

BUY™

SELL™

SHOP™



Downloaded From
www.TextBookDiscrimination.com



SELL YOUR OWN SAMPLES

(help others get the justice that they deserve)



BUY™

SELL™

SHOP™

www.TextBookDiscrimination.com

Get ***Booked Up*** on Justice!

© TBD Corporation. All Rights Reserved.

ORIGINAL

IN THE SUPREME COURT OF FLORIDA

FILED
THOMAS D. HALL
2011 AUG -1 PM 4:09

CLERK, SUPREME COURT
BY VAB

**IN RE: IMPLEMENTATION OF
COMMITTEE ON PRIVACY AND
COURT RECORDS RECOMMENDATIONS
—AMENDMENTS TO THE FLORIDA
RULES OF CIVIL PROCEDURE;
THE FLORIDA RULES OF JUDICIAL
ADMINISTRATION; 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
OF PROCEDURE.**

Case No.: SC-08-2443

**MOTION FOR REHEARING ON BEHALF OF
THE FLORIDA COURTS TECHNOLOGY COMMISSION
AND THE ACCESS SUBCOMMITTEE OF THE FLORIDA COURTS
TECHNOLOGY COMMISSION**

The Florida Courts Technology Commission ("FCTC") and the Access Subcommittee of the FCTC ("Access Subcommittee"), by and through their respective chairs, the Honorable Judith Kreeger and Paul R. Regensdorf, Esq., respectfully request that this Court rehear or reconsider, pursuant to Rule 9.330 of the Florida Rules of Appellate Procedure, one portion of its June 30, 2011 opinion adopting the new Rule of Judicial Administration 2.425 (Minimization of the Filing of Sensitive Information) in the above cause (the "Opinion"), and would show the Court as follows:

See 11/3/2011 order

I. THE GROUNDS IN SUPPORT OF THIS MOTION.

This motion is directed to a single, discrete portion of the Opinion in which the Court, in footnote 13, appears to have misapprehended or overlooked that the Access Committee has, indeed, already addressed a vehicle for keeping unnecessary sensitive information out of the court file and for sanctioning unauthorized filings. Specifically, in reviewing the background of “minimization”, unauthorized filings, and the Privacy Committee Report’s Recommendation Eight, this Court commented in the Opinion that:

... Recommendation Eight, addressing unauthorized filings, see Privacy Committee Report at 54, was referred to the Access Committee. The Access Committee was charged with studying the rules to "determine whether any sanctions [for unauthorized filings] need to be strengthened to further the goal of preventing gratuitous publication of extraneous and potentially damaging information." Admin. Order AOSC06-27 at 3. *However, the Access Committee did not directly address Recommendation Eight in its petition or report.* We cannot fully implement the Privacy Committee’s minimization recommendations without a clear mechanism in place to stop the filing of all unauthorized documents. Therefore, we ask the various Florida Bar rules committees to study the issue of unauthorized filings, as suggested in Recommendation Eight of the Privacy Committee Report, and report back to the Court with recommendations to address this issue. The committees should coordinate their efforts, with the Rules of Judicial Administration Committee overseeing the effort.

Opinion, at 6 – 7, n. 13 (emphasis added).

For the reasons set forth below, the FCTC and Access Committee respectfully suggest that: (i) Recommendation Eight and the Court's concerns about preventing gratuitous publication of extraneous and potentially damaging information were fully addressed in the Access Committee's Response served May 12, 2010, in response to question 7 that the Court posed in its April 1, 2010 Order seeking clarification; and in the further revisions in what has now become Rule 2.425, (ii) The Access Committee specifically recommended the creation of Rule 2.425, separate from but as a companion to Rule 2.420, as a means to define information within documents that is not now authorized to be filed; and (iii) the responsibility remains with the filer, rather than the clerks of court, to ensure compliance with Rules 2.420 and 2.425, the violation of either of which courts can sanction under existing, and now also under recently amended, rules of court.

II. ARGUMENT.

A. Recommendation Eight and its Background.

Recognizing the great promise that modern technology offers to improve the efficiency, effectiveness, and openness of Florida courts, the Court gave the Committee on Privacy and Court Records ("Privacy Committee") the mission to devise a plan that, among other things, includes rules of court that identify the requirements that must be met before court records can be released electronically. The charge included recommending strategies to reduce the amount of personal

and sensitive information that unnecessarily becomes part of a court record.¹ The Court also directed the Privacy Committee to recommend strategies to educate court users and the public about the privacy implications of placing such information in court records.

As a result, the Privacy Committee issued its report containing twenty-four recommendations (“Privacy Report”) toward development of a comprehensive set of policies to provide electronic access to court records, while protecting confidential information and records. Those recommendations are contained within three groups: One, to create a means to protect the confidentiality of information required by law to be confidential, but that must be in court files; Two, to minimize the presence of other sensitive or personal information that need not be included in the court file; and Three, to create "a general framework within which electronic access to court records can be provided." Privacy Report, at 57.

