IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO RULE OF JUDICIAL ADMINISTRATION 2.420 - PUBLIC ACCESS TO JUDICIAL BRANCH RECORDS

CASE NO.

PETITION OF THE COMMITTEE ON ACCESS TO COURT RECORDS TO AMEND RULE OF JUDICIAL ADMINISTRATION 2.420

The Committee on Access to Court Records (the Access Committee), by and through its undersigned Chair, the Honorable Judith L. Kreeger, Circuit Judge, Eleventh Judicial Circuit, files this petition pursuant to Florida Supreme Court Administrative Order AOSC06-27, *In Re: Committee on Access to Court Records*, dated August 21, 2006, (Appendix D) directing the Access Committee to review and propose revisions to Florida Rule of Judicial Administration 2.051, now rule 2.420, relating to confidentiality and access to court records.

The Access Committee proposal is provided in legislative format in Appendix A. A two-column table comparing the Access Committee proposal to the existing rule is provided in Appendix B. For reference the Access Committee proposal is provided in legislative format set against the pending proposal of the supreme court released on February 28, 2008. This document is Appendix C.

The Access Committee was formed pursuant to Administrative Order AOSC06-27, *In Re: Committee on Access to Court Records*, issued on August 21, 2006. The Access Committee was created to advance the implementation of a number of recommendations of the predecessor Committee on Privacy and Court Records (the Privacy Committee). The Privacy Committee had concluded, and the Supreme Court had agreed, that the Florida judicial branch should have as a goal providing electronic access to non-confidential court records when appropriate conditions are met. Administrative Order AOSC06-20, *In Re: Implementation of the Report and Recommendations of the Committee on Privacy and Court Records*. The purpose of the Access Committee has been to assist in establishing those necessary conditions.

This petition is directed solely to amendments to rule 2.420. The Access Committee is also submitting a separate petition that addresses changes to other rules of court for purposes of minimizing personal information in court records, and a committee report that addresses other matters that do not implicate rules of court. The proposed amendments were approved by the Access Committee on July 14, 2008, by a vote of 12-0. The Committee conducted 12 meetings from November 30, 2006 to July 14, 2008.

The major task assigned to the Access Committee was to propose revisions to Rule of Judicial Administration 2.420 (formerly 2.051) to address the effective scope and operation of the rule in terms of its relationship to statutory public records exemptions. This followed on the conclusion of the Privacy Committee that a central obstacle to implementation of remote electronic access to court records in Florida is that in its present form, rule 2.420 is administratively impracticable and inadvisable as a matter of policy because it appears to indiscriminately incorporate all statutory categories of confidential records, of which there are more than one thousand.

The Court also directed the Access Committee to address several other matters in its proposed revisions to rule 2.420. The Court directed that the rule be amended to clearly provide for the responsibilities of filers when submitting confidential information to the courts. Filing requirements should include a certification to the clerk of court when confidential information is filed, notice to parties and affected non-parties, and a good faith provision that subjects the attorney or party to sanctions. (Privacy Report at 64) The Court also directed the Access Committee to propose revisions to rule 2.420 to clarify that court records defined by the rule as confidential may not be released except as allowed by law.

Charge.

The charge to the Access Committee with regard to rule 2.420 provides:

> The primary purpose of the Committee is to review Florida Rule of Judicial Administration 2.051 and develop proposed revisions to the rule with regard to the following matters:
>
> 1. Recommendation Two: Scope of Confidentiality. Review and explore revisions of rule 2.051 to narrow its application to a finite set of exemptions that are appropriate in the court context and are

identifiable. The Committee should note that the Supreme Court has not made a decision as to whether the absorption doctrine applies.

. . . .

4. Recommendation Thirteen: Confidential Information. Propose revisions to rule 2.051 to clarify that those records defined in the rule are confidential and may not be released except as provided. Because this requirement is already established in existing law, the Committee is directed to propose a rule amendment or committee note that is consistent with the recognition of the current legal requirements.

