Gregg D. Thomas, Esq.
Direct Dial: (813) 984-3066
gthomas@tlolawfirm.com

Reply To Tampa

October 31, 2008

VIA OVERNIGHT DELIVERY

The Honorable Thomas D. Hall
Clerk of the Court
Florida Supreme Court
500 South Duval Street
Tallahassee, Florida 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
Comment to Proposed Rule 2.420 and 2.535 of the Rules of Judicial Administration

Dear Mr. Hall:

In response to this Court's invitation to comment upon proposed revisions to Rule 2.420 and Rule 2.535 of the Florida Rules of Judicial Administration, we offer this comment in opposition to the proposed rule changes on behalf of Cox Newspapers, Inc., publisher of *The Palm Beach Post*; Media General Operations, Inc., d/b/a *The Tampa Tribune* and WFLA-TV; Lakeland Ledger Publishing Corporation, publisher of *The Ledger*, New York Times Regional Media Group, publisher of the *Sarasota Herald-Tribune*, *Gainesville Sun* and *Ocala Star-Banner*; and Sun-Sentinel Company, publisher of the *South Florida Sun-Sentinel* (collectively the "Florida Media Organizations").

The Florida Media Organizations appreciate the Court's willingness to consider their comments concerning the recommendations of the Rules of Judicial Administration Committee. Proposed Rule 2.420 seeks to amend the definition of judicial records by removing access to electronic records of court proceedings from its ambit. Proposed Rule 2.535 declares that such electronic records are not the "official record" of a proceeding and therefore are not subject to disclosure. We submit this comment because we are gravely concerned with the constitutionality and impact of these proposed rule changes. By altering the definition of the term "judicial record," and stating that digital records are not "official records" of court proceedings, the proposed rules exempt an entire category of judicial records based solely on the form of the record. A records exemption cannot be created in such a manner without violating Article I, Section 24 of the Florida Constitution. Amending the definition of judicial records is not the proper vehicle to pass such an exemption. Moreover, the proposed rule changes would undermine this Court's long-standing commitment to operate in the sunshine. The proposed changes should be rejected – not only for constitutional concerns, but also for sound policy reasons.

Introduction

In 1995, this Court adopted a rule that allowed courts to implement the digital recording of court proceedings. The intent of the rule was to provide for the efficient and cost-effective recording and transcription of such proceedings. *See In re Florida Rules of Judicial Administration – Court Reporting*, 650 So. 2d 38 (Fla. 1995). As circuits throughout Florida implemented digital recording systems in their courtrooms, the new rule brought Florida into the digital age. It is no coincidence that this Court – which has long been an ardent proponent of a transparent judiciary – was at the forefront of digitally recording court proceedings.

These recordings constitute open judicial records, and enhance the public's ability to monitor the judicial system. Because the digital recordings are judicial records, for years, many circuits throughout the State have routinely provided copies of the recordings to journalists. These recordings are a critical newsgathering tool. Having access to an electronic recording allows the media to listen to proceedings they cannot attend. The recordings capture tone and

emphasis that is lacking in a written transcript and allow the media to report more accurately what transpires in the courtroom. They also provide confirmation of information learned in proceedings a journalist can attend – ensuring testimony or rulings from the bench are correctly reported. Moreover, obtaining a DVD or CD of a court proceeding is more efficient and cost-effective than having to pay a court reporter to create a written transcript of a proceeding.

The proposed rules represent a step backwards and out of the digital era. They create an unconstitutional exemption that shields digital recordings of court proceedings from public inspection. The proposed rules would automatically close an entire category of documents. Such a result cannot be achieved through court rule, but only via the Legislature. Moreover, the definitional change clashes with the constitutional definition of a "public record" contained in Article I, Section 24.