Recommendation Eight, within Group Two (“Minimization”), was intended to prohibit the “gratuitous publication of extraneous and potentially damaging personal information”, and was not designed to be a broad charge to alter the general system of filing documents in Florida courts:

¹ *In re: Committee on Privacy and Court Records (Amended Administrative Order)*, AOSC04-4 (Fla. February 12, 2004).

Unauthorized Filings Prohibited

The Committee recommends that the Supreme Court consider study of a court rule to prohibit the filing of *documents that are not authorized* by court rule or statute, or seeking relief by the court. The rule should clearly define improper filings, set out a method through which clerks of court can effectively identify filings which are not proper, and *authorized (sic) clerks to make improper filings unavailable for inspection* pending judicial determination of whether the filing will be accepted. The rule should provide that filings that are not accepted be returned to the filer with an explanation of why the filing is being returned.

Privacy Report, at 54 (emphasis added). There are, however, two fallacies in this recommendation: (1) that a universe of “authorized filings” exists, or can or should be enumerated and (2) that the clerks of court have the ability and authority to exercise sufficient discretion to refuse to accept court filings.

B. “Authorized Filings” are Nowhere Specifically Defined and the Clerks Cannot Make That Determination.

Certain authorized filings are defined by court rule. For example, Florida Rule of Civil Procedure 1.100 (a) (Pleadings) provides that there shall be a complaint or petition, answer, third-party complaint, etc., and concludes that “[n]o other pleadings shall be allowed”. Conversely, Rule 1.100 (b) (Motions) only generally provides that any application to the court for an order shall be by written motion, but nowhere defines the extent of or limitations on the types of motions that are “authorized” to be filed.

Under Rule 1.150 (Sham Pleadings) a party may file a verified motion to strike another party's sham "pleading" (presumably a motion as well) "or any part thereof", and the court is afforded discretion in granting summary judgment or entering a default against the sham filer. Similarly, under Rule 1.140 (f) (Motion to Strike), "a party may move to strike *or the court may strike* redundant, immaterial, impertinent, or scandalous matter from any pleading at any time." Fla. R. Civ. P. 1.140 (f) (emphasis added).

Therefore, the province of attacking a filing deemed "unauthorized" appears to lie with the parties and the court, and not with the clerk. The answer to the question whether additional or existing sanctions need to be strengthened to prevent unauthorized filings is addressed below as part of the description of the Access Committee's May 12, 2010 Response to the Court's request for additional information.

The Privacy Committee likely misconstrued the role of the clerks of court. See Recommendations Eight and Nineteen, Privacy Report at 54 & 66. Although they are constitutional officers, the clerks of court were never authorized by rule or law to make substantive decisions about whether filings are "authorized". In the Court's June 30, 2006, Administrative Order implementing the Privacy

Committee's recommendations², this Court recognized this misconception and narrowed portions of Recommendation Eight. Noting the limited role of the clerks of court in the context of confidentiality and with respect to unauthorized filings, this Court specifically stated that the clerks of court, as ministerial officers, should not be tasked with making substantive decisions about whether information or documents that are filed should be held confidential.³ And, with respect to unauthorized filings, while duly acknowledging the concerns expressed by certain clerks of court, the Court stated that:

...the responsibility for identifying unauthorized filings cannot be placed on the clerks of court. Thus, in directing that Recommendation Eight be studied, it is understood that the current rules already provide for sanctions against those who are responsible for unauthorized filings and that the rules should be studied to determine whether any sanctions need to be strengthened to further the goal of preventing gratuitous publication of extraneous and potentially damaging information.⁴

The Court recognized that then existing rules did provide for sanctions against those who are responsible for unauthorized filings, but it tasked the Access Committee with studying whether those sanctions should be strengthened. The Access Committee did, indeed, answer that question.

² *In re: Implementation of Report and Recommendations of the Committee on Privacy and Court Records*, Case No.: AOSC06-20 (Fla. June 30, 2006).

³ *Id.* at 6.

⁴ *Id.* at 7.

(i) The Access Committee's May 12, 2010 Response.

While addressing the Privacy Report's recommendations with respect to confidential information by proposing amendments to Rule 2.420, the Access Committee also oversaw a multi-rules committee process that was designed to propose amendments to various rules of procedure to minimize the amount of personal and sensitive, but unnecessary, information and documents found in court files. None of the rules committees found any rules-based or substantive law-based lists of unauthorized filings or any authority for the clerks of court to reject any filing except for non-payment of a statutory fee. For that reason, the various rules committees and the Access Committee focused on creating a new rules structure that would reduce the amount of personal and sensitive information that would be introduced into court files.

