

## **APPENDIX TWO**

### **Draft Rule Changes**

The draft amendments to Rule of Judicial Administration 2.051 provided below incorporate many of the Committee's recommendations. This is work product of the Committee and staff that generally reflects the views of a majority of the Committee. The Committee did not, however, have ample opportunity to fully discuss the specific language in detail, and did not vote on the amendments.

#### **RULE 2.051. PUBLIC ACCESS TO JUDICIAL BRANCH RECORDS**

##### **(a) Generally.**

Subject to the rulemaking power of the Florida Supreme Court provided by article V, section 2, Florida Constitution, the following rule shall govern public access to the records of the judicial branch of government. The public shall have access to all records of the judicial branch of government, except as provided below.

##### **(b) Definitions.**

(1) "Records of the judicial branch" are all records, regardless of physical form, characteristics, or means of transmission, made or received in connection with the transaction of official business by any judicial branch entity and consist of:

(A) "court records," which are the contents of the court file, including the progress docket and other similar records generated to document activity in a case, transcripts filed with the clerk, documentary exhibits in the custody of the clerk, and electronic records, videotapes, or stenographic tapes of depositions or other proceedings filed with the clerk, and electronic records, videotapes, or stenographic tapes of court proceedings; and

- (B) “administrative records,” which are all other records made or received pursuant to court rule, law, or ordinance, or in connection with the transaction of official business by any judicial branch entity.
- (2) “Judicial branch” means the judicial branch of government, which includes the state courts system, the clerk of court when acting as an arm of the court, The Florida Bar, the Florida Board of Bar Examiners, the Judicial Qualifications Commission, and all other entities established by or operating under the authority of the supreme court or the chief justice.
- (3) “Custodian.” The custodian of all administrative records of any court is the chief justice or chief judge of that court, except that each judge is the custodian of all records that are solely within the possession and control of that judge. As to all other records, the custodian is the official charged with the responsibility of maintaining the office having the care, keeping, and supervision of such records. All references to “custodian” mean the custodian or the custodian’s designee.
- (4) “Electronic form” means information which exists in a digital medium, including: a digitized representation of text or a graphic image; a digitized visual image of a document, exhibit or other thing; a digitized visual or audio recording of an event, including recordings of court proceedings; or data in the fields or files of a database.

**(c) Exemptions.**

The following records of the judicial branch shall be confidential and may not be released by a custodian except as provided by parts (f) or (g) of this rule:

- (1) Trial and appellate court memoranda, drafts of opinions and orders, court conference records, notes, and other written materials of a similar nature prepared by judges or court staff acting on behalf of or at the direction of the court as part of the court’s judicial decision-making process utilized in disposing of cases and controversies before Florida courts unless filed as a part of the court record;
- (2) Memoranda or advisory opinions that relate to the administration of the court and that require confidentiality to protect a compelling governmental interest, including, but not limited to, maintaining court security, facilitating a criminal investigation, or protecting public safety, which cannot be adequately

protected by less restrictive measures. The degree, duration, and manner of confidentiality imposed shall be no broader than necessary to protect the compelling governmental interest involved, and a finding shall be made that no less restrictive measures are available to protect this interest. The decision that confidentiality is required with respect to such administrative memorandum or written advisory opinion shall be made by the chief judge;

(3) (A) Complaints alleging misconduct against judges until probable cause is established;

(B) Complaints alleging misconduct against other entities or individuals licensed or regulated by the courts, until a finding of probable cause or no probable cause is established, unless otherwise provided. Such finding should be made within the time limit set by law or rule. If no time limit is set, the finding should be made within a reasonable period of time;

(4) Periodic evaluations implemented solely to assist judges in improving their performance, all information gathered to form the bases for the evaluations, and the results generated therefrom;

(5) Only the names and qualifications of persons applying to serve or serving as unpaid volunteers to assist the court, at the court's request and direction, shall be accessible to the public. All other information contained in the applications by and evaluations of persons applying to serve or serving as unpaid volunteers shall be confidential unless made public by court order based upon a showing of materiality in a pending court proceeding or upon a showing of good cause;

(6) Copies of arrest and search warrants and supporting affidavits retained by judges, clerks, or other court personnel until execution of said warrants or until a determination is made by law enforcement authorities that execution cannot be made;

(7) All records made confidential under the Florida and United States Constitutions and Florida and federal law;

(8) All records ~~presently~~ deemed to be confidential by court rule as of October 29, 1992, including the Rules for Admission to the Bar, by Florida Statutes, by prior case law of the State of Florida decided prior to October 29, 1992, and by the rules of the Judicial Qualifications Commission;

