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Reply To Tampa

April 15, 2009

VIA E-MAIL and U.S. MAIL

The Honorable Thomas D. Hall
Clerk of the Court
Florida Supreme Court
500 South Duval Street
Tallahassee, Florida 32399-1927

RE: Proposed Rule Amendments Regarding Minimization
Case No. SC08-2443

Dear Mr. Hall:

We write on behalf of Orlando Sentinel Communications Company, publisher of the *Orlando Sentinel*, and Sun-Sentinel Publishing Company, publisher of the *South Florida Sun-Sentinel* (the “Media Organizations”) to comment upon the various rule changes submitted through the Committee on Access to Court Records (the “Access Committee”). The proposed rules at issue grew out of the Court’s request to the various rules committees to review existing rules and recommend rule changes aimed at minimizing the unnecessary filing of personal information in court files. The Access Committee has reviewed the rules committees’ recommendations and made its own recommendations concerning the various proposed rule changes. We address some of the proposed rules here.

The Media Organizations understand the concerns of the various rules committees and the prior Committee on Privacy and Court Records. Minimization can be accomplished in a manner that accommodates legitimate concerns about extraneous information in court files -- without impinging on the public’s

constitutional right of access and the underpinning policy of judicial transparency. The following discussion is intended to summarize the framework through which the rule proposals should be viewed – a framework which is generally consistent with the Access Committee’s view of the proposed rule changes.

Once a document is placed in a court file, the right of access attaches. *See, e.g., FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 409 (1st Cir. 1987) (“relevant documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies”). To the extent procedural rules require the filing of information that a trial court does not need for decision-making purposes, those rules should be changed so that the filing of the information is no longer required. Recommendations, however, which mandate records be accepted for filing -- but then redacted before providing them to the public -- should be rejected. Such rules create records exemptions in violation of Article I, Section 24 of the Florida Constitution, which permits only the Legislature to create exemptions to access based on a finding of necessity. Otherwise, the record-by-record decision-making process under Rule 2.420 must be followed to seal information in a court file.¹

Proper minimization efforts place the burden on filers either not to file documents or to exclude information within documents pre-filing when the documents or information at issue is not necessary to a court’s determination of the issues before it. Proper implementation of minimization efforts, however, does not permit the judicial branch or clerks to redact information contained in court files absent a specific statutory exemption or a proper court order under Rule 2.420.

The Specific Proposals Upon Which Comment is Invited

The Media Organizations offer no comment on the recommendations of the Access Committee and the various rules committees, except as set forth herein. The Media Organizations’ comments are intended to assist the Court in evaluating the proposed rule changes.

¹ The South Florida Sun-Sentinel has separately commented on proposed revisions to Rule 2.420 in Case No. SC07-2050. The Orlando Sentinel herein joins in and adopts that comment.

Civil Procedure Rules Committee

Proposed Rules 1.191(a) and 1.280(f) refer to the redaction of records. While it appears the intent of these rules is to place the burden on the filer of a particular record to limit the inclusion of certain information *prior* to filing, the use of the concept of “redaction” creates an ambiguity as to whether these rules require clerks to redact the information identified in Rule 1.191 (a) and 1.280(f) when a filer fails to exclude that information. Of course, such an interpretation of the proposed rules would run afoul of Article I, Section 24.

The term “redact” in the context of agency records under the Public Records Act is defined to mean “to conceal from a copy of an original public record, or to conceal from an electronic image that is available for public viewing, that portion of the record containing exempt or confidential information.” § 119.011(12), Fla. Stat. (2007). Pursuant to the Act, the custodian of a requested record has authority to “redact” that portion of a record which is exempt from disclosure. *See* § 119.07(1)(d), Fla. Stat. (2007). The Clerks of Court, of course, are familiar with this concept of redaction because exemptions requiring redaction under the Public Records Act apply directly to official records maintained by the clerks. In situations under our open records laws where redaction is permitted, the concept generally is equated with record keeper’s duty to conceal something contained in the public record.

