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THE SUPREME COURT OF FLORIDA

PRIVACY, ACCESS, AND COURT RECORDS

Report and Recommendations

of the

Committee on Privacy and Court Records

Jon Mills, Gainesville, Chair

August 15, 2005

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I. Introduction

The Committee on Privacy and Court Records was created by Administrative Order AOSC03-49, signed by Harry Lee Anstead, Chief Justice of Florida, on November 25, 2003, substituted by AOSC04-4 on February 12, 2004. The creation of the Committee followed recommendations made by the Judicial Management Council[1] and by the legislatively created Study Committee on Public Records,[2] both of which recommended that the Supreme Court initiate a policy development process to guide the judicial branch in providing electronic access to court records.

The Administrative Order set out a charge to the Committee with three components which can be summarized as:

1. to recommend comprehensive policies to the Supreme Court to regulate the electronic release of court records;
2. to develop and initiate strategies to reduce the amount of personal and sensitive information that may unnecessarily become a part of a court record;
3. to develop and submit to the Court recommendations regarding categories of information that are routinely included in court records that the Legislature should consider for exemption from the right of access.

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[1] Report and Recommendations of the Judicial Management Council of Florida on Privacy and Access to Court Records, Judicial Management Council, December, 2001.

[2] Report of the Study Committee on Public Records, February, 2002.

The Chief Justice appointed Jon Mills, Dean Emeritus of the University of Florida Levin School of Law, as Chair of the Committee, and appointed the following individuals as members:

Ms. Kristin Adamson, Tallahassee

Mr. Andrew Z. Adkins, Gainesville

The Honorable Edward H. Fine, West Palm Beach

Professor A. Michael Froomkin, Coral Gables

The Honorable Lydia Gardner, Orlando

The Honorable Thomas D. Hall

The Honorable Jacqueline R. Griffin, Orlando

Mr. Jon Kaney, Jr., Ormond Beach

The Honorable Judith L. Kreeger, Miami

The Honorable Barbara T. Scott, Punta Gorda

The Honorable Kim A. Skievaski, Pensacola

The Honorable Elijah Smiley, Panama City

Mr. Walt Smith, Sarasota

The Honorable Larry Turner, Gainesville

The Honorable Henry H. Harnage, Miami

Judge Harnage was appointed as liaison to the Family Court Rules Committee and the Rule of Judicial Administration Committee. Justice R. Fred Lewis was appointed liaison to the Supreme Court of Florida. In early 2005 Judge Harnage reluctantly resigned from the Committee due to other workload demands.

The Committee held its first meeting in Tampa, Florida, on April 12 and 13, 2004. Subsequent meetings were held on August 20, 2004 in Orlando, November 17 and 18, 2004, in Tallahassee, January 18 and 19, 2005 in Miami,

March 7, 2005 in Gainesville, March 28, 2005 in Tampa, April 12, 2005 by telephone conference call, May 3, 2005, by telephone conference call, June 10, 2005, by telephone conference call, and June 22 and August 12, 2005, in Orlando.

The Committee is grateful to all of those who aided the Committee by providing it with meeting facilities and extended warm hospitality, including the Tampa Stetson Law Center, the Second District Court of Appeal, the Florida State University College of Law, the First District Court of Appeal, the Supreme Court of Florida, the Eleventh Judicial Circuit in Dade County, the Eighth Judicial Circuit in Alachua County, and the Ninth Judicial Circuit in Orange County.

A workgroup of the Committee conducted site visits to the offices of the clerks of court in Charlotte, Sarasota and Manatee Counties for the purposes of viewing first hand the document processing systems of a sampling of clerk offices. These site visits were highly educational, and the Committee extends its appreciation to The Honorable Barbara T. Scott, the Honorable Karen T. Rushing, the Honorable R. B. "Chips" Shore and their staffs for their assistance and hospitality in arranging these site visits.

During the course of its deliberations the Committee received formal public testimony at its meetings on November 17 and 18, and January 18 and 19. The Committee is grateful for the thoughtful comments offered by all of those appearing before the committee, as well as their written submissions.

A draft of this report was released for public comment on May 6, 2005. By the end of the public comment period written comments were received from approximately fifty individuals and organizations. These comments were very helpful to the Committee in finalizing this report and recommendations, and the

Committee wished to thank all of those who supplied comments for their efforts.

In June and July, 2005, several committee members wrote comments expressing their views. These were circulated among members, and the Committee held a final meeting on August 12 to reconsider the recommendations and the member comments and to record a vote for each separately.

The breadth and complexity of the subject under study is such that intelligent, reasonable people can and do reach different conclusions about law and policy. Indeed, public input to the Committee includes passionate, articulate arguments on a number of sub-issues. It should therefore not be surprising that the Committee could not reach consensus on several major issues, indeed it would be remarkable if it did.

The report contains twenty-four recommendations organized into three groups. Some of the recommendations received the unanimous support of all members, but many did not. To fully document and reflect this diversity of opinions, the votes of each member are included along with each recommendation. The narrative text of the report is intended to be descriptive of the rationale of the majority, and a vote against a particular recommendation should be understood to also indicate disagreement with the rationale behind it. There was no vote taken on the narrative section of the report. In addition, three member comments are included which express in detail the divergent views of their authors and members joining in the comments. Finally, two appendices are attached, one documenting the legal research on which the Committee based its decisions, and one presenting a draft of Rule 2.051 that incorporates many of the Committee's recommendations. These parts are valuable work product of the Committee and staff that generally represent the

views of the Committee. However the Committee did not have ample opportunity to fully discuss and vote on these documents in detail, and so they should not be understood to be sanctioned by the Committee in the way the individual recommendations are.

The Committee acknowledges and extends its gratitude to The Florida Bar Foundation, with funds provided by Florida's Interest on Trust Accounts program, for its support of the Committee. In addition, the Committee wishes to express its appreciation to Mr. John Adams of the University of Florida Levin College of Law and Ms. Sunshine Bradshaw of Florida Coastal College of Law.

Finally, the Committee expresses its appreciation to personnel in the Office of the State Courts Administrator, who supported its work, including Ms. Laura Rush, Ms. Peggy Horvath, Ms. Jo Suhr, Ms. Sherry Waites, and Mr. Steve Henley.

II. Technology in the Courts

Court systems, like other institutions, are in the midst of significant changes in the way they conduct business, changes compelled by the emergence of digital technology. The replacement of paper documents with digital records is not merely an efficiency improvement ancillary to the general conduct of court business. Digitization is changing the ways in which information can flow and spread, and in so doing is creating possibilities that did not exist with paper records. No institution is immune from the transforming force of the digital age. We have entered a new world.

These changes are occurring because digital records are different from paper records. Although the information intended to be conveyed is identical, there are qualitative differences that make them vastly more flexible, economical and useful

than paper records: A digital record can be created, transmitted, stored, replicated, searched and aggregated with degrees of speed and economy unimaginable with paper records. These qualitative differences make digital records far more desirable than paper records. The same differences also give rise to the problems that confront us.

Florida's court system is widely respected for its progressive approach to innovation and change, and particularly for its willingness to incorporate new technologies into court processes. In its formal planning processes the judicial branch expressly recognized the value of information technology to improve court access and operations.[3] The current two-year operational plan for the branch includes specific objectives related to electronic filing, integrated information systems, automated forms and increased reliance on web-based information communication.[4]

The Committee consulted the plans of the Florida judicial branch regarding electronic filing, and bases its conclusions and recommendations on the assumption that Florida's courts will increasingly rely on electronic rather than paper records. In considering access to these records, the prevailing view of the Committee is that in the long term there will not likely be, nor should there be, differential treatment of records in different forms. Having said that, the Committee also recognizes that there may in fact be sound practical and policy reasons to treat paper records differently from electronic records during a period of transition.

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[3] Strategies 4.1(f) and 4.2(c), *Taking Bearings, Setting Course; The Long-Range Strategic Plan for the Florida Judicial Branch*, Judicial Management Council, 1998.

[4] *Horizon 2006; The 2004-2006 Operational Plan for the Florida Judicial Branch*, Florida Supreme Court, 2005.

The Committee comprehends its task, therefore, as not merely to create an electronic access policy as a companion to an "over the counter" records policy, but to create a blueprint for a comprehensive policy on court records that will serve the public and the courts as they move through the transition from a system of primarily paper records to one of primarily digital records. The Committee cautions that in moving through this transition, great care must be taken to avoid doing harm to the fundamental values of our justice system. These include the essential quality of the judicial process itself, the best interests of parties before the court, and the trust and confidence of the public in their judiciary.

Policies regarding privacy and access to records must therefore be consistent with the fundamental vision and mission of the judicial branch and ongoing efforts to achieve that vision and mission.[5] The Committee therefore approaches its task with a large measure of trepidation, and urges all involved to move with care and thoughtfulness, and to be mindful at each step that the lives and liberties of present and future Floridians may well depend on the ability of the judicial branch of Florida to navigate this historic transition. The Committee views the bundle of issues regarding privacy, confidentiality and access to court records as inextricably nested within the larger context of the integration of emerging technologies into modern society. These issues must be understood as not merely technical, but as central to the functioning of the courts and to relations between citizens and their government.

III. The Roles of the Courts, the Legislature and the Clerks of Court

Effective coordination and implementation of a sound and effective court records policy will require a clear understanding of the relative roles and authority

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[5] The vision and mission of judicial branch of Florida are presented in Taking *Bearings, Setting Course,* supra note 3.

of several components of government involved in the judicial system. Beyond that, it will require respect of each for the roles of others, and a sustained willingness of all to work together in good faith for the public benefit. The principal entities in this endeavor include the courts, the Legislature and the clerks of the various courts. The Committee invested substantial effort in research, analysis and discussion to understand and articulate as clearly as possible the constitutional roles and authority of components of the system.[6]

The primary actor is the Supreme Court, along with the chief justice and the chief judges of the various courts. The judiciary article vests the judicial power in the courts and further provides that "[t]he supreme court shall adopt rules for the practice and procedure in all courts [and] the administrative supervision of all courts." The constitution further provides in Article V, section 2 that "[t]he Chief Justice . . . be the chief administrative officer of the judicial system," makes chief judges of the district courts of appeal "responsible for the administrative supervision of the court," and makes circuit court chief judges responsible for the "administrative supervision of the circuit courts and county courts" within their circuit.

