

## IN THE SUPREME COURT OF FLORIDA

REX E. RUSSO,

Petitioner,

CASE NO.: SC18-886

vs.

MARY CAY BLANKS, CLERK,

Respondent.<sup>1</sup>

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### **RESPONSE TO THE PETITION FOR WRIT OF MANDAMUS**

Respondents, Mary Cay Blanks, Clerk of the Third District Court of Appeal (“Third District”), and Chief Judge Leslie B. Rothenberg of the Third District, respectfully submit the following response to the “Petition for Writ of Mandamus,” as requested in the Court’s Order issued July 31, 2018. The petition should be denied based on applicable **statute**, **precedent**, and Florida Rules of Judicial Administration.

**The petitioner’s apparent concern (regarding confidential court records in three appeals in which the petitioner represented the appellant and panels of the Third**

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<sup>1</sup> In accordance with Florida Rule of Appellate Procedure 9.100(e)(1), the name of the co-respondent, Chief Judge Leslie B. Rothenberg, has been omitted from the caption.

What statute? None mentioned.

What precedent? None cited relevant to issue.

District ruled against his client, with subsequent petitions for review by the Florida Supreme Court denied in each case) is not a proper basis for mandamus.

I. Background

The petitioner is an attorney in the private practice of law in Miami. Following his appearance in several appeals heard by the Third District, he made a public records request to the respondent Clerk requesting copies of the Third District's Internal Operating Procedures ("IOP") and any "administrative orders, directives, memorandum, notes, letters, or communiques of any sort establishing the procedures for assignment of the judges of the Third District Court to sit on a panel for an appeal that existed on July 1, 2015 or came into existence thereafter," as well as those establishing the procedures for publishing, or otherwise disclosing, the assigned judges of The Third District to sit on a panel for an appeal on or after that date (Petr. App. 4).

Additionally, the petitioner requested records: (1) establishing the panels in Case Nos. 3D15-1437, 3D15-2330, and 3D17-0001 (these were matters in which the petitioner was counsel of record for a party); (2) consolidating the first two of those cases and resetting the date for oral argument in any of the three cases; and (3) regarding the "dissemination of information as to the composition of the panel" or changes in the composition of the panels for any of the three cases.

The respondent Clerk replied with a letter enclosing the requested Third District IOP, advising the petitioner that other responsive records which may exist were determined to be confidential and exempt records pursuant to Florida Rule of Judicial Administration 2.420(c)(1), and inviting the petitioner to meet with the Chief Judge “to discuss any further questions you may have regarding procedures not expressly provided in the Court’s IOP.” (Petr. App. 6).

Following his receipt of that letter, the petitioner filed a petition for writ of mandamus in the Third District directed only to the co-respondent Clerk; Case No. 3D18-0419, Russo v. Blanks, Clerk. The Third District recused itself, and the case was reassigned by Chief Justice Labarga to the Fourth District Court of Appeal for consideration. The Fourth District dismissed the petition in an order dated April 30, 2018, specifying that:

Access to judicial branch records is governed by the rules and decisions of the Florida Supreme Court, not Chapter 119, Florida Statutes. *Times Publishing Company v. Ake*, 660 So. 2d 255 (Fla. 1995); *see also* Art. I, s. 24, Fla. Const. (“Rules of court that are in effect on the date of adoption of this section that limit access to records shall remain in effect until they are repealed.”); *In re Amendments to Florida Rules of Judicial Admin.-Pub. Access to Judicial Records*, 608 So. 2d 472 (Fla. 1992). **Petitioner did not submit a written request to the Chief Judge (the custodian of the court’s “administrative records”) and has not made the Chief Judge a party to this proceeding.** Fla. R. Jud. Admin. 2.420(b)(3) (“The custodian of all administrative records of any court is the chief justice or chief judge of that court.”); Fla. R. Jud. Admin. 2.420(m)(1) (requiring that a request for judicial branch records must be in writing and directed to the custodian). Dismissal is without prejudice for petitioner to submit a request in writing to the custodian and, if necessary, to seek review in the court having “appellate

jurisdiction to review the decisions of the judge denying access.” Fla. R. Jud. Admin. 2.420(l)(2) (providing for review of denials of requests for records).

Petr. App. 122.

The following day, the petitioner sent a letter to the respondent, Chief Judge Rothenberg, requesting copies of most of the same records previously requested from the respondent Clerk (Petr. App. 123). The petitioner’s request did not include the previously requested (and previously furnished) copies of the Third District’s IOP; instead, the request was limited to enumerated records regarding the panels for the three appeals in which the petitioner had represented parties (Case Nos. 3D15-1437, 3D15-2330, and 3D17-0001). On May 8, 2018, Chief Judge Rothenberg responded with a letter re-delivering the Internal Operating Procedures and amendments, and advising the petitioner:

Any other records which may exist relating to your request in your letter dated May 8, 2018, have been determined by the Court to be confidential and exempt records pursuant to Florida Rule of Judicial Administration 2.420(c)(1).