(9) Any court record determined to be confidential in case decision or court rule on the grounds that

(A) confidentiality is required to

(i) prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice;

(ii) protect trade secrets;

(iii) protect a compelling governmental interest;

(iv) obtain evidence to determine legal issues in a case;

(v) avoid substantial injury to innocent third parties;

(vi) avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of proceeding sought to be closed;

(vii) comply with established public policy set forth in the Florida or United States Constitution or statutes or Florida rules or case law;

(B) the degree, duration, and manner of confidentiality ordered by the court shall be no broader than necessary to protect the interests set forth in subdivision (A);

(C) no less restrictive measures are available to protect the interests set forth in subdivision (A); and

(D) except as provided by law or rule of court, reasonable notice shall be given to the public of any order closing any court record.

(10) The names and any identifying information of judges mentioned in an advisory opinion of the Committee on Standards of Conduct for Judges.

**(d) Electronic Access.**

(1) To promote efficiency and accountability, courts should aspire to provide access to court records in electronic form. Precautions must be taken prior to the release of records in electronic form to protect private and confidential information and to ensure the proper administration of justice.

The release of court records in electronic form, remotely or directly, is authorized for all records enumerated in subdivision (2) of this part, and for

records enumerated in subdivision (3) provided the clerk of court for the jurisdiction ensures that the described records are manually inspected and no confidential information is released. No other court records shall be released in electronic form unless authorized by order of the Supreme Court pursuant to subdivision (4) of this part.

(2) Any jurisdiction may release the following records in electronic form:

- (A) progress dockets, limited to case numbers and case type; party name, race, gender and year of birth; names and address of counsel; lists or indices of any judgments, orders, pleadings, motions, notices or other documents in the court file; notations of court events, clerk actions and case dispositions; name and date of death of deceased in probate cases, address of attorney of record or pro se party in probate case;
- (B) court records which are Official Records;<sup>63</sup>
- (C) court schedules and calendars;
- (D) traffic court records;
- (E) appellate court briefs, orders and opinions;

(3) The following records may be released electronically provided the clerk of court for the jurisdiction ensures that the described records are manually inspected and no confidential information is released:

- (F) the chief judge of a jurisdiction may, sua sponte, direct the electronic release of a record or records in a case of significant public interest;
- (G) records may be transmitted to a party, an attorney of record in a case, or an attorney expressly authorized by a party in a case to receive the record;
- (H) a record that has been individually and specifically requested;<sup>64</sup>

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<sup>63</sup> Certain Official Records, such as records in adoption cases, remain confidential by statute. In addition, Subsection 28.2221, Florida Statutes, prohibit clerks of court from publishing on an Internet website records in cases arising out of Family, Probate and Juvenile Rules. Nothing in this recommendation should be construed to negate these statutory restrictions.

- (I) records may be transmitted to an governmental agency or agent;
- (J) records in civil cases in which an agency, as defined in subsection 119.011(2), Florida Statutes, is a party.

(4) The Supreme Court may authorize remote access to records in electronic form in a jurisdiction pursuant to a certification and authorization process established by the Court to ensure compliance with all applicable laws and rules of court, including subdivision (5) or this part. If a custodian fails to comply with this rule or condition of authorization established by the Supreme Court, the Court may withdraw its authorization for that custodian to provide remote access.

(5) Access to court records in electronic form, other than those enumerated in subdivisions (2) and (3), may be authorized for a jurisdiction pursuant to subdivision (4) only when the following conditions are present:

- (A) the custodian has implemented processes and provides training to personnel to screen and redact court records to ensure against the unauthorized release of confidential information;
- (B) procedures are in effect to limit the amount of extraneous personal information entered into court files;
- (C) court records continue to be available for inspection and copying at the courthouse;
- (D) policies for access to court records, including access for judges, court staff and attorneys, are approved by the chief judge of the jurisdiction;
- (E) adequate revenues are available to ensure ongoing fiscal support for electronic access; and

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<sup>64</sup> The Committee agrees with testimony received that it will not be possible to adequately inspect large numbers of records, and so contemplates that large volume, or “bulk” requests, would not be consistent with this provision.

(F) records, other than official records, arising under the rules of family, juvenile or probate law may not be made available for remote electronic release.