That the judicial power includes the power to control its records is well-settled. This power has often been located within the inherent powers of the court. "[T]he general rule [is] that '[t]he judiciary has the inherent power and duty to maintain its records and to determine the manner of access to those records." *Gombert v. Gombert*, 727 So.2d 355, 357 (Fla. 1st DCA 1999) (*quoting Times Publishing Co. v. Ake,* 645 So.2d 1003, 1004 (Fla. 2d DCA), *approved,* 660 So.2d 255 (Fla.1995). It is possible but not necessary to view the inherent powers as a

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[6] See Appendix One, Legal Research, for a complete overview.

category different than the constitutional powers; the inherent powers describe the express judicial power to administer the judicial branch.

The power of the courts to manage judicial records is constrained by Article I, section 24 of the Florida Constitution. This provision (the "Sunshine Amendment") provides to every person a right of access to the records of government, including those of the judicial branch. The Sunshine Amendment and its implications for electronic court records is discussed more fully in Part IV of this report.

The Legislature has a significant role with respect to court records. Article II of the Florida Constitution mandates separation of powers, and it prohibits officers of one branch from exercising powers given to officers of any other branch, except as provided. Therefore the general power of the courts to supervise court records cannot be interfered with by the Legislature. However, the Sunshine Amendment vests solely with the Legislature the power to create new exemptions from the constitutional right of access, a power which extends to judicial records. Expressly provided in the constitution, this power is an exception to the general separation of powers. It is a discrete power, highly constrained by its own terms, and has never been held to vest in the Legislature any broader power over judicial branch records than that of creating exemptions.

The Committee notes that subsection (c) of the Amendment vests with the Legislature the power to enact laws governing the enforcement of the right of access. In granting a right of access to the people and expressly making it applicable to records of the judicial branch, the amendment does nothing to disturb the court's express and inherent power over its records. It is doubtful that the general enforcement clause extends legislative power to control the ways and means of access to records such that it would authorize the Legislature to enact a law compelling or forbidding the judicial branch from publication of nonexempt

records of the judicial branch electronically. Access to records and dissemination of records only tangentially implicates the housekeeping functions of "maintenance, control, destruction, disposal, and disposition." The Study Committee on Public Records concluded that this sentence did not authorize restrictions on Internet publication of records, and this Committee agrees with that interpretation.

The Legislature also has important powers to authorize fees and charges, and to appropriate funds for expenditure by the judicial branch. Further, within the bounds of the state and federal constitutions, the Legislature has the power under some circumstances to regulate the flow of personal information.

The clerks of the respective courts are the custodians of court records. The judicial power to administer the courts includes the power to supervise the management of court records maintained by a clerk in the performance of the clerk function as part of the judicial branch. See Rule of Judicial Administration 2.050(b)(2) and *Ake*, 645 So. 2d at 257 (holding that "the clerks of the circuit courts, when acting under the authority of their article V powers concerning judicial records and other matters relating to the administrative operation of the courts, 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").

This relationship sometimes gives rise to confusion, as the clerk of the circuit court is a constitutional officer yet subject to the administrative authority of the court. This confusion arises out of the constitutional provision creating the office, which on its face confers no powers or discretion on the clerk. Instead, section 5, Article II of the Florida constitution provides that "[t]he powers, duties, compensation and method of payment of state and county officers shall be fixed by law." This provision, which appeared as early as the 1885 Constitution, rejects the doctrine, sometimes called the *eo nominee* doctrine, that holds that officers named

in the constitution are vested with the common law powers of their common law counterparts. Further, the clerk of court in Florida is uniquely established in both the judicial and executive branches of government, and in each realm the express powers of the office are contingent upon local legislation and judicial supervision respectively.

Thus, "[t]he settled law in respect to such officers [clerks] is that the making or keeping of court records is a purely ministerial duty, and that in the performance of the duty such officers have no power to pass upon or contest the validity of any act of the court for which they act as clerk which purports to have been done in the performance of its judicial function." *State ex rel. Druissi v. Almand*, 75 So.2d 905, 906 (Fla. 1954).

> The Clerk is merely a ministerial officer of the court. *Leatherman v. Gimourginas*, 192 So.2d 301 (Fla.App.3d, 1966). He does not exercise any discretion. *Pan America World Airways v. Gregory*, 96 So.2d 669 (Fla.App.3d, 1957). He has no authority to contest the validity of any act of the court for which he acts as clerk which purports to have been done in the performance of the court's judicial function. *State v. Almand*, 75 So.2d 905 (Fla.1954).

Corbin v. Slaughter, 324 So. 2d 203, 204 (Fla. 1st DCA 1976) (holding that Clerk was required to comply with circuit judge's order to provide the judge with a schedule of deputy clerks assigned to his court).

As stated above, there is not universal agreement on the legal underpinnings of the relationship between chief judges and clerks. The line of analyses presented above is challenged in a public comment submitted to the Committee on behalf of the Florida Association of Court Clerks and Comptrollers: "Clerks have inherent authority to manage the performance of their constitutional and legislatively

imposed duties such as providing the public access to court records. We believe Clerks cannot overemphasize the necessity of maintaining independence in our administrative and ministerial functions in order to protect the integrity of the court system."[7] In supporting this position the Association relies on the case of *Morse v. Moxley*, 691 So.2d 504 (Fla. 5th DCA 1997) where the court held that the chief judge of a circuit did not have the power to assign deputy clerks to specific courts.

In attempting to direct the clerk as to which specific personnel would be assigned to courtrooms, Chief Judge Moxley relied on subsection 43.26(2)(d), Florida Statutes, which provides that a chief judge shall have the power "[t]o require attendance of state attorneys, public defenders, clerks, bailiffs, and all other officers of the court" and on Fla. R. Jud. Admin. 2.050(b)(6) which provides that the chief judge may "require the attendance of prosecutors, public defenders, clerks, bailiffs, and other officers of the courts." The Clerk argued that these provisions give authority "for the chief judge to require the attendance of clerks in court, these provisions cannot be properly construed to allow a chief judge to assign a specific deputy clerk to a specific judge during a specific time in a specific place because that would divest the clerk of administrative control of her own office." *Id.*

The Court agreed with the Clerk. "If we were to allow section 43.26 to have the broad application urged by [Judge Moxley], the statute would run afoul of the constitutional grant of power to the Clerk of the Court. We believe the statute grants only that authority to the Chief Judge as is contended by the Clerk. The hiring and firing, and specific designation of deputy clerks must rest with the Clerk." *Id.*

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[7] Tim Sanders, President of the Florida Association of Court Clerks and Comptrollers, June 2, 2005.

In reviewing this case, the Committee perceives that it was unnecessary and hence dictum for the court to pass opinion on the "constitutional grant of power to the Clerk of the Court," as the district court did. In fact, the constitution grants no power to the clerk of the circuit court. By plain meaning, the chief judge's order exceeded the authority vested in him by either the statute or rule.

More pertinent to the present discussion is the authority of the Court to make policies regarding access to judicial records. This is not a matter of "administrative and ministerial functions," but of policy. Here the law is well settled: "[T]he clerks of the circuit courts, when acting under the authority of their article V powers concerning judicial records and other matters relating to the administrative operation of the courts, 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." *Ake*, 645 So. 2d at 257.

Finally, of significant note is the recent passage of HB 1935, a "glitch bill" for implementation of Revision 7 issues, signed into law by the Governor on June 14, 2005. Among other things this bill amended section 43.26, Florida Statutes -- the same section at question in *Moxley* -- as follows:

> The chief judge of each circuit is charged by s. 2(d), Art. V of the Florida Constitution and this section with the authority to promote the prompt and efficient administration of justice in the courts over which he or she is chief judge. The clerks of court provide court-related functions which are essential to the orderly operation of the judicial branch. The chief judge of each circuit, after consultation with the clerk of court, shall determine the priority of services provided by the clerk of court to the trial court. The clerk of court shall manage the performance of such services in a method or manner that is consistent with statute, rule, or administrative order.

As this statute makes clear, a clerk of court is not independent of the court in performance of court-related functions, but is explicitly subordinate to the plenary authority of the Supreme Court and the chief judge, and must perform services in a manner consistent with statute, court rule or administrative order.

Finally, the Committee notes that a private entity which performs a governmental function on behalf of government is subject to the same law as the delegating entity regarding the performance of the function. The Florida Association of Court Clerks and Comptroller, Inc. (FACC) is a private non-profit organization. This organization has established the Comprehensive Case Information System (CCIS). The FACC has characterized itself as an agent of the individual clerks of circuit courts for purposes of gaining electronic access to court records under subsection (c) of Supreme Court Administrative Order AOSC04-4. Further, in authorizing the FACC to carry out this project and in appropriating a dedicated funding stream, the Legislature has delegated the functions associated with CCIS to FACC The agency relationship is likewise consistent with Section 28.24(12)(e)(1), Florida Statutes, which presently states that "[a]ll court records and official records are the property of the State of Florida, including any records generated as part of the Comprehensive Case Information System, . . . and the clerk of court is designated as the custodian of such records."

In sum, oversight of the management of court records and the administration of policies regarding access to them is within the general supervisory powers of the Supreme Court and the chief judicial officers, but also implicates in significant degree the Legislature, the clerks of court and the Florida Association of Court Clerks. The ability to make court records available electronically is contingent on these entities working effectively together, a condition which requires clear understanding and respect for the relative roles of each.

IV. The Right of Access to Public Records

Open government is a principle of the highest order in Florida. "[O]pen access to public records is both a constitutional right and a cornerstone of our political culture."[8] The Committee agrees with the numerous parties that provided input that there should be no retreat from the principle of open government, and that the records of Florida courts should remain open for public inspection except in those instances where the record is closed by law. The Committee is unanimous in the view that all information in court records which is not confidential should remain open for public inspection and copy. Nothing that the Committee recommends affects the right of access in any way. The Committee makes no recommendations to close any court records from the public.

