In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

[redacted]

Petitioner,

v.

CHIEF JUDGE OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA

Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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SUMMARY OF THE REPLY ARGUMENT

The parties agree that Florida recognizes a "judicial deliberation privilege." In fact, this is the rationale behind the distinction drawn by the Florida Supreme Court in Fla. R. Jud. Admin. 2.420 between records of communications by a judge made as part of deciding a case (which are exempted) and all others judicial communications (which are not). The Supreme Court has already incorporated the deliberations privilege into the Rule and has already struck the appropriate balance between that privilege and the public's Constitutional right of access to government records. This Court need only apply the Rule as written.

But the Respondent asks this Court to look beyond Rule 2.420 and apply concepts related to judicial immunity from civil liability. This argument mixes two entirely different protections that are driven by entirely different public policies. There are certainly instances, such as the communications at stake in this case, where conduct is immune, but nevertheless, must be disclosed.

Holding that administrative records—i.e. non-adjudicative rulemaking—must be disclosed is consistent with the traditions and Constitutional commitment to open government in Florida. The citizens of Florida could not have been more explicit when amending the Constitution that it was their expectation that judicial records be as accessible as those of other branches of government.

ARGUMENT

I. The Judicial Deliberation Privilege Does Not Apply To Discussions About the Proposed Administrative Order.

The Respondent's original explanation for redacting the requested public records was that they pertained to "attorney-client privileged information, work product, and other information as set forth in Rule of Judicial Administration 2.420."[1] On appeal, the Respondent abandoned the attorney-client and work product objections and argued instead a reason which Respondent had never specified—a judicial deliberation privilege.[2]

While Florida courts have not used such terminology, there can be no doubt that Fla. R. Jud. Admin. 2.420(c)(1) is itself an expression of the judicial deliberation privilege. Its very design reflects the balance struck by the Florida Supreme Court between the guarantee of access to public records in Florida's Constitution and the need to maintain inviolate a judge's thought processes <u>when making rulings in a case</u>.

[1] Letter from Amy Borman, Esq. to Richard Jarolem, Esq., June 3, 2014 (App. 3).

[2] This underscores the importance of requiring specificity in raising exemptions and expressly tying them to individual redactions.

Both the Respondent and the JAC[3] urge this Court to strike a new balance—to sanctify the thoughts and communications of judges merely because their office empowers them to make decisions in cases, even if the thoughts and communications in question did not arise in the context of an "adjudication."[4] This argument requires the Court to read the words "judicial decision-making" and "cases and controversies" out of the plain language of Rule 2.420(c)(1).

A. Not every order of a Chief Judge is adjudicative.

The Respondent posits that this Court should ignore the word "administrative" in the title of the Administrative Order and focus instead on the word "order." According to the Respondent, an "order," is, by definition, a judicial function (and therefore involves "judicial deliberation" protected from disclosure), rather than an unprotected administrative function.[5]

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[3] Judicial Administration Committee of the Florida Conference of Circuit Court Judges.

[4] "Adjudicatory"—the Respondent's word for documents that should be protected—means "of or relating to adjudication," which, in turn, means "the process of judicially deciding a case." Black's Law Dictionary, 9th Edition, 2009-2013. If Administrative Order 3.314-3/14 is adjudicative (intended to decide cases rather than manage the court's resources) then the Respondent has conceded the entire issue in the related appeal (*Katz v. Chief Circuit Judge, Fifteenth Judicial Cir.*, Case No. 4D14-1691)—that the Chief Judge exceeded his role as an administrative officer.

[5] Respondent's Brief, p. 14 ("The act of entering an administrative order is a judicial function carried out by the chief judicial officer.")

Yet, the Respondent admits that records of purely administrative acts are not exempted—acts such as those relating to personnel, judicial education, office supplies, and the expenditure of public funds.[6] And these very same administrative tasks are regularly accomplished by the Chief Judge of the Fifteenth Circuit by way of administrative orders.[7] Thus, the title "order" on a document signed by a Chief Judge cannot be used to differentiate between adjudicative acts and administrative acts, just as the title "Executive Order" on a document signed by the Governor does not make him a judicial officer.

Nor is it logical or helpful to tell this Court that the public records exemption covers certain "judicial responsibilities which can only be carried out by a judge," but then cite to a laundry list of duties that were actually delegated by the

[6] Respondent's Brief, p. 5.

