

IN THE SUPREME COURT OF FLORIDA

**IN RE: AMENDMENTS TO
FLORIDA RULE OF JUDICIAL
ADMINISTRATION 2.420**

CASE NO: SC20-1765

**FLORIDA ASSOCIATION OF COURT CLERKS, INC.'S
COMMENTS TO PROPOSED AMENDMENTS TO RULE 2.420**

The Florida Association of Court Clerks, Inc. d/b/a Florida Court Clerks & Comptrollers ("Association") submits this comment on the proposed amendments to Rule 2.420 of the Florida Rules of Judicial Administration as set forth in the Supreme Court of Florida ("Court") opinion in this matter dated January 21, 2021 ("Opinion").

The Association is a non-profit voluntary association whose membership includes each of the 67 elected clerks of the circuit and county courts ("Clerks") throughout Florida. The Clerks have significant duties and responsibilities pursuant to the Florida Rules of Judicial Administration, including Rule 2.420. Through the Association, the Clerks work together on issues of mutual interest and concern. Because the proposed amendments to Rule 2.420 will significantly affect each Clerk, the Association at the direction of its Executive Committee and on behalf of the Clerks, reviewed the proposed changes, objects to them and provides the following comments.

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BACKGROUND

Florida's Clerks have historically been the custodian of court records and protectors of the privacy of the public as provided by law and rules of this Court. The evolution to electronic record-keeping over the past two decades has greatly increased this responsibility. In recognizing the potential for harm resulting from the ease and anonymity of electronic access, this Court issued administrative order AOSC04-04 in 2004. AOSC04-04 imposed a moratorium on Clerks being able to provide electronic access to the public until proper protections necessary to balance the public's right to inspect with individual privacy rights were developed. Since the entry of AOSC04-04, the Court has continued to work diligently through a series of subsequent administrative orders and rule amendments to provide a process to allow public access to court records electronically while continuing to protect the privacy of the confidential information of the citizens.

It is not necessary nor particularly helpful to delve further into this evolution of the Court's continued efforts to balance these two rights other than to say that the protection of an individual's confidential information has always been of foremost importance to the Court. The development of the Clerk's Statewide Comprehensive Case Information System, a matrix to define authorized users with access

to electronically maintained records, mandatory e-filing, and other technological enhancements have all provided for the protection of records and information this Court has deemed confidential and exempt from public view.

Currently, Rule 2.420 requires the filer to identify the confidential information at the time of filing in order to provide notice to the Clerk to redact as appropriate. The law further requires the Clerk to “screen” all filings to designate and maintain exempt from public access all confidential information whether or not previously identified by the filer. *In re Amendments to Rule of Judicial Administration 2.420*, 31 So. 3d 756 (Fla. 2010). The amendments to Rule 2.420 proposed by the Opinion seek to eliminate this review by the Clerk – the ultimate protection of the public's right to privacy – by making the only protection of a person's confidential information the identification by the filer, be it an attorney, a pro se party, or other individual.

Given the expressed intention of the Court to amend Rule 2.420 in this manner, the Clerks submit the following suggested changes and concerns.

SUGGESTED CHANGES

The Opinion states that Rule 2.420(d)(1) would be amended so that:

...in certain civil cases, the clerk of court does not have an independent responsibility to identify and designate information as confidential. Instead, that is the sole responsibility of the filer.

Opinion at 3. However, the actual language of the proposed amendment to Rule 2.420 creates a new subsection (C) which reads in part:

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 subsection (d)(2)

Opinion at 7 (emphasis supplied). Thus, what appears to be a mandatory exclusion of action by the Clerk in the Opinion is drafted as permissive in the proposed rule amendment. The Clerks have several concerns with this distinction. Clerks, by statute and case law, are ministerial officers and are not to exercise judgment in the performance of their duties. See, e.g., *State v. Almand*, 75 So. 2d 905, 906 (Fla. 1954) (the making or keeping of court records by the clerk is a ministerial duty); *Solomon v. Sanitarians' Registration Bd.*, 155 So. 2d 353, 356 (Fla. 1963) (a duty or act is defined as ministerial when there is no room for the exercise of discretion, and the performance being required is directed by law). With the proposed rule amendment stating the Clerk "shall not be required," the Clerk is placed in the position of deciding whether or not to review the document to determine and maintain information as confidential that the filer has failed to designate. Not only does this

language place the Clerk in the position of exercising individual judgment, but it would also clearly result in a lack of uniformity in the application of the Rule throughout the state. The Association maintains many best practice policies but has no authority to require a Clerk to act in a certain way in the exercise of a permissive practice. To provide clarity and consistency throughout the state, the Clerks recommend the elimination of the words "be required to" from the language in the proposed amendment quoted above. With this change, subsection (C) would begin in part as follows:

In civil cases, the clerk of the court shall not designate and maintain information as confidential unless the filer follows the notice procedures set forth in subsection (d)(2)

Since all case types may contain confidential information, some Clerks review all filings for possible further redaction when filed. Other Clerks conduct redaction when access is requested (also known as viewable on request or VOR). Regardless, the current Rule requires Clerks to redact all confidential information without regard to specific case types. Because the new Rule differentiates certain case types for Clerks to continue to redact within CA, CC, and SC court types, the amended Rule will cause two unintended operational consequences.

