IN THE SUPREME COURT OF FLORIDA

Case No. SC20-1765

In Re: Amendments to Florida Rule of Judicial Administration 2.420

COMMENT OF RACHEL M. SADOFF, IN HER OFFICIAL CAPACITY AS BREVARD COUNTY CLERK OF THE CIRCUIT COURT & COMPTROLLER

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Introduction

The undersigned submits the following comment on behalf of Rachel M. Sadoff, in her official capacity as Brevard County Clerk of the Circuit Court & Comptroller (the "Clerk"), regarding the Court's proposed amendment to Florida Rule of Judicial Administration 2.420, eliminating the requirement that the state's clerks of court independently designate certain information as confidential in certain civil cases. The Clerk files this comment in her own capacity, and does not intend for it to be construed as the opinion or belief of any other independently elected clerk or of the clerks' statewide association.

Interest of the Commenter

The Clerk is one of 67 independently elected constitutional officers charged with maintaining the trial court's records, providing public access to the same, and safeguarding expunged, sealed, or otherwise confidential records. On a daily basis, the Clerk redacts records for public consumption under rule 2.420.[1] Elected without opposition in 2020, she shares a strong commitment to preserving the philosophy with her predecessor and fellow clerks that "[a]

[1] In 2019, the Clerk processed nearly 9,000 separate 2.420 notices.

public office is a public trust," and that her duty is to serve the public to the best of her abilities and to help resolve their needs. *See* art. I, § 8, Fla. Const.

Since 1838, it has been the role of the state's clerks to preserve the public's trust by balancing public access to case information with the safeguarding confidential records from release. *See* art. V, § 13, Fla. Const. (1838). As a result, any changes to the duties imposed under rule 2.420 directly affect the Clerk's operations as well as the services she provides to her constituents.

The Clerk believes there are a number of unintended consequences and questions that require clarification regarding the Court's proposed revision, and submits them for consideration.

COMMENT

For decades, customers of the court system have relied upon the protections found in rule 2.420 and its predecessor rules. In furtherance of its commitment to protecting confidential information from release, in 2010 this Court adopted amendments which would "ensure[] the confidentiality of a narrow set of court records … as a necessary prerequisite to the Court's ongoing effort to provide the public with electronic access to court records." *In re Amends. to Fla. Rule of Jud. Admin. 2.420 & Fla. Rules of App. Pro.,* 31 So. 3d 756, 757 (Fla. 2010). The rule required the state's clerks to automatically designate the list of items as confidential; regardless if a party also filed the required notice under rule 2.420. *See id.* at 765.

At the time, electronic access was governed on an interim basis and was limited to a finite set of case types. *See* In re: Committee on Privacy and Court Records, Fla. Admin. Order No. AOSC04-4 (Feb. 12, 2004); In re: Implementation of Report and Recommendations of the Committee on Privacy and Court Records, Fla. Admin. Order No. AOSC06-20 (June 30, 2006); In re: Interim Policy on Electronic Release of Court Records, Fla. Admin. Order No. AOSC06-21 (June 30, 2006); and In re: Revised Interim Policy

on Electronic Release of Court Records, Fla. Admin. Order No. AOSC07-49 (Sept. 7, 2007). In the decade that followed this Court's vast amendment to rule 2.420, online electronic access burgeoned and the state's clerks vastly expanded the types of records that were available to the public with the click of a button in compliance with this Court's commitment to electronic access. *See, e.g.*, In re: Standards for Access to Electronic Court Records, Fla. Admin. Order No. AOSC14-19 Amended (May 23, 2014, *nunc pro tunc* to Mar. 19, 2014).

Beginning with AOSC14-19, the Court promoted electronic access to court files through the Access Security Matrix (the "Matrix"). The Matrix determines a subscriber's level of electronic access based on (1) the case type in question and (2) the identity of the subscriber. These variables are not static; they change from case to case and are dependent on whether the subscriber might be an attorney of record in one case, and a registered user in another.[2]

[2] Likewise, the Matrix is not static and the Access Governance Board, through the Florida Court Technology Commission, makes recommendations for changes in the context of changes in law for this Court's consideration and potential adoption.