Although the additional "records" you have requested are exempt pursuant to Rule 2.420(c)(1), I have previously extended and continue to extend my invitation to you to meet with me to discuss any further questions you may have regarding procedures not expressly provided in the Court's IOP. There is no **mystery** regarding the procedures you have inquired about. I have spoken about them at several seminars, and I am happy to discuss them with you.

Please let me know if I can provide any further assistance to you regarding this matter.

mystery remains as to who made the appointments, and the timing and reason for the substitution

Petr. App. 126.

The petitioner accepted Chief Judge Rothenberg's invitation to meet in order to answer any remaining questions the petitioner had regarding the Third District's operating procedures. The petitioner and Chief Judge Rothenberg met on May 17, 2018.

On May 30, 2018, the petitioner filed the instant petition for a writ of mandamus and an appendix in this Court.

## II. Analysis

“Mandamus is a ‘narrow, extraordinary writ’ used to compel the performance of a clear legal duty when there is no other adequate remedy available.” Mathews v. Crews, 132 So. 3d 776, 779 (Fla. 2014) (quoting Sica v. Singletary, 714 So. 2d 1111, 1112 (Fla. 2d DCA 1998)).

The respondents respectfully submit that the authorities cited by the Fourth District in the earlier order of April 30, 2018 (Petr. App. 122), and by respondent Chief Judge Rothenberg in her letter of May 8, 2018, to the petitioner (Petr. App. 126), are correct statements of the law applicable to the internal “iDCA”<sup>2</sup> task notes

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<sup>2</sup> “iDCA” is the internal side of the electronic filing, docketing, and case management system in place at the Third District since June 2013. “eDCA” is the external filing and docketing system available to attorneys and parties in their cases before the Third District. See [http://www.3dca.flcourts.org/Clerk/eDCA\\_User\\_Guide.pdf](http://www.3dca.flcourts.org/Clerk/eDCA_User_Guide.pdf). The eDCA/iDCA software operates in a manner very similar to the public/external and

circulated among the Clerk’s office, Judges of the Court, and law clerks, as well as the internal records reflecting oral argument assignments.

These internal electronic and paper records embody and transmit the internal decision-making process of the judges assigned to the panel for a case, and are confidential “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,” as provided by Florida Rule of Judicial Administration 2.420(c)(1), “Confidential and Exempt Records.” The records also include the Clerk’s notes of case assignments prepared in furtherance of the duties performed by the Clerk for the Chief Judge and Court in conformance with the IOP.

In this case, iDCA task notes include the judicial decision to consolidate Third District cases 3D15-1437 and 3D15-2330, two of the cases in which the petitioner represented the appellants. The consolidation of these cases, discussed in greater detail below, resulted in the rescheduling of oral argument to a later date—a date which had previously been assigned to a different panel of Judges.

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confidential/internal case management system called eFACTS at the Florida Supreme Court.

Ordering the respondents to produce the internal task notes and other records regarding these decisions and duties would contravene Rule 2.420(c). Production of such records **is not “a clear legal duty.”** ← 

?Saying "not clear" duty because the exemption is not clear?
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Further, electronic copies of the filings, orders, and opinions in the three cases included in the petitioner’s public records request were (and are) available to the petitioner because he was the attorney of record for the appellants in each of the cases. Also publicly available via the Third District’s website are the calendars listing the panels of Judges which heard oral argument in the three appeals in question; see <http://www.3dca.flcourts.org/Calendars/CalendarArchives.shtml>, the public, archived calendars maintained on that site (Resp. App. 5-6, 10-11, and 17-18); **and the archived video of those arguments,** [http://www.3dca.flcourts.org/Archived\\_Video.shtml](http://www.3dca.flcourts.org/Archived_Video.shtml).

A. Records Available to the Petitioner in His Third District Cases

Focusing more specifically on the petitioner’s **request for records pertaining to the panel assignments for his three cases,** the previously produced IOP describes the process. Section 6, “Clerk,” tasks the Clerk with the annual preparation of a calendar for the “upcoming” year, assigning judges “on a random rotating basis so that each judge, with the exception of the chief judge, will sit approximately an equal number of times each year with each judge to sit with two other judges approximately an equal number of times.” (Petr. App. 25-26) (“The chief judge, at

his or her option, may be assigned one or two fewer sittings than the other members of the court each year”).

