IN THE SUPREME COURT OF THE STATE OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.420

CASE NO.: SC11-2466

COMMENT OF THE FLORIDA COURTS TECHNOLOGY COMMISSION AND ITS SUBCOMMITTEE ON ACCESS TO COURT RECORDS WITH RESPECT TO THE TREATMENT OF PSYCHIATRIC EVALUATIONS IN THE PROPOSED AMENDMENTS TO RULE 2.420

The Florida Courts Technology Commission and its Subcommittee on Access to Court Records (hereinafter collectively the Access Committee) by and through the Commission's chair, the Honorable Lisa T. Munyon, Circuit Judge in the Ninth Judicial Circuit, and Paul R. Regensdorf, Esq., chair of the Access Committee, file this Comment of the Florida Courts Technology Commission and its Subcommittee on Access to Court Records with Respect to the Treatment of Psychiatric Evaluations in the Proposed Amendments to Rule 2.420 and would show the Court as follows:

1. The Access Committee of the Florida Courts Technology Commission is specifically authorized by this Court's Administrative Order AOSC09-3 to act as the successor to the Committee on Access to Court Records for the purposes of responding to various comments filed in cases relating to Rule 2.420 and the confidentiality of court records.

2. The Access Committee was uniquely involved in all of the original considerations as to which types of documents should be given an "automatic exemption" pursuant to the guidelines established by the Supreme Court in its implementation of the Privacy Committee's report and, since its initial proposal, has actively participated in every case which directly impacted Rule 2.420 and its scope.

3. Since no new exceptions were offered by the Rules of Judicial Administration Committee in this case, the Access Committee was not copied with the Petition or Comments in this case, nor was it otherwise involved.

4. Upon learning that the Florida Public Defenders Association (FPDA) was raising again the issue of the possible exemption of all psychiatric evaluations [at least in a criminal context] from public records in the judicial branch, the Access Committee has sought permission to intervene and submits, subject to the granting of that intervention, this Comment for the Court.

5. Fully aware that this is a rules case and not a strictly adversarial proceeding, the Access Committee's position with respect to psychiatric evaluations breaks down into two components:

a. This Court has actively been presented with the issue of how psychiatric evaluations should be dealt with under Rule 2.420 in three different proceedings (as will be set forth in detail below) and has actively and directly

considered it in Case No. SC10-2242, rejecting a blanket exception for such documents in court records in the state of Florida. The FPDA actively participated in that proceeding, argued for a blanket exception, and was unsuccessful in its efforts in Case No. SC10-2242 (which was decided in an opinion dated July 7, 2011). While the Access Committee commends the FPDA for its tenacity on this issue, it first suggests to this Court that the concepts of *res judicata* and collateral estoppel, if not *stare decisis* itself, preclude the FPDA from re-litigating this issue before this Court, only one year after the issue was fully briefed and decided on the merits by this Court. A motion for rehearing in Case No. SC10-2242 would certainly have been in order following this Court's decision of July 7, 2011, had the FPDA wanted to continue the discussion, but none was forthcoming. The FPDA's comment before this Court now is simply out of place.

b. On the merits, the proposition that psychiatric or other mental health evaluations should receive some blanket exception to the public's right to have access to its court records is no more supported in the statutes nor in the Constitution of the State of Florida now then it was a year ago. As will be set forth below, the position of the FPDA at this time is essentially that, "since these evaluations have always been held as confidential, they should be continue to be held as confidential in the future as well." Without quarreling as to whether or not these documents were universally held as confidential in the past, the law and the

Constitution now are clear. This Court has already decided that absent a new legislative enactment to the contrary or the intervention of a judge in a particular case determining the confidentiality of a specific psychiatric evaluation, there is no law or provision of our Constitution that authorizes such treatment. See Rule 2.420(c)(9) and 2.420(d)(3).

A. This Court in Case No. SC10-2242 has expressly and thoroughly considered the question of a blanket exception for psychiatric evaluations and has rejected that concept.

1. To assist the Court in having before it all of the various comments that have been previously presented to the Court on this topic, the following historical documents are included in the Appendix to this Comment for the Court's use.

a. Although the question of the possible confidentiality of psychiatric evaluations was considered during the preparation of the original amendments to Rule 2.420 and rejected as an automatic exception to the general principle of public access to court records, the first explicit discussion of an exception for psychiatric evaluations or other comparable mental health evaluations came in the comment of the Criminal Procedure Rules Committee in Case No. SC08-2443, a copy of which is attached hereto as Exhibit A.

b. In response to that comment, the Access Committee conducted an examination of the law of the state of Florida and ultimately submitted in Case No. SC08-2443 a response in opposition to the requested blanket exception for

psychiatric evaluations. A copy of that response is attached hereto as Exhibit B. There was a minority report filed on behalf of certain members of the Access Committee and a copy of that response is attached hereto as Exhibit C.

c. Since these comments dealing with a possible exception to Rule 2.420 were presented to the Court in a case [SC08-2443] that did not explicitly deal with Rule 2.420 (but rather with the coordinate changes necessary in **other** rules sets), this Court directed that further comments on the issue of psychiatric and other mental health evaluations be filed in a new case, Case No. SC10-2242. It also directed the Access Committee to further respond to any such comments. A copy of the Court's Notice in this regard is attached as Exhibit D.

d. In response to that notice, two additional comments were submitted in support of a broader exception for psychiatric or mental health evaluations. One was by the Task Force on Substance Abuse and Mental Health Issues in the Court (a copy of which Comment is attached hereto as Exhibit E), and the second was a comment of the FPDA (a copy of which is attached hereto as Exhibit F).

e. In response to these two comments and the previous comment of the Criminal Procedure Rules Committee, the Access Committee again conducted an investigation into the legal support for a blanket exception for psychiatric evaluations, concluded there was none, and submitted a response to this

Court in case SC10-2242, a copy of which (without exhibits) is attached hereto as Exhibit G.

f. Thereafter, on July 7, 2011, this Court issued its opinion in Case No. SC10-2242, accepting the position of the Access Committee that there was no legal or constitutional basis for a blanket exception, and recognizing instead an exception only for pre-sentence investigation reports which were grandfathered into an exempt status pursuant to the 1992 constitutional amendment. A copy of this opinion is attached hereto as Exhibit H.

2. For all of the above reasons, it is respectfully suggested to this Court that the issue of the legal status of a blanket exception for psychiatric or mental health evaluations has been carefully and thoroughly considered by this Court as recently as last year, and specifically in a case in which the FPDA and the Access Committee each were active participants. For this reason, if no other, it is urged that the comment of the FPDA is misplaced and should be rejected.

B. On the merits, psychiatric and mental health evaluations are entitled to no blanket exception from public access as public records.

1. As the Access Committee was careful to note in its previous filings, it has absolutely no interest in seeing the private mental evaluations of participants in our legal system broadcast across the public record through court records in cases in which such evaluations may have to be filed. Just as the Access

Committee has no interest in seeing them broadly published, the Committee also strongly feels that there is absolutely no legal basis for any automatic exception that would bar public access to such documents in each and every case. Rather than restate its position presented to this Court in Case No. SC10-2242 (a copy of which is attached hereto as Exhibit G), the Access Committee incorporates here that argument which remains unchanged: since 1992, the courts cannot create blanket exceptions to the public records laws of the state of Florida and there was no pre-1992 Florida statute or rule which recognized an automatic exemption when a psychiatric or mental health evaluation was placed into the court record in a criminal case, nor has the Legislature created such an exception since 1992.

2. In the absence of such a now-existing statute (or the existence of a rule or statute that predated the 1992 constitutional amendment), it continues to be the position of the Access Committee that any individual or organization seeking to have a type of document excluded from the public record is faced with one of two choices. The first avenue is to go to the Legislature of the State of Florida and convince the Legislature that there is an appropriate basis for the creation of a legislative exception to the public records laws in the state of Florida for certain psychiatric and mental health evaluations in a court context under defined circumstances. The Access Committee would actively support any such effort and would be happy to assist in the creation or crafting of any such legislative request.

3. In the absence of any such legislative enactment, however, our constitutional framework leaves litigants with only one remaining available choice. That is to file with the appropriate court a "Motion to Determine Confidentiality of Court Records" as is specifically provided for in Rule 2.420(d)(3). When that motion is filed and presented to a court in the state of Florida, then pursuant to Rule 2.420(c)(9) a judge is authorized to consider on a case by case basis, whether the document falls into an exempt category in a court context, such as to make that document (or portions thereof) exempt from public scrutiny pursuant to the public records laws of the state of Florida. The Access Committee recognizes that this procedure may be an arduous one, requiring multiple motions, but the Constitution of the State of Florida and the laws of the state of Florida allow no other alternative. This Court in it decision last year in Case No. SC10-2242 specifically ruled that the mere "custom" of keeping documents confidential was insufficient, as was a circuit-wide administrative order which is largely immune from judicial review.

4. The FPDA now argues in this case essentially that psychiatric and mental health evaluations should be kept confidential by Supreme Court rule because they have frequently if not always been kept confidential by clerks in the past. While that may or may not be true, it was and continues to be the position of the Access Committee that such informal lore of "confidentiality" can no longer

stand in the face of the 1992 constitutional amendment and this Court's commitment to appropriate public access under Rule 2.420. The fact that there were seldom challenges in the past to the de facto treatment of psychiatric evaluations as confidential is no legal support for the continued treatment of such reports in that way. This 2012 Comment relies on no new statutory or constitutional authority for an exception, and the Access Committee is similarly unaware of any.

