

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC08-2443**

IN RE: IMPLEMENTATION OF COMMITTEE ON PRIVACY AND COURT RECORDS RECOMMENDATIONS - AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE; THE FLORIDA RULES OF CRIMINAL PROCEDURE; THE FLORIDA PROBATE RULES; THE FLORIDA SMALL CLAIMS RULES; THE FLORIDA RULES OF APPELLATE PROCEDURE; AND THE FLORIDA FAMILY LAW RULES.

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**COMMENT OF THE CRIMINAL PROCEDURE RULES COMMITTEE**

The Criminal Procedure Rules Committee (CPRC), by and through its Chair, Fleur J. Lobree, and John F. Harkness, Jr., Executive Director of The Florida Bar, file this comment in response to this Court's order of April 1, 2010. The CPRC recognizes this Court's admonition that further comments should be limited to the issues raised in this order or revisions made by the Court. However, the Court's order also reflects its main concern is how the amended rules will work in conjunction with each other and whether, if amended as proposed, the rules will conflict with each other or existing rules. Upon review of the criminal rule amendments proposed by the Court, which cross-reference *Fla. R. Jud. Admin.* 2.420, the CPRC suggests that these revisions should not be made without further modifications to subdivision (d)(1)(B) of Rule 2.420, which is to become effective on October 1, 2010. The CPRC is uncertain whether this Court will consider that these comments are untimely or better addressed by way of a new referral, but feels compelled to briefly express practical concerns the current proposals have raised. Accordingly, the CPRC respectfully requests that the Court consider the following:

By its report to the Committee on Privacy and Court Records of August 1, 2007, the CPRC, in relevant part, recommended changes to criminal rules related to filing of mental health evaluations and reports. The CPRC proposals would have required additional provisions that "th[ese] report[s] shall be filed and maintained under seal in the court file." Affected would be Rules 3.211(d), 3.212(d), [former 3.216(g)], 3.218(a), and 3.219(a). These proposals were approved by a vote of 21-7 by the full CPRC. In the Petition of the Committee on Access to Court Records, the Access Committee did not disagree with the intention of these proposals, but did not support them as it considered that 1) they were beyond the scope of its charge,

and 2) determinations of confidentiality should be according to the general rule. The Access Committee's September 2, 2008 Final Report and Recommendations also noted at page 23 that under Article I, Section 24, of the Florida Constitution, the Court lacks authority to make records confidential that are not made confidential by general law or by rule existing prior to November 1992. Accordingly, this Court's Compilation of Proposed Amendments includes changes to Rules 3.211(d), 3.212(d), 3.218(a), and 3.219(a) to add the provision that "[t]he procedure for determinations of the confidential status of reports is governed by Rule of Judicial Administration 2.420" rather than following the CPRC's recommendations.

The CPRC respects the Court's preference for handling all confidential information under the purview of Rule 2.420, rather than the alternative of separately designating identical provisions in multiple rules. However, the CPRC is concerned that Rule 2.420(d), identifying only nineteen bases for the designation and maintenance of confidential information by the clerk of court, will not adequately protect personal mental health information that must be included within criminal court files. The only provision in Rule 2.420(d)(1)(B) pertaining to the confidentiality of mental health records of criminal defendants is subdivision (x), referring to "[i]dentifying information in clinical records of detained criminal defendants found incompetent to proceed or acquitted by reason of insanity. § 916.107(8), Fla. Stat." However, this provision does not automatically protect the confidentiality of psychological and psychiatric reports filed with the court before a finding of incompetence to proceed or an acquittal by reason of insanity. Moreover, removal of only identifying information from such a report would not adequately protect a patient's privacy, if the report remains publicly accessible within the court file of an otherwise-identifiable defendant.

Criminal courts see the routine, and often voluminous, filing of mental health evaluations and reports by experts, rather than by parties, under Rules 3.211, 3.212, 3.216, 3.218, 3.219, 3.710, and 3.851. Psychological and psychiatric reports (and such reports within presentence investigations) are separately confidential or exempt from public disclosure under sections 456.057, 456.059, 916.107(8), and 921.231, Florida Statutes, and Rule 3.712 (effective since 2/1/73).<sup>1</sup> They are also Protected Health Information under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in various sections of Titles 18, 26, 29, and 42 U.S.C.).

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<sup>1</sup> See also former §§ 455.241, 455.2415, Fla. Stat. (1991).

Before the March 18, 2010 revisions to Rule 2.420(d), many circuits had entered administrative orders that authorized and required the clerks of court to seal psychological and psychiatric evaluations pursuant to sections 456.057 and 456.059, Florida Statutes, as well as pre-sentence reports under Rule 3.712. *See e.g.*, 4th Jud. Cir. AO2006-05; 6th Jud. Cir. AO2007-042 PA/PI-CIR; 9th Jud. Cir. AO2006-15 (vacated 5/9/07 by AO2007-03); 11th Jud. Cir. AO06-36; 18th Jud. Cir. AO07-18. As clerks have routinely sealed psychological and psychiatric evaluations and pre-sentence investigation reports pursuant to these and similar administrative orders for years, the CPRC respectfully suggests that this Court should consider revising Rule 2.420(d)(1)(B) to allow this practice to continue, and conserve judicial review for other records or information not routinely determined to be confidential.

The CPRC understands that new subdivision (d)(3) of Rule 2.420 authorizes any person filing confidential information with the court that is not itemized within subdivision (d)(1) to move for a determination of confidentiality, and also that any interested person may request that information be maintained as confidential within a court file. However, psychological and psychiatric reports are commonly filed in criminal cases by experts or agencies that are not parties to the action. As such, for a party to make such a motion, it would either have to do so in anticipation of the filing of the report, or after such, which would not only needlessly expend limited judicial resources on something uncontroversial, but also give the clerks the additional burden of having to locate and re-designate reports that are not filed concurrently with a motion.

Accordingly, the CPRC respectfully asks that before final action in this case, the Court consider: 1) adding psychological, psychiatric, and pre-sentence reports to the list of records enumerated in Rule 2.420(d)(1)(B) for designation and maintenance of confidential information by the clerk of court; 2) alternatively allowing the circuit courts to continue the present practice of authorizing and requiring the clerks of court to seal such records by way of administrative orders, rather than requiring the filing of voluminous motions regarding such in individual cases; or, at a minimum, 3) modifying the proposed amendments to Rules 3.211(d), 3.212(d), 3.218(a), and 3.219(a) to alternatively track the proposed language for Rule 12.363(e), which provides, “The court shall consider whether the report should be sealed as provided by Florida Rule of Judicial Administration 2.420.”

Respectfully submitted on \_\_\_\_\_.

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