

# MEMORANDUM

**RE:** Materials for Consideration in Referees' Training

**DATE:** March 30, 2009

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**ISSUE 1:** How should the referee evaluate an unopposed motion to seal in a bar discipline case?

**ANSWER:** Seal only those documents properly considered privileged under one of the categories identified in Rule of Judicial Administration 2.420, and then only to the extent necessary to preserve the confidential information. Enter redacted versions, wherever possible, into the public record, sealing only unredacted versions.

**ANALYSIS:** Confidentiality of Bar discipline proceedings expires once there has been a finding of probable cause for further disciplinary proceedings. R. Regulating Fla. Bar 3-7.1(a)(3). As a practical matter, this is when the formal complaint alleging unethical conduct is filed with this Court, triggering the appointment of a referee. Thus, the documents submitted into evidence at the hearing before the referee are not confidential by virtue of the fact that they are evidence in a Bar discipline proceeding.

Subdivision (d) of the rule addresses limitations on disclosure and provides that “[a]ny material provided to The Florida Bar that is confidential under applicable law shall remain confidential and shall not be disclosed except as authorized by the applicable law” and that “[i]f this type of material is made a part of the public record, that portion of the public record may be sealed by the grievance committee chair, the referee, or the Supreme Court of Florida.” (Emphasis added.)

Judicial Administration Rule 2.420 governs public access to judicial branch records. Subdivision (c) of the rule identifies certain kinds of records of the judicial branch that remain “confidential.” Subdivision (c)(9) provides:

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); and

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

There is a strong presumption of openness for all court proceedings; sealing should only occur when it is necessary and when there is no reasonable alternative available to accomplish the desired result. Even then, the court must use the least restrictive closure necessary to accomplish its purpose. Barrow v. Fla. Freedom Newspapers, 531 So. 2d 113, 118 (Fla. 1988).

**ISSUE 2:** Once documents have been admitted into evidence, may they be removed from the record by the referee on consent of the parties?

**ANSWER:** Only upon written motion and order and only if the documents were improperly admitted into the record. See R. Regulating Fla. Bar 3-7.6(n)(4).

**ANALYSIS:** Rule 3-7.6 governs proceedings before a referee. Subdivision (n)(2) provides that the record in the case “shall include all items properly filed in the cause including pleadings, recorded testimony, if transcribed, exhibits in evidence, and the report of the referee.”<sup>1</sup> (Emphasis added.) Subdivision (n)(3) requires the

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1. The record in a Bar discipline case is more inclusive than the record on appeal pursuant to Florida Rule of Appellate Procedure 9.200(a) and for good reason. The Clerk of the Supreme Court is the final repository for Bar discipline records, unlike appellate records, which are ultimately returned to the trial courts. Fla. R. App. P. 9.200(g).

referee, with the assistance of bar counsel, to prepare the record for filing “with the office of the clerk of the Supreme Court of Florida” and to “certify that the record is complete.” Subdivision (n)(4), titled “Supplementing or Removing Items from the Record,” provides:

The respondent and The Florida Bar may seek to supplement the record or have items removed from the record by filing a motion with the referee for such purpose, provided such motion is filed within 15 days of the service of the index. Denial of a motion to supplement the record or to remove an item from the record may be reviewed in the same manner as provided for in the rule on appellate review under these rules.

(Emphasis added.)

Subdivisions (n)(3) and (n)(4) are relatively new provisions, having been added in 2007, and made effective on March 1, 2008. See In re Amendments to the R. Regulating Fla. Bar, 2007 WL 4440381 (Fla. Dec. 20, 2007). The express purposes for the amendments, as set forth in the Bar’s petition to amend the rules,<sup>2</sup> were to allow the Bar to assist the referee in preparing the record to be filed with the Court and to give the respondent an opportunity to seek to supplement or remove items from the record.

Subdivision (n)(4) has never been judicially interpreted. However, the Court would be constrained to interpret the provision in conjunction with rule 2.420 or the provision would run afoul of article 1, section 24 of the Florida Constitution. Art. I, § 24, Fla. Const. (providing every person with the right to inspect or copy any public record made or received in connection with the official business of any

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2. The Bar’s petition seeking the amendments stated:

*Reasons:* The rule now requires that a referee prepare the record and file it with the court. Currently, the clerk's office advises that such records are poorly prepared and seeks relief from the bar. Recently, the Special Commission on Lawyer Regulation recommended that bar counsel be required to assist the referee in preparing the record in the referee's office and that the respondent be allowed an opportunity to seek to supplement or remove items from the record, with right of review consistent with rule 3-7.7. These proposed amendments seek to address those issues.

public body, officer, or employee of the state); see also R. Jud. Admin. 2.110 (providing that the Rules of Judicial Administration “shall supersede all conflicting rules and statutes”); Smithwick v. TV-12 of Jacksonville, 730 So. 2d 795 (Fla. 1st DCA 1999). Thus, the only things that could be properly removed from the record would be those things that were improvidently admitted, for example, materials completely irrelevant to the issues being decided. For privileged materials, sealing would be the proper course.

There is also a very good, practical reason to prevent the removal of items from the record. Critically, the Supreme Court is the only entity that can impose discipline on a member of the Bar. See Fla. Bar v. Anderson, 538 So. 2d 852, 854 (Fla. 1989); see also art. V, ' 15, Fla. Const. The referee can only make recommendations. This is so even where there is a consent judgment. In order to properly fulfill its constitutional duty in this regard, the Court should be provided with a complete and unadulterated record of the proceedings below. Thus, once something relevant has been properly introduced into the record, it must stay in the record, even if the parties, having reached a stipulated agreement, wish to remove something from it.