5. The Access Committee unfortunately has to report that the Legislature has created no comprehensive scheme to utilize in determining which psychiatric or mental health evaluations should be kept confidential and which should not. In the absence of such a comprehensive legislative scheme, it was and continues to be the position of the Access Committee that the only judicial officer in the state of Florida who is officially charged with the authority to determine the confidentiality of psychiatric evaluations is the presiding judge of any criminal [or civil] case and that authority arises out of Rule 2.420. The statutory provision referred to in exception 20 [Rule 2.420(d)(1)(B)(xx)] was not **selected** by the Access Committee as the only psychiatric record worthy of confidentiality, but instead was noted because it is the only statutory provision that falls within this Court's guidelines for the determination of an automatic exception to the otherwise general public access to court records.

6. Without the benefit of the citation to any statutory authority, the FPDA now recommends a provision that would make confidential every "psychological and psychiatric evaluation and treatment record filed in a criminal case." While that may capture, in a blanket context, many documents that should be held confidential if properly presented to a trial judge, the Access Committee must disagree with any such blanket exception for these evaluations because there is simply no authority in Florida law for this Court to create such a blanket and automatic exception. Even if it could be proven to this Court that clerks in the past have routinely acted as though there were such an exception (prior to 1992), that "course of dealing" or "that's the way we always do it" approach to privacy and confidentiality are no longer the watch words under Rule 2.420.

For all the foregoing reasons, the Access Committee respectfully disagrees with the comment of the Florida Public Defenders Association and urges that this Court take no further action with respect to psychiatric evaluations other than to approve the minor wording change proposed by the Rules of Judicial Administration Committee in this case.

Respectfully submitted,

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CERTIFICATE OF FONT COMPLIANCE

This Notice is in Times New Roman 14-point and otherwise complies with font requirements of Florida Rules of Appellate Procedure 9.210(a)(2).

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Appendix to Comment of the Florida Courts Technology Commission and the Access Committee

EXHIBIT A	Comments of the Criminal Procedure Rules Committee in Case No. SC08-2443 (May 12, 2010)
EXHIBIT B	Response of the Subcommittee on Access to Court Records to the May 12, 2010 Comment of the Criminal Procedure Rules Committee in Case No. SC08-2443 (Nov. 1, 2010)
EXHIBIT C	Response of the Subcommittee on Access to Court Records to the May 12, 2010 Comment of the Criminal Procedure Rules Committee - Minority Report in Case No. SC08-2443 (Nov. 1, 2010)
EXHIBIT D	Order Opening SC10-2242, Publication Notice, and Proposed Revision of Rule 2.420(d)(1)(B) (Nov. 19, 2010) (published in Dec. 15, 2010 edition of The Florida Bar News)
EXHIBIT E	Amended Comment of the Task Force on Substance Abuse and Mental Health Issues in the Court in Case No. SC10-2242 (Jan. 14, 2011)
EXHIBIT F	Comment of the Florida Public Defenders Association in Case No. SC10-2242 (Jan. 18, 2011)
EXHIBIT G	Response of Subcommittee on Access to Court Records to Comments of the Task Force on Substance Abuse and Mental Health Issues in the Court and Comments of the Florida Public Defender Association in Case No. SC10-2242 (Feb. 8, 2011)
EXHIBIT H	Supreme Court Decision in Case No. SC10-2242 (July 7, 2011)

IN THE SUPREME COURT OF FLORIDA

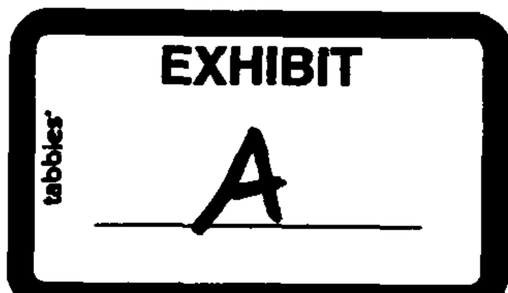
CASE NO. SC08-2443

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.

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).[1] 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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[1] *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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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 PROBTE RULES; THE FLORIDA SMALL CLAIMS RULES; THE FLORIDA RULES OF APPELLATE PROCEDURE; AND THE FLORIDA FAMILY LAW RULES

RESPONSE OF SUBCOMMITTEE ON ACCESS TO COURT RECORDS TO COMMENT OF CRIMINAL PROCEDURE RULES COMMITTEE

The Florida Court Technology Commission Subcommittee on Access to Court Records (the Access Subcommittee), by and through its undersigned Chair, the Honorable Judith L. Kreeger, Senior Judge in the Eleventh Judicial Circuit, acting pursuant to this Court's order of September 1, 2010, responds to the May 12, 2010 comment filed by the Criminal Procedure Rules Committee (CPRC). The Access Subcommittee is authorized by Administrative Order AOSC09-3, In Re: Florida Courts Technology Commission, Subcommittee on Access to Court Records (Jan. 27, 2009), to act as successor to the Committee on Access to Court records for purposes of responding to comments filed in this and other related rules petitions.

The CPRC requests that the Court consider amending Florida Rule of Judicial Administration 2.420(d)(1)(B) to include automatic sealing of certain categories of reports and evaluations in criminal cases. Specifically, the CPRC seeks to include psychological, psychiatric, and presentence investigation reports among records the clerks of court must designate and maintain as confidential. Alternatively, the CPRC requests that the circuit courts be permitted to continue the present practice of authorizing and requiring the clerks to seal such records by way of administrative orders. Alternatively, the CPRC seeks modification of proposed amendments to Rules 3.211(d), 3.212(d), 3.218(a), and 3.219(a) to alternatively track proposed language for rule 12.363(e), the CPRC text providing, "The court shall consider whether the report should be sealed as provided by Florida Rule of Judicial Administration 2.420."

The Access Subcommittee welcomes the comments of the CPRC and notes that the CPRC's current and former chairs, as well as other members, participated in successive discussions preliminary to development of this response. As will become apparent, the Access Subcommittee agrees with the CPRC in certain respects and believes a modest revision of the listed exemptions under Rule of Judicial Administration 2.420(d)(1)(B) would be an improvement.

As a preface to its response, the Access Subcommittee notes that 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. Within a far more expansive universe of potentially confidential information, the 19 automatic exemptions presently identified under subdivision (d)(1)(B) are simply those records which the rule directs the clerk to identify and maintain as confidential. Other matters not so clearly meeting the above-stated criteria may still be determined to be confidential on a case by case basis under the procedure set forth in rule 2.420(e).

In applying the criteria for inclusion among automatic exemptions, the Access Subcommittee looked first to statutory provisions unmistakably identifying information in the court record as confidential. With the exception only of rules of court in effect upon the November 3, 1992 adoption of article I, section 24 of the Florida Constitution, only the Legislature may enact an exemption. See Memorial Hospital-West Volusia, Inc. v. News-Journal Corp., 729 So. 2d 373, 380 (Fla. 1999) (holding that the court will not imply an exemption which is available only upon legislative action in accordance with express constitutional procedure). See also Wait v. Florida Power & Light Co. , 372 So. 2d 420, 424 (Fla. 1979) (section 119.07(2)(a) expressly precluding judicial creation of exemptions). The courts do not have authority to make records confidential that are not made confidential by general law or rule existing prior to November 1992.

Presentence Investigation Reports

The CPRC proposes that the court include presentencing investigation reports (PSIs) among the exemptions which the clerk must identify and maintain as confidential under rule 2.420(d)(1)(B). Upon reviewing this request, the Access Subcommittee agrees. Florida Rule of Criminal Procedure 3.712 explicitly provides that PSIs shall not be a public record. That rule was in effect prior to the 1992 adoption of the grandfathering provision under article I, section 24(d). See In re Florida Rules of Criminal Procedure, 272 So. 2d 65, 123 (Fla. 1972). The Access Subcommittee unanimously agrees that PSIs should be included in the list of automatic exemptions under rule 2.420(d)(1)(B) with citation to Florida Rule of Criminal Procedure 3.712.

Further revision of rule 2.420(d)(1)(B) will be necessary upon including this or any other additional specific exemptions based on the authority of a court rule. The rule text immediately preceding the 19 exceptions presently refers to confidential information "under any of the following statutes or as they may be amended or renumbered." (emphasis added) In the event that PSIs are added to the list of exemptions, this introductory text should be revised to read, "under any of the following statutes or court rules as they may be amended or renumbered."

Psychological and Psychiatric Evaluations

The CPRC also proposes that the court include psychological and psychiatric evaluations (mental health evaluations) among the enumerated exemptions under rule 2.420(d)(1)(B). While the Access Subcommittee agrees that ideally these evaluations would best be treated as confidential based on longstanding practice, the statutes that the CPRC cites to support including them among the enumerated exemptions listed in subdivision (d)(1)(B) do not explicitly require that they be treated as confidential in the court context. Consequently, a substantial majority of the Access Subcommittee disagrees with the CPRC proposal, further noting that the former Committee on Access to Court Records reached the same conclusion in its Final Report and Recommendations submitted to the court September 2, 2008. In the 2008 report, the Access Committee concluded "the Court does not have authority to make records confidential that are not made confidential by general law or rule existing prior to November of 1992." (Report at 23) Absent a clear legal basis, the Access Subcommittee cannot recommend that mental health evaluations be included among exemptions under rule 2.420(d)(1)(B).

