



Tampa

601 South Boulevard, Tampa, FL 33606
ph 813-984-3060 fax 813-984-3070 toll free 866-395-7100

South Florida

915 Middle River Drive, Ste. 309, Fort Lauderdale, FL 33304
ph 954-703-3416 fax 954-400-5415

www.tlolfirm.com

Mark R. Caramanica

Direct dial: (813) 984-3073
mcaramanica@tlolfirm.com

Reply to: Tampa

April 30, 2020

VIA ELECTRONIC MAIL

The Honorable Josephine Gagliardi
Chair, Rules of Judicial Administration
Committee
Lee County Justice Center
1700 Monroe Street
Fort Myers, FL 33901
jgagliardi@ca.cjis20.org

Ms. Krys Godwin
Bar Attorney Liaison
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300
kgodwin@floridabar.org

Re: News Media Coalition comments on proposed Rule 2.423

Dear Judge Gagliardi and Ms. Godwin:

As you will recall, our firm represents the news media regarding various matters impacting the public's right of access to court records. Our overarching concern is that the public and press be provided contemporaneous access to filed court records.¹ Our work is guided by this goal. To that end, we have actively followed the work of the Marsy's Law Joint Subcommittee regarding proposed Rule 2.423 (the "Proposed Rule"), participating in weekly phone conferences and commenting on draft proposals.

On behalf of the News Media Coalition,² we submit this comment to the Rule of Judicial Administration Committee ("RJAC") concerning the Proposed Rule.

¹ Earlier this year, in *Courthouse News Service v. Schaefer*, No. 2:18-cv-391, 2020 WL 863516 (E.D. Va. Feb. 21, 2020), the court laid out the constitutional access standard in the context of new civil actions: newly-filed civil complaints are to be publicly available contemporaneously with their filing, which means "**on the same day of filing, insofar as practicable.**" *Id.* at *17 (emphasis in original).

² The "News Media Coalition" for this comment includes: (1) The Associated Press; (2) the First Amendment Foundation; (3) the Florida Press Association; (4) Gannett. (*USA TODAY*, and Florida properties which include: *Daily Commercial*, *Daytona Beach News-Journal*, *Florida*

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The Proposed Rule seeks to implement a procedure for identifying and redacting those portions of court records containing “victim” information as defined in Article I, Section 16 of the Florida Constitution (commonly known as and referred to herein as “Marsy’s Law”).³ Before commenting on the Proposed Rule, the News Media Coalition provides some brief background on why public access to criminal court records is important and, consequently, why the RJAC should ensure no rule is adopted inhibiting that right.

The Importance of Crime Records

Stated plainly, citizens have a right to know when, where, and the nature of, any crime that occurs in their neighborhoods. Ironically, concealing crime-related records from the public can strip neighborhoods of the very information used to stay better informed of risks and take protective measures. Crime information also enables tracking and trend projections. Indeed, in the wake of Marsy’s Law, Florida has witnessed significant restrictions in public access to routine crime information used for such purposes—such as basic details about a crime

Today, Herald-Tribune, Naples Daily News, Northwest Florida Daily News, Ocala Star Banner, Panama City News Herald, Pensacola News Journal, Tallahassee Democrat, TC Palm, The Destin Log, The Florida Times-Union, The Gainesville Sun, The Ledger, The News-Press, The Palm Beach Post, The Star, The Walton Sun, and Washington County News); (5) Graham Media Group (WJXT-TV4 (Jacksonville), WKMG-TV6 (Orlando)); (6) The McClatchy Company (*Bradenton Herald* and *Miami Herald*); (7) New World Communications of Tampa, Inc. (WTVT FOX 13 Tampa Bay-St. Petersburg); (8) The New York Times Company; (9) Oregon Television, LLC (WOFL FOX 35 Orlando); (10) Scripps Media, Inc. (WFTS (Tampa Bay), WFTX (Fort Myers-Naples), WPTV (West Palm Beach), WSFL (Miami-Fort Lauderdale) and WTXL (Tallahassee)); (11) TEGNA Inc. (WTLV/WJXX (Jacksonville), and WTSP (Tampa)); (12) Tribune Publishing Company (*Orlando Sentinel* and *South Florida Sun-Sentinel*); and (13) WP Company LLC (*The Washington Post*).