5. Recommendation Sixteen: Unsealing of Records. Propose revisions to rule 2.051 to provide a clear and effective mechanism through which a preliminary determination that a record is exempt or confidential can be challenged and reviewed.

6. Recommendation Seventeen: Responsibility of Filer. Propose revisions to rule 2.051 to provide for certain responsibilities of the filer of court documents regarding confidential information.

[Footnotes deleted]

Absorption and the Scope of Rule 2.420.

The central question regarding rule 2.420, as posed by the Privacy Committee, is "whether the rule incorporates, or absorbs, state exemptions and federal confidentialities, thus making them confidentialities under court rule." (Privacy Report at 29) The rule was adopted in 1992 in anticipation of passage of the Sunshine Amendment of the Florida Constitution. It provides in pertinent part:

> (c) Exemptions. The following records of the judicial branch shall be confidential:
>
> . . . .

> (8) All records presently deemed to be confidential by court rule, including the Rules for Admission to the Bar, by Florida Statutes, by prior case law of the State of Florida, and by the rules of the Judicial Qualifications Commission.

Upon examination of these provisions, the history of the Sunshine Amendment, and other materials, the Privacy Committee concluded that subdivision 2.420(c)(8) was intended to embrace and does incorporate the statutory exemptions:

> The Committee believes that on its face this rule incorporates state statutory exemptions, making exempt information confidential within judicial branch records. The Committee believes that this is the interpretation given to the rule by the Florida Supreme Court in *State v. Buenoano*, 707 So. 2d 714, 718 (Fla. 1998).

(Privacy Report at 30-31 (footnote omitted))

In reaching this conclusion, the Privacy Committee relied on *State v. Buenoano*, in which the Court interpreted subdivision 2.420(c)(8) as it relates to several specific statutory exemptions for criminal investigative records. The Court held that the records in question, which were exempt under the statutory exemption, "are likewise exempt under rule [2.420]." *State v. Buenoano*, 707 So. 2d at 718.

While the Privacy Committee agreed with the legal conclusion that the rule absorbs all statutory exemptions, it emphasized that this outcome leads to two serious problems. First, the committee agreed that this result is contrary to Florida's open records tradition and policy. It observed that many statutory exemptions are either overbroad or inappropriate when applied to court records. Second, the committee recognized the practical concern raised by clerks of court and others: the task of fully applying all statutory exemptions to all court records would be enormously burdensome and would present an insurmountable obstacle to the eventual implementation of public online access to court records. This problem is somewhat unique to electronic access because with traditional "over the counter" access to paper records only records that are actually requested need be screened for confidential information. This leaves the vast bulk of court records unexamined, protected by "practical obscurity," distant from public view.

Implementation of instant electronic access, on the other hand, would require that all records that are to be made available be screened and redacted before being stored on a publicly accessible system. A representative of the Florida Association of Clerks of Court informed the Privacy Committee that Florida courts receive some 19 million documents annually. The Privacy Committee therefore determined that revising the rule was a necessary precondition to electronic access and it made the following recommendation:

> The Committee has concluded that implementation of a system that allows large volumes of court records to be released electronically cannot be responsibly achieved under the current [Rule 2.420]. The Committee therefore recommends that the Supreme Court direct a review of the effective scope of [Rule 2.420(c)(8)] and explore revision of the rule for the purpose of narrowing its application to a finite set of exemptions that are *appropriate in the court context* and are *readily identifiable*.

(Privacy Report at 47 (emphasis added))

The supreme court concurred with this analysis and subsequently charged the Access Committee with proposing rule revisions consistent with the recommendation of the Privacy Committee.