This collective body of proposed rules, focused on "minimization," was initially submitted to the Court for its consideration in 2008. On April 1, 2010, this Court responded to the package of rules and entered an order requesting clarification and input from the various Florida Bar rules committees and the

Access Subcommittee by posing seven specific questions⁵ addressed to the Group Two Recommendations on “minimization” to further the goal of preventing gratuitous publication of extraneous and potentially damaging sensitive information. Among its responses to this Court, the Access Committee proposed for the first time the genesis of what has become the newly-approved Rule 2.425.

The Court’s requested clarification in question 7 asked:

Why the Committee on Access to Court Records did not propose any amendments in response to its charge to [s]tudy court rules to prohibit the filing of documents that are not authorized by court rule or statute, or seeking relief by the court. The responsibility for identifying unauthorized filings cannot be placed on the clerks of court. It is understood that the current rules already provide for sanctions against those who are responsible for unauthorized filings; accordingly, the rules should be studied to determine whether any sanctions need to be strengthened to further the goal of preventing gratuitous publication of extraneous and potentially damaging information.⁶

On May 12, 2010, the Access Committee responded to all seven questions.⁷ As to question 7, the Access Committee stated that it:

⁵ *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*, Case No.: AOSC08-2443 (Fla. April 1, 2010).

⁶ *Id.* at 3.

⁷ *Response of the Subcommittee on Access to Court Records*, served May 12, 2010.

extensively studied the court rules and the recommended changes made by each rules committee. The Committee recommended that, with the exception of presumptively confidential information itemized in the new Rule of Judicial Administration 2.420 (d) (1), the burden be on the filer to alert the clerk and the court to the filing of confidential information. The Subcommittee further believes that the court's ability to impose sanctions for unauthorized filings is adequately covered by the "good cause" provision of 1.280 (f) and 12.280 (f), the recommended clarification of what constitutes good cause, and other existing rules and statutes.⁸

In proposing new Rule 2.425, the Access Subcommittee created a specific centralized rule of procedure that is designed to prevent the filing of unauthorized personal and sensitive information, comparable in many respects to Rule 2.420, which was designed to keep confidential information from inappropriate public access. Taking the best recommendations from each of the various rules committees, the Access Committee crafted Rule 2.425 as a second safety net designed to prevent filers from including in court records sensitive personal information that was not then necessary or relevant to an issue to be determined by the court. Since the clerks of court had no authority to reject a now "unauthorized filing", the onus was placed squarely upon the filer. Although as originally proposed on May 12, 2010, there was no separate sanction authority included in Rule 2.425, after this concept was vetted with all of The Florida Bar rules committees, the proposed rule as finally presented to this Court and approved gave

⁸ *Id.* at 9 – 10.

specific sanctioning authority to the courts to address misuse or abuse by any filer who gratuitously placed sensitive information in a public repository. See Rule 2.425(c).

The Access Subcommittee acknowledges that its reports did not specifically state that its recommended amendments to Rule 2.420 and creation of proposed Rule 2.425 were directly responsive to Recommendation Eight. However, it is respectfully suggested that these two complex rules create an overlapping procedure that is intended and designed to protect the public's confidential information from becoming available for electronic access and to prevent unnecessary sensitive information from even reaching the court record at all. Thus, confidentialities in court records are protected under Rule 2.420, and minimization is achieved by identifying information that should never be filed and specifically providing for sanctions if a filer violates Rule 2.425. This combination addresses and encompasses a broad spectrum of what would be considered "unauthorized" filings (i.e., anything that is confidential or violates the minimization limitations).

For these reasons, the Access Subcommittee believes that its predecessor Access Committee fully addressed Recommendation Eight. It is respectfully suggested that further efforts to regulate this issue by the Court's rulemaking process would be counterproductive and may add to the existing complexity of

Rule 2.420.⁹ With an effective date of October 1, 2011, Rule 2.425, its companion Rule 2.420, and its cross-referencing in Florida Rules of Civil Procedure 1.191, Florida Rules of Criminal Procedure 3.021, Florida Probate Rules 5.080, Florida Rules of Traffic Court 6.155, Florida Small Claims Rules 7.020, Florida Rules of Juvenile Procedure 8.021, Florida Rules of Appellate Procedure 9.050, and Florida Family Law Rules 12.191 presents a collective and comprehensive mechanism for the parties to seek and the courts to impose sanctions for unauthorized filings. Further rule amendments at this time would be duplicative and quite probably counterproductive.

Instead, the FCTC and the Access Subcommittee recommend that a reasonable amount of time be allowed for newly amended Rule 2.420 and newly created Rule 2.425 to coexist, to ascertain whether any additional safeguards need to be constructed to catch unauthorized sensitive or confidential information that is not otherwise snared by either Rules 2.420 or 2.425.

