

IN THE SUPREME COURT OF FLORIDA

**IN RE: AMENDMENTS TO FLORIDA RULE
OF JUDICIAL ADMINISTRATION 2.420 CASE NO.: SC07-2050**

**CONSOLIDATED COMMENTS OF COURT RULES
COMMITTEES RE: SUPREME COURT'S
PROPOSED CHANGES TO FLORIDA RULE OF
JUDICIAL ADMINISTRATION 2.420 AND
FLORIDA RULE OF APPELLATE PROCEDURE 9.100**

On September 9, 2009, this Court issued a Publication Notice in the above-referenced matter, inviting comment on the Court's revisions to proposed amendments to Rule of Judicial Administration 2.420, provided in the appendix to that Notice. Also included in the appendix were amended Florida Rules of Appellate Procedure 9.040, 9.100, and 9.110.

The Honorable Lisa Davidson, Chair, Rules of Judicial Administration Committee; Fleur J. Lobree, Chair, Criminal Procedure Rules Committee; John G. Crabtree, Chair, Appellate Court Rules Committee; and John F. Harkness, Jr., Executive Director, The Florida Bar, submit these consolidated comments on behalf of the committees listed above (hereinafter sometimes referred to as the "consolidated committee"). The consolidated comments were approved by the Rules of Judicial Administration Committee by a vote of 22-1, and by the Appellate Court Rules Committee by a vote of 18-1. The comments with respect to subdivision (f)(3) were also separately approved by the Criminal Procedure Rules Committee by a vote of 32-0.

The Executive Committee of the Board of Governors voted 9-1 to approve the comments.

The rules that were contained in the Court's appendix to the September 9, 2009, Publication Notice are set forth in Appendix A to this report. Those rules appear exactly as the Court issued them (with struck-through and underlined language, and with the Court's bold-face additions and the Court's strike-throughs). The consolidated committee's proposed changes to the text are shown either as underlined text or as struck-through text, as the context requires, and are also shaded (in a lighter shade on the

paper version and in blue on the electronic version of this report) to distinguish those amendments from prior amendments to the text. In addition, to further clarify the consolidated committee's changes, the same proposal is presented in Appendix B. That appendix strips out all prior struck-through language and deletes underlining (but retains the Court's bolded text), and then overlays only the consolidated committee changes for ease of reference.

Representatives from each of the committees listed above convened as a consolidated committee by conference call on six separate occasions to review the Court's proposed amendments to *Fla. R. Jud. Admin.* 2.420 and *Fla. R. App. P.* 9.100. (No discussions were deemed necessary regarding changes to Rules 9.040 and 9.110.) Input was also received by the consolidated committee from representatives of the Committee on Access to Court Records, the Circuit Court Clerk's Offices for the 7th and 13th Judicial Circuits, and from representatives of various media organizations.

As a threshold matter, the consolidated committee wishes to direct the Court's attention to the fact that this proposal contains certain revisions beyond the specific areas designated for comment by this Court. These additional revisions are included because during the course of lengthy and detailed calls the committee members concluded that the committee's failure to bring such matters to the attention of the court could undermine the entire regime for treatment of confidential materials constructed in Rule 2.420. These revisions are being suggested either because this Court's proposed language prompted additional revisions elsewhere in the rule or because the committee members came to realize the significance of certain matters that had not previously been considered. Because the committee members felt that it was important to create an overall rule that was as comprehensive, clear, and consistent as possible, all revisions that the committee believes to be appropriate are included herein.

Revisions to 2.420(b)

The consolidated committee felt that it would be helpful to define the term "affected non-party" so that references within the rule to non-parties who are entitled to receive notice of certain filings would be clear and consistent. That term has been defined and inserted as subdivision (b)(5) to make clear that non-parties who are entitled to receive notice of such filings are only those persons who are identified by name in a court record that

contains confidential information pertaining to the named individual to avoid any inherently subjective consideration of who might or might not be “affected” by a filing. The defined term is then used throughout the rule where appropriate.

Revisions to 2.420(d)(2)

First, the committee revised the language in (d)(2) to address the use of these rules in connection with evidence introduced during a court hearing or at trial in addition to materials filed with the court, based on the committee’s view that materials submitted as evidence were as deserving of protection as other court records. Therefore variations on the term “introduce” appear in this subdivision (d)(2), in (d)(3), and in (e)(6). Second, the committee incorporated a reference to the new form created for the purpose of identifying confidential information being filed with the clerk or submitted to the court. (That form appears at the end of revised rule 2.420 in Appendix A to this report.) Finally, the committee changed the word “records” to “information” in the last sentence of the subdivision to clarify that, to the extent practicable, it is only the confidential information that should be treated as confidential rather than the entire court record containing such information.