[7] For example: *In Re: New Judges-Furniture and Supplies* (AO 11.401-9/08); *In re: Flower Fund* (AO 11.502-9/08); *In re: Judicial Research Materials and Libraries* (AO 11.402-1/13); *In Re: Policies for Use of Personal Computers by Judges and Court Personnel* (AO 11.704 9/08); *In Re: Gift Policy* (AO 11.703-9/08); *In Re: Code of Conduct for Nonjudicial Court Employees* (AO 11.702-9/08); *In Re: Judicial Assistant Coverage* (AO 11.602-1/13); *In Re: Interns and Volunteers* (AO 11.705-3/11); *In Re: Civil Rights Complaint Procedure* (AO 11.701-9/08) (adopted pursuant to Administrative Order *In Re: Personnel Rules and Regulations* issued by the Chief Justice of the Supreme Court on September 23, 1993). All available at: http://15thcircuit.co.palm-beach.fl.us/web/guest/series11.

legislature.[8] Such tasks performed as an appointee of the legislature would seem exceptionally remote from protected adjudicative functions. The Chief Judge's legislatively created functions could even be (at least arguably) a reason to subject those tasks to a request under Chapter 119 rather than the Rules of Judicial Administration.

B. Not every "judicial act" entitled to immunity is an adjudicative function entitled to secrecy.

Although the term "judicial act" is not found in Rule 2.420, both the Respondent and JAC attempt to graft it on to the exclusion in order to claim that acts immune from civil liability in a separate suit are also privileged as judicial deliberations.[9] The key to the superficial plausibility of the argument is the equating of administrative functions with "ministerial acts"—which they say are not entitled to immunity. Thus, they argue, the non-ministerial (or discretionary) act of fashioning the administrative order must be a "judicial act" worthy of the deliberation privilege.

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[8] Respondent's Brief, pp. 11-12, citing to: Florida Statutes §§ 40.001, 48.27, 48.29, 100.361, 102.141, 112.3232, 905.01(2), (3). Notably, an attorney general opined that the actions taken by a chief judge under Chapter 48 "appear to be administrative or ministerial in nature…" 1989 Op. Att'y Gen. Fla. 3 (1989).

[9] Respondent's Brief, pp. 12-13; JAC's Brief, pp. 4-5, in which all but one case concerned judicial immunity from liability.

Of course, ministerial acts are not the equivalent of administrative (or non-adjudicative) acts. But more importantly, this Court flatly rejected the idea of a ministerial act exception to judicial immunity. *Berry v. State*, 400 So. 2d 80, 83 (Fla. 4th DCA 1981) (finding that the common-law principle of absolute judicial immunity trumps the statutory "ministerial" exception to sovereign immunity). Thus, this Court did not differentiate between "ministerial" acts—much less non-adjudicative functions—when it concluded in *Fong v. Forman*, 105 So. 3d 650, 652 (Fla. 4th DCA 2013) that the Clerk of Court enjoyed judicial immunity.

Even if this Court were to adopt the judicial/ministerial dichotomy adopted by the First District in *Fuller v. Truncale*, 50 So. 3d 25, 28 (Fla. 1st DCA 2010) for immunity determinations, it would not assist this Court in applying Rule 2.420 because the immunity granted judges and their agents encompasses far more than judges and their thought processes. In fact, the Florida Supreme Court has recognized that the immunity granted judges "embraces" quasi-judicial functions and "rests on the same footing" as the immunity conferred upon prosecutors and grand juries. *Office of State Attorney, Fourth Judicial Circuit of Florida v. Parrotino*, 628 So. 2d 1097, 1098 (Fla. 1993).

The much broader reach of judicial immunity stems from the fact that it serves a different public policy than the deliberation privilege. Judicial immunity

is intended to benefit the judicial system and the public by insuring that judges can serve without the prospect of personal financial ruin. *Johnson v. Harris*, 645 So. 2d 96, 98 (Fla. 5th DCA 1994). The deliberation privilege, on the other hand, arises from a public policy favoring finality of judgments. *Washington v. Strickland*, 693 F.2d 1243, 1263 (5th Cir. 1982) *rev'd on other grounds*, 466 U.S. 668 (1984).

Neither public policy is impinged by this case. But because Rule 2.420 strikes a balance between the deliberation privilege and right of access to public records, it is notable that the existence of a strong, all-encompassing immunity lessens the need for a similarly sweeping exclusion from disclosure. Broad immunity means that the public's interest in transparency in government can be fully effectuated without fear that judges or their support staff will be held liable for their words. Indeed, the subject communications of the Respondent and the other judges about the proposed administrative order are undoubtedly judicial acts immune from civil liability. But they are not privileged from disclosure as judicial deliberations in deciding a case.

C. The Rule 2.420 exclusion applies only to the thought processes involved in deciding cases over which a judge presides.