The first unintended consequence will occur because the technologies created for the case maintenance systems (CMS) and

automated redaction do not carve out specific case types to send to automated redaction nor a VOR queue. These technologies will need to be modified to exclude all case types within CA, CC, and SC without removing redaction for Jimmy Ryce, sexual abuse, and medical malpractice cases. These sub-case types were explicitly identified for Clerks to continue their current redaction responsibilities under Rule 2.420 as proposed. In contrast, the rest of the case types within the CA, CC, and SC court types would no longer be reviewed for confidential information without a filed notice of confidential information. This will require significant program changes to the Clerks' CMS which will require additional time and expense to implement.-

The second unintended consequence is a result of Clerks now having to determine if the documents they are reviewing are those that pass directly through without review or are included in one of three case types (Jimmy Ryce, sexual abuse, and medical malpractice) that need redaction. This unintended consequence will be minimized with the changes to the technology described above. However, the technology modifications will not solve the issue for cases involving sexual abuse. The Summary Reporting System (SRS) is an important driver in determining case types within the Florida Court system. Currently, the SRS does not have a specific case type for civil

sexual abuse cases. Thus, sexual abuse cases would be included in either the other negligence or other civil categories of the SRS. These categories are a catch-all and would contain many types of cases, most of which would not require Clerk redaction under the new Rule. Additionally, the civil cover sheet required to be filed when the petitioner/plaintiff files a new case follows the SRS case types – making it have the same flaws for separately and quickly identifying a sexual abuse case compared to other non-redacted case types. As a solution to this issue, the clerks request that the Court amend both the SRS manual and reports and the civil cover sheet, Form 1.997, Rule of Civil Procedure, to include sexual abuse as a distinct case type.

As demonstrated below, there exists a significant amount of non-compliance with the current Rule today. With the current proposed date of July 1, 2021, for the implementation of the proposed rule amendment, there will not be adequate time to even begin to educate not only members of The Florida Bar, but also attorneys of other jurisdictions, and more critically, the pro se and other non-party filers. If the amendment to the Rule is adopted in its present form, the Clerks are prepared to implement a program of statewide education as well as work with The Florida Bar in their efforts to inform the members of the Bar (those talks have, in fact,

already begun), but this effort will take significantly more time than what is currently provided in the amendment.

If the Court decides to go forward with the proposed amendment to Rule 2.420, Clerks recommend:

(1) The Rule should provide “the clerk of the court ***shall not designate*** and maintain information as confidential unless the filer follows the notice procedures set forth in subsection (d)(2)...” as opposed to the current wording “***shall not be required to designate.***”

(2) Both the SRS manual and the civil cover sheet, Form 1.997 Rule of Civil Procedure, be amended to include sexual abuse as a distinct case type. The Association believes that changes will need to be made to the Access Security Matrix adopted by this Court to effectively effectuate the amended Rule. The Association suggests the Court refer that issue to the Florida Courts Technology Commission (FCTC) to propose any required changes.

(3) The effective date of the Rule 2.420 amendment be extended until January 1, 2022, at the earliest and preferably July 1, 2022, in order that Clerks, working with the Court, The Florida Bar, and other relevant groups have the time to educate attorneys, pro se and other

non-party filers of the amendment and of potential harm that may result from non-compliance.

OTHER CONCERNS

In addition to the recommended changes in the language of the proposed amendment discussed above, the Clerks continue to object to the rule change and express serious concern as to the impacts the amended Rule 2.420 will have on the public and the expectation of privacy and security that individuals and businesses have in the maintenance of their confidential information that is contained in court records.

