

**RULES OF JUDICIAL ADMINISTRATION COMMITTEE
AGENDA**

**Friday, January 15, 2021
1:00-5:30**

I. CALL TO ORDER—Michael Korn, Chair

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G. Joint Ad Hoc Subcommittee on Rule 2.423

Two comments were filed with the Court that are being reviewed by the joint ad hoc subcommittee. Response to comments is due January 25, 2021.

Two comments were received after publication, one from the News media coalition and one from the Clerks of Court. The Chair requests Michael Schmid to detail the comments that were received.

Michael Schmid states that the joint subcommittee met again after the comments were received. The Clerks comments were very well presented, and no response is necessary by the subcommittee.

Second comment from the News Media Coalition This was a lengthy comment and a lot of it had to do with Marsy's law itself. The joint subcommittee does want to address that.

Regarding subdivision (d) the request was to change the word from "indicate" to "identify". Unanimous vote to reject that change based upon creating an undue burden on the clerks.

Regarding the notice provisions, the coalition wanted changes to subdivisions (b) and (d) and that the notice itself should not be confidential. The position of the subcommittee is that you can't keep anything confidential in the notice. In subdivision 2.423(e) the commenters suggested adding language that once the information is divulged by the victim it would no longer be confidential information. There was a lot of discussion about how inadvertent disclosure would lead to bad results. As it is currently drafted, the Court has the final say and the subcommittee believes this is sufficient to address those

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concerns raised in the comment and no changes will be recommended.

The Chair reports that procedurally, the Appellate Court Rules Committee is going to request an extension of time because they are continuing to address some issues. The current plan, after discussion with Judge Ray, Chair of the Appellate Court Rules Committee, is to file simultaneous requests for extension of time of approximately 45 days and then file the responses simultaneously.

THE FLORIDA BAR

JOINT SUBCOMMITTEE REPORT

Please be advised that Joint Subcommittee on Marsy's Law conducted a meeting on January 13, 2021, by conference call to discuss two comments received in response to proposed Rule of Judicial Administration 2.423 filed with the Supreme Court in case number SC20-1128. The minutes will reflect the Joint Subcommittee participants who attended, as well as additional participants who joined.

The Joint Subcommittee determined a response to the comments was due to the Court by January 25, 2021. It is my understanding that based on comments received by the Appellate Rules Committee, it may seek an extension before filing its response.

The Joint Subcommittee received one comment from the Florida Court Clerks and Comptrollers which was in full support of the proposed Rule 2.423. The Joint Subcommittee is appreciative of the FCCC's support and input throughout the rule making process. Having reviewed the comment in support of the proposed rule, the Joint Subcommittee has determined that no response is required.

The second comment was received from the News Media Coalition by way of Carla Jean LoCicero. The majority of the comment was directed to the Coalition's broad concern regarding the impact of Marsy's Law; therefore, much of the comment is outside the scope of this Joint Subcommittee. However, there were some substantive edits to the proposed Rule which were examined by the Joint Subcommittee.

Proposed Change to Rule 2.423(d):

(1) The filer of an initial charging document shall indicate identify the existence of confidential crime victim information pursuant to article I, section 16 of the Florida Constitution. If the filer indicates identifies 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.

Response:

The Joint Subcommittee determined that the change is unnecessary, contrary to the intent of the rule, and would complicate the procedure used in the routine filing of some charging documents. First, requiring that confidential information be specifically identified by the filer of the initial charging document would be overly burdensome and inconsistent with existing procedures for filing charging documents. The goal of the Joint Subcommittee was to permit filers, specifically law enforcement filing uniform arrest affidavits (UAAs), to indicate on the face of a charging document whether it contains confidential victim information. Because charging documents are often created by non-attorneys, e.g., law enforcement, and filed through an online portal automatically, the Joint Subcommittee, consistent with the recommendations of the FCCC, sought to create a rule that would allow for the originator of a charging document to indicate the presence of confidential information by "checking a box" or some similar method that would be apparent to the clerks upon filing. This method eliminates the need for a separate filing alongside the charging document and thereby reduces the burden on the filer, clerks, and law enforcement agencies and limits the amount of confidential information contained in the court file. A clerk should be able to readily identify the confidential victim information within a UAA when it is indicated that a victim wishes to remain confidential as the UAA has a specifically designated location where a victim's information is listed, and officers will typically refer to the person as "victim" within the probable cause portion of the UAA. Likewise, victim information in an Information will be readily apparent. Therefore, the initial charging document need only indicate the existence of confidential crime victim information.