Worth noting, however, PSIs must include a "medical history and, as appropriate, a psychological or psychiatric evaluation." § 948.015(9) Fla. Stat. (2010) (emphasis added). If rule 2.420 is amended to include PSIs among

automatic exemptions, the amended text might provide further for confidentiality of "any attached psychological or psychiatric evaluations," with additional citation to section 948.015(9), Florida Statutes. This would, however, extend no protection to pretrial mental health evaluations, suggesting a comprehensive remedy may better be addressed through legislative action.

Subcommittee member the Honorable Melanie G. May will separately file a minority report relating to confidentiality of mental health evaluations.

Administrative Orders

The CPRC alternatively requests that the circuit courts be permitted to continue the present practice of authorizing and requiring the clerks of court to seal PSIs and mental health evaluations by the process of having chief judges enter administrative orders, as opposed to the process presently set forth under rule 2.420(e). The Access Subcommittee disagrees. Trial courts are permitted under the rule to deal with isolated problems by motion, but any substituted reliance on local introduction of expanded lists of "approved" exemptions is contrary to the purpose of the revised rule. The recent revision was designed to provide uniform procedures for all courts to protect confidential information and to make accessible information which no longer requires that protection. Permitting local introduction

of new blanket exemptions not only risks undermining a uniform statewide system, but may also create the basis for legal or constitutional objections.

Modifying Proposed Amendments to Rules

The CPRC additionally requests that the Court at least modify proposed amendments to rules 3.211(d), 3.212(d), 3.218(a), and 3.219(a), adding text providing, "The court shall consider whether the report should be sealed as provided by Florida Rule of Judicial Administration 2.420." The proposed text is mirrored in proposed Florida Family Law Rule of Procedure 12.363(e). The Access Subcommittee has no strong position on this matter and raises no objection if the Court feels that the addition of such language would be helpful to practitioners.

Respectfully submitted this ____day of November 2010.

THE HONORABLE JUDITH L. KREEGER
Senior Judge, Eleventh Judicial Circuit
Chair, Subcommittee on Access to Court Records
175 N.W. First Avenue, Room 2114
Miami, Florida 33128
Florida Bar Number # 98600

CERTIFICATE OF SERVICE

I HEREBY CERTFY that a true and correct copy of the foregoing has been furnished by United States mail to the following persons this ____ day of November 2010:

Robert M. Eschenfelder, Chair
Code and Rules of Evidence Committee
1112 Manatee Avenue West, Suite 969
Bradenton, FL 34205

Robert T. Strain, Chair
Criminal Procedure Rules Committee
Capital Collateral Regional Counsel
3801 Corporex Park Drive, Suite 210
Tampa, FL 33619

Fleur J. Lobree, former Chair
Criminal Procedure Rules Committee
Office of the State Attorney
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Katherine E. Giddings, Chair
Rules of Judicial Administration Committee
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Jeffrey Scott Goethe, Chair
Probate Rules Committee
Barnes, Walker & Goethe
3119 Manatee Avenue West
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Michele A. Cavallaro, Chair
Small Claims Rules Committee
Fidelity National title Group
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John G. Crabtree, Chair
Appellate Court Rules Committee
Crabtree & Associates P.A.
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Steven Patrick Combs, Chair
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Combs Greene McLester
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William W. Booth, Chair
Juvenile Court Rules Committee
Legal Aid Society of Palm Beach County
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John Anastasio, Chair
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Cal Goodlett
~~Steve Henley~~, Staff Liaison
Florida Court Technology Commission
500 South Duval Street
Tallahassee, FL 32399

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).

The Honorable Judith L. Kreeger

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 PROBTE RULES; THE FLORIDA SMALL CLAIMS RULES; THE FLORIDA RULES OF APPELLATE PROCEDURE; AND THE FLORIDA FAMILY LAW RULES

RESPONSE OF SUBCOMMITTEE ON ACCESS TO COURT RECORDS TO COMMENT OF CRIMINAL PROCEDURE RULES COMMITTEE MINORITY REPORT

The Criminal Procedures Rules Committee filed a Comment to this Court's order of April 1, 2010. The Comment highlights statutes, rules, and well-established local administrative rules and practices that protect the privacy of mental health evaluations, records, and reports, and which have done so prior to November, 1992. When the Access to Court Records Committee developed the exemptions found in Rule 2.420(d)(1)(B) of the Florida Rules of Judicial Administration, it restricted its consideration of automatically exempt records to those articulated in general law or statute existing prior to November, 1992. In doing so, it did not include presentence investigations, pursuant to Rule 3.712 of the Florida Rules of Criminal Procedure and section 921.107(8), Florida Statutes (2009), which have been exempt from public records long before the establishment of section 24, article I, of the Florida Constitution.

I join the majority view of the Access Subcommittee in recommending that rule 2.420 be amended to include pre-sentence investigations. I also agree that the "medical history and, as appropriate, a psychological or psychiatric evaluation" that may be included be subject to automatic exemption. *See* Access Subcommittee's Comment at page 4. I further agree with the majority's view concerning administrative orders and the modification of proposed amendments to Rules 3.211(d), 3.212(d), 3.218(a), and 3.219(a) of the Florida Rules of Criminal Procedure. I part company with the majority, however, in its unwillingness to recommend inclusion of pretrial mental health evaluations.

In the initial creation of rule 2.420(d)(1)(B), the Access Committee did not include sections 456.057, 456.059, or 90.503, Florida Statutes, which, although not as clearly expressed, 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); *Hunter v. State*, 639 So. 2d 72 (Fla. 5th DCA 1994); *Ussery v. State*, 654 So. 2d 561 (Fla. 4th DCA 1995); *Attorney Ad Litem For D.K. v. The Parents of D.K.*, 780 So. 2d 301 (Fla. 4th DCA 2001).

As I wrote in my dissent in *Limbaugh v. State*, 887 So. 2d 387, 399 (Fla. 4th DCA 2004): "The special nature of the doctor-patient relationship dates back 2400

years to the age of Hippocrates. From that point forward, medical records have been the focus of constitutional, statutory, and regulatory protections." This Court recognized the privacy afforded medical records under section 23 of the Florida Constitution in *State v. Johnson*, 814 So. 2d 390 (Fla. 2002). Most recently, this Court again emphasized the need for keeping this information confidential in the context of a competency issue 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. And, the United States Congress reminded us of the importance of a person's right to privacy in medical records in amending HIPAA. *See* Health Insurance Portability and Accountability Act [HIPAA], 42 U.S.C.A. § 210 (1996).

Section 456.057(1) 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). Subsection (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.

§ 456.057, Fla. Stat. (2009) (emphasis added).

Section 456.059 provides that "[c]ommunications between a patient and a psychiatrist . . . **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." (Emphasis added). And section 916.107(8) provides in part: "Unless waived by express and informed consent of the client or the client's legal guardian . . . the clinical record is confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution."

These statutes have been on Florida's books since 1976, and clearly articulate that communications between a patient and psychotherapist are privileged and confidential unless the party's mental condition is put in issue, at

which point the privilege is waived. Just because those communications become part of an evaluation or report, they do not lose the confidentiality otherwise provided by section 456.059.

Because psychiatric records are privileged and exempted from both public records under section 119.07(1) and article I, section 24 of the Florida Constitution, they, along with evaluations and reports, should be included in rule 2.420(d)(1)(B)'s automatic exemptions. The clerks already know the nature of these documents and have been responsible for keeping the records confidential for decades. What the clerks don't know is whether one of the exceptions to confidentiality applies. By keeping the records confidential, the trial court can then determine if the privilege has been waived or whether some exception to confidentiality exists. *See* § 456.057(7)(a), Fla. Stat. (2009).

Even the Evidence Code addresses the confidential nature of communications between a psychotherapist and patient.[1] § 90.503, Fla. Stat.

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[1] Section 90.503(2), Fla. Stat. (2009) 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.

(2009). This privilege also existed prior to the creation of section 24 of the Florida Constitution. "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) provides exceptions to confidentiality, whose responsibility should it be to determine whether the evaluation, report, or record is subject to an exception to that privilege? Should a clerk be making the decision of whether an exception to the privilege applies? *See* 90.503(4), Fla. Stat. (2009).[2]

As the Criminal Procedure Rules Committee articulated in its Response, "psychological and psychiatric reports are commonly filed in criminal cases by

---

[2] Section 90.503(4), Florida Statutes (2009) provides:

> There is no privilege under this section:
>
> (a) For communications relevant to an issue in proceedings to compel hospitalization of a patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has reasonable cause to believe the patient is in need of hospitalization.
>
> (b) For communications made in the course of a court-ordered examination of the mental or emotional condition of the patient
>
> (c) For communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of his or her claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

experts or agencies that are not parties to the action." They are filed when competency and insanity are considered, or other mental health evaluations undertaken with regard to sentencing. To further the goal of protecting confidential information, these records, evaluations, and reports should be automatically exempted until a trial court determines that the privilege of confidentiality does not apply under sections 456.057(7) and 90.503(4), Florida Statutes (2009).