**(e) Privacy Notice and Certification of Confidential Information.**

(1) Privacy Notice. Every clerk of court of an appellate or circuit court shall post in a location within the public area of the office of the clerk and on the clerk's website a prominent notice that states:

“PRIVACY NOTICE:

- Under Florida law court records are public records that may be released to the general public both at the court and via electronic means.
- The inclusion of personal information in court records may be detrimental to your privacy and the privacy of other persons.
- Every document filed with this court must indicate whether the document contains confidential information in accordance with Rule of Judicial Administration 2.051(e)(2).”

(2) Indication of Confidentiality. Each document filed with the clerk or court shall include a 2 inch high by 1 inch wide box in the upper right hand corner on its first page. Within that box the filer shall indicate whether the document contains or does not contain information that is confidential under state or federal law or court rule or order. The filer must indicate either:

- (A) that the filer believes the document does not contain confidential information, indicated by the inclusion of the words “Not Confidential” in bold font in the box, or,
- (B) that the filer believes the document contains confidential information, indicated by the inclusion of the word “CONFIDENTIAL” in capital letters and bold font in the box. A pleading or motion indicating confidential information must be accompanied by a “Certification of Confidential Information” pursuant to subparagraph (3) of this part.

(3) Certification of Confidential Information. Each document filed with the clerk of court which contains information that is confidential must include a

signed “Certification of Confidential Information.” The Certificate of Confidential Information, see Form 2.---, shall describe the nature of the information that the filer considers confidential but without disclosing the confidential information itself, and shall identify the statute, court rule, or court order which the filer believes makes the information and/or document confidential and exempt from public disclosure

A filer must file under seal a document that is identified as confidential under seal. The custodian shall place the Certificate of Confidential Information in the court file and shall not seal the Certificate.

(4) Notice to Non-Parties. If the confidential information described pursuant to subdivision (3) concerns or refers to a named non-party to the case, the filer shall inform such non-parties of the filing by mailing a copy of the Certificate of Confidential Information, together with a copy of the document that is designated confidential, to that person. The filer shall also notify such non-party that the document is subject to unsealing and that the non-party may move to have the record sealed. The filer shall certify within the Certificate of Confidential Information that the filer has given such notice to such non-parties.

(5) Duplicate Filings. Parties shall avoid duplicate filings. Courtesy copies of documents already filed within a court file must be clearly marked “COURTESY COPY DO NOT FILE.”

(6) Compliance:

(A) Any document submitted by a pro se litigant that does not include an indication of non-confidentiality or confidentiality pursuant to subdivision (2), or any document that includes an indication of confidentiality but does not include a Certification of Confidential Information pursuant to subdivision (3), may be accepted by the clerk of court but shall not be made available by remote electronic access.

(B) Any document submitted by an attorney that is not in conformity with subdivisions (2) and (3) shall be date and time stamped by the clerk and returned to the filer for failure to comply with this rule. The date and time stamped on the original filing shall be the controlling date and time for purposes of any time limits under any statutes of limitations for initial pleadings or time limits for responsive pleadings to avoid default, but

shall not have any affect on any other time limit for compliance with any time requirements in law or court rule.

(C) Failure to comply with this part may subject an attorney or party to sanctions by the Court.

**(d) (f) Procedure.**

Requests and responses to requests for access to records under this rule shall be made in a reasonable manner.

(1) Requests for access to records shall be in writing and shall be directed to the custodian. The request shall provide sufficient specificity to enable the custodian to identify the requested records. The reason for the request is not required to be disclosed.

(2) The custodian shall be ~~solely~~ responsible for providing access to records of the custodian's entity. The custodian shall make an initial determination determine whether the requested record is subject to this rule and, if so, whether the record or portions of the record are confidential or exempt from disclosure. The custodian shall hold a court record which is initially determined to be confidential or exempt under seal.

(3) Any person may challenge an initial determination that a record or a portion of the record is confidential by filing a motion with the court having jurisdiction of the case. The movant shall serve the motion all parties and any non-party who is identified pursuant to subdivision (e)(4). Any non-party identified pursuant to subdivision (e)(4) shall have standing to move to maintain the sealing.

~~The custodian shall determine the form in which the record is provided.~~

(34) Fees for copies of records in all entities in the judicial branch of government, except for copies of court records, shall be the same as those provided in part 119.07, Florida Statutes (2001).

**(d) (g) Review of Denial of Access Request.**

Expedited review of denials of access to records of the judicial branch shall be provided through an action for mandamus, or other appropriate appellate remedy, in the following manner:

- (1) Where a judge who has denied a request for access to records is the custodian, the action shall be filed in the court having appellate jurisdiction to review the decisions of the judge denying access.
- (2) All other actions under this rule shall be filed in the circuit court of the circuit in which such denial of access occurs.