The benefits of access to public records can be sorted into several conceptual bundles according to the use or purpose of the access. These bundles then can be ranked in a hierarchy of public value. The highest order benefits of open records are those derived from the accountability that openness brings to the use of governmental power. Open records facilitate transparency in government. Transparency supports accountability in decision making. Accountability compels consistency and fealty to due process and the law. This is the public policy value that motivates Florida's constitutional right of access:

> In serving the right of each citizen to be informed, judicial openness, of which the press is an instrument, sustains public confidence in the judiciary and thus serves the ultimate value of popular sovereignty.

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[8] *In Re Report and Recommendations of the Judicial Management Council of Florida on Privacy and Access to Court Records*, 832 So 2nd 712 (Fla. 2002).

John Doe 1 through John Doe 4, et al. v. Museum of Science and History, et al, 1994 WL 741009 (Fla. Cir. Ct.)

The second bundle concerns the fair and efficient treatment of parties as they interact with the judicial process. When parties and attorneys are provided with access to the information used by the court in making judicial determinations, they can make informed decisions about strategies and tactics in their cases. There are no surprises. Remote electronic access for attorneys and parties would yield great improvements in efficiency.

A third bundle concerns the use of court record information by non-parties with an interest in the information about events and outcomes in court cases. Employers have an interest in the criminal history of potential employees; title search firms must carefully investigate the legal status of assets and properties; the right to vote may be contingent on the fact of conviction of a felony. Access to court records facilitates these transactions. Similarly, case data, specific and aggregated, is invaluable to researchers, scholars, court administrators and others in conducting inquiries that improve the administration of justice and inform study of broader social and political issues

A fourth bundle concerns the commercial use of information gleaned from court files wherein the use to which the information is put bears no relationship to the events under adjudication. Modern data companies continue to develop portfolios on individuals, adding any information that can be gathered from any source. The public benefit of such uses is remote from the purpose for which the public record was created, and there are greater private benefits derived by non-parties.

A fifth conceptual bundle is the use of court records for essentially voyeuristic purposes with little or no social value and some social harm. For example, concerns about the publication of victim photographs in the case of the

Gainesville slayings committed by Danny Rolling motivated a partial closure of such evidence in that case.

A final conceptual bundle of "benefits" concerns the value of information in public records to facilitate criminal activity. The most common example is identity theft, but stalking, harassment and domestic violence can also be facilitated by use of information gathered through public records. Such uses provide only a "private good" to perpetrators and are otherwise a social bad.

In formulating access policies the objective should be to promote the uses which have higher public value and to discourage or prohibit the uses which cause social harm or have little public benefit. Within this context, advocates of open government must recognize that the right of access to public records under the Florida Constitution does not create a right to *Internet* publication of those records. While electronic publication of government records may be of benefit and economy under many circumstances, no agency of government is constitutionally mandated do so. The question of whether records should be released electronically does not implicate the right of access, but is rather a question of balancing convenience and efficiency against costs and harms. It is not a question of law but one of judicial branch policy.

V. The Right of Privacy

The Florida Constitution includes two provisions intended to protect the privacy interests of Floridians. Both of these have significant implications regarding court records. The first constitutional provision is the right of privacy contained in the Declaration of Rights. Article I, section 23 affords to Floridians a protection broader in scope than the right of privacy provided in the United States

Constitution. Approved by the voters in 1980, this provision, in its present form[9] provides in full:

> Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Several aspects of this provision bear discussion. First, it protects only against governmental intrusion into privacy. The question has been raised whether the provision should be expanded to provide protection in private and commercial contexts. Writing in 1997, Justice Ben Overton and Kathleen Giddings recommended revision of the provision to create protection from non-governmental intrusion. Regarding the existing text and the rise of data aggregation, they observed that:

> It does nothing to protect citizens from intrusions by private or commercial entities. Without question, it is this latter intrusion that will present the greatest privacy challenge in the coming decade and the twenty-first century. As technology develops, more and more methods for assimilating and distributing information will likely become available. As the United States Supreme Court has recognized, an individual's interest in controlling the dissemination of personal information should not dissolve simply because that information may be available to the public in some form." Given the current state of technology, as well as the potential for more sophisticated advancements, the time is ripe to consider taking steps that may ensure protection of our

[9] A 1998 amendment was a technical revision that cured gender-specific language without alteration to substance.

> privacy into the future. Otherwise, "[p]rivacy as we know it may not exist in the next decade." (internal citations omitted)[10]

Second, the right of privacy on its own terms does not protect information in a non-exempt public record. The rule that there is no disclosural right of privacy in public records of the state was firmly settled both as a matter of tort and constitutional law in Florida prior to the creation of the present constitutional right:

> We conclude that there is no support in the language of any provision of the Florida Constitution or in the judicial decisions of this state to sustain the district court's finding of a state constitutional right of disclosural privacy.

Shevin, 379 So. 2d at 639.

Following this decision, the people of Florida amended their Constitution to create the right of privacy, but explicitly subordinated it to the right of access to public records. The Amendment provides that it "shall not be construed to limit the public's right of access to public records and meetings as provided by law" (emphasis added). In *Michel v. Douglas*, 464 So. 2d 545, 546 (Fla. 1985), the Court noted that "[b]y its specific wording, article 1, section 23 of the state constitution does not provide a right of privacy in public records:"

The Supreme Court has further held that any federal disclosural right of privacy will not outweigh the public right of access to a public record. "Additionally, we recently found no state or federal right of disclosural privacy to

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[10] Overton, Ben F., and Giddings, Kathleen E., *The Right of Privacy in Florida in the Age of Technology and the Twenty-first Century: A Need for Protection from Private and Commercial Intrusion,* Florida State University Law Review, Fall, 1997.

exist." *Michel v. Douglas,* 464 So. 2d 545, 546-7 (Fla. 1985) (citing *Forsberg v. Housing Authority*, 455 So. 2d 373, 374 (Fla.1984)).

In sum, court records are public records, and public records once created are not protected by the state right of privacy, by federal right, or by common law tort. This does not mean, however, that the state right of privacy has no relevance for purposes of the issues before this Committee. It does. While the privacy right does not protect privacy interests with respect to information contained in public records, it does protect privacy interests with respect to information not yet disclosed by an individual. The Committee urges that the right of privacy in this context be more fully explored, and efforts taken to give it full force and effect in the protection of the personal information of Floridians.

Article I, section 23 has been interpreted to create a high burden which government must overcome when it seeks to compel a person to provide personal information about which an expectation of privacy exists:

> The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden of proof can be met by demonstrating that the challenged regulation serves a compelling state interest, and accomplishes its goal through the least intrusive means.

Winfield v. Division of Pari-Mutual Wagering, 477 So. 2d 544, 547 (Fla. 1985).

More recently, this provision was applied in a case regarding a statutory requirement that a taxpayer applying for a homestead tax exemption must provide

a social security number on the application.[11] The District Court held that a taxpayer has a reasonable expectation of privacy with respect to a social security number, and there had not been a showing of a compelling state interest in requiring the social security number as a condition for obtaining the tax benefit. The Court remanded. In discussing the purpose of the constitutional right, the Court cited comments made by Chief Justice Ben Overton before the 1977-78 Constitutional Revision Commission:

> "[w]ho, ten years ago, really understood that personal and financial data on a substantial part of our population could be collected by government or business and held for easy distribution by computer operated information systems? There is a public concern about how personal information concerning an individual citizen is used, whether it be collected by government or business. The subject of individual privacy and privacy law is in a developing stage . . . . It is a new problem that should be addressed."

Rasmussen v. S. Florida Blood Serv., Inc., 500 So. 2d 533, 536 (Fla. 1987).

The Second District in Thomas observed, citing the opinion in Rasmussen, that "the principal aim of the constitutional provision is to afford individuals some protection against the increasing collection, retention, and use of information relating to all facets of an individual's life. . . . Against this background," the District Court concluded, "it seems obvious that private, sensitive, and confidential information regarding individuals is protected by the privacy clause of the Florida Constitution."[12]

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11 Fred A. Thomas and Joy S. Thomas v. Jim Smith, et al, 882 So 2d 1037, (Fla. 2d DCA, 2004).

12 Supra at 1043.

VI. Personal Information in Court Records

Florida court records contain a great deal of personal information about people, much of it needed to adjudicate issues before the court, and some of it extraneous and unnecessary for purposes of adjudication, case management, or any other purpose of the court. Florida courts routinely collect personal information about people under circumstances that do not arise to the level of a compelling need, in apparent conflict with the spirit if not the letter of the right of privacy.

The Committee bases this conclusion on extensive input received from attorneys and judges in response to its outreach efforts. Reported instances of the disclosure of information that may not be necessary include data in various required documents in all divisions of the trial courts, especially in juvenile,[13] family, probate and criminal cases. Court records frequently contain documents that unnecessarily include: social security numbers, financial information, names, ages, addresses, driver records, information about family members, and medical and other intimate information. For example, in some instances parties are required by the court to produce a driver's license, which is photocopied and the copy included in the court file.[14]

The discussion above concerns information that is required to be disclosed, possibly under circumstances that would not withstand scrutiny if challenged under

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[13] The impact of unnecessary collection of information is lessened in most juvenile because they are statutorily exempt from disclosure. However, the fact of collection is separate from release, and the right of privacy protects juveniles as it does adults.

[14] Certain information contained on a driver's license, which includes the license number, photo, signature and medical information, is protected from general agency release under the federal Drivers Privacy Protection Act and Chapter 119, Florida Statutes. In this case the information is being required directly from the individual, but the state and federal protections would support the notion that a person could have a reasonable expectation of privacy in the information.

the state right of privacy. In many other instances that personal information is not compelled but is voluntarily provided to the court. While these circumstances do not run afoul of the letter of the constitution, they may be inconsistent with its general intent, and are at any rate important to consider within the overall policy discussion.