Any evidentiary concerns motivating the rule changes should be dealt with in a different manner. The Court, of course, may require a written transcript for evidentiary purposes, but providing that a written transcript is the only publicly accessible record of a proceeding runs contrary to sound public policies favoring access. Florida has endeavored for more than five decades (since at least 1967 with the passage of the Sunshine and Public Records Acts) to make its branches of government open to its citizens in a cost-effective manner. Digital records provide an inexpensive and effective way to insure that citizens can monitor events that occur in Florida courts.

Access to Judicial Records and the Proposed Rule Changes

Nearly two decades ago, the voters of this State overwhelmingly approved a constitutional amendment that bestows constitutional rights of access to judicial records. Article I, Section 24 of the Florida Constitution provides:

> Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf . . . This section specifically includes the legislative, executive, and judicial branches of government.

Fla. Const. art. I, § 24(a). In the judicial branch, the Court created Rule 2.051, which was later renumbered, as the vehicle through which this mandate is realized. It provides that "[t]he public shall have access to all records of the judicial branch of government and its agencies, except as provided [in the Rule]." Fla. R. Jud. Admin. 2.420(a).

By rule and in keeping with the constitutional and statutory definition of a "public record," this Court defined judicial records broadly as "all records, *regardless of physical form*, characteristics, or means of transmission, made or received in connection with the transaction of official business by any judicial branch entity . . ." Fla. R. Jud. Admin. 2.420(b)(1) (emphasis added). Such records consist of both "court records" and "administrative records," which are defined as:

> (A) "court records," which are the contents of the court file, including the progress docket and other similar records generated to document activity in a case, transcripts filed with the clerk, documentary exhibits in the custody of the clerk, and electronic records, videotapes, or stenographic tapes of depositions or other proceedings filed with the clerk, and *electronic records, videotapes, or stenographic tapes of court proceedings*; and
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> (B) "administrative records," which are all other records made or received pursuant to court rule, law or ordinance, or in connection with the transaction of official business by any judicial branch entity."

Fla. R. Jud. Admin. 2.420(b)(1)(A), (B) (emphasis added). Proposed rule 2.420 would alter this definition by removing "electronic records, videotapes, or stenographic tapes of court proceedings" from the definition of court records. The rule would also add an exception to the definition of administrative records for "electronic records of court proceedings that are governed by rule 2.535." Additionally, Proposed Rule 2.535 would mandate that "[t]he electronic record is not the official record of a proceeding and is not subject to disclosure . . ."

The proposed rule changes remove digital recordings of court proceedings from the public disclosure requirements of Article I, Section 24 and Rule 2.420.[1] The committee note states that the rule is intended to clarify that when a court proceeding is electronically recorded and is also recorded via a written transcript prepared by a court reporter,[2] the written transcript is the official transcript to the exclusion of all electronic records. Therefore, the purpose of the proposed rule is not simply to clarify the definition of judicial records, but to shield a category of records – recordings of court proceedings – from public disclosure.

A core principle in the definition of judicial records, however, is that such records be provided *regardless of physical form*. Fla. R. Jud. Admin. 2.420(b)(1). The proposed rule, therefore, materially alters the definition of judicial records in an attempt to create a categoric exemption. This definition of judicial records – which specifically includes electronic records of court proceedings – was added in 2002. It did not alter the substance of what constituted a judicial record, but clarified that judicial records included both court records and administrative records and made certain that the definition mirrored that of "public records" found in chapter 119. *See Report of the Supreme Court Work-Group on Public Records*, 825 So. 2d 889, 888-89 (Fla. 2002).

In addition to the conflict with the exemption creation procedures of the Florida Constitution, the definitional change creates a conflict with the constitutional definition of publicly accessible records. If the proposed rule change is passed, digital records of court proceedings would still qualify as judicial

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[1] Although it appears from the committee note that the goal of the proposed rule is simply to provide a written transcript in lieu of a digital recording of a court proceeding, the change could have broader implications on the right to access electronic records.

