



FIRST AMENDMENT FOUNDATION

336 East College Avenue, Suite 101 Tallahassee, FL 32301

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October 31, 2008

VIA E-Mail and U.S. Mail

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

Re: Amendments to the Florida Rules of Judicial Administration and the Florida Rules of Appellate Procedure – Implementation of Commission on Trial Court Performance and Accountability Recommendations, Case No. SC08-1658

Dear Mr. Hall:

In response to this Court's invitation to comment upon the proposed amendments to the Florida Rule of Judicial Administration 2.420, and the Florida Rule of Court Reporting 2.535, Case No. SC08-1658, we file this comment on behalf of the First Amendment Foundation (FAF), a Florida not-for-profit corporation.

The FAF is a public interest organization formed for the purpose of helping preserve and advance freedom of speech and of the press as provided in the United States Constitution and the Florida Constitution. FAF acts as an advocate and defender of the public's right of access to the records and meetings of its government. The Foundation represents more than 200 members, including most of Florida's daily and weekly newspapers, other media organizations, First Amendment and media law attorneys, students, private citizens, and public interest organizations. See <http://www.floridafaf.org>.

Florida has a long, rich history guaranteeing the public's right of access to government records. In 1992, the Florida voters overwhelmingly – 87% of the voters, the largest margin of approval ever given to effect a constitutional change – passed a constitutional amendment, Article I, Section 24, guaranteeing the public's right of access to government records and meetings.

Recently efforts were made by this Court to preserve the constitutional right of access to records in order to advance the public's ability to oversee its government. For example, in response to press investigations uncovering the "supersealing" of hundreds of court records, the Florida Supreme Court ruled that state courts may not keep the existence of civil and divorce cases off

public dockets. The Court adopted a related amendment making it more difficult for parties to seal records. The Court explicitly banned the practice of keeping a civil case completely off the public docket and asserted, "the public's constitutional right of access to court records must remain inviolate," in an effort to eliminate supersealing and to preserve the public's rights of access to court records. [In re Amendments to Florida Rule of Judicial Administration 2.420 – Sealing of Court Records and Dockets, Apr. 5, 2007]

In contrast, the Florida Bar's Rules of Judicial Administration Committee (RJAC) and the Florida Court Rules Committee (CRC) have submitted a report to the Florida Supreme Court wherein the committees have proposed rule amendments to Rule 2.420 to except electronic records of court proceedings from the definition of "administrative records." [Proposed Rule Amendment 2.420 (b) (1) (B)]. Their proposed rule amendments would also make an "electronic record" as defined by Rule 2.535 "not the official record of a proceeding," and therefore not subject to public disclosure under most circumstances. [Proposed Rule Amendment 2.535 (a) (5)]. The FAF believes that the proposed rule amendments of the RJAC and CRC stand in direct conflict with the Court's recent strides to enhance transparency in Florida courts and raise serious constitutional issues.

The proposed rule amendments would allow for automatic closure of electronic records of court proceedings pending a court ruling or order. Pursuant to the proposed rule amendments "the court in its discretion" may allow release of the official record. If the court allows the release of the official record, it can then decide whether or not to allow release of the electronic record. Thus, by simply removing electronic records from the definitions provided by rules 2.420 and 2.535, the proposed rule amendments would allow the courts the discretion to deny release of electronic records of court proceedings. The effect is to create a public records exemption for the electronic transcript and to reverse the presumption of openness to this type of judicial record. Therefore, it is the First Amendment Foundation's strong belief that proposed rule amendments stand in direct violation of Article I, section 24, Fla. Con., and we respectfully request that the Court withdraw the proposed rule amendments of the RJAC and CRC from further consideration.

The First Amendment Foundation is grateful for the opportunity to comment on the Court's recommendations. We would greatly appreciate the Court's consideration of our concerns and suggestions. If we can answer any questions or provide additional information, please don't hesitate to contact us.

Sincerely,

Barbara A. Petersen

Barbara A. Petersen, President
Florida Bar No. 914207

Adria E. Harper

Adria E. Harper, Director
Florida Bar No. 0026198

Case No. SC08-1658

FAF's Comment to Amendments to the Florida Rules of Judicial Administration and the Florida Rules of Appellate Procedure

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Comment has been mailed and delivered on October 31, 2008, to:

Scott M. Dimond, Chair
Rules of Judicial Administration Committee
2665 S. Bayshore Dr., Penthouse 2
Miami, FL 33133

John S. Mills, Chair
Appellate Court Rules Committee
865 May St.
Jacksonville, FL 32204-3310

Robert B. Bennett, Jr., Chair
Commission on Trial Court Performance and Accountability
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