A common occurrence of voluntary unnecessary filing of personal information takes place when discovery material is filed with the court at the time it is provided to the opposing party. The filer is under no obligation to file the material with the court, and most of it is unnecessary for purposes of the court at that time. However, the filer does so for other reasons, often to document compliance with the discovery request. In many of these circumstances, the party providing the information is probably unaware of effectively waiving a valuable constitutional right and simultaneously offering up the information to the public domain.

The Committee urges the Supreme Court to consider a strategy made up of three components, each designed to curtail, or minimize, the inclusion of personal information in court files that is unnecessary for purposes of adjudication and case management. The components are distinct, and any one can be pursued without the others, but the committee feels that all three are viable and necessary to protect the privacy interests of court users in the digital era.

The first component of the strategy requires a systematic and meaningful review of all rules of court and commonly used forms for the purpose of reducing the unnecessary inclusion of personal information in court files where it is subject to release as a public record. This review should include clear direction to appropriate rules committees to undertake such a review in consultation with relevant sections of The Florida Bar. The essential task is for the each rules committee to assure the Supreme Court that all rules of court and commonly used

forms within the practice area do not tend to cause individuals to disclose personal information in a manner inconsistent with both the letter and the spirit of the constitutional right of privacy.

A particular form of the type of voluntary public disclosure addressed above concerns the filing of financial affidavits generated pursuant to Florida Family Law Rule of Procedure 12.285. Pursuant to its charge the Committee has reviewed this rule and recommends revision to the rule as follows.

Rule 12.285 requires mandatory disclosure in many family cases, including filing and serving extremely detailed financial affidavits at certain times during certain case processes.[15] One District Court of Appeal applying the rule to a case where neither party requested financial relief stated "It stands to reason then, that if a court in a dissolution proceeding under this rule, is not being called upon to award any permanent financial relief to a party, financial affidavits are not required and are indeed wholly irrelevant to the proceeding."[16] The rule requires that each party only serve other mandatory disclosure documents on the other party, not necessarily submit those disclosure documents to the court. Rule 12.285(i) requires parties to file a certification affirming that the party has complied with the disclosure requirement, and further instructs that except for a child support guidelines worksheet, the other disclosure documents are not to be filed with the court without a court order. This portion of the rule is commonly overlooked or ignored, and parties, particularly parties proceeding pro se, commonly file the mandatory disclosure documents when disclosing them *to* the opposing party. As part of the above recommendation the Committee recommends that the Supreme Court direct the Family Law Rules Committee to consider proposing revision of Rule 12.285 to minimize this problem.

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[15] Fla. Fam. L. R. P. 12.285(d) ; 12.285(b)(1) ; 12.285(a)(1) ; 12.285(c)(1)
[16] *Salczman v. Joquiel*, 776 So.2d 986 (Fla. 3d DCA 2001).

The second component of a strategy minimization involves a comprehensive and ongoing educational effort to communicate to the public, attorneys, judges and court and clerk staff about the loss of privacy that can occur when unnecessary personal information is entered into court records.

The third component of a strategy of minimization involves a fundamental shift in the posture of courts in Florida regarding the very acceptance of filings. Traditionally, Florida court files have been governed by the principle that a party may file any document, and a clerk of court is obliged to accept it. This principle, which can be referred to the "open file" principle, allows the court file to become a vehicle for unjustified violation of privacy when attorneys and pro se litigants file extraneous information in court files. Once filed, judicial immunity protects the filer from liability for harm to reputation because the law of privacy holds that no person has an action for invasion of privacy based on the filing or publication of a court record. The potential for electronic release has compounded the potential harm many fold.

The Committee urges reconsideration of the principle of the open file, and recommends consideration of the alternative concept that a court file is not a public common, where anyone is free to post anything, but should instead be understood for what it is: a conduit and repository of information exchanged between parties and the court.[17] As such, the court file is the responsibility of the court, and the placing of a document into the court's file is a privilege subject to appropriate constraint to prevent harmful abuse. This principle can be referred to as a

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[17] One attorney testified that: "I don't have an expectation of privacy in the courthouse . . . . It's a public commons. Its Central Park." Responding to a question about Internet posting of forensic photographs of sexual assault victims: "It may be important to actually see it, no matter what is the parade of horrors." David Bralow, Assistant General Counsel, Tribune Newspapers, remarks before Committee, November 17, 2004.

"controlled file." The Committee notes that other jurisdictions, particularly the federal courts, exercise substantial control over the content of their files. This would not be an entirely new undertaking. Court rules have long allowed a party to move to strike "redundant, immaterial, impertinent, or scandalous matter from any pleading at any time." Fla.R.Civ.P. 1.140(f). Also a party may move to strike a "sham" pleading. Fla.R.Civ.P. 1.150. These mechanisms would be inadequate to protect legitimate privacy interests in an environment where records are available for immediate electronic release because the information would be disseminated before a party could make such a motion and reach a judicial determination. Furthermore, these remedies require an affirmative act by the injured party, which itself requires knowledge of the harmful filing.

The Committee is aware that the concept of a controlled file represents a significant change in traditional notions about court files in Florida, and that the implementation of such a concept statewide would be a major undertaking requiring significant resources and policy attention. The Committee is of the view, however, that the electronic release of court records cannot be achieved if court files remain open to receipt of unnecessary and immaterial personal information. Digital records create novel challenges, and so novel solutions are called for if the resolution of the tension inherent in a system that seeks to encourage public transparency while appropriately protecting privacy is to be resolved.

Discovery Information.

Finally, as part of the general strategy of minimization outlined above, the Committee urges a specific remedy to the problem of the gratuitous filing of information that has been disclosed pursuant to a discovery order. The power to compel disclosure of information in discovery is highly invasive, and takes on new significance in light of the potential for the electronic dissemination of the

compelled information. The Committee recommends that steps be taken to restrain parties who gain possession of information pursuant to compelled discovery from unnecessarily and gratuitously publishing such information into a court file.

Recognizing this invasive power of discovery, as the Supreme Court has in *PNI v. Doe*, (cite) among other cases, the Supreme Court should direct the consideration of a rule that would require that attorneys and litigants refrain from filing discovery information with the court until such time as it is properly filed for good cause. The Committee is well aware that this issue likely raises a number or collateral issues, but nonetheless it appears to the Committee that restrictions on compelled information is consistent with the terms and intent of the state constitutional right of privacy, limiting as it does the intrusiveness of the requirement to disclose to the achievement of its purpose

VII. Exemptions and Confidentiality

As noted above, there are two state constitutional provisions intended to protect the privacy interests of Floridians. The discussion and recommendations in the previous section centered on the right of privacy. The right of privacy empowers citizens to resist the compelled disclosure of personal information. It is intended to operate to keep personal information out of government hands in the first place. Under many circumstances, however, there is a necessity for government to require personal information. This is particularly true in the court context because courts are commonly called upon to resolve highly personal issues. The second provision therefore concerns protection of privacy interests in information *after* it has come into a public record.

Article I, section 24 of the Florida Constitution provides in subsection (a) that "[e]very person has the right to inspect or copy any public record." Subsection (c) creates a mechanism for the Legislature to create exemptions to this

general right: "The Legislature, however, may provide by general law passed by a two-thirds vote of each house for the exemption of records from the requirements of subsection (a) . . . provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law."

In addition to the grant of power to the Legislature in subsection (c), subsection (d) includes a clause which provides that "rules of court that are in effect on the date of adoption of this section that limit access to records shall remain in effect until they are repealed." In October, 1992, the Florida Supreme Court adopted Rule of Judicial Administration 2.051 to conform court rules to the pending the constitutional amendment.

A central problem that has been brought to light by the rise of digitization concerns the great practical challenges inherent in wholesale identification and protection of information that is confidential under the current rule. Confidential information in a court record may not be released, either "over the counter" of a clerk of court office or electronically. Traditionally, a request "over the counter" created an opportunity for clerk staff to manually examine the record and redact or withhold confidential information. Many records were never requested and thus never examined in this manner.

The prospect of the wholesale release of court records electronically poses substantial practical problems in locating and protecting or redacting confidential information in court records. Before these operational issues can be addressed, however, there is a threshold legal issue that requires resolution regarding the very understanding of what information must be kept confidential in Florida court records and what information is not protected. The Committee has found that there is disagreement in Florida on this critical matter.

Absorption.

The question revolves around the interplay of Rule 2.051, adopted to fall within the window created in subsection (d) of Section 24, Article I of the Florida Constitution, and statutory exemptions in existence in 1992 and passed pursuant to subsection (c) as well as confidentialities based in federal law. The Committee conducted research and considered the matter in depth and reached a conclusion as to what it believes the scope of confidentiality in court records to be at present. The Committee shared its analysis with interested parties,[18] and has received written comments and oral testimony presenting alternative views.[19] The Committee is well aware that its opinion carries no legal weight, and that ultimately the matter may have to be addressed through properly pled cases.

The crux of the issue concerns the application of Rule of Judicial Administration Rule 2.051(c)(8). The question is whether the rule incorporates, or absorbs, state exemptions and federal confidentialities, thus making them confidentialities under the court rule. The Committee believes that it does.

The effective difference in terms of the volume and nature of information protected in Florida court files is great. Under the "full absorption" view held by the Committee, information deemed worthy of protection under state or federal law generally is confidential when it is in a court file. Under the "non-absorption" theory, advanced by interested parties, filing into a court file is tantamount to publication, and thus most information loses its protected status. There has also

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18 See Appendix One, Legal Analyses.

19 Memorandum of November 1, 2004 by Carol LoCicero and Patricia Wallace on behalf of the Media & Communications Law Committee of The Florida Bar entitled *Whether the Public Records Act Exemptions Apply to Court Records.* See also: Memorandum of November 7, 2004 by member Jon Kaney, entitled *"Legal Issues: Comments on Memorandum of November 1, 2004 of the Media & Communications Committee of The Florida Bar regarding "Whether the Public Records Act Exemptions Apply to Court Records."*

been advanced a "narrow absorption" perspective that holds that the only information that remains protected is that which is the subject of an express exemption specifically directed to judicial records. Under a non-absorption or narrow absorption view hundreds of state statutory exemptions[20] would not be applicable to court records.