Accordingly, for the reasons set forth in this motion for rehearing, it is respectfully suggested to this Court that the concerns of the Privacy Committee in drafting Recommendation Eight and of this Court in assigning it to the Access

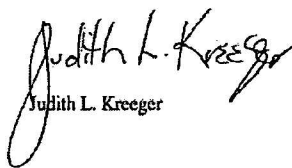
⁹ The Rules of Judicial Administration Committee is presently readying a wide cross section of additional amendments, which if adopted will increase its complexity. While only anecdotal at this point, it appears that even with multiple educational programs being offered by the Bar, its members (as well as members of the judiciary) are assimilating it slowly and additional outreach efforts are already being planned.

Committee for attention have been fully and properly addressed through the creation of newly amended Rules 2.420 and 2.425 and that any further effort at this time would not be productive.

Respectfully submitted,



Paul R. Regensdorf, Chair
Access Subcommittee



Hon. Judith L. Kreeger, Chair
Florida Courts Technology
Commission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and nine copies of the foregoing have been furnished to the Clerk of the Florida Supreme Court; and that a true and correct copy of the foregoing has been furnished to those listed below, this 1st day of August 2011, by U.S. Mail:

John F. Harkness, Jr.
Executive Director
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300

Alicia M. Menendez, Chair
Code and Rules of Evidence Committee
Shook, Hardy & Bacon, L.L.P.
201 S. Biscayne Blvd. Suite 2400
Miami, Florida 33131-4339
amenendez@shb.com

Jamie Billotte Moses, Chair
Appellate Court Rules Committee
Fisher Rushmer et al., P.A.
P.O. Box 712
Orlando, Florida 32802-0712
jmoses@fisherlawfirm.com

Joel M. Silvershein, Chair
Juvenile Court Rules Committee
State Attorney's Office
201 SE 6th Street, Suite 660
Fort Lauderdale, Florida 33301-3334
jsilvershein@sao17.state.fl.us

Ashley J. McCorvey Myers, Chair
Family Law Rules Committee
McCorvey & Myers
1912 Hamilton St., Suite 204
Jacksonville, Florida 32210-2078
ashleymyers.law@verizon.net

Keith H. Park, Chair
Rules of Judicial Administration
Committee
P.O. Box 3563
West Palm Beach, Florida 33402-3563
kparkpa@bellsouth.net

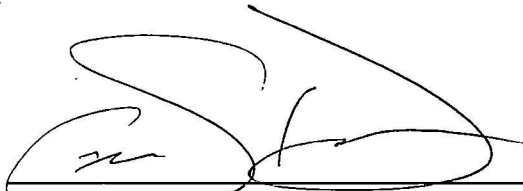
Kevin David Johnson, Chair
Civil Procedure Rules Committee
Thompson Sizemore Gonzalez
& Hearing, P.A.
201 N Franklin St Ste 1600
Tampa, Florida 33602-5110
kjohnson@tsghlaw.com

Hon. Donald Eugene Scaglione, Chair
Criminal Procedure Rules Committee
20 N Main St, Rm 359
Brooksville, Florida 34601-2817

Judson Lee Cohen, Chair
Small Claims Rules Committee
Cohen Law Offices
1 SE 3rd Ave, Suite 2900
Miami, Florida 33131-1711
judsoncohen@cohenlawoffices.com

Jill Marie Hampton, Chair
Traffic Court Rules Committee
Private Counsel LLC
733 W. Colonial Dr.
Orlando, Florida 32804-7343
JH@AttorneyHampton.com

John C. Moran, Chair
Probate Rules Committee
Gunster Yoakley & Steward, P.A.
777 S. Flagler Dr., Suite 500 E
West Palm Beach, Florida 33401-6121
jmoran@gunster.com



Susan Dawson, Esq.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing has been submitted in compliance with the requirements of *Fla. R. App. P. 9.210(a)(2)*.

A handwritten signature in black ink, appearing to read 'SD', is written over a horizontal line.

Susan Dawson, Esq.
Office of the State Courts Administrator
Supreme Court Building
500 South Duval Street
Tallahassee, Florida 32399-1900
Telephone: 850-487-9383
Facsimile: 850-487-4988
Email: dawsons@flcourts.org
Florida Bar No.: 0076848

BUY™

SELL™

SHOP™



Downloaded From
www.TextBookDiscrimination.com



SELL YOUR OWN SAMPLES

(help others get the justice that they deserve)



BUY™

SELL™

SHOP™

www.TextBookDiscrimination.com

Get ***Booked Up*** on Justice!

© TBD Corporation. All Rights Reserved.