For the more than 10 years that filers have had the responsibility to identify confidential information contained in records, a significant number of filers continue to fail in this requirement. As an example, Rule 2.420(d)(1)(B)(iii) identifies social security, bank account, charge, debit and credit numbers as confidential. Filings in the case types specified in the proposed amendment routinely contain such information, combined with other personally identifiable information such as a person's name, date of birth, and signature. Public access to confidential information combined with the personal identifiers creates exactly the dangerous situation the Rule was created to prevent, and which for years the Court has tried to guard against. The risk of identity

theft by fraudsters is real, as is the personal and financial toll on victims. Both attorney and pro se filers routinely file documents containing such information without including the appropriate notice. To demonstrate the current level of non-compliance, the Association recently undertook a week-long survey conducted in several counties to determine the number of cases filed that did not comply with the confidential information notice by the filer. The five counties participating in the study reported 46,853 cases filed subject to the notice requirement, a total of 500 Notices of Confidentiality filed, and 9,835 cases that contained unidentified confidential information discovered by the Clerk and requiring further redaction.¹

The survey suggests that approximately 21% of civil cases are currently in non-compliance with the 10-year-old Rule. Expecting attorneys who are not currently complying to immediately begin doing so may be unrealistic. Extensive attorney education could net positive results over

¹ The Association conducted a week-long survey in February 2021, whereby five mid to medium-large counties determined how many cases filed that week would be subject to the amendment to Rule 2.420 as currently proposed by the Court. Additionally, the survey determined how many of those cases were accompanied by a Notice of Confidentiality identifying some if not all confidential information, and how many instances of further redaction were disclosed by independent Clerk review. The counties that participated in the survey were Manatee, Marion, Martin, Palm Beach, and Volusia. A breakdown of the resulting data for each county is attached hereto as Appendix 1.

time but would not instantly ameliorate the risk created by removing Clerk review. Moreover, perhaps the most significant harm falls on pro se filers, who rarely have reason to know of the requirement to file Notices of Confidentiality. With this rule change, pro se filers will be extremely vulnerable to victimization from identity theft. Ironically, the act of education and warning the public of the rule change and need to personally identify their sensitive information may also attract bad actors who would now have open and easy access to find personal identifying information for their intended nefarious acts. Confidential information will be released, and the resulting harm to the public could be substantial.

This is not a new issue. In 2001, the Judicial Management Council of Florida published a Report and Recommendation entitled "Privacy and Electronic Access to Records" and noted that "*Floridians value both access to government and personal privacy-both goals are in the state Constitution and recognized as matters of public policy.*" (Emphasis added.) In fact, the elimination of the Clerk's responsibility to review, designate, and redact confidential information has been considered in greater detail than most other proposed rule changes.

In 2018, the Rules of Judicial Administration Committee (RJAC) created a special subcommittee to conduct a comprehensive review of Rule 2.420. That review was initially

intended to address procedural and organizational issues. The subcommittee's goal was to eventually have those approved by the Court and then address any substantive issues. However, the efforts of the subcommittee were expanded to include the role of the Clerk in protecting confidential information in Court filings. Ultimately the subcommittee voted not to make any changes in the Clerk's role.

By letter dated January 31, 2019, the Chief Justice requested that the RJAC and the FCTC review issues of purported delay in Clerk processing of court filings and providing access to the public. Working together, the RJAC and the FCTC by letter dated December 30, 2019, notified the Court of their joint recommendation to keep the Rule in its current form and not change the Clerk's role. Additionally, The Florida Bar Board of Governors, at its December 2019 meeting, reviewed the majority and minority reports of the RJAC and FCTC and voted 43-0 to approve the majority report, which recommended no action as to further changes to the role of the Clerk in Rule 2.420.

In conclusion, Florida's Clerks of Court have, since the beginning of statehood, been considered the public trustee committed to maintaining the privacy of its citizens' records as determined confidential by law and rule of this Court. Rule 2.420 is the embodiment of that role. To eliminate the Clerk's duty to protect that privacy

and rely on the compliance by a filer to identify the information, whether it be an attorney, pro se, or other type of filer, would be the abandonment of the protection which has existed throughout our history as a state and lead to the potential for serious and ongoing harm to the public.

Appendix 1

Sample Survey of Five Counties of Case Filings
Subject to Proposed Amendment to RJAC Rule 2.420
For One Week Period in February 2021

Circuit Civil	Cases	Notices of Confidentiality	Further Redaction Required
Manatee	572	1	0
Marion	1,874	0	23
Martin	1,131	1	13
Palm Beach	14,142	14	3,874
Volusia	2,840	6	19
Total	20,559	22	3,929
County Civil	Cases	Notices of Confidentiality	Further Redaction Required
Manatee	689	11	26
Marion	862	12	59
Martin	374	5	11
Palm Beach	5,106	51	1,255
Volusia	1,691	23	24
Total	8,722	102	1,375
Small Claims	Cases	Notices of Confidentiality	Further Redaction Required
Manatee	1140	45	362
Marion	1,976	38	141
Martin	587	15	31
Palm Beach	8,866	217	3,980
Volusia	5,003	61	17
Total	17,572	376	4,531
Circuit Civil, County Civil, and Small Claims	Cases	Notices of Confidentiality	Further Redaction Required

Manatee	2,401	57	388
Marion	4,712	50	223
Martin	2,092	21	55
Palm Beach	28,114	282	9,109
Volusia	9,534	90	60
Total	46,853	500	9,835

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th 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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