Rule of Judicial Administration 2.051 governs public access to the records of the judicial branch. Rule 2.051(a) provides for public access to all records of the judicial branch, access mandated by the right of access, except as provided *within the rule*. Rule 2.051(c) then enumerates exceptions to the application of the general rule and states that the excepted records "shall be confidential." Among these exceptions, subdivision 2.051(c)(8), includes:

> [a]ll records presently deemed to be confidential by court rule, including the Rules of Admission to the Bar, by Florida Statutes, by prior case law of the State of Florida, and by the rules of the Judicial Qualifications Commission.

The Committee believes that on its face this rule incorporates state statutory exemptions, making exempt information confidential[21] within judicial branch

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[20] Various inventories yield different numbers based on method. The Office of the Attorney General places the total at 683 (*Presentation to The Florida Supreme Court Committee on Privacy and court Records).* The Florida Senate Committee on Governmental Oversight and Productivity places the amount at approximately 900 (*Public Records and Meetings: Clarifying and Streamlining Open Government Requirements, Interim Project Report 2005-138*), the First Amendment Foundation calculates the number to be 1,027, (*Database of Exemptions to Florida's Open Government Laws,* The First Amendment Foundation, 2005).

[21] The terms "exempt" and "confidential" are not synonymous, but by operation of the rule information which is made exempt by statute becomes confidential under the rule. See Part F of Appendix One. "Exempt" information

records.[22] The Committee believes that this is the interpretation given to the rule by the Florida Supreme Court in *State v. Buenoano,* 707 So. 2d 714, 718 (Fla. 1998). In deciding that the records in question in that case were confidential court records, the Court reversed a contrary holding of the trial court. The trial court had assumed the records had lost their confidentiality in light of their disclosure to the defendant and, applying the balancing standard of Rule 2.051(c)(9), found no grounds to seal the records. Relying on subdivision (c)(8), rather than (c)(9), the Supreme Court reversed, and explained that:

> Rule of Judicial Administration 2.051 does not change our conclusion that the documents at issue are not subject to public inspection. Although the documents when given to Buenoano were placed in Volume IV of the court record, rule 2.051(c)(8) specifically adopts statutory public records exemptions. *See Florida Publ'g Co. v. State,* 706 So.2d 54 (Fla. 1st DCA 1998). That rule exempts from public access "all records presently deemed to be confidential by ... Florida Statutes." Since we have determined that the documents are exempt from public access under chapter 119, they are likewise exempt under rule 2.051.
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> *State v. Buenoano,* 707 So. 2d 714, at 718 (Fla. 1998).

Advocates of the non-absorption theory dismiss this as dictum. The Committee does not agree, believing that the holding that the relevant exemption is incorporated through Rule 2.051(c)(8) was essential to the result that the

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may be released at the discretion of the custodian. "Confidential" information may not be released to unauthorized persons. Rule 2.051 does not afford discretion, thus all exempt information becomes confidential and cannot be released.

[22] "Records of the judicial branch" includes "court records," which are the contents of a court case file, and "administrative records" of the courts.

information in question remained inaccessible, and so cannot be disregarded as superfluous. The point that the information in the court file is made confidential because Rule 2.051(c)(8) incorporates, *inter alia*, the exemption of subsection 119.072 is necessary to the ruling that the records remained exempt. It cannot therefore be dictum but is rather a holding on a matter of law. Alternatively, non-absorption advocates maintain that the Supreme Court, despite its holding, incorrectly interpreted the law and applied the wrong rule.[23]

In a memorandum submitted to the Committee, advocates of the non-absorption theory argue that Rule 2.051(c)(8) does not incorporate the statutory exemptions because the statute expressly provides, and the Supreme Court has often said, that the public records statutes do not apply to court records.[24] This is true, but misses the point. The fact that the Legislature cannot legislate with respect to court records did not prevent the Court from exercising its authority in the window prior to the Sunshine Amendment to incorporate by reference statutory exemptions as rule-based exemptions applicable to court records. The question is not whether the statutes apply to the court records, but whether the court rule incorporates the statutory exemptions. The Committee believes that it does, that it does so on its face, that this was the intention of the Court in adopting the rule in 1992, and that the Court has endorsed this construction in its subsequent decisions.

The practical implications surrounding either interpretation of the absorption question are significant. If the rule does not absorb state and federal law, hundreds

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23 "I think the proper way for Buenoano to have come out, if the court was going to determine that a closure was appropriate, was for the court to have applied the Barron standard in (c)(9)." Carol LoCicero, remarks before Committee, November 18, 2005.

24 Supra note 19. While this argument is summarized here for purposes of discussion, the Committee does not suppose to represent the views of the interested party and commends the full memorandum submitted to the Committee.

of state statutory exemptions and federal confidentialities would no longer apply when the information entered a Florida court file. It is doubtful that this would be a result that the Legislature ever contemplated when creating exemptions. Nor is there an indication that the Supreme Court intended this result when it adopted Rule 2.051.

The fact that the Court made no reference to the issue when it announced the rule in 1992 supports the conclusion that it did not desire to abandon the statutory exemptions and expose previously confidential information. In fact the Court thought that the exceptions to the general rule of access were "reasonable and necessary" because they "permit the judiciary to protect the rights of citizens and perform its responsibilities."[25]

The "Impossibility Problem" and Reexamination of the Scope of Confidentiality

While the Committee is firm in the conclusion that Rule 2.051(c)(8) currently absorbs statutory exemptions, it also agrees that a system which would require all court records to be inspected to redact all information embraced by the current rule would be exceedingly difficult, if not practically impossible, given the scope of the rule and the foreseeable resources of the judicial branch. This has come to be referred to as "the impossibility problem." After lengthy struggle, the Committee has therefore has reluctantly reached the conclusion that implementation of a system that allows large volumes of court records to be released electronically cannot be responsibly achieved at this time.

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[25] *In Re Amendments to the Florida Rules of Judicial Administration - Public Access to Judicial Records*, 608 So. 2d 472, 473 (Fla. 1992).

In reaching this conclusion the Committee agrees with public comments received from clerks of court and others:

> Even the best guidance possible as to what should be kept confidential under Florida law would not, contrary to the (draft) Report's suggestion, enable Clerks to afford the adequate time, staff, and resources necessary to systematically inspect and scrupulously protect such information in millions of public records.[26]

> However, even if we were to accept the CPCR's various conclusions regarding the absorption of exemptions under Rule 2.051(c)(8), we must immediately recognize the overwhelming practical and administrative problems placed on the courts as judges and clerks attempt to review hundreds of court documents for confidential or exempt information. The task is impracticable, if not impossible.[27]

Further consideration has led the Committee to the belief that many of the incorporated exemptions in Florida law may be either unnecessary or excessively broad in the judicial context. The strong presumption of openness, flowing from both the Sunshine Amendment of the Florida Constitution and the First Amendment of the United States Constitution, argues against the categorical closure of records as it does the closure of proceedings.

Public input provided to the Committee indicates that the constitutionality of the present rule may be subject to challenge on First Amendment grounds.[28] For example, section 119.07(6)(k), Florida Statute provides that "[a]ny information

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26 Diane Matousek, Clerk of Court, Volusia County.

27 Barbara Petersen, President, First Amendment Foundation.

28 John Bussian on behalf of Florida Freedom Newspapers, et al, March 23, 2005.

revealing the substance of a confession of a person arrested is exempt from the provisions of § 119.07(1)] and s. 24(a), Art. I of the State Constitution State Constitution, until such time as the criminal case is finally determined by adjudication, dismissal, or other final disposition." The question can be asked whether a rule incorporating this provision, which would have the effect of automatically sealing the record of a confession introduced or proffered as substantive evidence in a trial, overrides the presumptive openness of court records. One would think not, but even if it did, would this be sound policy? It appears that in creating the statutory exemption the Legislature did not contemplate its application in court, and in incorporating the statute into the rule the Court may have been overcautious. If the substance of a confession that is entered into evidence in a criminal trial is made technically confidential by operation of the rule, then the rule begs for reexamination.

The Committee therefore recommends that the Supreme Court of Florida direct a review of Rule 2.051(c)(8) and explore revision of the rule for the purpose of narrowing its application to a set of exemptions that are appropriate in the court context and are readily defined. The Committee is of the opinion that it is within the rule-making power of the Supreme Court, and not contrary to the Florida Constitution, to effectively expand public access to court records by reducing the scope of confidentiality under the rule. Other protections in the rule should remain in effect.

The Committee urges the Supreme Court to direct reexamination and revision of Rule 2.051(c)(8), and to forego implementation of a general system for the electronic release of court records until this project is complete.

Protection of Confidential Information

Whatever the scope of confidentiality is, a necessary condition for the electronic publication of court records is that all confidential information be protected from unauthorized release. The responsibility of protecting confidential information is a constitutional mandate upon the judicial branch. It is not a policy option. The right of access to public records under Article I, section 24, as well any exception to the right created pursuant to its terms, is specifically binding on the judicial branch. It is also binding on "each agency or department created thereunder . . . and each constitutional officer . . . created pursuant to law or this Constitution."

The Supreme Court is responsible pursuant to Article V, section 2 for adopting rules for the administration of all courts, and the chief justice and chief judges of the various courts are responsible for the administration of the courts within their jurisdictions. Under this structure the responsibility of the court to enforce the constitution extends to the clerk of court as the custodian of the court record. A clerk is the custodian of court records pursuant to Rule of Judicial Administration 2.051, as well as several provisions of Chapter 28, Florida Statutes.[29] As such, the clerks of court of the various courts have proximate responsibility for protecting the confidentiality of court records, a responsibility subject to court rules and the oversight of the chief judge of the jurisdiction.[30]

The Committee is of the view that the incorporation of exemptions under Rule 2.051(c)(8) has not been fully understood. If court records are to be released electronically, it is incumbent on the Supreme Court to provide guidance to the

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[29] Sections 28.13, 28.211, 28.212, 28.213, 28.2221, 28.223, 28.29, and 28.35, Florida Statutes.