More information is available at the click of a button than ever before, and requires oversight to prevent misuse.

A. THE CASE TYPES CONTEMPLATED ROUTINELY CONTAIN CONFIDENTIAL INFORMATION

While the Court proposes to change the onus of designating confidential information from the Clerk to the filers in three seemingly innocuous case categories (SC, CC, and CA), the Court respectfully does not contemplate the volume of confidential information in these cases, or what the consequences of inadvertent release could mean for litigants. Of the nearly 9,000 rule 2.420 notices filed with the Clerk in 2019, nearly 50 percent were filed in the affected case categories.[3]

For instance, small claims cases (SC) routinely contain bank account and/or social security number information for a debtor on a hospital bill or other indebtedness such as credit card defaults. Circuit civil cases (CA) contain civil causes of action for heinous crimes and other types of confidential matters, including settlement of minors' and wards' claims and clinical records. Others contain bank account information and social security numbers in contract

[3] 4,071 rule 2.420 notices were filed in the affected categories: 619 in CA cases; 1,031 in CC cases; and 2,421 in SC cases.

indebtedness disputes, foreclosures, and other case types. County civil cases (CC) contain much of the same information as SC and CA cases, depending on (1) the value of the claim or (2) whether the county court shares jurisdiction of a cause of action not otherwise delegated exclusively to the circuit court. *See* § 34.01, Fla. Stat.

While it is true that these three civil case categories—of the extant 18[4]—often contain less confidential information throughout than criminal, dependency, adoption, or probate and guardianship cases, it is in fact these categories that often contain the very information rife for use in identity theft. The Clerk cautions the Court from loosening its stance on data protection without carefully considering the types of actions filed therein.

B. FILERS HAVE COME TO RELY ON THE CLERK TO REMOVE CONFIDENTIAL INFORMATION AS A PUBLIC SERVICE AND SAFEGUARD

For more than a decade, filers have relied on clerks to automatically remove confidential information that they either forgot or chose not to mark as confidential in a notice.[5] As

[4] SC, CC, CA, DR, DP, GA, CP, MH, CF, MM, CO, MO, IN, CJ, CT, TR, AP, AC

[5] The Clerk recognizes the argument that the federal courts place the onus on filers to remove confidential information. That said, federal courts deal with entirely different subject matter than that

proposed, the Clerk would not be required to designate items as confidential in nearly all case types in SC, CC, and CA categories. While appearing to potentially remove work from the Clerk, the Clerk believes the workload remains the same or, potentially, increases.

i. The Clerk still must designate confidential items in 15 case categories

First, the Court is not removing the requirement for the Clerk to automatically designate confidential items in the remainder of the 15 case categories. Removing the requirement to automatically designate in the remaining three case categories—among 18—does not alleviate a "burden."[6] From a logistics standpoint, it appears entirely nonsensical public policy to put in practice a rule that treats three case categories (and, not the entirety of those categories) differently from the remaining 15. The Clerk would perhaps understand the impetus of the revision if the Court were

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relegated to the state's trial courts. The practice of self-redacting under rule 2.425 is conditioned on minimization as opposed to actual self-redaction, and has candidly done little to reduce confidential information in court files.

[6] Again, as demonstrated by the Clerk's own research, nearly half of the 2.420 notices it receives are filed in the case types the Court purports to affect.

applying the methodology to *all* civil categories as opposed to criminal, or vise versa. But, that is not the case.

ii. The solution does not solve the media's concerns

The Court's stated beneficiary is news media organizations. The Court notes that media "have reported concerning delays in their access to nonconfidential court records." While a source of concern (and one the Clerk shares), the revision will not solve that problem.