The Court added a significant caveat to its charge: "The Committee should note that the Supreme Court has not made a decision as to whether the absorption doctrine applies." Administrative Order AOSC06-27. The Access Committee interpreted this to mean that the Court desires that the rule be applied to a limited set of circumstances where confidentiality is clearly appropriate to court records and the subject record or information is readily identifiable by staff of the clerk of court. The Court clearly indicated that it was reserving judgment about the question of whether the rule absorbs other statutory exemptions. This interpretation is not inconsistent with *Buenoano*, where the Court ruled only that the specific criminal investigative records exemptions relevant to the subject records in that case remained exempt pursuant to the court rule. So, while the Court has not determined the scope of the absorption doctrine, and the decided cases do not articulate a definitive construction of the scope and breadth of rule 2.420(c)(8), the Court has indicated that absorption of applicable exemptions can be categorically applied in "a finite set of exemptions that are appropriate to the court context and are identifiable." The Access Committee was asked to define

that "finite set." With respect to other, less clear exemptions outside of that set, the Court may later clarify the issue over time.

This view was reinforced in an opinion that the Court issued in April 2007, in adopting rules amendments proposed by the Rules of Judicial Administration Committee to address the issue of sealed cases:

> Rule 2.420 recognizes a narrow category of court records where public access is automatically restricted by operation of state or federal law or court rule. See Fla. R. Jud. Admin. 2.420(c)(7)-(8). For records in this category, the State itself, through law and court rule, has identified specific privacy or government interests that clearly outweigh the public's right to know. These interests have been identified through the democratic process either in the Legislature or through the Court's public rule-making process.

In re Amendments to Florida Rule of Judicial Admin. 2.420-Sealing of Court Records and Dockets, 954 So. 2d 16 (Fla. 2007). The Access Committee again interpreted this to mean the rule can be understood to incorporate some, but not all, statutory exemptions, a concept that may be referred to as "soft" absorption.

In addition to reinforcing the concept of limiting "automatic" or categorical absorption to a relatively small set of exemptions, the 2007 amendments to rule 2.420 also presented an opportunity to consider how those exemptions which are not categorically incorporated might otherwise be addressed. The amended rule now includes a motion process through which a party may request that circuit or county court records in a non-criminal case be made confidential under rule 2.420(c)(9). This motion process, in new subdivision 2.420(d), provides a formal procedure for filers to certify that a motion to make records confidential meets certain requirements. Such motions must be made in good faith subject to sanction. Motions must be publicly noticed. The proposed amendment requires a hearing for a contested motion, and specifies the content of an order granting a motion in whole or in part. While the new subdivision was directed to non-criminal cases in county or circuit courts and limited the bases for motions to the elements subdivision 2.420(c)(9), the Access Committee concluded that this motion process could be expanded and used within the rule to accomplish much of

what the committee had been charged with accomplishing. Specifically, the process might accommodate assertions of confidentiality that rely on statutory exemptions beyond those that are categorically absorbed.

Analysis and Preliminary Proposal.

The Access Committee directed the Rule 2.420 Workgroup (the Workgroup) to develop recommendations for consideration by the full committee. After reviewing the history and legal background of this issue, the Workgroup created a framework to guide its work. First, the Workgroup developed a model that would conceptually organize all information in court records into three categories in terms of confidential status:

Type I: Information that is subject to a clearly applicable court rule or statutory exemption *and* is readily identifiable.

Type II: Information that is subject to a clearly applicable court rule or statutory exemption but which is *not* readily identifiable, *or* information which is not clearly subject to a court rule or statutory exemption.

Type III: Information that is not subject to a court rule or statutory exemption.

The Workgroup then developed proposed revisions to the rule that would accomplish the following:

Type I: The rule would itemize the court rules and statutory exemptions that comprise Type I, require that a filer of such information identify it as such, require the clerk to review for facial validity the identification of the information as confidential, and direct the clerk to independently identify and keep the information confidential whether the filer identified the information or not. These concepts are incorporated in new subdivision (d)(1) of the proposed rule.

Type II: Building on the motion process proposed by the Rules of Judicial Administration Committee and adopted by the Court in 2007, a filer or other affected person may file a motion to

determine whether information not included in the Type I list is confidential. This concept is incorporated in new subdivision (d)(2) of the proposed rule.