[30] Rule 2.050(b)(2). A clerk of court when acting as the custodian of court records is under the administrative authority of the chief judicial officer of the jurisdiction pursuant to Article V, section 2, of the Florida Constitution. (Ake)

clerks of court as to enable them to carry out the constitutional obligations of the judicial branch to protect confidential information.

Conceptually, there are a number of actors within the judicial system and points within the judicial process where information that must be kept confidential can be identified and effectively segregated. The actors include parties, attorneys, clerks of court, other court staff, and judicial officers. Each of these actors have traditionally played some role in identifying confidential information under different scenarios.

The Committee makes a set of recommendations to revise Rule 2.051 to require that filers identify confidential information, that clerks protect the identified information and systematically inspect every record for additional confidential information, and that the court make available a system to review instances where the status of a document is challenged.

VIII. Privacy in the Digital Age

Hundreds of thousands of Floridians were dismayed to learn in recent months that identity thieves may have stolen or purchased personal information about them from commercial data brokers and other entities. The first report came in February, 2005, when the nation's largest database company, ChoicePoint, revealed that it had sold dossiers on over 145,000 consumers, including over 10,000 Floridians, to a ring of identity thieves operating overseas.[31] The Los Angeles Times reported that Choicepoint had a similar but smaller security breach in 2002.[32] Also in February Bank of America announced that it had lost computer tapes during shipping which held customer credit card information on account

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[31] Letter from J. Michael de Janes, Chief Privacy Officer, to individual consumers dated February 8, 2005.

[32] Los Angeles Times, March 3, 2005.

holders. In April, Lexis-Nexis, vendor through its Seisint subsidiary of the Florida-based information network MATRIX (Multi-state Anti Terrorism Information Exchange), announced that a security review revealed that it may have allowed the records of 310,000 consumers to be stolen in a security breach.[33]

Consumers have become concerned not only with the unauthorized release of information by data companies, but also with the manner in which the industry conducts business under current law. Prior to the incidents described above, most people were largely unaware of the extent to which information about them was collected and circulated, and many assumed that practices which are in fact common were not legal or even technologically possible. These incidents have led to a growing public realization that we are moving toward a privacy crisis.[34]

Current laws are not adequate. While certain activities of data companies relating to credit reports fall within the Fair Credit Reporting Act, much of the business conducted by data companies is not covered by the Act. Many observers view the Fair Credit Report Act itself as insufficient and see it as contributing to the problem of identity theft. This criticism arises from two provisions of the Act: First, in typical cases of identity theft a consumer's credit is damaged when a credit agency reports that the innocent consumer has failed to make payment on a debt. In fact the consumer did not incur the debt, and the institution involved in the transaction failed to verify the true identity of the borrower. An immunity

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33 News Release, Lexis-Nexis, April 12, 2005.

34 "It takes less and less effort each year to know what each of us is about. When we were at the coffeeshop and where we went in our cars. What we wrote online, who we spoke to on the phone, the names of our friends and their friends and all the people they know. When we rode the subway, the candidates we supported, the books we read, the drugs we took, what we had for dinner, how we like our sex. More than ever before, the details about our lives are no longer our own." Harrow, Robert, Jr.. "No Place to Hide," Free Press, New York, 2005.

provision in the Act shelters both the institution and the credit agency from any lawsuit for defamation for reporting false and damaging facts (that he or she has failed to pay on a debt) about the innocent consumer. The second part of the Act that contributes to identity theft is the federal preemption provision, which prevents states from creating a cause of action in state law for what would otherwise be a tort of defamation. Thus, upon closer analysis, victims of identity theft are victimized not only by the identity thief, but also by the credit industry, which reports false information about them, and by an Act of Congress which strips from them a meaningful legal remedy for the harm to their good name

Activities of database companies not covered by the Fair Credit Reporting Act are largely self-regulated. Voluntary constraints adopted by the industry, known as the Individual References Services Group, are widely considered to be ineffective and self-serving.[35] Indeed assurances provided to this Committee by database companies that individual data is effectively protected by voluntary practices[36] may have created a false sense of security on the part of the public[37] in

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35 Testimony of Marc Rotenberg, President, Electronic Privacy Information Center, before Subcommittee on Commerce, Trade and Consumer Protection, Committee on Energy and Commerce, United States House of Representatives, March 15, 2005.

36 "ChoicePoint controls access to its database by requiring every customer to fill out an application . . . . We then verify the information provided to us. . . . We believe these safeguards are effective protection against the misuse of information in our databases . . . ." J. Michael de Janes, General Counsel, letter to Committee dated October 29, 2004.

"We employ our own set of safeguards against misuse such as use of secure hardware and software, password protection and credentialing of customers. . . . We believe these safeguards are effective protection agains the misuse of information in our databases, but we are always ready to discuss new ideas if they will provide additional protection." Kevin G. Connell, President and CEO, Accu-Screen Inc., letter to Committee dated November 1, 2004.

light of recent industry admissions that data is routinely released without the knowledge of consumers. Responding to criticisms of his company, ChoicePoint Chairman and CEO Derek Smith said the unauthorized release of information is widespread: "I think this is a pervasive problem in American society, and I think for the most part companies actually just ignore the fact it happens because they could be held accountable."[38]

The power to regulate the data industry does not reside with the judicial branch, and so the Committee does not urge the Supreme Court to attempt to do that which is beyond its power. Furthermore, the privacy crisis extends far beyond court records, so that even if the courts were to close all of their records tomorrow the larger problem would remain. The Florida Legislature, however, has significant power to protect Floridians by enactment of state laws. Of perhaps greater impact, Florida is in this area in a position to lead the nation by way of innovative example.

The constitutional right of privacy in Florida – "the right to be let alone and free from governmental intrusion" – is explicit and stronger than the federal right and any such right found in any other state constitution. This unique provision gives the citizens of Florida a basis on which to demand protection of their information and reasonable limitations on the use of personal information which they provide into public records. With properly tailored laws these protections can be effectuated within the constraints of the Sunshine Amendment of the Florida constitution and the First Amendment of the United States constitution. While this Committee supports transparency and accountability in government, it agrees that

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[37] "You have to subscribe to get to [DBT] as well as ChoicePoint and PACER . . . . it' like an act of Congress to get a password from those organizations, which is comforting to me." Jody Habayeb, Tampa Tribune, remarks before Committee, November 17, 2004.

[38] Interview, WXIA-TV, Atlanta, Georgia, February 23, 2005.

"it is clearly the case that open government interests are not served when the government compels the production of personal information, sells the information to private data vendors, who then make detailed profiles available to strangers. This is a perversion of the purpose of public records."[39]

Justice Ben Overton and Kathleen Giddings, writing in 1997, agreed: "the assurance of adequate governmental accountability and fundamental rights of openness should not force the citizens of Florida to forfeit the protection of their personal information from being used for secondary commercial purposes. While both federal and international laws may soon force greater recognition of technological privacy concerns, Florida should take the opportunity now to provide its citizens with stronger privacy protections." [40] While a custodian cannot unilaterally restrict the use of the public records, a recent opinion of the Second District Court of Appeal clarified that it is within the power of the Legislature to authorize restrictions on the use of a public records.[41]

Some data industry leaders concede that the time has indeed come to regulate their industry. Derek Smith of ChoicePoint has called for a national discussion on data policies: "I see the fact that risk is escalating at tremendous amounts to America citizens . . . So I believe as a society we need to have a debate to talk about what is the legitimate use of information, when it should be used, who should access it, what the consumer's redress should be if in fact there is an issue

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39 Supra, note 10.

40 Supra, note 10.

41 An agreement entered into between a clerk of court and another entity, such as a subscription agreement under which the contracting entity is to receive public records from the clerk, which contains provisions which purport to constrain the entity regarding subsequent use or further dissemination of the records may be in violation of the Sunshine Amendment unless the restriction is lawfully authorized by statute. Microdecisions Inc. v Skinner, 2004 WL 2723533

or a challenge or the data is not correct. And there ought to be oversight by governmental authorities to ensure that it runs correctly and appropriately. I do believe in the end that regulation is for this industry ultimately good." [42]

A national discussion is already underway. A collaborative project currently in progress is the development of "A Model Regime of Privacy Protection."[43] The Model Regime describes potential privacy policies regarding: notice, consent, control and access; security of personal information; business access and use of personal information; government access and use of personal information; and privacy innovation and enforcement.

Within this broad sphere there is much which some may disagree with, and much that can be agreed upon. This Committee urges that while this discussion must proceed nationally, it must also and especially take place here in Florida, among Floridians. The Sunshine State has the most transparent government in the world, and in that transparency Floridians are the most exposed people on Earth. In a state where access to public records is, as the Supreme Court of Florida observed, "both a constitutional right and a cornerstone of our political culture,"[44] we have become accustomed to openness and accept that most government records, including court records, are open to the public. Technology has increased the cost of such transparency in terms of loss of personal privacy. In light of this shift, the time has come to reexamine our public policy objectives and the laws that implement them, and to adjust those laws to reach our objectives.

The Committee strongly urges the Legislature to undertake a comprehensive review of all of these issues, and to formulate a statutory scheme that defines the

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[42] Interview, WXIA-TV, Atlanta, Georgia, February 23, 2005.

[43] Solove, Daniel, and Hoofnagle, Chris. George Washington University Law School Public Law Research Paper No. 136, April 5, 2005.

[44] *In Re Report and Recommendations of the Judicial Management Council of Florida on Privacy and Access to Court Records,* 832 So 2nd 712 (Fla. 2002).

rights that Floridians should have regarding their personal information. This statutory scheme should define the protections of consumers, the obligations of business that traffic in personal information, the remedies that consumers will have available to them, and an effective framework for enforcing this system.

IX. Recommendations

Organization and Sequence of Implementation

The Committee advances a total of twenty-four recommendations. While some of these recommendations can stand alone, most are interrelated and in some cases contingent upon each other. Taken together, the recommendations are best understood to present a plan, or roadmap, to develop and effectuate a comprehensive set of policies to provide electronic access to court records while appropriately protecting privacy interests. If approved and implemented, this plan would create an historic change in the way our courts conduct business and interact with the public. As such, the plan would require a number of major steps taken in sequence. Some tasks must be substantially accomplished before others can be addressed. In short, there is a great deal that must be done before full electronic access can be provided responsibly, and it must be understood that such an endeavor must be carried out in an orderly manner. The necessary steps must include the engagement of many entities and individuals and cannot be accomplished quickly.