[2] The committee seems to assume that a written transcript will always be simultaneously available. Of course, that often is not the case. Hiring a court reporter to prepare a written transcript can result in delays depending on the schedule of the court reporter and also adds significant costs as compared to simply obtaining the digital recording. Moreover, there is nothing in the proposed rules that gives the public the affirmative right to have a written transcript prepared from a recording. Therefore, it is possible that that there may be no record of certain court proceedings. Certainly, in these cases, the digital recording should be accessible.

records, directly accessible under Article I, Section 24.[3] Simply put, Article I, Section 24 and this Court's current rule specify that, if a document is made in connection with the transaction of official business, it is a judicial record subject to public disclosure. Even if the specific language regarding digital recordings is deleted from the definition section of court records, such recordings are still records made in connection with the transaction of official business of the court and would fall within the broad definition of "judicial records" under the constitutional provision. The definitions in Rule 2.420 should not be altered in a manner that conflicts with Article I, Section 24's definitional requirements.

The Proposed Rules Improperly Attempt to Create an Exemption to Access to Judicial Records.

Exemptions to the public's right of access to judicial records are statutorily created by the Legislature or are found in Rule 2.420 – as that rule existed prior to the effective date of the constitutional provision. Fla. Const. art. I, § 24 (Legislature may create exemptions to the constitutional right of access to judicial records); Fla. R. Jud. Admin. 2.420(a) ("[t]he public shall have access to all records of the judicial branch of government, except as provided [in this Rule]"). The Florida Constitution provides that court rules in effect on the date of the adoption of Article I, Section 24 remain in full force and effect until repealed. However, any *new* exemption to the public's right of access must be statutorily created by the Legislature. Fla. Const. art. I, § 24(c), (d). Therefore, judicially-created exemptions to the right of access to judicial records were essentially frozen when Article I, Section 24 was passed. Any attempts to pass a new exemption to the right of access to such records must come from the Legislature.[4]

Perhaps knowing this hurdle, the committee attempts to cloak an exemption to judicial records in terms of altering the definition of judicial records and

[3] The proposed rule change and this comment deal with digital recordings of court proceedings that qualify as judicial records because they are made pursuant to the authority of the court under Rule 2.535, which allows courts to electronically record their proceedings.

[4] Of course, the Court can change other aspects of Rule 2.420. For example, it can add procedural requirements or clarify definitions. What the Court cannot do, however, is restrict the right of access to judicial records.

declaring that a digital recording of a court proceeding is not the "official record." Make no mistake, the proposed rules do not simply clarify the definition of judicial records, they rewrite the definition to *exclude* these electronic records of court proceedings. The result is the complete denial of access to an electronic document that was otherwise a judicial record. Therefore, the proposed rules improperly attempt to create an exemption for digital recordings of court proceedings by altering the definition of judicial records rather than creating a legislative exemption to the right of access to such records.

If the committee seeks to exempt these recordings from public disclosure, it must seek an appropriate, statutorily-created exemption from the Legislature. Fla. Const. art. I, § 24(c), (d). This Court should decline to adopt the proposed rules because they *create* an exemption to the right of access to such records. The authority to create new exemptions to the right of access to judicial records rests with the Legislature, and the adoption of a rule excepting digital recordings from the right of access would be constitutionally suspect.

The Proposed Rule Change is Unnecessary.

The stated intent behind the rule-changes is to make the written transcript of court proceedings the "official record" to the exclusion of electronic recordings. If this is the true intent behind the proposed rules, then no amendment to the definitions of judicial records or even an exemption is necessary. The Florida Media Organizations do not take issue with the proposition that, for use in a judicial proceeding, a participant may be required to have an "official record" of a court proceeding. What constitutes the "official record" of a court proceeding for judicial purposes is an evidentiary issue that the courts can easily address without restricting the right of access to judicial records. This Court should be wary of any attempts to conflate such evidentiary issues with access issues. The proposed remedy for the evidentiary problem creates constitutional ills.

