IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-2136

IN RE: AMENDMENT TO FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.420 - SEALING OF COURT RECORDS AND DOCKETS

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COMMENTS OF ATTORNEY DON FOUNTAIN TO PROPOSED FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.420

Attorney Don Fountain respectfully submits these comments to the proposed changes to Rule 2.420 as published in the December 15, 2006 Edition of the Florida Bar News, and states as follows:

My experience in handling product liability litigation for many years leads me to believe that there are two issues created by the proposed Rule changes that will consume considerable additional judicial time and result in the delay of virtually every product liability action, and likely any case against a corporation or business of virtually any kind.

First, the broad, non-specific statement under subsection C (A) (ii) that "confidentiality is required to protect trade secrets" will undoubtedly result in virtually every document that is sought from a corporation during discovery to be designated by the corporation to whom discovery is directed as some type of "trade secret," and therefore, implicate the procedures set forth in this Rule.

Secondly, as written this Rule provides an excellent judicially sanctioned excuse for a party who is under the obligation to respond to discovery to object and delay responding to discovery and delay producing any documents on the basis that all of the responsive documents are "trade secret" and the court has not had an

opportunity to hold the hearings necessary to determine whether the documents sought to be produced are confidential, and therefore, the producing party is unable and unwilling to produce any documents until the processes outlined in this Rule have been completed, re-argued, appealed, etc. The net result is an extreme delay of the judicial process, because delayed document production spawns delayed depositions, expert disclosures and trial. Examples of actual discovery responses are attached.

The practical day-to-day effects of this rule change must be considered. This rule will result in judicial hearings. The hearings necessitated by this rule are not five minute motion calendar type hearings, but instead are lengthy special set hearings that are extremely difficult for trial courts to find time for on their calendars. Delays of months will occur because of this rule, and because the documents at issue are likely central to the litigation the entire case will be delayed.

Documents that could not even remotely meet the required legal definition of "trade secret" are claimed as trade secrets in the courts every day. Statutory provisions that give the court authority to impose sanctions if it determines that there was not a good faith basis to claim a document was a "trade secret" are laughable. Sanctions are rarely, if ever, granted by courts, and do not serve to provide any deterrent to corporate litigants who have far more to lose than a couple thousand dollars in sanctions if damaging documents are produced.

Documents that are truly "trade secret" are rarely involved in litigation. Typically by the time litigation occurs the state of knowledge or technology that existed at the time relevant documents were created is several years old and is no

longer capable of meeting a stringent trade secret definition that includes an actual demonstration through evidence that disclosure of a trade secret would create an economic harm or an economic benefit to a competitor. In product liability litigation product manufacturers routinely claim that technology that is ten or more years old and that has subsequently been abandoned by the company that possesses the trade secret information itself is still trade secret for the purpose of litigation. It would be interesting to examine the results of legal research conducted to determine whether any litigation has ever resulted because a document produced in litigation fell into the hands of a competitor and caused demonstrable economic harm.

In order to counteract the undoubted affects that this statute will have on litigation, I would suggest incorporating a very stringent test that must be met before a document can be asserted as "trade secret" along with a required or mandatory monetary sanction provision against not only the company asserting the trade secret claim, but also against any attorney advancing it, where a later determination was made that in fact no valid "trade secret" existed.

In addition, while corporations are not bound by any ethics, attorneys are. A requirement that the trial judge report an attorney to the Florida Bar would be a powerful, who advances an invalid "trade secret" claim.

Additionally, the statute should be amended to include a specific provision that provides that the belief or assertion that a "trade secret" does exist or may exist will not delay or excuse the production of documents in discovery, and that any claimed "trade secret" documents must be produced to the requesting party

within the time required by the Florida Rules of Civil Procedure. The statute should provide that the party receiving the documents will treat them as confidential pending ultimate resolution by the court.

Finally, the Committee could actually save a tremendous amount of judicial effort if it were to adopt a uniform order regarding the production of confidential documents during litigation. I have attached a stipulated protective order that my firm has utilized in many litigated product liability cases against Ford Motor Company and others. You will note some handwritten modifications to the order that center around another issue that typically consumes a considerable amount of judicial time; the authenticity of confidential documents.

It is common place in litigation for defendants to designate multitudes of documents as "confidential" or "trade secret" essentially claiming that they are so competitively sensitive that disclosure would cause financial ruin to the producing corporation. However, when the time comes for the documents to be introduced into evidence at trial, defendants often claim that these same highly sensitive "confidential" documents are not authentic and therefore not admissible. Many trial judges get lost in the illogical paradox of how a document that is so competitively sensitive could not be authentic. It makes no legal or common sense that heightened protection should be afforded to a document that is not authentic.

Therefore, creating an appropriate rule and an uniform order would dramatically assist the trial courts in administering truly confidential documents and would avoid hearings on a variety of issues including: the language of the appropriate protective order regarding confidential documents, motions to compel

production of confidential documents pending resolution of the wording of the appropriate protective order, motions to continue depositions and discovery deadlines due to delayed production of confidential documents, and motions to determine authenticity of confidential documents.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. regular mail this ____ day of January, 2007 to: Gary D. Fox, Committee Chair, SunTrust International Center, 1 S.E. 3rd Avenue, Suite 3000, Miami, Florida 33131-1711.

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