Revisions to 2.420(d)(3)

The consolidated committee believes that the entire confidentiality regime incorporated into rule 2.420 would be strengthened considerably by requiring persons who have a good faith belief that they are filing or submitting confidential information to the court to move to designate such materials as confidential in accordance with subdivision (e), (f), or (g). The rule does not impose any new obligation to ascertain confidentiality, which was previously a feature of the Court’s proposed rule (d)(3). Rather, the proposed revisions merely obligate filers to take steps to protect information if the filer already holds the belief that the materials should be deemed confidential. Specifically excluded from the obligation is a person or counsel for a person filing their own confidential information and intending to waive any claim of confidentiality.

Revisions to 2.420(d)(4)

The Court’s proposed rule (in bold type) raised several issues that the consolidated committee sought to address by proposed new language. The

committee sought to restructure the proposed rule in three ways by rewriting the subdivision.

First, the proposed committee language specifies the types of motions that create a third-party notice obligation. The committee felt that there were three types of motions under rule 2.420 that could *disclose* a non-party's confidential information, and each of those is specified in the first sentence of this rule.

Second, the committee specified with greater detail and with language consistent with other parts of the rule the type of information that such affected non-parties would consider significant. The committee also sought to clarify the precise type of warning that should accompany notice of different types of events to ensure that the third party would be notified of the specific potential harm attendant to each such possible event. The committee did not feel that it was necessary to advise third parties of the possibility of a later effort to unseal confidential information because pursuant to this provision any such motion would require its own notice to such affected non-parties.

Third, the committee expanded upon the service requirements for such a notice, as non-party service is not otherwise provided under these rules. That language appears in the last two sentences of the subdivision.

Revisions to 2.420(e)(5) and (g)(5)

The consolidated committee proposes minor revisions intended to clarify that all parties (*i.e.*, not merely “affected” parties) must receive notice and that notice must also be given to “affected non parties” as that term has been defined in 2.420(b)(5).

Revisions to 2.420(e)(6)

The consolidated committee believed that including an obligation for a filer to seek protection for information that a filer believed in good faith to be confidential (as set forth in subdivisions (d)(2) and (3)) without a concomitant authority for the court to sanction filers who failed to comply with that obligation would undermine the purpose of subdivision (d)(3). Further, because other aspects of this rule had previously embraced the concept of sanctions in the event of noncompliance, the committee felt that it

would be appropriate to broaden the sanctions language consistent with the prior sanctions provisions. Therefore, the committee re-wrote this subdivision.

Revisions to 2.420(f)(3)

A review of the revisions made by the Court to proposed rule 2.420 that were indicated in bold type was also performed independently by the Florida Criminal Procedure Rules Committee (CPRC). This matter was assigned to a subcommittee, which met and made its recommendation to the full committee. Thereafter, the full committee voted unanimously, 32-0, to propose further revisions to subdivision (f)(3).

It was the intention of the CPRC, through its prior proposals and comments concerning this rule, that the procedure set forth in subdivision (f)(3) for a “Restricted Motion to Determine Whether a Court Record Is Confidential” be utilized only in situations in which the filing of such a motion would reveal either the identity of a confidential informant or active criminal investigative information. As such, subdivision (f)(1) provides that all other motions concerning confidentiality of court records in criminal cases are governed by the procedures of subdivision (e). Therefore, the CPRC recommends deletion of the second sentence of the Court’s bold-type proposal in subdivision (f)(3), as it considers this provision to be redundant.

Moreover, the CPRC unanimously adheres to its prior position that not only the content of documents sought to be protected by restricted motions, but also the existence of the motions themselves, must remain confidential pending a ruling on the motion or further order of the court. As explained in *State v. Burgos*, 985 So. 2d 642, 644 (Fla. 2d DCA 2008):

The State has a limited privilege to withhold the identity of persons who provide law enforcement officers with information about criminal activity. *See Roviario v. United States*, 353 U.S. 53, 60-61, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). Because the State has the privilege of nondisclosure, the burden is on the defendant claiming an exception to the rule to show why he is entitled to disclosure. *Treverrow v. State*, 194 So. 2d 250, 252 (Fla.1967).

See also §§ 119.071(2)(c) and (f), 119.0714(1)(f), and 914.28, Fla. Stat.

(2009). The policy reasons for not disclosing as public record the identity of confidential informants or active criminal investigative information are obvious. Once the existence of a motion concerning the identity of a confidential informant or an active criminal investigation is revealed for all to see in the public record, that person and the law enforcement officers with whom the person is cooperating could be at risk of physical harm, and future or ongoing criminal investigations could be compromised.¹

(The consolidated committee was in unanimous agreement with the following proposed change proffered by the CPRC.)