As noted by the Subcommittee's Majority Response, one of the Access Committee's "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." *See* Subcommittee Response at page 3. The concern is that clerks will not have the expertise to discern whether a report is confidential. However, for decades Florida's clerks have recognized and kept confidential psychological and psychiatric evaluations, reports and records. This has been in part the result of long-standing recognition of the confidentiality of such evaluations, reports and records and because most jurisdictions have administrative orders pre-dating 1992 that keep those evaluations, reports, and records confidential. 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.

Alternatively, I respectfully recommend that the Court order that rule 2.420 is suspended as 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.[3]

Respectfully submitted this _____ day of November 2010.

THE HONORABLE MELANIE G. MAY
Appellate Judge, Fourth District Court of Appeal
Subcommittee on Access to Court Records
1525 Palm Beach Lakes Boulevard
West Palm Beach, FL 33401
Florida Bar Number: 333621
Phone 561-242-2028

[3] *See generally* Adolfo Pesquera, *Prosecutor, Defender Spar Over Scope of Confidentiality Rules*, DAILY BUSI. REV., Oct. 27, 2010, at A2, *available at* http://www.dailybusinessreview.com/PubArticleDBR.jsp?id=1202473950030&hbxlogin=1

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Tallahassee, FL 32399

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The Honorable Melanie G. May

At the suggestion of the Florida Courts Technology Commission's Subcommittee on Access to Court Records, the Florida Supreme Court is considering amendments to Florida Rule of Judicial Administration 2.420, Public Access to Judicial Branch Records.

The Court invites all interested persons to comment on the amendments under consideration, which are reproduced in full below, as well as online at http://www.floridasupremecourt.org/decisions/proposed.shtml. An original and nine paper copies of all comments must be filed with the Court on or before January 18, 2011, with a certificate of service verifying that a copy has been served on the committee chair, The Honorable Judith L. Kreeger, Senior Judge, Eleventh Judicial Circuit, 175 N.W. First Ave., Room 2114, Miami, Florida 33128, as well as a separate request for oral argument if the person filing the comment wishes to participate in oral argument, which may be scheduled in this case. The Subcommittee chair has until February 8, 2011, to file a response to any comments filed with the Court. Electronic copies of all comments also must be filed in accordance with the Court's administrative order In re Mandatory Submission of Electronic Copies of Documents, Fla. Admin. Order No. AOSC04-84 (Sept. 13, 2004).

IN THE SUPREME COURT OF FLORIDA

IN RE AMENDMENTS TO THE FLORIDA RULES OF JUDICIAL ADMINISTRATION, CASE NO. 10-2242

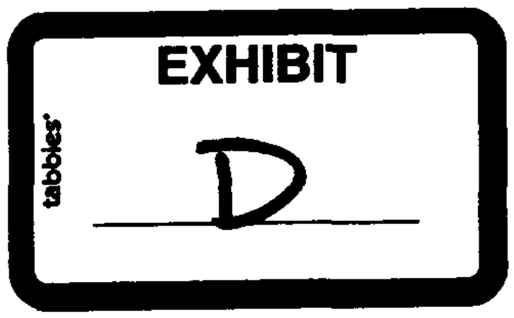
RULE 2.420. PUBLIC ACCESS TO JUDICIAL BRANCH RECORDS

(a) - (c) [No change]

(d) Procedures for Determining Confidentiality of Court Records.

(1) The clerk of the court shall designate and maintain the confidentiality of any information contained within a court record that is described in subdivision (d)(1)(A) or (d)(1)(B) of this rule. The following information shall be maintained as confidential:

(A) information described by any of subdivisions (c)(1) through (c)(6) of this rule; and



(B) except as provided by court order, information subject to subdivision (c)(7) or (c)(8) of this rule that is currently confidential or exempt from section 119.07, Florida Statutes, and article I, section 24(a) of the Florida Constitution under any of the following statutes or court rules as they may be amended or renumbered:

(i) Chapter 39 records relating to dependency matters, termination of parental rights, guardians ad litem, child abuse, neglect, and abandonment. § 39.0132(3), Fla. Stat.

(ii) Adoption records. § 63.162, Fla. Stat.

(iii) Social Security, bank account, charge, debit, and credit card numbers in court records. § 119.0714(1)(i)–(j), (2)(a)-(e), Fla. Stat. (Unless redaction is requested pursuant to 119.0714(2), this information is exempt only as of January 1, 2011.)

(iv) HIV test results and patient identity within those test results. § 381.004(3)(e), Fla. Stat.

(v) Sexually transmitted diseases - test results and identity within the test results when provided by the Department of Health or the department's authorized representative. § 384.29, Fla. Stat.

(vi) Birth and death certificates, including court-issued delayed birth certificates and fetal death certificates. §§ 382.008(6), 382.025(1)(a), Fla. Stat.

(vii) Identifying information in a petition by a minor for waiver of parental notice when seeking to terminate pregnancy. § 390.01116, Fla. Stat.

(viii) Identifying information in clinical mental health records under the Baker Act. § 394.4615(7), Fla. Stat.

(ix) Records of substance abuse service providers which pertain to the identity, diagnosis, and prognosis of and service provision to individuals who have received services from substance abuse service providers. § 397.501(7), Fla. Stat.

(x) Identifying information in clinical records of detained criminal defendants found incompetent to proceed or acquitted by reason of insanity. § 916.107(8), Fla. Stat.

(xi) Estate inventories and accountings. § 733.604(1), Fla. Stat.

(xii) The victim's address in a domestic violence action on petitioner's request. § 741.30(3)(b), Fla. Stat.

(xiii) Information identifying victims of sexual offenses, including child sexual abuse. §§ 119.071(2)(h), 119.0714(1)(h), Fla. Stat.

(xiv) Gestational surrogacy records. § 742.16(9), Fla. Stat.

(xv) Guardianship reports and orders appointing court monitors in guardianship cases. §§ 744.1076, 744.3701, Fla. Stat.

(xvi) Grand jury records. Ch. 905, Fla. Stat.

(xvii) Information acquired by courts and law enforcement regarding family services for children. § 984.06(3)-(4), Fla. Stat.

(xviii) Juvenile delinquency records. §§ 985.04(1), 985.045(2), Fla. Stat.

(xix) Information disclosing the identity of persons subject to tuberculosis proceedings and records of the Department of Health in suspected tuberculosis cases. §§ 392.545, 392.65, Fla. Stat.

(xx) Presentence investigation reports and attached psychological or psychiatric evaluations. Fla. R. Crim. P. 3.712; §948.015(9), Fla. Stat.

(2) - (4) (No Change)

(e) - (i) (No Change)

Committee Notes

[No Change]

2002 Court Commentary

[No Change]

2005 Court Commentary

[No Change]

2007 Court Commentary

[No Change]

[No Change]

IN THE _____ COURT, _____
JUDICIAL CIRCUIT, IN AND FOR
_____ COUNTY, FLORIDA

CASE NO.: _____

_____
Plaintiff/Petitioner,

v.

_____
Defendant/Respondent.
_____/

NOTICE OF CONFIDENTIAL INFORMATION WITHIN COURT FILING

Pursuant to Florida Rule of Judicial Administration 2.420(d)(2), the filer of a court record at the time of filing shall indicate whether any confidential information is included within the document being filed; identify the confidentiality provision that applies to the identified information; and identify the precise location of the confidential information within the document being filed.

Title/Type of Document(s): _____

Indicate the applicable confidentiality provision(s) below from Rule 2.420(d)(1)(B), by specifying the location within the document on the space provided:

_____ Chapter 39 records relating to dependency matters, termination of parental rights, guardians ad litem, child abuse, neglect, and abandonment. § 39.0132(3), Fla. Stat. (If the document is filed within a Chapter 39 case, this form is not required.)

_____ Adoption records. § 63.162, Fla. Stat. (If the document is filed within a Chapter 63 adoption case, this form is not required.)

_____ Social Security, bank account, charge, debit, and credit card numbers in court records. § 119.0714(1)(i)–(j), (2)(a)–(e), Fla. Stat. (Unless redaction is requested pursuant to § 119.0714(2), this information is exempt only as of January 1, 2011.)

_____ HIV test results and patient identity within the HIV test results. § 381.004(3)(e), Fla. Stat.

_____ Sexually transmitted diseases — test results and identity within the test results when provided by the Department of Health or the department's authorized representative. § 384.29, Fla. Stat.

_____ Birth and death certificates, including court-issued delayed birth certificates and fetal death certificates. §§ 382.008(6), 382.025(1)(a), Fla. Stat.

_____ Identifying information in petition by minor for waiver of parental notice when seeking to terminate pregnancy. § 390.01116, Fla. Stat. (If the document is filed within a Ch. 390 waiver of parental notice case, this form is not required.)

_____ Identifying information in clinical mental health records under the Baker Act. §394.4615(7), Fla. Stat.

_____ Records of substance abuse service providers which pertain to the identity, diagnosis, and prognosis of and service provision to individuals who have received services from substance abuse service providers. § 397.501(7), Fla. Stat.

_____ Identifying information in clinical records of detained criminal defendants found incompetent to proceed or acquitted by reason of insanity. § 916.107(8), Fla. Stat.

_____ Estate inventories and accountings. § 733.604(1), Fla. Stat.

_____ Victim's address in domestic violence action on petitioner's request. § 741.30(3)(b), Fla. Stat.

_____ Information identifying victims of sexual offenses, including child sexual abuse. §§ 119.071(2)(h), 119.0714(1)(h), Fla. Stat.