We believe the Rules of Civil Procedure Committee intends to place the burden on the filer to excise certain information from documents before they are filed. We agree with the changes suggested by the Access Committee with respect to proposed rule 1.191, which clarify that the responsibility falls on the filer. (Access Committee Appx. C, p. 1).² These changes by the Access Committee

² Note the Access Committee’s transcription of this Rule at Appendix B, page 2 to the committee’s comment is slightly different in that it includes the term “redaction” in Rule 1.191(b). For this reason, the Media Organizations support only the proposed rule as it is presented in the Access Committee’s Appendix C, page 1.

clarify that the filer, not the clerk, is responsible for minimizing the inclusion of personal information.³

Also to avoid any confusion as to whose obligation it is to exclude personal information from filings and to bring the Social Security number redaction provision in line with Rule 1.191 on including the last four digits, the Media Organizations propose the following changes to proposed rule 1.280(f) (additions are noted in italics):

(f) Court Filing of Documents and Discovery. Information obtained during discovery shall not be filed with the court until such time as it is filed for good cause. Compliance with specific mandatory filing requirements of any other rule of procedure shall constitute good cause except that dates of birth, social security numbers (*except the last 4 digits*), and credit and financial account numbers shall be redacted *by the filer* from documents filed in reliance on this exception.

Those situations in which the filer does not adhere to its obligations under these sections are appropriately addressed through the motion procedure set forth in Rule 2.420 of the Rules of Judicial Administration and, where appropriate, by sanctioning the filer.

Criminal Procedure Rules Committee

The Media Organizations object to the proposals of the Criminal Procedure Rules Committee insofar as these proposals call for the automatic closure of types of court records. As the Access Committee recognized in its report, those proposals violate Article I, Section 24. The Media Organizations, therefore, concur with the Access Committee's proposed revisions to proposed rules 3.211, 3.212, 3.216, 3.218, and 3.219 which, if accepted, would require the proponent of closure to file a motion seeking closure in accordance with Rule 2.420, the Florida Constitution, and this Court's established precedent.

³ The Media Organizations have included an Appendix A summarizing their comment on the various rule proposals for the Court's convenience.

Probate Rules Committee

The Media Organizations do not object to the rule changes proposed by the Probate Rules Committee. The Committee note correctly explains that inclusion of the last four digits of a decedent's Social Security number is helpful in distinguishing between individuals with similar names. That partial number assists in identity verification and fosters accuracy and truthful reporting. (The Media Organizations have suggested a change to permit inclusion of the last four digits of a Social Security number in Rule of Civil Procedure 1.280(f), discussed above.)

Small Claims Rules Committee

The Media Organizations do not object to the proposed changes to the Small Claims Rules; however, the comment to Proposed Rule 7.140 is ambiguous and may inadvertently suggest that the court will assist *pro se* litigants in ensuring that unnecessary personal information is not *released* (the comment uses the word "published") from the court file. Again, once information is included in a court record, it must be made public, unless a specific statutory exemption applies or an order is granted under the procedure established in Rule 2.420.

The Media Organizations suspect it is neither the Small Claims Rules Committee's nor the Access Committee's intention to condone the practice of subsequently removing personal information from court files. To make that point clear, however, the Media Organizations propose revising the Committee note to read (proposed additions are in italics and underlined, and deletions are in strikethrough font):

Subdivision (e)(3) was added so that a judge can assist an unrepresented party in *making sure personal information is not unnecessarily included by the party in a document filed with the court.* ~~the handling of private information that might otherwise inadvertently become public by placement in the court file.~~

Appellate Court Rules Committee

We have previously commented on the proposed revisions to the appellate rules with respect to minimization in Case No. SC08-147. That comment

addressed concerns with the use of the concept of “redaction” in the proposed rule and proposed revisions.

Family Law Rules Committee

The Media Organizations concur with the Access Committee’s changes to proposed rule 12.130 (*see* Access Committee Appx. C, p. 32) and 12.285 (*see* Access Committee Appx. C, p. 34) to remove reference to the word “redaction” for the reasons set forth above with respect to the discussion of the proposed changes to the rules of civil procedure and the appellate rules.