For the foregoing reasons, the CPRC respectfully requests that the Court revise the initial paragraph of subdivision (f)(3) as follows (the CPRC's suggested addition is in italics below):

(3) Any motion to determine whether a court record that pertains to a plea agreement, substantial assistance agreement, or other court record that reveals the identity of a confidential informant or active criminal investigative information is confidential under subdivision (c)(9)(A)(i), (c)(9)(A)(iii), (c)(9)(A)(v), or (c)(9)(A)(vii) of this rule may be made in the form of a written motion captioned “Restricted Motion to Determine Whether a Court Record is Confidential.” If the motion reveals the identity of a confidential informant or active criminal investigative information, the movant may request that the motion also be determined to be confidential.*Any motion made pursuant to this subdivision and all court records that are the subject of such a motion must be treated as confidential and not indicated on the docket by the clerk pending a ruling on the motion or further order of the court.*

¹ Additionally, in the event this Court does not adopt all of the proposed revisions recommended in this report regarding subdivision (d)(4) concerning confidential information involving a named non-party, the CPRC respectfully submits that subdivision (d)(4) should include language to clarify the word “involves” and to specify that criminal cases are not included in this subdivision.

Revisions to Fla. R. App. P.9.100(d)

The Court's revisions to Rule 9.100(d) eliminated the language permitting expedited review of oral orders. Only expedited review of written orders is permitted under the revised rule. The consolidated committee, however, is of the opinion that language encompassing oral orders should remain in the rule.

Rule 9.100(d) concerns the expedited review of not just court records closures, but also court proceedings closures. Rule 2.420 certainly contemplates the timely entry of an actual written order involving court records closures. However, Rule 2.420 has nothing to do with issues involving the closure of court proceedings. In addition, there will be times in the heat of trial or a major hearing, for example, when an oral order is entered sealing court records — but a written order will not follow for some time. In the meantime, the closed record could be central to a newsworthy proceeding. The delay in access and seeking review itself could become a significant problem if review of the oral order cannot be sought on an expedited basis.

This review problem could also affect a party seeking closure. If an oral order denying closure is entered, can the party seeking closure not seek expedited review of an oral order opening a proceeding or record?

To remedy these concerns, the oral order language has been returned to the revised rule. *It is shown as struck-through by the Court, and as underlined and shaded by the consolidated committee, in Appendix A.* In addition, the consolidated committee made grammatical changes to the first sentence of subdivision (a) for clarity, and added a reference to “any affected non-parties” at the end of the subdivision to comport with similar added language throughout Rule 2.420.

Respectfully submitted on November 9, 2009.

/s/ Lisa Davidson

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CERTIFICATION OF FONT COMPLIANCE

I certify that this report was prepared in 14-point Times New Roman font.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished by United States mail to The Honorable Judith Kreeger, Chair, Committee on Access to Court Records, 175 N.W. 1st Ave., Suite 2114, Miami, FL 33128-1845; Steve Henley, Office of State Courts Administrator, 500 S. Duval St., Tallahassee, FL 32399-1900; Carol M. Touhy, 1714 Lime Tree Dr., Edgewater, FL 32132-3200; Laura E. Roth, 101 N. Alabama Ave., DeLand, FL 32724-4316; Barbara A. Petersen and Adria E. Harper, 336 E. College Ave., Suite 101, Tallahassee, FL 32301; Carol Jean LoCicero, 400 N. Ashley Dr., Tampa, FL 33602; Deanna K. Shullman, 101 N.E. 3rd Ave., Suite 1500, Fort Lauderdale, FL 33301-1181; Irene Plank, P.O. Box 3079, Sarasota, FL 34230-3079; Lucy A. Dalglish, Gregg P. Leslie, and Matthew B. Pollack, 1101 Wilson Blvd., Suite 1100, Arlington, VA 22209; Robert Dewitt Trammell, P.O. Box 1799, Tallahassee, FL 32302; Arthur I. Jacobs, 961687 Gateway Blvd, Suite 201I, Fernandina Beach, FL 32034-9159; John E. Morrison, 1320 N.W. 14th St., Miami, FL 33125-1609; Penny H. Brill, 1350 N.W. 12th Ave., Miami, FL 33136; and Jodi B. Jennings and Krys Godwin, 651 East Jefferson St., Tallahassee, FL 32399-2300 on November 9, 2009.

/s/ J. Craig Shaw

J. Craig Shaw

Staff Liaison to Committees

The Florida Bar

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