case and precisely what the rule should prevent. At the end of the day, the burden rested with the press to establish good cause for vacating the Buchanan closure order under decisions like *Times Publ'g Co. v. Russell*, 615 So. 2d 158 (Fla. 1993), even though closure was effectuated in the first instance without any showing under *Barron*. And though the Buchanan records did not appear to have been properly sealed in the first place, the trial court initially refused to release the court file. (That order is attached as Exhibit C.)

Similarly, the proposed rule allows for closure without a meaningful showing under *Barron*. For this reason, when a motion to vacate is filed, the rule should require the trial court to conduct a de novo hearing of the Motion to Make Court Records Confidential, with the proponent of closure bearing the burden of justifying closure.[3] It would be inconsistent with the case law and undermine confidence in the judiciary, to create a system that provides no notice, permits

[3] It is not unprecedented for this Court to assign by rule of procedure the burden of proof to a particular party to a matter. See, e.g., Fla. Prob. R. 5.275 (assigning burden of proof in will contests to proponent of will); Fla. Fam. L. R. P. 12.650 (assigning burden of proof to petitioner in proceedings to override family violence indicators). Likewise, it is not unprecedented for this Court to set forth the showing required for motions made under procedural rules. See, e.g., Fla. R. Civ. P. 1.280(c) (specifying that protective orders may be obtained on good cause shown to avoid annoyance, embarrassment, harassment and the like).

motions to be granted without hearing based on the agreement of the parties, and then requires anyone wishing to vacate the closure order to satisfy a higher good cause standard on a motion to vacate a closure order. Such a system certainly would not be in keeping with the Court's goal of preventing excessive closures, such as those revealed recently involving closed dockets and sealed case files. No would it be in keeping with this Court's opinions on access to judicial records.

Concerns with Hiding Party Names

Finally, while the Florida Media Organizations applaud the Committee's efforts to preclude secret dockets by expressly specifying in the proposed rule that case numbers and docket numbers (or other numeric identifier) may never be made confidential, these restrictions fall short of averting the problem of secret dockets. By leaving open the possibility that names may be removed from the public docket – and, in fact, expressly endorsing that possibility in subsection (d)(3)(C) – the proposed rule effectively sanctions the secrecy it aspires to avoid. As a practical matter, facilitating the routine removal of names from the docket provides complete secrecy as to that action's existence because cases listed as Doe cases tell the public nothing about who the parties in interest are. As written, the proposed rule would allow anyone to remove their name from the docket (and effectively conceal the existence of the matter as to them) with little effort and little constitutional regard. The procedures for vacating closure orders do not correct this situation because it is nearly impossible to determine which Doe cases are legitimately designated as such and which Doe cases are simply a subterfuge for avoiding public access. Unless the Florida Media Organizations were to challenge every Doe indication (a result surely not intended by the rules), many improperly concealed party names would remain hidden from public scrutiny. While the Florida Media Organizations recognize that confidentiality of party names may be appropriate – in compelling situations – the proposed rule in effect condones this practice as a matter of course.[4] Closure of names certainly should not be part of

[4] In its comment, the Florida Prosecuting Attorneys Association expresses concern about revealing the fact that a particular defendant is to become a confidential informant in a criminal investigation. To remedy this concern, the prosecutors propose that any Motion to Make Court Records Confidential filed in any criminal proceeding be treated as confidential. The prosecutors also propose that no closure orders in any criminal matters be posted at all under Rule 2.420(d)(4). Obviously, this proposal goes well beyond the confidential informant situation and encompasses all closure motions in all criminal proceedings. Moreover, under the rule revisions proposed by the Florida Media Organizations, the prosecutors' concerns could be remedied by still requiring the public filing of a brief Motion to Make Court Records Confidential, but permitting counsel to submit *in camera* the records that reveal the

the normal menu of closure options. Such a rule would run far afoul of the standards in *Barron* and the protections mandated by Article I, § 24.[5]

CONCLUSION

Though the Buchanan matter may seem like an isolated occurrence because of the breadth of the closure, it is not. The closure of records based merely on the parties' stipulation, without notice or a hearing, is not rare. The procedures suggested in the rule are certainly a start, but those procedures do not go far enough to ensure that the problems experienced in circuits throughout this State do not occur again. To correct situations like Buchanan and to bring the proposed rule better in line with the requirements of *Barron* and Article I, § 24, the Florida Media Organizations summarize their requests here:

- Foremost, provide that the proponent of closure bear the burden of establishing its propriety in all closure proceedings, including proceedings to vacate closure orders;

- Require that the court conduct a *de novo* hearing on motions to vacate closure orders;

- Require that names be made available on the public docket in all but the rarest of circumstances upon a proper showing under *Barron*.

- Require open hearings on the Motion to Make Court Records Confidential;

- Require proponents of closure to certify that the closure motion is supported by a sufficient factual and legal basis;

- Require more sufficient notice of closure orders; and

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defendant's agreement to be a confidential informant. Prosecutors and criminal defense attorneys face the same issues now, but have raised no outcry that the safety of informants has been jeopardized under the present system.

[5] If the rule is interpreted as creating a *de facto* available exemption from public access for party names, it runs afoul of Article I, Section 24(c), which permits only the Legislature to create exemptions from public access.

- Require that docket notice of closure motions and orders be provided in all cases.

The Florida Media Organizations appreciate the time and attention both the Court and the Rules of Judicial Administration Committee have devoted to addressing the sealed docket and case file issues discovered in several circuits in this State. We thank the Court again for considering our concerns, and urge the Court to adopt revisions to Rule 2.420 which address the issues raised in this comment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was forwarded via E-Mail and U.S. Mail to J. Craig Shaw, Bar Staff Liaison, Rules of Judicial Administration Committee, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300; Gary D. Fox, Chair, Rules of Judicial Administration Committee, SunTrust International Center, One S.E. 3rd Avenue, Suite 3000, Miami, FL 33131-1711; Jonathan D. Kaney, Jr., Cobb & Cole, P.O. Box 2491, Daytona Beach, FL 32115-2491; and The Honorable Judith L. Kreeger, Dade Cty Courthouse, 175 NW 1ST Ave Ste 2114, Miami, FL 33128-1845, and by U.S. Mail to John F. Harkness, Jr., Executive Director, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300; Lisa Goodner, Office of the State Courts Administrator, 500 S. Duval Street, Tallahassee, FL 32399-6556; William C. Vose, Chair, Criminal Procedure Rules Committee, 1104 Bahama Drive, Orlando, FL 32806-1440; Arthur I. Jacobs, Florida Prosecuting Attorneys Association, 401 Center Street, 2nd Floor, P.O. Box 1110, Fernandina Beach, FL 32035; Penny H. Brill, Asst. State Attorney, 1350 N.W. 12th Avenue, Miami, FL 33136; and Carol Touhy, 101 N. Alabama Ave., Room C254, Deland, FL 32724, on January ___, 2007.

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