_____ Gestational surrogacy records. § 742.16(9), Fla. Stat.

_____ Guardianship reports and orders appointing court monitors in guardianship cases. §§ 744.1076, 744.3701, Fla. Stat.

_____ Grand jury records. Ch. 905, Fla. Stat. (If the document is filed in a Ch. 905 grand jury proceeding, this form is not required.)

_____ Information acquired by courts and law enforcement regarding family services for children. § 984.06(3)–(4), Fla. Stat. (If the document is filed in a Ch. 984 family services for children case, this form is not required.)

_____ Juvenile delinquency records. §§ 985.04(1), 985.045(2), Fla. Stat. (If the document is filed in a Ch. 985 juvenile delinquency case, this form is not required.)

_____ Information disclosing the identity of persons subject to tuberculosis proceedings and records of the Department of Health in suspected tuberculosis cases. §§ 392.545, 392.65, Fla. Stat.

_____ Presentence investigation reports and attached psychological or psychiatric evaluations. Fla. R. Crim. P. 3.712; §948.015(9), Fla. Stat.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U.S. mail / personal service to: _____, on _____, 20_____.

_____
Attorney Name .....
Address .....
Phone .....
Florida Bar No. .....

Note: The clerk of court shall review filings identified as containing confidential information to determine whether the information is facially subject to confidentiality under the identified provision. The clerk shall notify the filer in writing within 5 days if the clerk determines that the information is NOT subject to confidentiality, and the records shall not be held as confidential for more than 10 days, unless a motion is filed pursuant to subdivision (d)(3) of the Rule. Fla. R. Jud. Admin. 2.420(d)(2).

IN THE SUPREME COURT OF FLORIDA

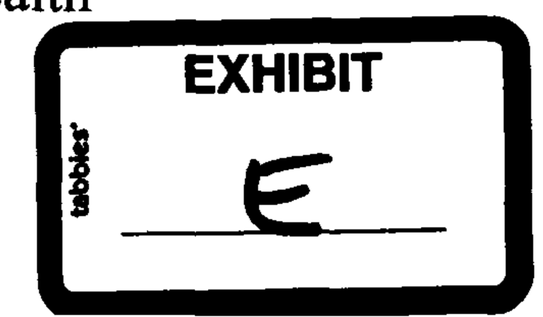
CASE NO. 10-2242

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.
>
> 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
Richard E. Gerstein Building
1351 N.W. 12th Street, RM 617
Miami, FL 33125
Florida Bar Number: 655635
Phone: 305-548-5394

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).

The Honorable Steven Leifman

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA RULES OF JUDICIAL ADMINISTRATION

Case No. SC10-2242

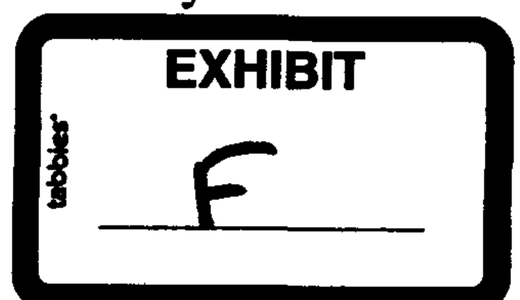
_____/

COMMENTS OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION

The Florida Public Defender Association, Inc. ("FPDA") respectfully offers the following comments on the proposed amendments to Florida Rule of Judicial Administration 2.420.

The FPDA consists of the twenty elected public defenders, hundreds of assistant public defenders, and support staff. As appointed counsel for indigent criminal defendants, FPDA members are deeply interested in the rules of procedure designed to ensure the efficiency of the criminal justice system.

The FPDA supports the proposed amendment to include presentence investigation reports and any attached psychological or psychiatric evaluations in the list of documents that clerks will automatically designate and maintain as confidential. The FPDA believe that the Subcommittee on Access to Court Records should have gone further and included all pretrial mental health evaluations. The FPDA believes that Judge May's minority report and the comments filed by the Task Force on Substance Abuse and Mental Health Issues ("Task Force") correctly set forth why these evaluations are, and have always



been, treated as confidential by the clerks. The FPDA endorses and adopt those comments.

The only thing the FPDA would add to those thoughtful comments is to emphasize to this Court the practical importance of this issue. Although the exact numbers are hard to estimate, on a statewide basis trial courts order probably tens of thousands of mental health evaluations each year, the vast majority of for competence to proceed pursuant to Florida Rule of Criminal Procedure 3.210(b). The mental health professionals merely file their reports with the court.

Additionally, state attorneys and public defenders also order psychological evaluations. These attorneys often disclose and file those reports with the court. While the FPDA has no way of estimating the number, the experience of our members is that those numbers would be significant.

Heretofore, the clerks' offices would automatically maintain and handle all those evaluations as confidential for all the reasons in Judge May's minority report and the Task Force's comments. Under Rule 2.420, court-appointed mental health professionals should technically file a "Motion to Determine Confidentiality of Court Records" under subsection (f). *See* Fla. R. Jud. Admin. 2.420(d)(3). Subsection (f), however, incorporates subsection (e), which requires that such a motion include "a signed certification by the party or the attorney for the party making the request that the motion is made in good faith and is supported by a

sound factual and legal basis." Fla. R. Jud. Admin. 2.420(e)(1). Mental health professionals are not lawyers, however, and cannot make such certifications. Therefore, they are unlikely to do anything other than file their reports and defense counsel will have to file the motions (assuming defense counsel receives a copy of the report). Additionally, assistant public defenders (and assistant state attorneys and all other attorneys working in the criminal justice system) will also have to file these motions for every evaluation they order and file.

Even if the defense and state agree that the reports should be confidential (thereby obviating the need for a hearing, *see* Rule 2.420(f)(1)(A)), the motion still has to be calendared, and the court has to issue a written ruling within 10 days. *See* Fla. R. Jud. Admin. 2.420(f)(1)(B).

All of this effort—filing a motion, service of that motion, calendaring that motion, hearing that motion, and rendering a written order on that motion—will be necessary to accomplish what is right now efficiently and automatically done by the clerks without the need to expend any additional time and effort by either the attorneys or the court. In effect, by not including all pretrial mental health evaluations, the Subcommittee on Access to Court Records recommends that this Court make the administration of the criminal justice system less effective and efficient. Judge May's minority report and the Task Force's comments explain the legal basis for including all pretrial mental health evaluations in Rule

2.420(d)(1)(B), and this Court should do so. It is never a good time to make the criminal justice system less efficient, but to do so in a time a fiscal austerity is especially imprudent.

Respectfully submitted,

Florida Public Defender Association, Inc.
By: Nancy Daniels, President
Public Defender
Second Judicial Circuit of Florida

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of these comments were served by mail on the Honorable Judith L. Kreeger, Committee Chair, 2301 North Bay Road, Miami Beach 33140 on this ___ day of January 2011.

I hereby certify that these comments were printed in 14-point Times New Roman.

_____

NANCY DANIELS

IN THE SUPREME COURT OF FLORIDA

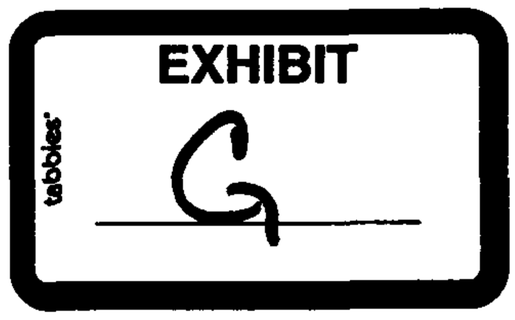
IN RE: AMENDMENTS TO FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.420

Case No. SC10-2242

_____/

RESPONSE OF SUBCOMMITTEE ON ACCESS TO COURT RECORDS TO COMMENTS OF THE TASK FORCE ON SUBSTANCE ABUSE AND MENTAL HEALTH ISSUES IN THE COURT AND COMMENTS OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION

The Florida Courts Technology Commission and its Subcommittee on Access to Court Records (hereinafter collectively the "Access Committee"), by and through the Commission's Chair, the Honorable Judge Judith L. Kreeger, Senior Judge in the Eleventh Judicial Circuit, and Paul R. Regensdorf, Esq., Chair of the Access Committee, acting pursuant to this Court's publication notice issued November 19, 2010, submits this response to the above described comments. The Access Subcommittee is authorized by the Administrative Order AOSC 09-3, In Re: Florida Courts Technology Commission, Subcommittee on Access to Court Records, Jan. 27, 2009, to act as successor to the Committee on Access to Court Records for purposes of responding to comments filed in this and other related matters.



Procedural Background

The specific subject matter of this rules case, Case No. SC10-2242, arose out of a comment by the Criminal Procedure Rules Committee in Case No. SC08-2443. In its comment, that Committee requested that this Court implement a broad automatic exemption under Rule of Judicial Administration 2.420 for a variety of mental health reports, psychiatric evaluations, and psychological evaluations of various types (hereinafter referred to as "mental health evaluations") filed with Florida courts. A copy of that comment is attached hereto as Exhibit "A".

In response to that comment requesting a broader exemption for mental health evaluations, both the Access Committee response and a minority report from the Access Committee were filed in Case No. SC08-2443. Copies of these filings in Case No. SC08-2443 are attached hereto as Exhibits "B" and "C".