The cases cited by the Respondent regarding the judicial deliberation privilege involved decision making in cases over which the judge presided.[10] The Respondent even summarizes the judicial deliberation privilege as necessary to allow "cases to be decided on the law without fear or reprisal."[11]

No case cited by the Respondent or the JAC suggests that the thought processes or "inner workings" pertaining to a managerial or rulemaking decision of a judge acting in his capacity as an administrator are privileged. The motivations behind non-adjudicative, managerial decisions are precisely what the Constitutional transparency-in-government provisions are designed to reach. Art. I, § 24(a), Fla. Const.; s*ee Browning v. Walton*, 351 So. 2d 380, 381 (Fla. 4th DCA 1977) (purpose of Chapter 119 was to "open the records so the citizens could discover what their government was doing"); *Zorc v. City of Vero Beach*, 722 So. 2d 891, 896 (Fla. 4th DCA 1998) (purpose of Sunshine Law, [§ 286.011, Fla. Stat.] is to prevent secret decisions at non-public meetings).

It is because of the overarching public policy of openness in government that the exemptions in Rule 2.420(c)(1) must be construed narrowly—erring on the side

[10] Respondent's Brief, p. 16-17.

[11] Respondent's Brief, p. 16 (emphasis added).

of disclosure rather than secrecy. *See Bludworth v. Palm Beach Newspapers, Inc.*, 476 So.2d 775, 779 n. 1 (Fla. 4th DCA 1985). Yet the JAC argues that the use of the plural "cases and controversies" should be interpreted broadly such that the exemption would apply to administrative orders that have some effect on multiple cases.[12]

The JAC's discussion, however, leaves out two important parts of the exemption which are underscored here:

> 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 <u>disposing</u> of cases and controversies before Florida courts <u>unless filed as a part of the court record</u>;[13]

First, the exemption only applies to decisions "disposing" of cases and controversies. This refers to adjudicative decisions that determine the disposition of a case, echoing the judicial deliberation privilege's concern with the finality of judgments. Presumably, orders pertaining to the administration or management of the court's resources would not be "disposing" of particular cases.

Second, the exemption ends with an exception: "unless filed as part of <u>the</u> court record." (emphasis added) The JAC admits that court records are those

[12] JAC's Brief, p. 7.

[13] Fla. R. Jud. Admin. 2.420(c)(1)(emphasis added).

generated in "*a case*."[14] More specifically, "court records" are defined as the contents of "the court file." Fla. R. Jud. Admin. 2.420(b)(1)(A) (emphasis added). Thus, the exception to the exemption applies to materials associated with a judicial decision when they are filed in the court file of a case. The use of the definite article "the" contemplates that the decisions covered by the exemption would only be in a proceeding for which there would necessarily be an associated court file into which they could be deposited. The exemption, therefore, would not apply to administrative orders because there would be no associated case file into which they could be placed.

The Respondent argues that reading the plain language in this way would remove confidentiality regarding divisional standing orders, local rules, or research not tied to a specific case. Of course, the process by which local rules are established is already public. Fla. R. Jud. Admin. 2.215(e). Divisional standing orders, typically involving such mundane matters as the providing of courtesy copies of memoranda or cell phone usage would not involve any confidential thought processes worthy of an exemption. Nor would generalized research not tied to a specific case reveal thought processes or threaten the finality of a decision.

[14] JAC's Brief, p. 7 (emphasis original).

The JAC points to the rules of judicial administration in other states to argue that even the discussions concerning a court's administrative matters are sacrosanct in those states.[15] Leaving aside the question of whether those states have constitutional guarantees of open government similar to those of Florida,[16] the Florida Supreme Court has already promulgated its own Rule of Judicial Administration that does not contain the language used in the rules of other states. The absence of comparable language expressly and specifically identifying administrative matters only strengthens the conclusion that the Florida Supreme Court did not intend to exempt them. This Court should reject the invitation to rewrite the exemption created by the Supreme Court.

The JAC also points to the fact that the Supreme Court shields its rule-making deliberations (by opening a new case with every proposed amendment) as evidence that it believes that discussions about administrative orders should be similarly confidential.[17] But again, this fact actually counsels against the conclusion that the JAC seeks to draw.

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[15] JAC's Brief, p. 10.

[16] *See*, Open Justice Initiative, *Report on Access to Judicial Information*, March 2009, p. 31. Available at: http://www.right2info.org/resources/publications/Access to Judicial Information Report R-G 3.09.DOC.

[17] JAC's Brief, pp. 11-12.