³ Article I, Section 16(b)(5) of the Florida Constitution states that a crime victim has “[t]he right to prevent the disclosure of information or records that could be used to locate or harass the victim or the victim’s family, or which could disclose confidential or privileged information of the victim.”

Marsy’s Law defines a “victim” as: “a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act or against whom the crime or delinquent act is committed. The term ‘victim’ includes the victim’s lawful representative, the parent or guardian of a minor, or the next of kin of a homicide victim, except upon a showing that the interest of such individual would be in actual or potential conflict with the interests of the victim. The term ‘victim’ does not include the accused. The terms ‘crime’ and ‘criminal’ include delinquent acts and conduct.” Art. I, Sec. 16(e), Fla. Const.

The Proposed Rule contains companion descriptions at 2.423(b)(1) and (b)(3).

(something even Marsy's Law advocates have rejected⁴) and simple block-level information about where crimes occur.⁵

Aside from the right to know what is occurring in their neighborhoods, citizens equally possess the right to monitor government prosecutions and adjudications of crime, in both a timely and robust manner. As the Second Circuit has observed:

Transparency is pivotal to public perception of the judiciary's legitimacy and independence. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification.

U.S. v. Aref, 533 F.3d 72, 83 (2d Cir. 2008) (citations omitted).

The public's ability to observe court proceedings extends to records, with courts recognizing a First Amendment-based right of access. See, e.g., Associated Press v. U.S. Dist. Court for the Cent. Dist. of Cal., 705 F.2d 1143, 1145 (9th Cir. 1983) (finding First Amendment right of access to pre-trial criminal court records and noting that "the two principal justifications for the first amendment right of access to criminal proceedings"—that proceedings have been historically open and openness plays a role in the proper functioning of the judicial process—"apply, in general, to pretrial documents."). Indeed, "[i]t is arguable that the right of access to records may be more important than the right to observe the judicial process because it allows examination of documents, pleadings, and transcripts which portray a more complete picture of the official development and resolution of a case." Willie Nelson Music Co. v. Comm'r of Internal Revenue, 85 T.C. 914, 919 n. 15 (1985) (citation omitted).

Moreover, if the public is to stay meaningfully informed, timely access to records is also required. Florida courts, as well as courts around the nation, recognize this. See, e.g., Courthouse News Serv. v. Schaefer, 2020 WL 863516, *supra* note 1; Courthouse News Serv. v. Planet, 947 F.3d 581, 585 (9th Cir. 2020) (recognizing First Amendment right of access to newly-filed civil complaints and noting that "[t]he peculiar value of news is in the spreading of it

⁴ See Press Release from Marsy's Law in regards to public crime data, *SpotCrime*, Sept. 20, 2019, reprinted and available at: <https://blog.spotcrime.com/2019/09/press-release-from-marsys-law-in.html>.

⁵ See, e.g., Police wait days before alerting public to dangerous home invasion, *WINK* (Fort Myers), May 15, 2019, available at: <https://www.winknews.com/2019/05/15/police-wait-days-before-alerting-public-to-dangerous-home-invasion/>; Brittany Suzsan, Without a trace: How a misfired Florida law makes crimes disappear, Medium, Feb. 4, 2020, available at: <https://medium.com/@UFbrechnercenter/without-a-trace-how-a-misfired-florida-law-makes-crimes-disappear-a6b7eb49d0f4>.

while it is fresh”) (citation omitted); State ex rel. Miami Herald Publ’g Co. v. McIntosh, 340 So. 2d 904, 910 (Fla. 1976) (“News delayed is news denied.”). See also Associated Press, 705 F.2d at 1147 (vacating trial court orders imposing temporary seal on all pre-trial filings for court to review for potential fair trial impact of disclosure as violation of public’s First Amendment access rights).

The Proposed Rule

The Proposed Rule was drafted assuming the constitutionality of Marsy’s Law and prior to the resolution of any legal issues related to its interpretation. Until the constitutionality, scope, and proper application of Marsy’s Law have been resolved by the courts, the Joint Subcommittee took a practical approach in drafting the Proposed Rule.⁶ While the News Media Coalition reserves all rights related to challenging Marsy’s Law, it recognizes that the Proposed Rule reflects the Joint Subcommittee’s efforts to avoid automatic and draconian closures that an overly broad interpretation of Marsy’s Law would effect.⁷ The News Media Coalition’s primary concern is with delays in access to critical criminal records that might arise.

