IN THE SUPREME COURT OF FLORIDA

CASE NO. 10-2242

IN RE: AMENDMENTS TO THE FLORIDA RULES OF JUDICIAL ADMINISTRATION

AMENDED COMMENT OF THE TASK FORCE ON SUBSTANCE ABUSE AND MENTAL HEALTH ISSUES IN THE COURT

The Task Force on Substance Abuse and Mental Health Issues in the Court (Task Force) by and through its Chair, the Honorable Steven Leifman, files this amended comment in response to the Florida Supreme Court's November 19, 2010, notice for comments in, "In re Amendments to the Florida Rules of Judicial Administration, Case No. 10-2242". The Florida Supreme Court, at the suggestion of the Access to Court Records Committee, is considering amending 2.420(d)(1)(B) of the Florida Rules of Judicial Administration (Rule 2.420(d)(1)(B)) to add presentence investigation reports and attached psychological or psychiatric evaluations as an automatic exemption.

The Task Force agrees with this proposed amendment. However, the Task Force respectfully requests that the Court consider further amending Rule 2.420(d)(1)(B) to also include pretrial and post trial psychological and psychiatric (mental health) evaluations and records. The Task Force is concerned that Rule 2.420(d)(1)(B), even with the inclusion of presentence reports and any attached evaluations, does not adequately protect the confidentiality of mental health

evaluations and records of criminal defendants. Subsection (viii), makes identifying information in clinical records under the Baker Act confidential. Subsection (x), makes identifying information in clinical records of detained criminal defendants found incompetent to proceed or acquitted by reason of insanity confidential. Proposed subsection (xx) protects the confidentiality of presentence reports and any attached mental health evaluations. However, nothing automatically protects the confidentiality of pretrial and post trial court ordered psychological and psychiatric evaluations and reports filed with the court before a finding of incompetence to proceed or an acquittal by reason of insanity. Further, nothing automatically protects the confidentiality of these evaluations and records prior to being attached to a presentence investigation report. It is inconsistent these reports and evaluations only become automatically exempt after either being attached to a presentence report or after the defendant is found incompetent to proceed or acquitted by reason of insanity. By that time, the very confidentiality to be protected has already been breached.

Although not as clearly expressed as the other cited statutes in Rule 2.420(d)(1)(B), sections 456.057, 456.059, and 90.503, Florida Statutes, have historically protected mental health evaluations, records, and reports for decades. These protections have been subject to opinions of this Court and other District Courts of Appeal. *See*, *e.g.*, *Caraballo v. State*, 39 So. 3d 1234 (Fla. 2010); *State*

v. Johnson, 814 So. 2d 390 (Fla. 2002); *Acosta v. Richter*, 671 So.2d 149 (Fla. 1996); *Hunter v. State*, 639 So. 2d 72 (Fla. 5th DCA 1994); *Ussery v. State*, 654 So. 2d 561 (Fla. 4th DCA 1995); *Estate of Stephens v. Galen Health Care, Inc.*, 911 So.2d 277 (Fla. 2nd DCA 2005); *Lemieux v. Tandem Health Care of Florida, Inc.*, 862 So.2d (Fla. 2nd DCA 2003); *Attorney Ad Litem For D.K. v. The Parents of D.K.*, 780 So. 2d 301 (Fla. 4th DCA 2001); and *O'Neill v. O'Neill*, 823 So.2d 837 (Fla. 5th DCA 2002).

In, *State v. Johnson*, 814 So. 2d 390 (Fla. 2002), this Court recognized that patient medical records have a confidential status by virtue of the right to privacy contained in section 23 of the Florida Constitution. Most recently, this Court emphasized the need for keeping competency information confidential in *Caraballo.*

> As a result of the court's obligation to ensure that the material stages of a prosecution not proceed against a criminal defendant while the defendant is mentally incompetent, any defendant may be subjected to a mandatory competency evaluation and, consequently, subjected to the risk of saying something or responding in a manner that is detrimental to or incriminates the defendant. It is for this reason that the protection of confidentiality is afforded to the substance of a defendant's competency evaluation. Under rule 3.211(e), **except in certain limited circumstances, the information obtained during the course of a competency evaluation must remain confidential.**

39 So. 3d at 1252-53 (Emphasis added).

Section 456.057(1), Florida Statutes, defines "records owner" as "any health care practitioner who generates a medical record after making a physical or **mental**

examination of, or administering treatment or dispensing legend drugs to, any person . . . .” (Emphasis added). Section 456.057(7)(a) provides:

> Except as otherwise provided in this section and in s. 440.13(4)(c), **such records may not be furnished** to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care or treatment of the patient, except upon written authorization of the patient. However, such records may be furnished without written authorization under the following circumstances:
> . . .
> 3. In any civil or criminal action, unless otherwise prohibited by law, upon the issuance of a subpoena from a court of competent jurisdiction and proper notice to the patient or the patient's legal representative by the party seeking such records.
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> Section 456.057(7)(a), Florida Statutes (2009) (Emphasis added).