In crafting this rule, the Joint Subcommittee specifically took into consideration the Florida Department of Law Enforcement's adoption of a uniform arrest affidavit pursuant to section 943.6871, Florida Statutes, which will hopefully include a data field whereby the law enforcement agency may indicate on the face of the UAA whether a victim has asserted protection under Marsy's law. Although there has

been a pause in the UAA project due to funding concerns, FDLE is currently working with its vendor to resume operations. A representative from FDLE advised that at this time there is no ETA for completion of the UAA or implementation. However, the current language of the rule would be consistent both with current practices by law enforcement agencies and the eventual adoption of the UAA.

Proposed Change to Rule 2.423(5):

(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.~~
Shall not contain any information claimed to be subject to confidentiality under article I, section 16(b)(5) of the Florida Constitution.

(C) Shall not be required when an entire case file is maintained as confidential.

(D) Shall not itself be confidential.

~~(D)~~ (E) A form shall accompany this rule.

Response:

The Joint Subcommittee determined that these proposed changes would increase the burden placed on clerks to independently identify confidential information and cause potential crime victim information to be disclosed to the public. The Joint Subcommittee recognized that it may sometimes be necessary for a filer to specify the exact information, e.g., victim's name, for which the Clerk should keep confidential and its location in the filing. Providing a line and page number alone may not sufficiently identify the information subject to redaction and would place a burden on the Clerk to review the document subject to the notice and make assumptions about what

information the filer may be referencing. Furthermore, the purpose of a notice of confidential information is only to identify confidential information, it would have no relevance to the underlying proceedings or the public. The clerk will also docket the filing of a notice. The Joint Subcommittee felt the proposed language balanced the interests of crime victims, the clerks, and the public. Therefore, the Joint Subcommittee does not recommend the changes proposed.

Proposed Change to Rule 2.423(d):

(e) Duration of Confidentiality. In accordance with article 1, section 16(b)(3) of the Florida Constitution, a crime victim is entitled to be reasonably protected from the accused and any person acting on behalf of the accused within the judicial process. Therefore, once the information claimed to be subject to confidentiality is either divulged by the victim or otherwise made public, or the court has made a final determination that it is no longer reasonable for the information to be maintained as confidential, the provisions of this rule no longer apply.

Response:

The Joint Subcommittee concluded that the proposed amended language inserts an interpretation of a victims' substantive rights into the language of the rule and goes beyond the scope of the Rules of Judicial Procedure. The Joint Subcommittee unanimously agreed that the determination of when a victim's right to confidentiality ends is best left to the courts to determine on a case-by-case basis. Moreover, the clerk's office would have no way of knowing whether information had been divulged or made public. It is conceivable information is accidentally or intentionally posted online and subsequently removed. The proposed amended language would leave that victim without recourse to keep their information private. The ultimate determination as to whether a disclosure should terminate the right to confidentiality must be made by a judge or fact finder based on the facts and totality of the circumstances and not because someone already divulged it accidentally or intentionally against the victim's will. Therefore, the Joint Subcommittee strongly disagrees with the proposed amendment.

The Joint Subcommittee voted 14-0 in favor of keeping the proposed language as is for the reasons stated above. The Joint Subcommittee Chair is prepared to report to the full RJA Committee at the meeting on January 15, 2021.

/S/ Michael Schmid
Joint Subcommittee Chair