

IN THE SUPREME COURT OF THE STATE OF FLORIDA

IN RE: AMENDMENTS TO THE
FLORIDA RULES OF JUDICIAL
ADMINISTRATION 2.423

CASE NO.: SC20-1128

**COMMENT OF THE FLORIDA COURT CLERKS AND
COMPTROLLERS REGARDING PROPOSED RULE 2.423**

In accordance with the notice appearing in the December 1, 2020, edition of The Florida Bar News, the following comment is offered in support of the adoption of Proposed Rule 2.423 to the Florida Rules of Judicial Administration. This comment is filed on behalf of the Florida Association of Court Clerks and Comptrollers, Inc. d/b/a Florida Court Clerks and Comptrollers ("FCCC").

I. Introduction

The victim's rights constitutional amendment, commonly known as "Marsy's Law," went into effect in Florida on January 8, 2019. As questions arose regarding the application of the new law to court records, Florida Supreme Court Clerk of Court John Tomasino, on behalf of the Court, sent a referral letter to Judge Josephine Gagliardi, then Chair of the Rules of Judicial Administration Committee ("RJAC"), requesting a joint committee consisting of representatives from the Appellate, Civil, Criminal, Juvenile and Judicial Administration rules committees of The Florida Bar be appointed to conduct a coordinated review of

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those committees' individual rules, and the rules as a whole, to determine whether amendments or additional rules would be needed to implement the new constitutional mandate.

An open forum to discuss issues surrounding Marsy's Law and court records was held at the RJAC's regular fall committee meeting on October 18, 2019, and many interested parties presented. Judge Gagliardi shortly thereafter appointed the Joint Committee on Marsy's Law. The Joint Committee had representatives from each of the committees referenced in the referral letter.

The Joint Committee held weekly conference calls to discuss the application of Marsy's Law to court records, with the goal of determining how to best protect victim identifying information while preserving timely access to court records. The Joint Committee heard presentations from various stakeholders including law enforcement, clerks of court, media representatives, victim advocates, and judges and attorneys in trial and appellate practice. Many issues and proposals were vigorously debated, and several approaches were explored. Representatives of many of the interested parties attended all the Joint Committee meetings and fully participated in the meetings.

The product of the Joint Committee's work, proposed Rule of Judicial Administration 2.423, provides a method for law enforcement and State Attorneys to communicate a victim's invocation of the victim's right to protection of

confidential information at case initiation. The Joint Committee determined it was critical that these two groups be allowed to express the victim's intent because they are the first people likely to encounter the victims. The proposal also provides a manageable way for victims, litigants and attorney filers to request protection of victim information in subsequent filings, while ensuring that accessibility to criminal court records is not unduly impeded.

Proposed Rule 2.423 was published for comment on March 24, 2020, in The Florida Bar News, and only one comment was received. It was from a News Media Coalition. The Media Coalition's comments indicated general support for the Proposed Rule, recognizing that, "the Proposed Rule reflects the Joint [C]ommittee's efforts to avoid automatic and draconian closures that an overly broad interpretation of Marsy's Law would effect." They proposed two items for consideration, which were discussed by the Joint Committee on May 6, 2020. Neither suggested change was found necessary to protect the intended rights of victims. The Joint Committee approved the final Proposed Rule and the Proposed Rule was then submitted to the Florida Bar Board of Governors, which voted 30–0 to recommend acceptance and adoption by this Court.

II. Comment

The FCCC supports the adoption of Proposed Rule 2.423 and urges its adoption, without change, as submitted by the RJAC. The Rule as proposed is

carefully crafted to strike a balance between two important interests—the protection of victim information made confidential by the constitutional change and unimpeded access to critical court records.

The substance of the Rule that accomplishes this necessary balance is found in subdivision (d) of the new rule. The FCCC offers the following comments regarding each subdivision of (d). Subdivision (d)(1) provides:

(d) Procedure for Identifying Confidential Crime Victim Information in Criminal and Juvenile Court Records.