In *Acosta v. Richter*, 671 So.2d 149 (Fla. 1996), this Court held that the statute dealing with patient records (formerly section 455.241(2) since amended and renumbered to section 456.057) provided for a broad physician-patient privilege of confidentiality with limited statutory exceptions. *See, e.g., Estate of Stephens v. Galen Health Care, Inc.*, 911 So.2d 277 (Fla. 2nd DCA 2005); *Lemieux v. Tandem Health Care of Florida, Inc.*, 862 So.2d (Fla. 2nd DCA 2003). And, the United States Congress has reminded us of the importance of a person’s right to privacy in medical records in amending 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.).

Section 456.059, Florida Statutes, provides:

> Communications between a patient and a psychiatrist, as defined in s. 394.455, **shall be held confidential and shall not be disclosed** except upon the request of the patient or the patient's legal representative. Provision of psychiatric records and reports shall be governed by s. 456.057.

Section 456.059, Florida Statutes (2009) (Emphasis added).

These statutes clearly articulate that communications between a patient and psychotherapist are privileged and confidential unless the party's mental condition is put in issue or the privilege is waived. Further, provision of psychiatric records and reports are governed by section 456.057, Florida Statutes, which prohibits release unless properly subpoenaed or another limited statutory exemption applies.

Even the Evidence Code recognizes the confidentiality of communications between a psychotherapist and patient. Section 90.503, Florida Statutes, provides:

> A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including alcoholism and other drug addiction, between the patient and the psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship.

Section 90.503, Florida Statutes (2009).

This privilege also existed prior to the creation of section 24 of the Florida Constitution. In *O'Neill v. O'Neill*, 823 So.2d 837 (Fla. 5th DCA 2002), the Fifth District Court of Appeal found that the statute setting forth the psychotherapist-

patient privilege must be strictly construed. “It is fairly well settled that confidentiality is essential to the conduct of successful psychiatric care.” *Attorney Ad Litem For D.K.*, 780 So. 2d at 306 (quoting Law Revision Council Note to section 90.503 (1976)). While section 90.503(4), Florida Statutes, provides exceptions to confidentiality, whose responsibility should it be to determine whether the evaluation, report, or record is subject to an exception? Should a clerk be making the decision of whether an exception applies?

Federal law also recognizes a privilege protecting confidential communications between psychotherapists and their patients. The United States Supreme Court in, *Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923, 135 L.Ed.2d 337 (1996) held that conversations between a patient and her therapist and the notes taken during their counseling sessions were protected from compelled disclosure under Federal Rule of Evidence 501. The Supreme Court noted that all 50 States and the District of Columbia have enacted into law some form of evidentiary psychotherapist privilege. *Id*. at 12. The Court also held that the privilege extends to communications made to social workers in the course of psychotherapy.

Although sections 456.057, 456.059, or 90.503, Florida Statutes, do not specifically evoke section 119, Florida Statutes, it is undisputed that they provide that mental health records and psychotherapist conversations are privileged and

confidential and cannot be disclosed without written authorization, a subpoena or other limited statutory exception. It makes no sense that records and evaluations protected under these statutes only become confidential and automatically exempt after either being attached to a presentence report or after the defendant is found incompetent to proceed or acquitted by reason of insanity. For these reasons, these reports should also be included as automatic exemptions. Failure to include these reports will result in the needless filing of motions where the confidentiality is undisputed. Further, it will be an arduous task for the courts that currently keep such records and evaluations confidential to undo and unseal records that have long been kept confidential.

As noted by the Access Committee, one of its essential tasks has been to "narrow the scope of subdivision (c)(8) to a finite set of public records exemptions that are both appropriate in the context of court records and readily identifiable by the clerks of court." The concern is that clerks will not have the expertise to discern whether a report is confidential. The goal is to make the filing of records a ministerial duty. However, for decades Florida's clerks have recognized and kept clinical records, psychological and psychiatric evaluations, reports and records confidential. This has been in part the result of a long-standing recognition of the confidentiality of such evaluations, reports and records and because most jurisdictions have administrative orders pre-dating 1992 that expressly kept those

evaluations, reports, and records confidential. What the clerks don't know is whether an exception to confidentiality applies. As a ministerial duty, it would be far easier to retain the confidentiality of these records and provide for their disclosure by motion than to flood the criminal justice divisions with thousands of motions to seal what are statutorily protected reports. For this reason, psychological and psychiatric evaluations, reports, and records should be deemed automatically exempted as confidential, pursuant to Rule 2.420(d)(1)(B) of the Florida Rules of Judicial Administration, until a trial court can determine whether an exception under sections 456.057(7) and 90.503(4), Florida Statutes, applies.

Alternatively, the Task Force respectfully recommends that the Court suspend Rule 2.420's application to criminal proceedings until the Legislature can address the issue. This would also allow the Legislature to address issues that are arising in drug and mental health courts throughout the State. The Task Force voted unanimously to support this Comment.

Respectfully submitted this ____ day of January 2011

_____
The Honorable Steven Leifman, Chair
Task Force on Substance Abuse and
Mental Health Issues in the Court
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CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States mail to the following persons this ____ day of January 2011:

The Honorable Judith L. Kreeger, Senior Judge
Eleventh Judicial Circuit
175 N.W. First Ave., Room 2114
Miami, FL 33128

CERTIFICATE OF TYPEFACE COMPLIANCE

I further certify this response has been prepared in MS Word using Times New Roman 14-point font which complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2).

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The Honorable Steven Leifman