Further, in the Clerk's experience, the types of cases affected by the Court's revision are not the types the media wishes to access in an expedited manner: small claims disputes between contractors (SC), a tenant's eviction (CC or CA), the local family being foreclosed for failing to pay their mortgage (CA), or a credit card company suing for non-payment (CC or CA). Nothing in the revision will allow the media to see injunction cases before they are served (DR), detailed information about a sex or child abuse case (CF), a notorious juvenile delinquent (CJ), ne'er-do-well parents (DP), or the inventory of a famous local celebrity (CP or GA).

The Clerk tracks internal statistics as a means by which to gauge provision of service to her customers. Our own internal

statistics indicate that in the past two years, on average we fulfilled VOR requests in as few as *16 minutes* and as many as *one hour and seven minutes* for external customers, including the media.

iii. The proposed revision disproportionately affects self-represented parties

The vast majority of attorneys in the case types that fall into SC, CC, and CA case categories file rule 2.420 notices as a matter of course. The proposed revision, while entirely unintended, appears to have a disproportionately negative impact on self-represented parties. These parties are the exact demographic the Court has worked hard to target for adequate access to justice and is exactly the demographic less versed in the Court's rules, procedures, and the clerks' practices. *See*, *e.g.*, In re: Florida Commission on Access to Civil Justice, Fla. Admin. Order No. AOSC14-65 Corrected (Nov. 24, 2014). The revision seems counter to this Court's well-intentioned goals and appears to take a step backward following giant strides toward building a more inclusive court system.

iv. Not automatically designating confidential items in SC, CC, and CA will likely lead to higher identity theft and related fraud

Perhaps the most unintended consequence of the Court's revision is the prospective ability for rampant, widespread identity theft and related fraud. This Court's and the clerks' trend has been to help constituents combat potential fraud—not invite it.[7]

Perhaps a party or their counsel forget to designate their social security number as confidential. More insidiously, a party maliciously files documents with confidential information concerning another party in an attempt to embarrass or harass. Litigation is rarely friendly and often arduous, contemptuous, and bitter—no less so when you are removing someone from their home (CC or CA), enforcing a contract for non-payment (SC, CC, or CA), libel or slander (CC or CA), or foreclosing on a person's property (CA). The revision does not contemplate abuse of the rule by one party choosing to publish another's confidential information without consent. Requiring—or allowing—the Clerk to automatically designate the items in rule 2.420 helps protect against this type of abuse in a prospective manner by insuring

[7] Dozens of clerks across the state have engaged software to inform the public when items have been recorded containing a specific name or against specific property to alert the public to potential fraud.

redaction before the record is publicly made available. Absent this designation, it could be weeks, months, or longer before the victim becomes aware of the issue. Even if the Court could later sanction the offender, the damage is done.

In 2019, there were 13 million incidents of identity theft in the United States, resulting in $3.5 billion in losses related to fraud recovery.[8] Key components needed to take over an account or open new ones include bank account data and social security numbers—the very items that are in SC, CC, and CA cases. While entirely possible to commit identity theft through myriad avenues, the proposed rule opens the door for court records to become an even greater treasure trove of data for criminals and those looking to sell and mine it—something this Court has taken a strong stand against. *See*, *e.g.*, In re: Access to Electronic Court Records, Fla. Admin. Order No. AOSC20-108 (Nov. 20, 2020) at 14-15.

v. The proposed revision has at best a net neutral effect on clerk operations

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[8] https://www.comparitech.com/identity-theft-protection/identity-theft-statistics/#:~:text=The%20total%20number%20of%20new,to%2014.4%20million%20in%202018, last accessed March 8, 2021.

As already indicated, clerks will still automatically designate confidential items in 15 case categories. After implementation, clerks will need to proactively review filings in the three identified categories to determine if a rule 2.420 notice was previously filed that affects that document's confidentiality. The Court's revision contemplates a situation in which clerks process a document and a rule 2.420 notice at the same time.