As to motions before a particular case is perfected and assigned to a merits panel, the Chief Judge “may direct the Clerk of Court to assign it to a panel and designate an assigned Judge” (IOP at 9, n.5, Petr. App. 22). Such panels are referred to as temporary or “motions” panels and are also assigned on a rotating basis. Because of the randomized and rotating assignments for motions panels and merits panels, and the passage of time between consideration of a motion and the filing of the answer brief, there is no correlation between the Judges assigned to the motions and merits panels in a given case. A given Judge may be on one, both, or neither of those panels.

As to changes in the composition of a panel following the distribution of the schedule for the upcoming year—which is done before individual cases are assigned to particular oral argument dates and panels in the upcoming year—the IOP also contains guidance. “Any judge may exchange a day, a week, or a portion of a calendar with any other judge to accommodate personal needs or plans (e.g., vacation), and shall notify, in writing, the chief judge, the clerk’s office, and the other judges of the court of any such change.” (Petr. App. 26).

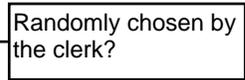
1. Cases 3D15-1437 and 3D15-2330

But even if that is so, a judge can ask to be "assigned to a given case" as opposed to the clerk of the court randomly assigning the case and the court sticking with that random assignment.

In the petitioner’s cases 3D15-1437 and 3D15-2330, the online docket available to the petitioner discloses a typical reason for a change in panel and assigned oral argument date: consolidation of two related cases. Both cases involved the same underlying circuit court lawsuit, (FM East Developers, LLC v. Mirzataheri, No. 14-19986 (Fla. 11th Cir. Ct. filed June 22, 2015)), parties, counsel, and trial judge. In Case No. 3D15-1437, the petitioner filed an appeal from a non-final order denying his clients’ motion to discharge a lis pendens. In Case No. 3D15-2330, the party opposing the petitioner’s clients sought a writ of certiorari to quash a summary judgment in favor of those clients regarding the same property.

Case No. 3D15-1437, the first filed case, was assigned to a merits panel and oral argument was scheduled for November 9, 2015 (Resp. App. 3). The case would have been heard by a panel of Third District Judges Rothenberg, Salter and Scales (Resp. App. 5-6, the calendar for that day available via the Court’s website). Approximately four weeks before the oral argument date, however, the appellee in that case filed a “Notice of Related Case”<sup>3</sup> alerting the Court to the relatedness of Case No. 3D15-2330.

Randomly chosen by the clerk?



Recognizing that the two cases involved the same circuit court case, parties, judge, attorneys, and property, the Court issued an order to show cause why the cases

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<sup>3</sup> Third District administrative order AO3D13-06 requires counsel to advise the court of “cases similar or related to another case pending before this court.”

should not be consolidated. The petitioner filed a reply agreeing that consolidation was appropriate (Resp. App. 7-8). The Court then entered an order on October 29, 2015, consolidating the two cases “for all appellate purposes” and resetting oral argument for both cases to February 15, 2016 (Resp. App. 9). From the dockets for the two cases, it is apparent that the case was reset for oral argument because the reply in case 3D15-2330 was not required to be filed until November 16, 2015,<sup>4</sup> a date after the initially-scheduled oral argument date in the first-filed case.

The new oral argument date, Monday, February 15, 2016, was assigned to the panel previously designated to hear appeals for the week of February 15 to 19:

Judges Rothenberg (who had been on the panel in the first-filed case before consolidation), Emas, and Fernandez (Resp. App. 10-11). The consolidated cases were heard and decided by that panel, which issued a unanimous opinion adverse to the petitioner’s clients a month after oral argument. Mirzataheri v. FM E. Developers, 193 So. 3d 19 (Fla. 3d DCA 2016) (Resp. App. 12-15). The docket indicates that the petitioner sought rehearing and rehearing en banc on behalf of his clients. Those motions were denied, and his subsequent petition for review by the Florida Supreme Court was also denied (Case No. SC16-1103; Resp. App. 16).

In other words the Chief Judge chose

2. Case No. 3D17-0001

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<sup>4</sup> Fla. R. App. P. 9.100(k).

Turning finally to the third case for which panel-related records are sought, Bennett v. Mortgage Electronic Registration Systems, Inc., Case No. 3D17-0001, the case was routinely set for oral argument for June 5, 2017. In keeping with the Court's practice, the oral argument schedule for that day and the panel (Judges Salter, Fernandez and Luck) were made public via the Court's website the preceding Monday (Resp. App. 17-18). The petitioner may be concerned that the panel for oral arguments the following day, June 6, 2017, was different (Judges Suarez, Salter, and Fernandez) (Resp. App. 19-20), but that is inferentially explained by the previously quoted IOP provision authorizing Judges to exchange an assigned oral argument day "with any other judge to accommodate personal needs or plans." The obvious inference is that Judges Suarez and Luck previously had exchanged an oral argument day for the week of June 5, 2017.