Type III: Any information which is not categorically confidential under Type I or is not determined to be confidential through a Type II motion is Type III information and is an open public record, consistent with the general policy stated in subdivision 2.420(a). ("The public shall have access to all records of the judicial branch of government, except as provided below.")

Definition: Additionally, in response to the charge to clarify the status of confidential records, a definition of "confidential" would be developed consistent with existing law. This definition is contained in new subdivision (b)(4) of the proposed rule.

In order to itemize those statutory exemptions that meet the criteria of being applicable in a court context, the Workgroup undertook a systematic review of all Florida statutory exemptions. A database was developed which included an inventory of all statutes that create public records exemptions. This inventory was then analyzed for operative language and statutory context that would indicate whether the exemption was expressly or impliedly applicable in a court context. Indicia of applicability included whether the statutory language, on its face, indicated legislative intent that the exemption apply to court records, whether the underlying public policy strongly supported applying the exemption to court records, and whether in practice and by custom the exemption has been routinely and traditionally applied to court records. With the inventory as a starting point, the Type I list was developed and finalized.

Other Proposed Changes to Rule 2.420.

While the Access Committee was working, other activities took place that impacted rule 2.420. The April 2007 amendments to the rule are discussed above. On October 31, 2007, the Rules of Judicial Administration Committee filed proposed amendments which included a new subdivision, 2.420(e). This new subdivision addressed sealing of county and circuit records in criminal cases, which had been excluded in the April 2007 amendments. The rules committee also proposed several minor changes to other parts of the rule. On February 28, 2008, the Court released for publication the rules committee proposal for comment along with the Court's own sua sponte alternative to this proposal. The Court's proposal

incorporates most of the rules committee's proposal but adds subdivisions 2.420(f) and 2.420(g), which address appellate court records in non-criminal and criminal cases, respectively.

As a result, by March 2008, the Workgroup was confronted with five different versions of rule 2.420: 1) the rule as it existed in 2006 when the Court charged the Access Committee with proposing revisions; 2) the rule after the amendments adopted in April 2007, which is the rule presently in effect; 3) the pending proposal filed by the Rules of Judicial Administration Committee on October 31, 2007; 4) the Court's proposal published on February 28, 2008; and 5) the Access Committee's preliminary proposal.

Final Proposal.

In developing its final proposal, the Access Committee elected to use the Court's proposal as a starting point. Most of the new elements of the Court's proposal, which includes most new elements of the proposal of the Rules of Judicial Administration Committee, are retained. Key elements of the Access Committee proposal are:

2.420(d): This is a new subdivision. It requires that the clerk identify information itemized in this subdivision and directs the clerk to keep it confidential as an administrative matter. Subdivision 2.420(d)(1)(A) incorporates the existing provisions of subdivision (c) that are unaffected by the rule change. Subdivision 2.420(d)(1)(B) lists the Type I exemptions to be categorically protected.

The subdivision also requires filers to identify any such information to the clerk at the time of filing, and to identify the applicable provision of the rule. The clerk is required to review this identification for facial validity. A procedure is provided for instances where the clerk determines that the identification is not facially valid.

Subdivision 2.420(d)(2) applies to instances where a statutory exemption that is not categorically incorporated under 2.420(d)(1) may constitute the basis for confidentiality. This provision directs the filer, or any

interested person, to file a motion to request a determination of confidentiality under the applicable subdivision that follows in the rule.

2.420(e): The scope of present subdivision (d), now designated as subdivision (e), is expanded to expressly allow motions based on any subdivision of 2.420(c). This would thus permit motions based on statutory exemptions or federal confidentialities that are arguably incorporated through 2.420(c)(8), but not administratively absorbed by inclusion as Type I exemptions in subdivision 2.420(d)(1)(B). This concept is continued in new subdivisions (f) (criminal trial court records), (g) (non-criminal appellate court records), and (h) (criminal appellate court records).