The recommendations of the Committee are grouped into three clusters which, in generally, would have to be accomplished sequentially:

Group One contains primary recommendations that the Committee urges be initiated in a short timeframe. Several of these would take time to complete – for example the review of Rule 2.051 urged in Recommendation Two – while others can be accomplished relatively quickly – such as implementation of the interim policy set out in Recommendation Five.

Group Two presents a series of recommendations designed to minimize the unnecessary introduction of personal information into court records. These can be undertaken during the time the activities in Group One are underway and will require a substantial commitment of resources as well as several years to implement. Furthermore, whether the Florida courts provide electronic access to records or not, the court system should assist Floridians to protect their privacy by helping reduce the amount of personal information about them that is entered into the public record. The recommendations in Group Two should therefore be undertaken regardless of the outcome of the choices implicit in the principal policy recommendations.

Group Three provides a framework for a system of electronic access. It includes a general policy statement in favor of electronic access and sets out a number of necessary conditions that must be met to provide such access responsibly. It is the view of the Committee that as a practical matter the implementation of this framework is not possible given the current scope Florida Rule of Judicial Administration 2.051, which incorporates all state and federal exemptions to the right of access and makes the described information confidential in a court record. The plan set out in Group Three should therefore be held in abeyance until the review proposed in Recommendation Two is complete and the scope of confidentiality under the rule is reduced. Of particular note, the Committee would not urge that filers of court information be held to the responsibilities described in Recommendation Nineteen until there is clear and comprehensible guidance available to them on what is to be kept confidential under the rule.

GROUP ONE

Recommendation One: PRIVACY PROTECTION REFORM

YEA: Adamson, Adkins, Fine, Froomkin, Gardner, Griffin, Hall, Kaney, Kreeger, Mills, Scott, Skievaski, Smiley, Smith, Turner

NAY: None.

The Committee recognizes that public opposition to the electronic release of court records occurs within the larger context of the emerging national discussion of privacy in the digital age. At present the database industry is largely unregulated, and privacy interests appear to be losing ground to economic and law enforcement interests. With limited exceptions the judicial branch does not in general have unilateral power to control the use of information lawfully obtained from public court records, and so can do little to address the larger problem of dissemination of information contained public court records. The state Legislature and the national Congress, however, have substantial powers to regulate the commercial database industry to protect citizens from identity theft and other harms. The Committee therefore recommends that the Florida Legislature and the national Congress enact meaningful privacy reforms consistent with the First Amendment that effectively protect the informational privacy interests of citizens.

Legislation to Protect Personal Information

The Committee recommends that the Florida Legislature enact laws that effectively protect the interests of Floridians regarding personal information in the possession of state agencies and data companies. Regulation should go beyond requiring consumer notification of an improper release of information, and should define the rights of consumers, the responsibilities of data companies, remedies for violations, and an effective enforcement system. In addition, the Legislature should encourage meaningful privacy protection at the federal level by passage of a legislative resolution to the United States Congress calling for strong federal privacy protections as well as preservation of the independent powers of states to provide greater protections than the protections provided by federal law.

Recommendation Two: SCOPE OF CONFIDENTIALITY

YEA: Adamson, Adkins, Fine, Froomkin, Hall, Kaney, Mills, Skievaski, Smiley, Turner

NAY: Gardner, Griffin, Kreeger, Scott, Smith

Any system of access to court records must identify and protect information that is confidential. Confidentiality of Florida court records is controlled by Florida Rule of Judicial Administration 2.051. The Committee has concluded that subdivision 2.051(c)(8) of the rule incorporates state and federal laws, making the relevant information confidential from disclosure under the rule. The Committee recognizes that to implement an electronic access system with the capacity to identify and redact all information in court files embraced by the current rule would be exceedingly difficult, if not impossible given the foreseeable resources of the judicial branch.

However, it is the further view of the Committee that some of the incorporated exemptions in Florida law may be unnecessary or overly broad in the judicial context where a strong presumption of openness exists. The Committee is of the opinion that it is within the rule-making power of the Supreme Court, and not contrary to the Florida Constitution, to effectively expand public access to court records by reducing the scope of confidentiality under subdivision 2.051(c)(8) of the rule. Protections provided by other subdivisions of the rule should remain in effect. The electronic access plan set out in Group Three should be deferred pending completion of this revision process.

Reexamination of Rule 2.051(c)(8).
The Committee has concluded that implementation of a system that allows large volumes of court records to be released electronically cannot be responsibly achieved under the current Rule 2.051. The Committee therefore recommends that the Supreme Court direct a review of the effective scope of Rule 2.051(c)(8) and explore revision of the rule for the purpose of narrowing its application to a finite set of exemptions that are appropriate in the court context and are readily identifiable.

Recommendation Three: NOTICE AND EDUCATION REGARDING PERSONAL INFORMATION

YEA: Adamson, Adkins, Fine, Froomkin, Gardner, Griffin, Hall, Kaney, Kreeger, Mills, Scott, Skievaski, Smiley, Smith, Turner

NAY: None.

Attorneys and the general public are not sufficiently aware of the loss of privacy that can occur due to the inclusion of personal information in a court file. The Supreme Court should direct that ongoing education be undertaken and appropriate public notices be provided regarding the loss of privacy and its consequences that can occur due to the unnecessary filing of personal information in court records.

Public Notice

The Committee recommends that the Supreme Court direct revision of Rule of Judicial Administration 2.051 to require clerks of court to provide prominent notices in offices and on websites to the effect that court records are public records that may be released to the general public both at the court and via electronic means, and that the inclusion of personal information in court records may be detrimental to the filer's privacy and the privacy of others.

Lawyer and Judicial Education

The Committee recommends that the Supreme Court direct that continuing education for attorneys, judges, court staff and clerks of court include education on the privacy implications of the inclusion of personal information in court records.

Pro Se Assistance

The Committee recommends that the Supreme Court direct that assistance to unrepresented litigants include information regarding the loss of privacy that can occur as a result of the inclusion of personal information in court records.

Recommendation Four: **COORDINATION AND OVERSIGHT OF RECORDS POLICIES**

YEA: Adamson, Adkins, Fine, Froomkin, Gardner, Griffin, Hall, Kaney, Kreeger, Mills, Scott, Skievaski, Smiley, Smith, Turner

NAY: None.

The Committee has concluded that court records policies regarding privacy and access are inextricably entwined with policies regarding document filing, records maintenance, court technology, and court performance and management. The Committee has concluded that records access as well as protection of privacy would be enhanced by a judicial branch governance structure that enhances coordination and oversight of all aspects of policy regarding court records, including filing, management, access and retention. This mechanism should coordinate planning, technology and budgeting to achieve goals related to court records. The Committee takes no position on the form of the governance mechanism.

Coordination and Oversight of Court Records Policies

The Committee recommends that the Supreme Court designate a judicial branch governance structure to coordinate and oversee policies regarding all aspects of court records, including public access, privacy protection, filing processes, records maintenance, and access, dissemination, retention and destruction of records. This mechanism should coordinate planning, technology and budgeting to achieve branch goals related to court records. The Committee recommends that the governance structure include clerks of court.

Recommendation Five: **Interim Policy**

YEA: Adamson, Adkins, Fine, Froomkin, Gardner, Kaney, Kreeger, Mills, Scott, Skievaski, Smiley, Smith, Turner

NAY: Griffin, Hall

The Committee recognizes that an interim policy will be necessary. The Committee urges that remote electronic release of the following court records be allowed until permanent policies are implemented.

Electronic Release of Records Allowed in Interim

The Committee recommends that Rule 2.051 be revised[45] to allow a jurisdiction to make the following court records available electronically without further authorization, provided that no information is released that is confidential by federal or state law, court rule, or court order:

a. progress dockets, limited to case numbers and case type; party name, race, gender and year of birth; names and address of counsel; lists or indices of any judgments, orders, pleadings, motions, notices or other documents in the court file; notations of court events, clerk actions and case dispositions; name and date of death of deceased in probate cases, address of attorney of record or pro se party in probate case;
b. court records which are Official Records;[46]
c. court schedules and calendars;
d. traffic court records;

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[45] In lieu of amendment of the rule the Chief Justice may elect to issue an administrative order setting forth the substance of the above proposed rule.

[46] Certain Official Records, such as records in adoption cases, remain confidential by statute. In addition, Subsection 28.2221, Florida Statutes, prohibit clerks of court from publishing on an Internet website records in cases arising out of Family, Probate and Juvenile Rules. Nothing in this recommendation should be construed to negate these statutory restrictions.

e. appellate court briefs, orders and opinions;

The following records may be released electronically provided the clerk of court for the jurisdiction ensures that the described records are manually inspected and no confidential information is released:

f. the chief judge of a jurisdiction may, sua sponte, direct the electronic release of a record or records in a case of significant public interest;
g. records may be transmitted to a party, an attorney of record in a case, or an attorney expressly authorized by a party in a case to receive the record;
h. a record that has been individually and specifically requested;[47]
i. records may be transmitted to an governmental agency or agent;
j. records in civil cases in which an agency, as defined in subsection 119.011(2), Florida Statutes, is a party.

[47] The Committee agrees with testimony received that it will not be possible to adequately inspect large numbers of records, and so contemplates that large volume, or "bulk" requests, would not be consistent with this provision.

Recommendation Six: MATERIALS RECOMMENDED FOR PROTECTION

YEA: Adamson, Adkins, Fine, Froomkin, Gardner, Griffin, Hall, Kaney, Kreeger, Mills, Scott, Skievaski, Smiley, Smith, Turner

NAY: None.