In response to these filings, the Court stated that it would not consider any new or broader exemptions to Rule 2.420(d) in Case No. SC08-2443, and directed interested persons to comment in this case, SC10-2242. A copy of the Court's November 19, 2010 order opening SC10-2242 and publication notice, together with proposed rule language, are attached hereto as Exhibit "D".

Accordingly, the Task Force on Substance Abuse and Mental Health Issues in the Court and the Florida Public Defender Association filed "comments" in this case. There is, however, no initiating document, petition or report that reflects the

position of the Access Committee about this requested expansion of the automatic exemptions specified in Rule of Judicial Administration 2.420(d). Consequently this response serves as both the explication of the Access Committee's work on this topic and the specific response to the two comments.

The Difference Between the Wisdom of Taking This Action and the Authority to Take This Action

To properly understand the position of the majority of the Access Committee about this precise question concerning access to mental health evaluations and similar documents in court files, it is essential to separate the **wisdom** of allowing the filing of mental health evaluations into a court file in a manner that preserves their confidentiality from public access until the law requires them to be available to the public, from the **authority** of the Access Committee to recommend, or this Court to create, such an automatic exemption without further action by the Legislature of the State of Florida.

The Agreed Wisdom Behind this Proposal

The Access Committee agrees that there are excellent policy reasons why there should be a method to protect certain mental health evaluations from unwarranted public access. It takes no issue with the fact that a properly run criminal justice system would benefit substantially from having such documents placed in the court file under certain circumstances and kept confidential from public access when so filed until such time as the substantive law requires that

those documents be released to public access. The Access Committee also readily accepts the fact that many clerk's offices in various counties in the State of Florida have historically and routinely kept such documents "confidential" pending either further determination by the court, or action by counsel which makes those mental health evaluations "public" and available for review by the public.

But the accepted "wisdom" behind trying to find a way to keep certain mental health evaluations "confidential" and away from public access and the generally accepted historical practice of clerks in keeping them confidential are not in themselves sufficient to create an automatic exception to Rule 2.420(d) or to the public's constitutional right to public access to court records.

The Access Committee suggests to this Court that for there to be an appropriate legal analysis and discussion of this very important issue, certain terminology should be understood and be more precisely utilized. The only issue to which the Access Committee has addressed these remarks is whether mental health evaluations are or should be "confidential" as that term is used in a public access context and defined in Rule 2.420(b)(4).

The definitional use of the word "confidential" is important in this context because, from time to time, Florida courts, the Legislature, and court rules in discussing mental health information utilize terms such as "private", "privileged," "confidential," or similar terms to define different relationships between the mental

Committee that these evaluations **should** be exempt from public access are two: (1) file a Motion to Determine Confidentiality of Court Records under Rule 2.420(e) [an admittedly cumbersome process due to the volume of mental health evaluations present in court files throughout Florida courts], or (2) have the Legislature create an exemption for mental health records in the court record context.

As the Access Committee has discussed with this Court in the past, its mission in proposing the 19 automatic exemptions in Rule 2.420(d) that were previously accepted by this Court was to identify those which, based on controlling law, are confidential in the context of court records, and which are also readily identifiable by the Clerks of Court. The fact that Clerks of Court may have been protecting these matters from public access in the recent past may speak to the wisdom of keeping them confidential, but it does not establish any legal authority therefor.

The Legal Authority for this Court to Create or Recognize a New Exception to Public Access to Court Records

The Access Committee's starting point for its analysis of mental health evaluations begins with Article I, Sections 24(c) and (d) of the Florida Constitution as adopted by the citizens of Florida in November 1992. Those sections clearly and explicitly provide that only "Rules of Court that are in effect on the date of adoption of this Section which limit access to records shall remain in effect until

they are repealed." Thus, from and after the effective date of Article I, Section 24, this Court lost any future authority to create, by court rule, new exemptions to public access to court records…or in fact to any public records.[1] See Memorial Hospital-West Volusia, Inc. v. News-Journal Corp., 729 So. 2d 373, 380 (Fla. 1995); Wait v. Florida Power & Light Co., 372 So. 2d 420, 429 (Fla. 1979). (It is only because a Rule of Criminal Procedure [Rule 3.712] predated the adoption of Article I, Section 24 and provided for the confidentiality in court records of presentence investigations with included mental health evaluations that the Access Committee has acknowledged and agreed that a 20th exception should be added to Rule 2.420(d). No other Rule of Criminal Procedure that addresses the mental status of a defendant– not 3.202. 3.203, 3.204, 3.210, 3.211, 3.212, 3.213, 3.214, 3.215, 3.216, 3.217, or 3.218, or any other – both predates 1992 and provides that any mental health evaluation in a court file will be exempt from public access.

Other than the clear exception set forth in Rule 3.712 of the Rules of Criminal Procedure with respect to pre-sentence investigations, there is no rule of procedure in effect at the time of the enactment of Article I., Section 24, that would create an across the board exception for mental health evaluations. Accordingly, any newly created exception in Rule 2.420(d) for mental health evaluations must be based upon a law passed by the Legislature that restricts the right of access to

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[1] The Supreme Court adopted Rule 2.051, Florida Rules of Judicial Administration (precursor to Rule 2.420) in October 1992, just prior to the adoption of Article I, Section 24.

such documents in a court file. Such a law would either have to have been enacted prior to July 1, 1993 [See Article I, Section 24(d)] or passed since that date in an act stating clearly why there was a need for such an exemption and defining the exemption no more broadly than necessary (and passed by 2/3 vote of each house if enacted since 2002). While it is the opinion of the Access Committee that there **should** be such a law, there simply is none.

Review of each statute cited by the proponents of a broad exception for mental health evaluations as authority for the creation of this new exception shows that none creates a blanket exception – or confidentiality – with respect to public access to mental health evaluations when placed in a court record. The various statutes discussed below do recognize the general wisdom of keeping such reports private, or inadmissible in evidence or non-discoverable, but none speaks to or creates a broad or automatic exemption to public access. The case law cited to this Court is similarly constitutionally insufficient.

The first statutory provision -- section 456.057, Florida Statutes – is found in the chapter regulating health care providers, and on its face it does not purport to deal broadly with court records, the right of the public to access to court records, or exceptions to the public's right. Rather, it deals with health care providers who may be deemed the owners of their patients' records. It careful excludes from its application even the peripheral health care specialists who are regulated under

different chapters of the statutes. It regulates the circumstances under which a heath care practitioner may disclose general medical [including mental health] information, but does not speak at all to the automatic confidentiality of mental health evaluations when placed in a court file. The health care practitioner might run afoul of this statute if she or he published them in a court file, but there is no way a clerk could know whether this statute applied more broadly.

Interestingly, section 456.057 does contain in subsections (9) and (10) more particularized and focused descriptions of medical records obtained by the Department of Health, and specifically excepts such records in the Department's hands from being public records under section 119.07(1), although that statute relates to matters contained in an investigation, and not to their presence in a public court record.

Simply stated, section 456.057, Florida Statutes, provides no support for the requested exception.

The second statute cited for support is section 456.059, Florida Statutes. This section recognizes the general patient-psychiatrist privilege and, found in the same chapter, limits a psychiatrist from disclosing information about the relationship without the patient's permission. While the statute uses the word "confidential," there is no hint or suggestion that this "confidentiality" applies or extends to court records or to the public's right to access. As a clerk could not

possibly know whether a patient or the patient's representative had approved or requested the disclosure.

Again, this statute recognizes the importance that the law places upon "communications" between a patient and a psychiatrist, but it provides no support to the suggestion that there be an automatic exception to such "communications" in court files. [Actually, mental health evaluators in a criminal context are quite frequently not health care practitioners who establish a doctor/psychiatrist – patient privilege with the defendant.]

The final statute explicitly offered in support of the automatic exception is section 90.503, Florida Statues, the portion of the Evidence Code that applies to the psychotherapist-patient privilege.[2] Like section 456.059, this statute identifies in an evidentiary sense the obligation of a psychotherapist to keep communications with a patient "confidential." It does purport to have broad application to the public's access to information placed into a court file. In fact, this statute explicitly provides in subsection (4) that there **is no privilege** in proceedings to compel hospitalization, in the course of a court-ordered examination, or in any proceeding in which the patient relies upon the psychiatric condition as part of a

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[2] Although not offered in explicit support for this proposed exception, reference is made in the Access Committee's Minority Report at 4 to § 916.107(8). This statute does state that an incarcerated defendant's clinical **records** are "confidential and exempt from the provisions of s. 119.07(1) and s. 24(a) Art .I of the State Constitution," it is important to note that that section does not refer to confidentiality in a **court context**, nor does it create any confidentiality for **mental health evaluations.** The statute protects the medical chart of a defendant from public information requests.

claim or defense. All of these factors make it impossible for a clerk to be able to discern whether any information given to the clerk for filing is "confidential" in any sense…let alone in a public access sense.

The fact that these statutes do not speak to or support public access "confidentiality" under Rule 2.420 does not negate the power of a judicial officer from finding information contained in a document, or an entire document, confidential, after a hearing. However, under today's laws, the decision must be made by a judge on a Motion to Determine Confidentiality of Court Records, and not by a clerk as an automatic exception under Rule 2.420(d).