(1) The filer of an initial charging document shall indicate the existence of confidential crime victim information pursuant to article I, section 16 of the Florida Constitution. If the filer indicates the existence of confidential crime victim information, the clerk of the court shall designate and maintain the confidentiality of any such information contained within the initial charging document. (Emphasis added).

Section (d)(1) provides the method for law enforcement and State Attorneys to communicate a victim's invocation of their right to protection of confidential information at the time of case initiation. This is crucial so that redaction of the document takes place *before* the public release of such information has occurred. As first contact to victims and the first filers of documents that begin criminal cases, law enforcement agencies and State Attorneys are best positioned to communicate the invocation of victim's rights to the clerks of court at the time of filing. If such an election of rights is not communicated to the clerks, often case initiating documents and information will be processed and made available too quickly for the victim, who may be completely unaware of their rights, to

communicate with the clerk that they seek protection before release of the public records.

Additionally, currently many law enforcement agencies accept Marsy's law invocations from victims seeking to protect their identifying information, and if not communicated to the court with the initial filing, the protections sought by victims will be frustrated. Further, the Uniform Arrest Affidavit (UAA) currently under development by the Florida Department of Law Enforcement (FDLE) and other stakeholders will include a standard electronic indicator when victim confidentiality rights have been invoked, which will provide an efficient and consistent method of communication to the clerks. The Joint Committee feels this UAA being updated by FDLE to include this information is critical to making the system work without placing an additional burden on law enforcement.

Subdivision (D)(2) and (3) provide:

(2) Except as provided under subparagraph (d)(1), the filer of any document with the court under this paragraph shall ascertain whether it contains any confidential crime victim information. If the filer believes in good faith that information is confidential, the **filer shall request that the information be maintained as confidential** by contemporaneously filing a "Notice of Confidential Crime Victim Information within Court Filing." (Emphasis added).

(3) A crime victim, the filer, a party, or any affected nonparty may file a Notice of Confidential Crime Victim Information within Court Filing at any time.

FCCC supports subdivisions (2) and (3) of the proposed Rule, as submitted by the RJAC. Subdivision (2) requires when any filing, after the case-initiating document, unavoidably contains victim identifying information, the filer is responsible for filing a Notice along with the document so that the clerk is alerted to perform redaction. The Notice of Confidential Crime Victim Information within Court Filing form proposed with this Rule is like the Notice of Confidential Information currently provided in Rule 2.420. The Notice and redaction process of Proposed Rule 2.423 would be like the process in Rule 2.420, with which clerks are very familiar and very accustomed to applying.

Similarly, subdivision (3) permits a crime victim, the filer, a party, or any affected nonparty to file such a Notice of Confidential Crime Victim Information within Court Filing at any time. This provision is necessary to address already existent public criminal records that may contain unprotected victim information, or in cases where victims did not invoke confidentiality protections at the beginning of the case but later wish to do so.

Subdivision (d)(4) provides:

(4) Filers of subsequent court filings shall limit the presence of crime victim identifying information in accordance with rule 2.425(a)(3) or file a Notice of Crime Victim Information within Court Filing with each subsequent court filing that contains confidential crime victim information. (Emphasis added).

While FCCC supports the Notice and redaction process of the Proposed Rule, FCCC also believes it is advisable to engage filers to minimize the labor costs and potential records access delays caused by the redaction process. Subdivision (4) achieves this by requiring filers to limit the presence of crime victim identifying information in court documents to the best of their ability before filing. While some criminal case pleadings require the inclusion of victim identifying information, and in such cases a Notice can be filed and redaction performed, FCCC supports the proposal of the minimization requirement on filers of sensitive victim information in accordance with Rule 2.425.

Subdivision (d)(5) provides:

(5) A Notice of Confidential Crime Victim Information within Court Filing:

- (A) Shall identify the precise location of the confidential information within the document being filed.
- (B) Shall be confidential to the extent it contains crime victim information pursuant to article I, section 16.
- (C) Shall not be required when an entire case file is maintained as confidential.
- (D) A form shall accompany this rule.