The titles and text throughout are modified, replacing the construction to "make confidential" with "determine the confidentiality of" to clarify that, consistent with constraints within article I, section 24 of the Florida Constitution, the rule would not purport to give the court expanded authority to confer confidential status on a record, or to expand the reach of the 1992 rule. Rather the amendment to the rule would only provide a procedural mechanism to determine whether confidential status attaches to the information by authority of legislative act or existing court rule.

2.420(f): The pending language regarding sensitive criminal case records in subdivision (f)(2), and similarly in (h)(2) for appellate criminal records, permits filing a restricted motion for "*any request* to make court records confidential *that may jeopardize* either the safety of a person or an active criminal investigation." (Emphasis added.) The Access Committee alternative describes the kinds of records subject to this subdivision and creates a higher and more specific threshold using language that mirrors existing language in subdivision 2.420(c)(9)(A).

2.420(g)-(h): The two subdivisions directed to appellate court records proposed in the Court's proposal are retained. The Court's proposal, however, assumes that any confidential information submitted by a lower tribunal is covered by an active order, and so the Court's proposed rule requires the clerk of the circuit court to indicate within the index the date and docket number of any such order. The Access Committee's proposal contemplates that information might also be administratively determined to be confidential under subdivision (d)(1) as well as being determined to be confidential in response to a motion. The lower tribunal clerk is still required to identify the confidential information but the manner of identification is less constrained.

2.420(i): Existing subdivision 2.420(d), renumbered 2.420(h) in the pending proposal and 2.420(i) in this proposal, is modified to clearly limit its application to administrative records of the judicial branch and to remove inappropriate reference to an appellate remedy.

Type I Exemptions.

The final list of statutory exemptions enumerated in subdivision 2.420(d)(1)(B) contains 19 items. Most of these are well established by law and practice and are routinely applied by the clerks of court. In all cases, however, it is necessary to go to the statutory language to understand the precise scope of the exemption in order to correctly apply it. Many of the statutes are difficult to interpret and could be misconstrued in their application. In several cases, the exemption expressly relates to the subject record while *in the custody of* a particular entity. For example, section 384.29, Florida Statutes, exempts records related to cases of sexually transmitted diseases "held by the department [of Health] or its authorized representatives." The proposed amendment to the rule would apply this exemption in the event the department or its representative provides such a record to a court. Similar records in the custody of any other party would not, however, be subject to the categorical protection of subdivision (d)(1), although they might be determined to be confidential upon a motion filed under (d)(2).

There are several exemptions that merit special discussion. These are exemptions, such as the sexually transmitted disease exemption discussed above, which provide various degrees of protection to potentially sensitive records that are of a clinical or therapeutic nature, typically involving documentation of a person's medical or psychological well-being. The statutory exemptions for these records are frequently targeted to states agencies, such as the Department of Children and Families, or service providers. In most cases the statutes that create these exemptions do not expressly state that they are intended to apply to such records when included in a court file, and it appears unlikely that the Legislature ever considered the question of whether the exemption would or would not apply to court records. Following lengthy discussion and study of these statutes, the Access Committee elected to exercise caution and include these exemptions on the Type I list. In the event this rule is adopted and these exemptions are categorically applied to court records, the Legislature may wish to revisit these statutes and express its intent regarding their application to court records.

Respectfully submitted this 2nd day of September 2008.

/S/
THE HONORABLE JUDITH L. KREEGER
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CERTIFICATE OF SERVICE

I HEREBY CERTFY that a copy of the foregoing has been furnished by United States mail to the following persons on September 2, 2008:

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CERTIFICATE OF FONT COMPLIANCE

I certify this petition has been prepared in MS Word using 14-point Times New Roman font.

/S/
THE HONORABLE JUDITH L. KREEGER
Chair, Committee on Access to Court Records
Florida Bar Number # 98600

READ-AGAINST CERTIFICATION

I certify these proposed rules were read against West's *Florida Rules of Court – State* (2008).

/S/
STEPHAN P. HENLEY
Senior Courts Operations Consultant
Office of the State Courts Administrator