The Access Committee very much appreciates both the substance and the tone of the many discussions and submittals that occurred on this topic over the last year. The professionalism demonstrated by prosecutors and defense attorneys, and other interested groups alike, has been impressive. The fact that, in the main, these groups recognize the **wisdom** of this proposed exception is correct and laudatory. The candor they employ is no less commendable. When the Task Force on Substance Abuse and Mental Issues in the Court states that the claimed statutory basis for this exception is "not as clearly expressed as the other cited statutes in Rule 2.420(d)(1)(B)," they are quite correct. Actually, the cited statutes do not even approach the necessary level of clarity. The Access Committee is significantly concerned that the carefully constructed balance between privacy

interests and public access interests inherent in Rule 2.420 would dissolve if automatic exceptions were created based solely on the public policy **wisdom** of a proposal, and not on the statutory and constitutional **authority** for the proposed exception.

The case law cited in support of the proposed mental health evaluation exception cannot legally provide authority for an exception to the constitutional right of the public to access court records, but even if it could, no case recognizes anything like a broad exception to public access for mental health evaluations.

The two cases cited most vociferously in support – Caraballo v. State, 39 So. 3d 1234 (Fla. 2010) and State v. Johnson, 814 So. 2d 390 (Fla. 2002) – demonstrate why there may be wisdom in protecting mental health information appropriately in a court context, but they do not provide the legal authority for the automatic exception sought.

Carraballo did not involve any issue of public access to any court record, but instead dealt with whether the State could use the testimony of a court-appointed mental health expert who conducted a competency examination of the defendant. After being excluded as a witness in the mental retardation hearing pursuant to Rule 3.211(e), Fla, R. Crim. P., the court allowed the State to use his testimony in the penalty phase of the trial. Finding that the trial court had erred by allowing the competency expert to testify other than in a competency hearing, this Court held

that Rule 3.211(e) explicitly provides that such an examining expert's testimony or report, "*shall be used only in determining the mental competency to proceed or the commitment or other treatment of the defendant.*" 39 So. 3d at 1253 (emphasis in original). Although this Court stated in Carraballo that the information in the evaluation "must remain confidential," *id.*, the terminology had nothing whatsoever to do with public access to the report. In fact there could have already been an open competency hearing, and the report would have been fully available to the state. Rather, it is clear in context that this Court that the testimony or mental health information had to be kept [confidential] **from the jury sentencing Mr. Carraballo.** A new sentencing hearing was the result. Any suggestion that this report or evaluation would have been shielded from public view by this analysis is quite misplaced. The defendant, having been compelled to submit to a court-ordered competency exam, is protected from having any fact-finder learn of that evaluation **other than in a competency hearing.** Caraballo provides no factual support and cannot provide any legal authority, for a blanket automatic exception to the public access guaranteed by Article I, Section 24.

Johnson similarly provides no support for an automatic exception under Rule 2.420. Johnson dealt with an exclusionary rule case involving a driver's medical records [including blood tests] obtained by the State using the State Attorney's subpoena power, rather than a subpoena from a court of competent

jurisdiction. Since the State had been unable to comply with a court's requirements for the patient consent, or unavailability, the records were obtained by its own subpoena. This Court rejected the end run on section 396.3025(4)(d) by noting that the:

> patient's medical records enjoy a confidential status by virtue of the right of privacy contained in the Florida Constitution, and any attempt on the part of the government to obtain such records must first meet constitutional muster.

814 So. 2d at 393. Johnson had nothing to do with public access to records contained in a court file, but rather dealt with the constitutional limitations on the government's ability to grab a citizen's medical records. Clearly, the "confidentiality" was not that of a public record, but rather that of a citizen's right to keep her records "confidential" from an over-reaching and unauthorized subpoena by the state. Johnson provides no support for a blanket automatic exception for mental health evaluations placed into a court file.

The other cases may use the word confidential or address aspects of a person's private health records, but none addresses the issue of authority that is the crux of this issue before the Court.

The Access Committee accepts that many if not all clerks may well have been keeping these mental health evaluation documents "confidential" in the past, and the Committee does not doubt the benefit to the system that action may

provide. In our constitutional system, however, the way to enshrine that result properly for the future is not to press for an unauthorized exception to Rule 2.420. In the long run, the solution rests with the Legislature. Until that action can be obtained, however, Rule 2.420(d) provides short-term protection through a Motion to Determine Confidentiality of Court Records.

Respectfully submitted this 8th day of February 2011.

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and

THE HONORABLE JUDITH L. KREEGER
Senior Judge, Eleventh Judicial Circuit
Chair, Florida Courts Technology Commission
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CERTIFICATE OF SERVICE

I HEREBY CERTFY that a true and correct copy of the foregoing has been furnished by United States mail to the following persons this 8th day of February 2011:

The Hon. Steven Leifman, Chair
Task Force on Substance Abuse and
Mental Health Issues in the Court
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General Counsel's Office
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CERTIFICATE OF TYPEFACE COMPLIANCE

I CERTIFY the foregoing 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).

Paul R. Regensdorf, Esq.

Supreme Court of Florida

No. SC10-2242

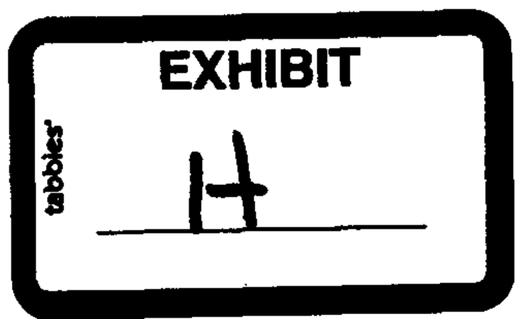
IN RE: AMENDMENTS TO FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.420.

[July 7, 2011]

PER CURIAM.

We have for consideration amendments to Rule of Judicial Administration 2.420 (Public Access to Judicial Branch Records). We have jurisdiction[1] and amend the rule as suggested by the Florida Courts Technology Commission's Subcommittee on Access to Court Records (Access Subcommittee) to include presentence investigation reports and attached psychological and psychiatric evaluations as an additional category of records that the clerk must automatically maintain as confidential pursuant to rule 2.420(d)(1)(B) of the Rules of Judicial Administration. A party seeking to maintain as confidential psychological or mental health evaluations not included in rule 2.420(d)(1)(B) must utilize the procedures set forth in rule 2.420(d)(3).

1. See art. V, § 2(a), Fla. Const.



This case involves amendments to recently adopted Florida Rule of Judicial Administration 2.420(d) (Procedures for Determining Confidentiality of Court Records) and the companion form (Notice of Confidential Information within Court Filing). See In re Amendments to Fla. Rule of Jud. Admin. 2.420 & Fla. Rules of App. Pro., 31 So. 3d 756 (Fla. 2010) (adopting procedures that allow the clerk of court to readily identify and screen from the public confidential information filed with the court and that refine the procedures for sealing and unsealing court records). The amendments are an offshoot of In re Implementation of Committee on Privacy & Court Records Recommendations, No. SC08-2443 (Fla. June 30, 2011) (involving rule amendments to minimize the amount of unnecessary personal information filed with the court) ("minimization case"). The amendments add presentence investigation reports (PSIs) and any psychological or psychiatric evaluations attached to PSIs to the list of information in court records that the clerk must automatically maintain as confidential under rule 2.420(d)(1)(B).

The amendments to rule 2.420(d)(1)(B) were originally suggested by the Access Subcommittee in its response to a comment filed in the minimization case by the Criminal Procedure Rules Committee (CPR Committee). See In re Implementation of Committee on Privacy & Court Records Recommendations, No. SC08-2443 (Fla. response filed Nov. 1, 2010); In re Implementation of Committee

on Privacy & Court Records Recommendations, No. SC08-2443 (Fla. comment filed May 12, 2010). A minority Access Subcommittee report filed in the minimization case urged that all pretrial mental health evaluations should be included in the rule 2.420(d)(1)(B) list. See In re Implementation of Committee on Privacy & Court Records Recommendations, No. SC08-2443 (Fla. minority report filed Nov. 1, 2010). Because rule 2.420 was not at issue in the minimization case, this case was created to consider the Access Subcommittee's suggested amendments to that rule[2] and the amendments were published for comment.

Comments in support of the suggested amendments were filed by the Task Force on Substance Abuse and Mental Health Issues in the Court (Task Force) and the Florida Public Defender Association (FPDA). The Task Force also urges us to further amend the rule to include pretrial and post-trial psychological and psychiatric evaluations and reports. The FPDA adopts the views expressed in the minority Access Subcommittee report and by the Task Force. The Access Subcommittee filed a response to the comments, taking the position that mental health evaluations and reports filed in criminal cases (other than those contained in PSIs) are not appropriate for inclusion in the list of information the clerk must

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2. See In re Implementation of Comm. on Privacy & Court Records Recommendations, No. SC08-2443 (Fla. order filed Nov. 19, 2010) (stating that suggested amendments to rule 2.420(d)(1)(B) will be considered in case no. SC10-2242).

automatically treat as confidential under rule 2.420(d)(1)(B). It explains that the Legislature would have to expressly make mental health evaluations filed with the court exempt from public access before those evaluations can properly be added to that list.[3]

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3. Article I, section 24, Florida Constitution, "Access to public records and meetings," which was adopted in November 1992 and became effective July 1, 1993, provides in pertinent part:

> (a) 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, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.
>
> . . . .
>
> (c) This section shall be self-executing. The legislature, however, may provide by general law passed by a two-thirds vote of each house for the exemption of records from the requirements of subsection (a) . . . provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. . . .
>
> (d) All laws that are in effect on July 1, 1993 that limit public access to records or meetings shall remain in force, and such laws apply to records of the legislative and judicial branches, until they are repealed. Rules of court that are in effect on the date of adoption of this section that limit access to records shall remain in effect until they are repealed.