The Media Organizations do not concur with the proposed revisions to Rule 12.363(e). As written, the proposal requires trial courts in all instances automatically to consider whether expert reports concerning a minor child should be treated as confidential under Rule 2.420 of the Rules of Judicial Administration. This proposal places a heavy burden on the judicial system. Rule 2.420 properly places the burden of seeking confidentiality of court records on the proponent of closure, not the court. That procedure should apply to expert reports. For this reason, the Media Organizations urge the Court to reject the proposed changes to Rule 12.363(e), except to the extent the proposed rule references proposed rule 12.280(a) (governing minimization of personal information in documents). To be clear, the Media Organizations suggest the following language (proposed additions are in italics and deletions in strikethrough font):

Any report filed in the court file shall be in compliance with rule 12.280(a). *The report shall not be considered by the court before it is properly admitted into evidence.* ~~The report shall not be filed in the court file unless or until it is properly admitted into evidence and considered by the court. The court shall consider whether the report should be sealed as provided by Florida Rule of Judicial Administration.~~ *The procedure for determinations of the confidential status of reports is governed by Rule of Judicial Administration 2.420.*

Conclusion

The Media Organizations do not object to the concept of minimization as it relates to placing the burden on filers not to include unnecessary information in court filings. The suggestions contained in this comment are offered in the spirit of ensuring that the rules balance legitimate concerns with the transparency honored in our State and by this Court. We appreciate the opportunity to participate in the rulemaking process.

Respectfully submitted,

THOMAS, LOCICERO & BRALOW PL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via E-Mail; U.S. Mail; Facsimile; Overnight Delivery on April ____, 2009, to:

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Subcommittee on Access
to Court Records
c/o Steve Henley
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Hon. Thomas D. Hall

April 15, 2009

Page 9 of 9

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Carol Jean LoCicero

Summary of Media Organizations' Proposals regarding Minimization¹

Proposed Rule	Media Organizations' Position
Fla. R. Civ. P. 1.191(a)	Adopt Access Committee's proposal
Fla. R. Civ. P. 1.280(f)	Propose alternative language: <p>(f) Court Filing of Documents and Discovery. Information obtained during discovery shall not be filed with the court until such time as it is filed for good cause. Compliance with specific mandatory filing requirements of any other rule of procedure shall constitute good cause except that dates of birth, social security numbers (<i>except the last 4 digits</i>), and credit and financial account numbers shall be redacted <i>by the filer</i> from documents filed in reliance on this exception.</p>
Fla. R. Crim. P. 3.211	Adopt Access Committee's proposal
Fla. R. Crim. P. 3.212	Adopt Access Committee's proposal
Fla. R. Crim. P. 3.216	Adopt Access Committee's proposal
Fla. R. Crim. P. 3.218	Adopt Access Committee's proposal
Fla. R. Crim. P. 3.219	Adopt Access Committee's proposal

¹ The Media Organizations' suggested additions to proposed rules are noted in *italics*. Suggested deletions are indicated by ~~strike through~~ font. Underlining, if present, is that of either the Access Committee or the applicable rules committee and represents their proposed additions.

Proposed Rule	Media Organizations' Position
Fla. Sm. Cl. R. 7.140	<p>Propose alternate language in Comment to rule:</p> <p>Subdivision (e)(3) was added so that a judge can assist an unrepresented party in <i>making sure personal information is not unnecessarily included by the party in a document filed with the court.</i> the handling of private information that might otherwise inadvertently become public by placement in the court file.</p>
Fla. R. App. P. 9.050(a)(2) ²	<p>Propose alternate language:</p> <p>(2) Personal Identifying Data. Personal identifying data includes data used to identify a specific person for governmental or business purposes, including but not limited to, dates of birth, home addresses, social security numbers, driver's license numbers, passport numbers, telephone numbers, email addresses, computer user names, passwords, and financial, bank, brokerage, and credit card numbers. If personal identifying data must be referred to, it shall be redacted to the extent possible to protect the privacy of the referenced person <i>only so much of the data as is necessary to the Court's consideration shall be included.</i></p>
Fla. Fam. L. R. P. 12.130	Adopt Access Committee's proposal
Fla. Fam. L. R. P. 12.285	Adopt Access Committee's proposal

² See Comment filed on March 27, 2008 by "the Media" in Case No. SC08-147.

Proposed Rule	Media Organizations' Position
Fla. Fam. L. R. P. 12.363(e)	<p>Proposed alternate language:</p> <p><u>Any report filed in the court file shall be in compliance with rule 12.280(a). The report shall not be considered by the court before it is properly admitted into evidence. The report shall not be filed in the court file unless or until it is properly admitted into evidence and considered by the court. The court shall consider whether the report should be sealed as provided by Florida Rule of Judicial Administration. The procedure for determinations of the confidential status of reports is governed by Rule of Judicial Administration 2.420.</u></p>