However, that is not always the experience observed by this office, and in fact, it is common to find a rule 2.420 notice docketed prior to or sometimes a day or two after the document it purports to affect. While it is true that many rule 2.420 notices are filed in the same e-filing submission as the documents they affect, that is not always the case depending on the method of filing (i.e., e-filing versus paper), if a party is attempting to proactively file something "under seal," or because a litigant forgot to file one at the appropriate time.

Because the clerks will still have to redact in most case categories and proactively review dockets to determine what is confidential, the Clerk sees this as net neutral to her operations.

C. RELIANCE ON THE MATRIX TO PRESCRIBE ALL MANNER OF ACCESS IS MISGUIDED

The Court's proposed revision reignites the discussion of whether the Matrix and the Standards for Access to Electronic Court Records (the "Standards") should govern all manner of records. Respectfully, they simply cannot. Despite being a brilliant tool in ensuring access to millions of records at the click of a button, the Matrix is respectfully incapable of managing the day-to-day, real life scenarios of customers at clerks' offices across this state because of its technical limitations and lack of independent knowledge.

i. The Matrix was not designed to apply to in person access

A party and their attorney may not access a case that has been sealed to the rest of the world but continues to be litigated. A misdemeanor defendant may never access confidential information in their own case, including their own social security number. A juvenile defendant or a litigant in a termination of parental rights case may only see their case number online and none of the file's contents. A personal representative in a probate matter cannot view the estate inventory they themselves filed. A petitioner in an

injunction file may only access the case number and party names prior to service of pleadings. A parent in a dependency matter may not view records relating to their own children.

These assertions may sound somewhat ridiculous, but they are entirely the level of electronic access mandated by the Matrix. Online access is necessarily more restrictive due to the precariousness of verifying the identity of an online subscriber as opposed to a person who is at a front counter. This is entirely why the Matrix should only govern electronic access.

The Matrix and the Standards are no substitute for ascertaining the facts of a particular case and discerning the proper level of access in more secure formats, such as in person. There must then be different rules for inherently different situations.

ii. "Circuit Civil Private" is not an actual case type

The Court carves out an exception to which CA, CC, and SC case categories will still require automatic designation by the clerks. In doing so, the Court relies on the Matrix's designation of a solitary "case type" as "View on Request": Circuit Civil Private[9] (Sexual

[9] "Circuit Civil Private" is not a case type that is on the prescribed civil coversheet, nor is it a reportable case type for SRS or UCR purposes through the Office of the State Court Administrator.

Abuse & Medical Malpractice). Unfortunately, that case type does not currently exist, and is not part of any of the Court's reporting mechanisms. Its description also varies from the citations used to support it: none of the authorities cited reference medical malpractice, which is part of the description, but they do reference child abuse, which is not. *See In re Amendments to Florida Rule of Judicial Admin. 2.420*, 124 So. 2d 819, 822 (Fla. 2013) (determining that the language of the controlling statute or rule, not the description used, should be looked to when determining intent). The Clerk requests the Court consider alternative language, which lists the affected case types in the appropriate categories, rather than referencing VOR. *See* Exhibit "A."

D. THE CLERK REQUESTS THE COURT ALLOW HER TO CONTINUE TO AUTOMATICALLY DESIGNATE CONFIDENTIAL INFORMATION IF SHE WISHES TO DO SO

If the Court is inclined to implement its revision to rule 2.420, the Clerk would respectfully request that the proposed language continue to contain a provision to *allow*—rather than *require*—her to continue designating confidential items if she chooses to do so.

The Clerk understands there are some who think there is inherent liability in choosing to take on this duty when permitted but not mandated. The Clerk respectfully rejects these arguments in favor of decades of jurisprudence to the contrary. Since 1838, clerks have been trusted to maintain the court's records and to provide copies to the public. In that role, clerks redact confidential information to maintain a balance between what the Court has determined is public and what is confidential. The clerks do so with a duty to the public as a whole, and not to any one individual. *See, e.g., Clerk of Circuit Court & Comptroller of Collier County v. Doe*, 292 So. 3d 1254 (Fla. 2d DCA 2020).