Art. I, § 24, Fla. Const. (emphasis added).

Rule 2.420(d)(1)(B) lists the nineteen categories of information in court records that the clerk of court must automatically designate and maintain as confidential. In our opinion adopting the new rule, we explained that the rule contains a narrow list of public records exemptions that are appropriate in the court context and are readily identifiable by the clerk of court. See 31 So. 3d at 765. In that opinion, we also made clear that other types of information filed with the court that may be confidential but are not included in the subdivision (d)(1)(B) list must be the subject of a case by case judicial determination of confidentiality before the information can be treated as confidential. Id.; see also Fla. R. Jud. Admin. 2.420(d)(3) (requiring person filing document with court that contains information that may be confidential but is not listed in subdivision (d)(1) to file motion for determination of confidentiality of court records). The proponents of adding all mental health evaluations and reports filed in a criminal case to the subdivision (d)(1)(B) list acknowledge that the statutes[4] relied upon for their inclusion do not clearly express that those evaluations and reports are confidential in the context of public access to court records. Therefore, we defer to the Access Subcommittee on the issue and add only PSIs[5] and any psychological or psychiatric evaluations

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4. See §§ 456.057, 456.059, or 90.503, Fla. Stat. (2010).

5. Rule of Criminal Procedure 3.712, which provides that "the presentence investigation shall not be a public record," was adopted before the 1992 adoption

attached to PSIs[6] to subdivision (d)(1)(B). We also add the new category to the notice of confidential information within court filing form included in the rule.

However, we decline to suspend application of rule 2.420(d) in criminal cases until the Legislature can address the issue of confidentiality of mental health evaluations and reports, as suggested by the Task Force. We also decline to authorize clerks of court to continue to seal mental health evaluations filed in criminal cases, pending a judicial determination, on the authority of administrative orders issued in the various circuits, as also urged here. Rule 2.420 provides the procedures for sealing court records. And, as the Access Subcommittee points out, permitting local introduction of blanket exemptions to the rule would undermine the uniform procedures adopted by the Court and could result in litigation.

Accordingly, we amend the Florida Rules of Judicial Administration as reflected in the appendix to this opinion. New language is indicated by underscoring; deletions are indicated by struck-through type. The amendments shall become effective immediately upon the release of this opinion.

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of the article I, section 24(d) grandfathering provision for rules of court limiting access to records. See In re Amendments to Fla. Rules of Crim. Pro., 272 So. 2d 65, 122 (Fla. 1972).

6. See §§ 921.231(1)(i) (requiring that, as appropriate, PSIs contain the psychological or psychiatric evaluation of offender who will be sentenced to prison); 948.015(9) (requiring that, as appropriate, PSIs contain the psychological or psychiatric evaluation of offender who will receive a nonstate prison sanction), Fla. Stat. (2010).

It is so ordered.

CANADY, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and PERRY, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THESE AMENDMENTS.

Original Proceeding – The Florida Judicial Administration Committee

Katherine Eastmoore Giddings, Chair, Judicial Administration Committee, Akerman Senterfitt, Tallahassee, Florida, and Senior Judge Judith Kreeger, Chair, Subcommittee on Access to Court Records, Eleventh Judicial Circuit, Miami, Florida,

as Petitioner

Nancy Daniels, Public Defender, Second Judicial Circuit, Tallahassee, Florida, on behalf of Florida Public Defender Association, Inc.; and Judge Steven Leifman, Chair, Task Force on Substance Abuse and Mental Health Issues in the Court, Eleventh Judicial Circuit, Miami, Florida,

Responding with comments

APPENDIX

RULE 2.420. PUBLIC ACCESS TO JUDICIAL BRANCH RECORDS

(a) - (c) [No change]

(d) Procedures for Determining Confidentiality of Court Records.

(1) The clerk of the court shall designate and maintain the confidentiality of any information contained within a court record that is described in subdivision (d)(1)(A) or (d)(1)(B) of this rule. The following information shall be maintained as confidential:

(A) information described by any of subdivisions (c)(1) through (c)(6) of this rule; and

(B) except as provided by court order, information subject to subdivision (c)(7) or (c)(8) of this rule that is currently confidential or exempt from section 119.07, Florida Statutes, and article I, section 24(a) of the Florida Constitution under any of the following statutes or court rules as they may be amended or renumbered:

(i) - (xix) [No change]

(xx) Presentence investigation reports and attached psychological or psychiatric evaluations. Fla. R. Crim. P. 3.712; §§ 921.231(1)(i), 948.015(9), Fla. Stat.

(2) - (4) [No change]

(e) - (i) [No change]

Committee Notes

[No change]

2002 Court Commentary

[No change]

2005 Court Commentary

[No change]

2007 Court Commentary

[No change]

2007 Court Commentary

[No change]

IN THE _____ COURT, _____
JUDICIAL CIRCUIT, IN AND FOR
_____ COUNTY, FLORIDA

CASE NO.: _____

_____
Plaintiff/Petitioner,

v.

_____
Defendant/Respondent.
_____/

NOTICE OF CONFIDENTIAL INFORMATION WITHIN COURT FILING

Pursuant to Florida Rule of Judicial Administration 2.420(d)(2), the filer of a court record at the time of filing shall indicate whether any confidential information is included within the document being filed; identify the confidentiality provision that applies to the identified information; and identify the precise location of the confidential information within the document being filed.

Title/Type of Document(s): _____

Indicate the applicable confidentiality provision(s) below from Rule 2.420(d)(1)(B), by specifying the location within the document on the space provided:

_____ Chapter 39 records relating to dependency matters, termination of parental rights, guardians ad litem, child abuse, neglect, and abandonment. § 39.0132(3), Fla. Stat. (If the document is filed within a Chapter 39 case, this form is not required.)

_____ Adoption records. § 63.162, Fla. Stat. (If the document is filed within a Chapter 63 adoption case, this form is not required.)

_____ Social Security, bank account, charge, debit, and credit card numbers in court records. § 119.0714(1)(i)–(j), (2)(a)–(e), Fla. Stat. (Unless redaction is requested pursuant to § 119.0714(2), this information is exempt only as of January 1, 2011.)

_____ HIV test results and patient identity within the HIV test results. § 381.004(3)(e), Fla. Stat.

_____ Sexually transmitted diseases — test results and identity within the test results when provided by the Department of Health or the department's authorized representative. § 384.29, Fla. Stat.

_____ Birth and death certificates, including court-issued delayed birth certificates and fetal death certificates. §§ 382.008(6), 382.025(1)(a), Fla. Stat.

_____ Identifying information in petition by minor for waiver of parental notice when seeking to terminate pregnancy. § 390.01116, Fla. Stat. (If the document is filed within a Ch. 390 waiver of parental notice case, this form is not required.)

_____ Identifying information in clinical mental health records under the Baker Act. §394.4615(7), Fla. Stat.

_____ Records of substance abuse service providers which pertain to the identity, diagnosis, and prognosis of and service provision to individuals who have received services from substance abuse service providers. § 397.501(7), Fla. Stat.

_____ Identifying information in clinical records of detained criminal defendants found incompetent to proceed or acquitted by reason of insanity. § 916.107(8), Fla. Stat.

_____ Estate inventories and accountings. § 733.604(1), Fla. Stat.

_____ Victim's address in domestic violence action on petitioner's request. § 741.30(3)(b), Fla. Stat.

_____ Information identifying victims of sexual offenses, including child sexual abuse. §§ 119.071(2)(h), 119.0714(1)(h), Fla. Stat.

_____ Gestational surrogacy records. § 742.16(9), Fla. Stat.

_____ Guardianship reports and orders appointing court monitors in guardianship cases. §§ 744.1076, 744.3701, Fla. Stat.

_____ Grand jury records. Ch. 905, Fla. Stat. (If the document is filed in a Ch. 905 grand jury proceeding, this form is not required.)

_____ Information acquired by courts and law enforcement regarding family services for children. § 984.06(3)–(4), Fla. Stat. (If the document is filed in a Ch. 984 family services for children case, this form is not required.)

_____ Juvenile delinquency records. §§ 985.04(1), 985.045(2), Fla. Stat. (If the document is filed in a Ch. 985 juvenile delinquency case, this form is not required.)

_____ Information disclosing the identity of persons subject to tuberculosis proceedings and records of the Department of Health in suspected tuberculosis cases. §§ 392.545, 392.65, Fla. Stat.

_____ Presentence investigation reports and attached psychological or psychiatric evaluations. Fla. R. Crim. P. 3.712; §§ 921.231(1)(i), 948.015(9), Fla. Stat.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U.S. mail / personal service to: _____, on _____, 20_____.

_____
Attorney Name .....
Address .....
Phone .....
Florida Bar No. .....

Note: The clerk of court shall review filings identified as containing confidential information to determine whether the information is facially subject to confidentiality under the identified provision. The clerk shall notify the filer in writing within 5 days if the clerk determines that the information is NOT subject to confidentiality, and the records shall not be held as confidential for more than 10 days, unless a motion is filed pursuant to subdivision (d)(3) of the Rule. Fla. R. Jud. Admin. 2.420(d)(2).