

IN THE SUPREME COURT OF FLORIDA

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

CASE NO. SC11-2466

**RULES OF JUDICIAL ADMINISTRATION COMMITTEE RESPONSE TO
COMMENTS OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION
AND THE BREVARD COUNTY CLERK OF COURT, MITCH
NEEDELMAN**

Keith H. Park, Chair, Rules of Judicial Administration Committee (“Committee”), and John F. Hartness, Jr., Executive Director, The Florida Bar, file this response to the comments of the Florida Public Defender Association, Inc. (“FPDA”) and the comments of the Brevard County Clerk of Court, Mitch Needelman (“Clerk”).

The Committee reviewed and considered the comments of the FPDA concerning the proposed amendments to Florida Rule of Judicial Administration 2.420. The FPDA objects only to the subdivision of the proposed amendment to the rule that relates to the confidentiality of psychiatric and psychological records in criminal cases.¹ In essence, the FPDA requests that the Court implement a blanket exemption for all psychological and psychiatric evaluations and treatment records filed in criminal cases.

As the Court and the Committee previously recognized, the only clear statutory exemptions for psychiatric and psychological evaluations are set forth in subdivision (d)(1)(B)(x), pursuant to Section 916.107(a), Florida Statutes, and subdivision (d)(1)(B)(xx), pursuant to Florida Rule of Criminal Procedure 3.712. This issue has been discussed on numerous occasions by both the Committee and the subcommittee assigned to this task and the overwhelming sentiment of all concerned has been and continues to be that such records should be exempt in both the criminal and civil contexts. However, the Committee concludes that there is no statutory basis for a rule in the form requested by the FPDA.²

¹ Subdivisions (d)(1)(B)(x) and (d)(1)(B)(xx) both refer to psychological and psychiatric records in criminal cases. However, it appears that the FPDA comments are directed solely to subdivision (d)(1)(B)(x).

² The Florida Supreme Court substantially addressed and analyzed this issue in *In Re: Amendments to Florida Rule of Judicial Administration 2.420*, 68 So.2d 228 (2011).

Although the Committee is unable to recommend an exemption for all psychiatric and psychological records that would automatically be exercised by the clerk, the trial court may nonetheless determine that such records are confidential under appropriate circumstances. It is recognized that the lack of statutory clarity in this area will lead to an increased burden on clerks, courts and attorneys based on motions that will likely be filed in order to protect psychiatric and psychological records in court files. The Committee is sympathetic to the position of the FPDA and recognizes the need for statutory exemptions that would better safeguard the psychiatric and psychological records of parties to civil and criminal litigation. Despite the fact that the subject matter is meritorious, these issues remain within the sole purview of the legislature to correct or clarify.

The Committee reviewed and considered the comments from the Brevard County Clerk of Court who raises issues regarding the perceived lack of specificity of the proposed Notice of Confidential Information Within Court Filing (“Notice”) form. In summary, the Clerk is concerned that the available software will not automatically identify the subdivision (d)(1)(B) exemptions and that the lack of specificity contemplated by the proposed Notice form will cause delays with identifying confidential information. Consequently, the Clerk perceives a potential inability to timely comply with the time frames as set forth in proposed subdivision (d)(2)(B)³. The Clerk does not advocate a change to either subdivision (d)(2)(A) or subdivision (d)(2)(B), but anticipates difficulty with identifying confidential information described in subdivision (d)(1)(B) unless more specific information is required in the Notice form. As a remedy, the Clerk recommends that the Notice form require a statutory reference, docket number, page number and line number of the exempt information.

Given that the Committee previously considered and thoroughly discussed this same subject matter over many arduous meetings, the Committee declines to accept the Clerk’s proposal to include a statutory reference. One of the most difficult issues investigated by the Committee was a method of providing notice of the confidential information without disclosing in the public records what the nature of the information is. It is recognized that the most controversial aspect of the current Notice is that it tends to make public the very information that the filer seeks to keep confidential. Despite the long deliberative process undertaken by the Committee that included receiving information and recommendations from many clerks across the State of Florida, the Clerk is advocating that the Notice form

³ The Clerk refers to the requirements of subdivision (d)(2)(B) as being “new steps,” but it is noted that existing subdivision (d)(2) contains the same requirements.

include the very information that the new Notice form seeks to remove: the statutory basis for the exemption.

All of the clerks of court consulted by the Committee felt that the new Notice form is sufficient in its proposed form because the clerks are already well aware of the twenty (20) exempt items contained in subdivision (d)(1)(B) and therefore need little direction in attempting to identify these types of exempt subject matters. The very reason that these twenty (20) exempt items were selected for automatic exemption by the clerk is based on the fact that the clerks have familiarity with the exempt status of the information and have historically treated these items as confidential without any type of notice.

Additionally, most of the clerks who provided recommendations to the Committee strongly believed that the computer software currently in use (or anticipated to be available in the near future) is capable of identifying nearly all of the subdivision (d)(1)(B) items without the use of the Notice. Some clerks vehemently advocated the total deletion of the Notice form because they contended that the Notice is an unnecessary filing that only clutters the court file. Based on information provided by a substantial number of clerks, judges and attorneys, the Committee concluded that the proposed Notice form suitably balances competing interests and, if properly completed by the filer, will adequately provide direction and guidance to the clerks regarding the location of the exempt information.

The Committee rejects the addition of docket number, page number and line number to the Notice form. As to docket number, such information would not be known in advance of filing the document. Information can be ambiguous regarding a page number as stated on a document or as it relates to the actual page number of a filing. Line number information is not always readily ascertainable and some documents are not susceptible of determining a line number.

Both the current Notice form and the proposed Notice form use the term “precise location” as a method of informing the clerk about where to find the exempt information. The “precise location” is deemed to be both accurate and adequate by the Committee as a method for locating confidential information and may well include the concepts of providing a page number, line number or other descriptive information that will allow a clerk to locate the confidential information.

The Committee requests that the Court amend Fla. R. Jud. Admin. 2.420 as outlined in its report.

Respectfully submitted on _____

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been sent, via U.S. Mail this _____ day of March, 2012, to:

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