The procedure for adopting Rules of Procedure is public (and subject to disclosure by way of public records requests) up until the moment a case is filed—after which the Supreme Court's deliberations are privileged. Fla. R. Jud. Admin. 2.140. That the Court did not provide a similar rule for discussions concerning local rules or administrative orders compels the conclusion that the Court intended the processes for local rule-making to be open and transparent.

The Court even created a means for challenging administrative orders (Fla. R. Jud. Admin. 2.215(e)(2)), because unlike the rules of procedure (and even local rules) which arise from a very open and transparent process, administrative orders are adopted without any prior input from the Florida Bar or the public. Thus, the heightened transparency as to the considerations that led to administrative orders is necessary for government accountability and to enhance the efficacy of the built-in methodology for challenging such orders.

D. Official business email transmissions must be treated just like any other type of official communication received and filed by the judicial branch.

Both the Respondent and the JAC cite the email discussion in *In re Amendments to Rule of Judicial Admin. 2.051 Pub. Access to Judicial Records*, 651 So. 2d 1185 (Fla. 1995) and the related Committee Note to Rule 2.420. The JAC concludes that the Supreme Court intended to exempt all internal "intra-court"

emails from disclosure.[18] The Respondent clearly believes otherwise, having produced a number of such emails.

In the end, the email discussion does nothing to define the contours of the exemption since the Supreme Court's holding was that "[o]fficial business email transmissions must be treated just like any other type of official communication received and filed by the judicial branch." *Id*. at 1187. And because the Supreme Court was not addressing administrative orders, but rather "trial court [and] appellate court functions," it is not surprising that it would say that many emails between judges and their staffs would be exempt. *Id*. at 1186-87.

II. Any Revelation of Judicial Bias Would Not Be "Forum Shopping."

The final pages of the JAC's amicus brief perhaps best articulates the underlying charge that galvanizes the Respondent's opposition to disclosure here—while at the same time illuminating a viewpoint that, once pondered, may well be shocking to the judicial conscience. Incredibly, the JAC actually advocates that it would be "improper to divulge to the Petitioner" whether it had been "denounced" by a judge because it may use that information to seek to recuse the judge.[19] In short, if the disclosure of the redacted information should reveal judicial bias, then it should be kept secret.

[18] JAC's Brief, p. 9.

[19] JAC's Amicus Brief, p. 13.

While the Petitioner neither hopes to find, nor even suspects, that it was maligned in the redacted materials,[20] the disclosure of improper motivations is, of course, the very purpose of transparency in government. Improper motives would not be confined to judicial bias against the Petitioner, but include bias against a party or a class of litigants, or simply the elevation of the needs of the judiciary (for example, to pursue continued funding) over the needs of litigants.

And contrary to the JAC's argument, it is not "forum shopping" to insist on unbiased judges. Indeed, if any judges were to have the bias that the JAC suggests, such judges are obligated to disqualify themselves even without the disclosure sought here. Fla. Code of Jud. Conduct, Canon 3E(1)(a); Fla. R. Jud. Admin. 2.330(i).

There is a jarring incongruity in that this clarion call to conceal bias from the public is made in the same breath as the argument that such secrecy is needed to maintain impartiality, as well as the "public image of the judiciary as impartial."[21]

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[20] The JAC states that the Petitioner "has requested documents that would allow it to determine whether its practices served as the impetus for the Administrative Order" (JAC's Brief, 13). This statement is untrue because the JAC is referring to a separate request which has no connection to the Administrative Order, not the request at issue here.

[21] Respondent's Brief, p. 9, 15, 22 (quoting twice from *In re Code of Judicial Conduct*, 603 So. 2d 494, 497 (Fla. 1992); JAC's Brief, p. 10 (quoting the same case). Notably, this case concerns neither judicial immunity nor public records,

In reality, it is transparency that guarantees impartiality. And it is transparency that fosters the public image of impartiality, not a cloak of secrecy which can only erode public confidence.

CONCLUSION

The Court should issue a writ of mandamus compelling production of the redacted information. If the Court should find that a privilege may apply to administrative orders, it should review the records *in camera* to determine whether each redaction actually protects a privileged thought process.

Dated: September 15, 2014

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but rather, whether the Code of Judicial Conduct could constitutionally prohibit a judge from publicly endorsing candidates.

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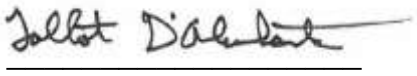
By: 
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Undersigned counsel hereby certifies that the foregoing Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this September 15, 2014 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties. I also certify that this petition has been electronically filed this September 15, 2014.

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