The Proposed Rule should be implemented as drafted, ensuring Clerks are relieved from any responsibility to hunt for or redact “victim” information a filer claims is protected under Marsy’s Law. That responsibility rightfully falls squarely, and solely, on the filer. This, the News Media Coalition maintains, will help achieve a better balance between the public’s right to ready access to court records and those currently afforded under Marsy’s Law. It would also relieve the Clerks of the impossible burden of undertaking this process every time a new filing is made in a criminal proceeding.⁸ To require so would grind Clerk operations to a halt and

⁶ One of the current—and central—disputes concerns whether Article I, Section 16(b)(5) is an “opt-in” provision that requires victims to affirmatively assert a right to confidentiality or instead is an “automatic” right that is triggered by virtue of being a qualifying “victim.” Other issues of current debate include, for example, whether law enforcement personnel can claim “victim” status as to alleged crimes committed against them while on duty. See, e.g., FOP seeks Marsy’s Law protection for JSO officers, *News4Jax*, Jan. 10, 2020, available at: <https://www.news4jax.com/news/local/2020/01/09/fop-seeks-marsys-law-protection-for-jso-officers/>; Florida cops who use force keep names secret with Marsy’s Law, *Tampa Bay Times*, Feb. 6, 2020, available at: <https://www.tampabay.com/news/2020/02/06/florida-cops-who-use-force-keep-names-secret-with-marsys-law/>.

⁷ Mainly, the Proposed Rule was drafted with the intent to avoid having to confront the disagreement as to whether Article I, Section 16(b)(5) is an “opt-in” or “automatic” right.

⁸ The News Media Coalition recognizes that as to “initial charging document[s],” Section (d)(1) of the Proposed Rule does not require filers of such documents to specifically identify what information is claimed as protected under Marsy’s Law by filing a “Notice of Confidential Crime Victim Information within Court Filing.” That notice requirement, found in Section (d)(2), applies to all subsequent filings. Section (d)(1) merely requires the filer to “indicate the existence” of such information in that filing. Indeed, these records are akin to civil complaints,

effectively shut down ready public access, flipping the public's presumptive right of access to court records.

The News Media Coalition also believes Section (d)(5)(B) is unnecessary and should be stricken. That section states that a Notice of Confidential Crime Victim Information with Court filing "Shall be confidential to the extent it contains crime victim information pursuant to article I, section 16." The proposed notice included within the Proposed Rule does not contemplate any substantive information that is claimed confidential be included on the actual notice. Rather, it only requires the filer identify exactly where the information is found in the subject filing.

The News Media Coalition therefore proposes two revisions to Section (d)(5). First, Section (d)(5)(B) should be replaced with language affirmatively prohibiting filers from including substantive information claimed protected under Marsy's law in such notices. For example, "(B) Shall not contain any information claimed to be subject to confidentiality under article I, section 16(b)(5) of the Florida Constitution." Second, additional language should be added to affirmatively state that a Notice of Confidential Crime Victim Information with Court filing "Shall not itself be confidential."

Finally, the News Media Coalition also suggests the RJAC consider whether the filer of information containing information protected by Marsy's Law that requires a notice under Section (d)(2) should also file a version of the document already in redacted form that conforms to the specific Marsy's Law designations identified. This should help relieve the Clerks of the additional step of having to redact documents, so that a redacted form of the record is contemporaneously available to the public. Much like the duty to minimize information in accordance with Rule 2.425, filers could take the additional step of submitting the redacted version of the subject record along with the unredacted version and notice as contemplated under the Proposed Rule. We understand individual Clerk records processing and document management systems may impact the ability to implement such a procedure but nonetheless believe the issue is worthy of consideration.

The News Media Coalition appreciates the opportunity to comment on the Proposed Rule and thanks the RJAC for considering its viewpoint. Again, it remains hopeful that any Proposed Rule facilitates constitutional access rights. We are available to respond to any questions or to discuss the Proposed Rule in greater detail if that would be helpful to the RJAC.

Very truly yours,

THOMAS & LoCICERO PL

/s/ Mark R. Caramanica

Mark R. Caramanica

which, as mentioned above, courts have held should be available the same day as filing to the extent practicable. The News Media Coalition therefore expects that access to such case-initiating documents will not slow should the Proposed Rule ultimately be approved.