When? Why? and How? Who decided to assign the case to that panel? Was it randomly done by the clerk of the court, or otherwise? Apparently otherwise.
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On September 6, 2017, the panel issued its opinion unanimously affirming the circuit court opinion under review (petitioner represented the appellants in the case); Bennett v. Mortg. Elec. Registration Sys., Inc., 230 So. 3d 100 (Fla. 3d DCA 2017) (Resp. App. 21-27). On behalf of his clients, the petitioner moved for rehearing and rehearing en banc, but those motions were denied, as was his further petition for review by the Florida Supreme Court, Case No. SC17-2203 (Resp. App. 28).

B. Records Considered Confidential

Some of the electronic records which have not been produced regarding panel assignments in the three appeals specifically designated by the petitioner, and as to which confidentiality is claimed under Florida Rule of Judicial Administration 2.420(c), are referred to as “task notes.” Such notes are typewritten text entered into the iDCA system to report votes by Third District Judges on motions, proposed orders and opinions, and transmittals to and from other Judges and the Clerk’s office regarding such matters. In particular cases, summaries and confidential research memoranda also may be uploaded into the electronic iDCA records regarding the case.

Can redact!!!!

These notes are not visible to attorneys and parties using the “eDCA” system, as that system docket motions, orders, opinions, the record, appendices, and similar records that are intended to be viewed by the parties, the attorneys, and authorized users within the Court. In contrast, the iDCA task notes and other confidential documents memorialize the collective efforts of the panel (or entire Court in en banc matters) to reach a decision, whether the issue is a motion to consolidate or an opinion determining the merits of a complex class action appeal.

Other confidential records which have not been produced include (1) records prepared by the Clerk to effectuate the random assignment of cases for the Court, as provided by the IOP, including the annual calendar of oral argument panels and

Never stated that the case was randomly assigned to a panel. Keeps talking about random creation of the panels.

changes to that calendar, and (2) the records evidencing exchanges of bench dates by Judges and reassignments of cases due to recusals.

### III. Conclusion

The petitioner seems concerned that the Third District is holding back some record or records which will explain a change in a judicial panel in his unsuccessful appeals.<sup>5</sup> The records already produced or otherwise available to him as counsel of record in those cases should allay those concerns. Randomly assigned panels are prepared toward the end of a calendar year for the “upcoming” year (IOP). The reassignment in the petitioner’s cases occurred because of the consolidation of two related cases arising from the same circuit court case—a consolidation the petitioner agreed would be appropriate. Consolidation of the later-filed case resulted in a deferral of the oral argument for the two cases (heard together) to a week with a different panel of Judges.

They do not!!!

In the third case identified in the petitioner’s records request, the difference in panel assignments between two days of an oral argument week is not unusual and is authorized by the provision of the IOP allowing Judges to exchange bench dates.

Why and when?  
Never even looked to see that there was a different panel the next day. Concern about Luck though.

Panel should have stayed the same!!!  
Just as the judge's exchange dates, could be required to come back another date. Thought that was routinely done.

<sup>5</sup> At no time in any of his three cases before the Third District did the petitioner seek the recusal or disqualification of any panel member, nor does his petition in this case indicate any basis for concern regarding any of the assigned Judges.

Any iDCA task notes, votes, inter-Judge communications, and Clerk's records prepared solely for the Court in these cases are confidential under Rule 2.420(c), such that the petition for a writ of mandamus should be denied.

Respectfully submitted,

/s/ Mary Cay Blanks, Clerk  
Third District Court of Appeal

/s/ Chief Judge Leslie B. Rothenberg,  
Third District Court of Appeal<sup>6</sup>

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of this Response to the Petition for Mandamus was emailed to Rex E. Russo, Esq. at [RexLawyer@Prodigy.net](mailto:RexLawyer@Prodigy.net) on this 30th day of August 2018.

/s/ Mary Cay Blanks, Clerk  
Third District Court of Appeal  
[blanksm@flcourts.org](mailto:blanksm@flcourts.org)

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<sup>6</sup> To avoid undue and unbudgeted expense, and to preclude conflicts of interest on the part of appellate counsel who might represent the respondents in this matter but also regularly appear before this Court, the respondents have relied upon Court resources rather than outside counsel to prepare this response.