Irrespective of whether the revision moves forward (and at all times prior to 2010), the Clerk had to redact in some form or fashion, and under this Court's revision, still will in a super majority of cases. When she does redact, the Clerk undertakes her best efforts to comply with this Court's rules. As with any human-driven process, redaction is not an exact science and occasionally, information is inadvertently released that should otherwise be obscured. When that occurs, clerks are not generally liable for

inadvertent release, as the duty of care is one owed to the public as a whole.

This Court has determined that it cannot impose its own duty of care which is not evident from common or statutory law. *See Trianon Park Condominium Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912, 917-18 (Fla. 1985) ("First, for there to be governmental tort liability, there must be either an underlying common law or statutory duty of care with respect to the alleged negligent conduct."). "For certain basic judgmental or discretionary governmental functions, there has never been an applicable duty of care." *Id.* at 917 (citing *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979)).

While the legislature may establish a duty of care, alas, the legislature does not govern this Court's records. *See Times Pub. Co. v. Ake*, 660 So. 2d 255, 257 (Fla. 1995) ("[T]he clerks of the circuit courts, when acting under the authority of their article V powers concerning judicial records … are an arm of the judicial branch and are subject to the oversight and control of the Supreme Court of Florida, rather than the legislative branch."); *see also State v. Wooten,* 260 So. 3d 1060, 1069 (Fla. 4th DCA 2018). As such, she

requests this Court allow her to continue to automatically designate confidential items if she chooses as a safeguard for her constituents.

E. IF THE COURT IMPLEMENTS THE REVISION, THE CLERK REQUESTS POSTPONEMENT OF THE EFFECTIVE DATE

The Clerk would respectfully request that if the Court considers nothing else from these comments, that it extend the effective date so that the Clerk may adequately and appropriately inform her constituents. As with any new policy, implementation and education take time. As it stands today, the Court intends to make its revision to the rule effective July 1, 2021. Comments are due by April 6, 2021. This Court will likely take time to consider filed comments, deliberate internally, and potentially schedule oral argument. It is likely that there would be a maximum (and likely fewer) of three months to inform the public of this massive change to confidentiality.

The Clerk respectfully requests the Court consider moving the effective date to January 1, 2022, to coincide with the next calendar year or at least six months from the date this Court makes any amendments to its opinion.

Respectfully submitted this 1st day of April, 2021,

/s/ Rebecca E. Lober
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of April, 2021, I filed the foregoing with the Clerk of the Supreme Court via the Florida Courts E-Filing Portal and furnished a true and correct copy of the same to the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with rule 9.045, Fla. R. App. P., and was prepared in double-spaced 14-point Bookman Old Style font and contains 3,913 words.

/s/ Rebecca E. Lober
REBECCA E. LOBER, ESQ.

EXHIBIT "A"

(C) In civil cases, the clerk of the court shall not be required to designate and maintain information as confidential unless the filer follows the notice procedures set forth in subdivision (d)(2), the filer files a Motion to Determine Confidentiality of Court Records as set forth in subdivision (d)(3), the filing is deemed confidential by court order, or the case itself is confidential by law. "Civil cases" as used in this rule includes only civil case types in the circuit, county, or small claims courts (identified by the Court Type Designator CA, CC, and SC in the uniform case numbering system), except those cases types litigating the claims of a purported victim of child abuse as defined in chapter 827, Florida Statutes, or that reveal the person as a victim of human trafficking as proscribed in section 787.06(3)(a), Florida Statutes, a victim of any sexual offense, including those proscribed in sections 787.06(3)(b), (d), (f), or (g), Florida Statutes, or Chapters 794, 796, 800, 827, or 847, Florida Statutes.