Many policy considerations have been forwarded in support of exempting digital recordings of court proceedings from public access. Again, because the goal of the proposed rule is to exempt such records, such policy considerations must argued to the Legislature. In any event, such policy considerations do not support the proposed rules. For example, if the committee is concerned that

confidential attorney-client communications may be audible on the recordings, the solution is to redact such information from the electronic recording (just as a court reporter would leave this information out of the written transcript). *Holt v. Chief Judge of the Thirteenth Judicial Circuit*, 920 So. 2d 814, 818 n.4 (Fla. 2d DCA 2006). Likewise, any concern that the recording may be used to misrepresent the "official record" is misplaced. As noted above, this is an evidentiary issue and easily resolved by requiring a participant in a judicial proceeding to have an "official record," which is the written transcript, prepared by a third party, the court reporter. Finally, any concerns about use of the electronic recordings to embarrass trial participants do not warrant the new rule. In Florida, what transpires in a courtroom is public property and the courts of this State have long allowed cameras (with both audio and video capacity) in the courtrooms, over such objections. *E.g., Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764 (Fla. 1979); *State v. Palm Beach Newspapers, Inc.*, 395 So. 2d 544 (Fla. 1981). If such concerns were insufficient to bar cameras in the courtrooms, they should similarly be insufficient to justify a blanket denial of access to recordings of such proceedings.

Public policy considerations actually support providing access to digital recordings of court proceedings. Audio recordings of court proceedings provide much more information than a written transcript. Indeed, such recordings provide tone and emphasis that is missing from a written transcript. Often tone and emphasis can change the meaning of a question, answer or statement in court and can be critical to a full understanding of a court proceeding. Similarly, many jurisdictions conduct first appearances via video with the defendants appearing at the jail. Videotape copies of these first appearances are significant tools for the media in disseminating information to the public – especially when a journalist is unable to attend the first appearance. Additionally, obtaining a written transcript from a court reporter can be cost prohibitive. The cost of retaining a court reporter to transcribe a court proceeding – especially a lengthy one – is substantial. The cost of obtaining a digital recording, on the other hand, is comparatively small. Transcription often takes time too. Requiring that the media obtain written transcripts in lieu of audio or video recordings of court proceedings hampers the dissemination of public information to the citizens and diminishes this Court's commitment to operate the judiciary in the Sunshine.

Conclusion

The proposed rule changes improperly seek to do what only the Legislature can do – create an exemption to the constitutional right of access to judicial records and should be rejected for this reason alone. In addition, the proposed rule changes bring the definition of a judicial record into conflict with the constitutional definition of a public record and are unnecessary to achieve the evidentiary purposes underlying the proposal. Even putting these constitutional infirmities aside, the proposal undermines fundamental transparency principles that this Court has always served in making its proceedings and records publicly accessible. The proposed changes should be rejected. The current definitions in of Rule 2.420 should not be changed.

Respectfully submitted,

THOMAS & LoCICERO PL

/s/ Rachel E. Fugate

Gregg D. Thomas
gthomas@tlolawfirm.com
Florida Bar No. 223913
Rachel E. Fugate
rfugate@tlolawfirm.com
Florida Bar No.
400 N. Ashley Drive, Suite 1100
Post Office Box 2602 (33601-2602)
Tampa, Florida 33602
Telephone: (813) 984-3060
Facsimile: (813) 984-3070

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on October 31, 2008, true and correct copies of the foregoing are being furnished via *XX U.S. Mail*; Facsimile; Overnight Delivery; Hand Delivery; E-Mail to Scott M. Dimond, Chair, Rules of Judicial Administration Committee, 2665 S. Bayshore Dr., Penthouse 2, Miami, Florida 33133; John S. Mills, Chair, Appellate Court Rules Committee, 865 May St., Jacksonville, FL 32204-3310; and Robert B. Bennett, Jr., Chair, Commission on Trial Court Performance and Accountability, 2002 Ringling Boulevard, Floor 8, Sarasota, Florida 34237-7002.

/s/ Rachel E. Fugate
Attorney

cc: Don North, WFLA
Janet Coats, *The Tampa Tribune*
Dale Cohen, Esq.
David McCraw, Esq.
David Bralow, Esq.