The Notice of Crime Victim Information within Court Filing form proposed with this Rule is like the Notice of Confidential Information form in Rule 2.420. This simple form puts clerks on notice of the presence of identifying victim information so that redaction can be successfully performed at the time the document is filed, before information has been released to the public.

Requiring the Notice to be filed before redaction will be performed, rather than treating all crime victim identifying information as automatically confidential, is essential to preventing potentially devastating delays in court record accessibility. Unlike the items identified as required to be automatically confidential in current rule 2.420, victim identifying information, based on its pure volume, must be treated differently. Notice driven redaction, rather than automatic protection, wisely averts the need for clerks to remove all criminal records from public access—an action which would contradict the intent of Florida’s open public records laws and would necessitate amendments to the current Florida Supreme Court’s Access Security Matrix.¹ It would ultimately result in criminal files being completely closed until specific requests are made, at which point the clerk could then review the file and make the appropriate redaction.

Subdivision (d)(6) provides:

(6) If a Notice of Crime Victim Information within Court Filing is filed, **the clerk of court shall review the filing identified as containing confidential crime victim information** to determine whether the purported confidential information is facially subject to confidentiality under article I, section 16(b)(5) of the Florida Constitution.

(A) The Clerk of the court **shall designate and maintain the confidentiality** of any such information contained within a court record.

¹ Florida Supreme Court Standards for Access to Electronic Court Records and Access Security Matrix, November 2020.

(B) If the Clerk determines that the information is not confidential, the Clerk shall notify the filer in writing within 5 days of filing the notice and thereafter shall maintain the information as confidential for 10 days from the date such notification by the Clerk is served. The information shall not be held as confidential for more than that 10-day period, unless a motion has been filed pursuant to rule 2.420(d)(3). (Emphasis added).

Once placed on notice that crime victim identifying information is present in any criminal court filing, from the initial charging document to any subsequent filings, subdivision (6) authorizes and requires clerks to designate and maintain the confidentiality of such victim identifying information. The clerks of court, currently and historically, have performed similar redactions of individual identifying information pursuant those statutory provisions adopted into Rule 2.420(d)(1)(B), such as:

- patient identity in HIV test results and tuberculosis proceedings,
- identifying information of a minor petitioning for waiver of parental notice,
- identifying information of individuals receiving mental health or substance abuse treatment,
- identifying information of petitioners or respondents in petitions for injunctions pre-service,
- and identifying information regarding victims of child abuse and victims of sexual offenses.²

² Florida Rules of Judicial Administration, Rule 2.420(d)(1)(B), lists 23 categories of confidential or exempt information afforded automatic protection by clerks of

The Florida clerks of court have applied statutory public records exemptions to protect sensitive identifying information where authorized long before the digitization of court records and have followed Rule 2.420 to protect those specific categories of confidential information since the first list was adopted by the Supreme Court. Also, clerks currently ensure the protection of confidential or sensitive case information in accordance with the Supreme Court Access Security Matrix. FCCC supports the RJAC's inclusion of the clerks in Proposed Rule 2.423 as the custodian of court records best positioned to effectuate the protection of crime victim identity afforded by Marsy's law.

III. Conclusion

The clerks of court are committed to performing their duties such that the privacy rights of victims are adequately protected, while recognizing the critical need for access to court records for attorneys, litigants and other interested parties. By authorizing clerks to perform redaction of victim information based on a filed notice, clerks are confident they will be able to perform the necessary redactions while general records access continues unimpeded. The Rule has been carefully crafted to strike a balance between these especially important interests. FCCC believes that if not adopted as drafted, the Marsy's Law constitutional provision regarding crime victim confidentiality may be completely undermined. On behalf of

court when such information is present in court records.

FCCC, we respectfully request your support for and adoption of Proposed Rule 2.423 as submitted.

Respectfully submitted this 31st day of December, 2020 by

/s/ Tara S. Green

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished by e-mail, via the Florida Courts E-Filing Portal, on December 31, 2020, to:

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