The Committee considered the highly sensitive contents of psycho-social evaluations, psychological evaluations, and guardian ad litem reports and concluded that in contemplation of a system of greater access it would be advisable that these records be kept under seal and unsealed on a showing of good cause. The Committee also took testimony and discussed the scope of confidentiality of medical, mental health and drug treatment information considered by the court within drug court cases and notes that practices regarding confidentiality do not appear to be uniform among jurisdictions. The dual nature of drug courts as both adjudicative and therapeutic, give rise to unique issues with respect to public accountability and subject confidentiality. Rational and consistent policies are required. The Committee concludes that the Treatment-Based Drug Court Steering Committee is better situated to study and make recommendations in these areas

Materials Recommended for Protection

The Committee recommends that the Supreme Court direct the appropriate rules committees to propose revision to court rules to provide that psycho-social evaluations, psychological evaluations, and guardian ad litem reports be placed under seal by the clerk of court and unsealed only by judicial order on a showing of good cause.

Confidentiality of Certain Drug Court Information

The Committee recommends that the Supreme Court direct the Treatment-Based Drug Court Steering Committee to make recommendations regarding the appropriate scope of confidentiality regarding medical, mental health and drug treatment information within drug court cases.

GROUP TWO

MINIMIZATION

The Committee has concluded that Florida court files commonly contain information which is not required by law or rule and which is not needed by the court for purposes of adjudication or case management. Once entered into a court file this information becomes a matter of public record. Much of this information is personal or sensitive in nature. The Committee perceives that there is not a clear understanding on the part of attorneys and the general public of the negative effects on personal privacy of placing unnecessary information in a court record. The Committee makes a series of recommendations intended to minimize the inclusion of extraneous personal information in court records.

Recommendation Seven: **REVISION OF RULES AND FORMS LEADING TO EXTRANEOUS PERSONAL INFORMATION**

YEA: Adamson, Adkins, Fine, Froomkin, Gardner, Griffin, Hall, Kaney, Kreeger, Mills, Scott, Skievaski, Smiley, Smith, Turner

NAY: None.

The Committee has determined that a systematic review of court rules and approved forms would reveal that a number of rules and forms are written in ways that lead to routine filing of personal information which is not needed by the court for purposes of adjudication or case management.

Review of Rules and Forms

The Committee recommends that the Supreme Court direct a comprehensive judicial branch initiative to review and revise rules of court and approved court forms across all case types for the purpose of modifying rules and forms to avoid the filing of personal information which is not necessary for adjudication or case management.

Recommendation Eight: **UNAUTHORIZED FILINGS**

YEA: Adamson, Adkins, Fine, Froomkin, Griffin, Hall, Kaney, Kreeger, Mills, Skievaski, Smiley, Smith Turner

NAY: Gardner, Scott

The Committee has found that a court file is primarily a conduit and repository of information exchanged among parties and the court. As such, the court file is not an open forum available for the gratuitous publication of extraneous and potentially damaging personal information. The Committee has therefore considered recommending a policy that prohibits filings that are not authorized by court rule or statute.

Unauthorized Filings Prohibited

The Committee recommends that the Supreme Court consider study of a court rule to prohibit the filing of documents that are not authorized by court rule or statute, or seeking relief by the court. The rule should clearly define improper filings, set out a method through which clerks of court can effectively identify filings which are not proper, and authorized clerks to make improper filings unavailable for inspection pending judicial determination of whether the filing will be accepted. The rule should provide that filings that are not accepted be returned to the filer with an explanation of why the filing is being returned.

Recommendation Nine: **RULE OF FAMILY LAW PROCEDURE 12.285**

YEA: Adamson, Adkins, Fine, Froomkin, Gardner, Griffin, Hall, Kaney, Kreeger, Mills, Scott, Skievaski, Smiley, Smith, Turner

NAY: None.

The Committee has found that portions of Florida Rule of Family Law Procedure 12.285 are commonly overlooked or ignored. The rule provides for mandatory disclosure of financial information and requires service of affidavits and financial information on the other party and submission of certification of such service. It require submission of the information to the court only in some circumstances. The Committee has learned that parties, particularly parties proceeding *pro se,* commonly file the financial information with the court at the time of disclosure to the opposing party even when not required by the rule. The Committee has found that this rule should be clarified to achieve the goal of substantial reduction in the unnecessary filing of financial information in family law cases.

Revision of Rule 12.285

The Committee recommends that Family Law Rule 12.285 be amended as follows:

that parties should not be required to file financial affidavits if (a) they have no minor children and no support issues, and they have filed a written settlement agreement at the commencement of their case; or (b) the court lacks jurisdiction to determine any financial issues;

and

the rule should state at the beginning of the mandatory disclosure requirement, rather than the end, that the parties shall not file the documents that constitute their mandatory disclosure, but that they shall serve and file a certificate of compliance that specifically describes the documents that they have served on the other party.

Recommendation Ten: DUTY TO PROTECT DISCOVERY INFORMATION

YEA: Adamson, Adkins, Fine, Froomkin, Gardner, Hall, Kaney, Kreeger, Mills, Scott, Skievaski, Smiley, Smith, Turner

NAY: Griffin

The Committee has considered the problem of the routine and sometimes gratuitous filing of information that has been disclosed pursuant to a discovery order. The Committee notes that compelled discovery is an exercise of state power subject to restraint by the right of privacy provided in Section 23 of Article I of the Florida Constitution, which has been held to protect citizens from intrusion any greater than necessary to achieve the state interest. The Committee urges that parties who gain possession of information pursuant to compelled discovery should protect the fruits of discovery, and should be constrained from publishing discovery material into a court file unless and until such time as the information may be properly filed for good cause.

Protection of Discovery Materials

The Committee recommends that the Supreme Court direct the creation of a rule of procedure that would require attorneys and litigants to refrain from filing discovery information with the court until such time as it is filed for good cause. The court shall have authority to sanction an attorney or party for violation of this rule.

GROUP THREE

The following recommendations present a general framework within which access to court records can be provided. The Committee notes that faithful application of the current Rule 2.051 renders the implementation of a general system for electronic access impractical at this time. Proposed amendments to Rule 2.051 are provided in Appendix Two.

Recommendation Eleven: **GENERAL POLICY ON ELECTRONIC ACCESS TO COURT RECORDS**

YEA: Adkins, Fine, Froomkin, Gardner, Hall, Kaney, Mills, Scott, Skievaski, Smiley, Turner

NAY: Adamson, Griffin, Kreeger, Smith

The Committee has concluded that electronic access to non-confidential court records would support public policy goals regarding efficiency and accountability. Therefore, the Committee recommends that the judicial branch adopt as a goal the implementation of a system to provide general electronic access to court records. Such access should only be allowed, however, where the precautionary measures described in Recommendation Twelve are achieved.

Access as Goal

The Committee recommends that the judicial branch of Florida adopt as a goal the provision of general public electronic access to court records through remote means in jurisdictions where conditions described in Recommendation Twelve are satisfied.

Recommendation Twelve: CONDITIONS FOR ELECTRONIC ACCESS

YEA: Adkins, Fine, Froomkin, Gardner, Hall, Kaney, Mills, Scott, Skievaski, Smiley, Turner

NAY: Adamson, Griffin, Kreeger, Smith

Conditions for Electronic Access

The Committee recommends that Rule of Judicial Administration 2.051 be revised to allow remote access to court records in electronic form to the general public in jurisdictions where the following conditions are met, provided that no confidential or exempt information is released:

a. Recommendations Two, Three, Six, Seven, Eight, Nine and Ten are implemented;
b. screening and redaction processes are in place to ensure that confidential information is not released without authorization;
c. access to court records remains in effect at the courthouse without costs other than those authorized by statute;
d. court records within the jurisdiction remain fully accessible to judges and court staff for judicial purposes;
e. adequate revenues are projected to ensure ongoing fiscal support for electronic records access; and,
f. records arising under the rules of family, juvenile or probate law, other than Official Records, are not made available for remote electronic release.

Recommendation Thirteen: CONFIDENTIAL INFORMATION

YEA: Adamson, Adkins, Fine, Froomkin, Gardner, Griffin, Hall, Kaney, Kreeger, Mills, Scott, Skievaski, Smiley, Smith, Turner

NAY: None.

The Committee has found that the responsibility of protecting confidential information is a constitutional mandate upon the judicial branch and that any access to court records must be conditioned on the effective identification and protection of confidential information. Ultimate responsibility for protecting confidential information in court records belongs to the court. The responsibility of the court extends to the clerk of court as the custodian of the court's records pursuant to Article V of the Florida Constitution.

Confidential Information Not to be Released

The Committee recommends that the Supreme Court direct revision of Rule 2.051 to clarify that those records defined in Rule 2.051(c) of the judicial branch are confidential and may not be released except as provided.

Recommendation Fourteen: SCOPE OF RULE 2.051 AND STATUTORY EXEMPTIONS

YEA: Adamson, Adkins, Fine, Froomkin, Hall, Kaney, Mills, Skievaski, Smiley, Smith Turner

NAY: Gardner, Griffin, Kreeger, Scott, Smith

Recommendation Two urges review and revision of Rule 2.051 to narrow its scope. With respect to the current rule the Committee has reached these conclusions:

- Rule 2.051(c)(8) incorporates by reference statutory exemptions of Florida and federal law, making the statutory exemptions rule-based confidentialities pursuant to the grandfather clause for rules of court in Section 24(d) of the Florida Constitution.

- Any statute in which the Legislature exempts the described information not merely from the reach of Chapter 119.07(1) but also from Section 24(a) of the Florida Constitution applies to judicial branch records independently.

- The blanket application of statutory exemptions through Rule 2.051 may infringe on the First Amendment qualified presumption in favor of a right of public access to records of criminal proceedings.

The Committee notes that the interplay of the statutes and the rule presents substantial legal issues requiring resolution in properly contested cases or controversies, and makes the following recommendations pending revision of the rule or adjudication of the legal issues:

Rule Absorption of Statutory Exemptions
Policies and actions regarding court records should be based on the understanding that subdivision 2.051(c)(8) generally absorbs Florida statutory exemptions and federal confidentialities.

Independent Authority of Statutory Exemptions
Policies and actions regarding court records should be based on the understanding that any statute in which the Legislature explicitly exempts the described information not merely from the reach of

Chapter 119.07(1) but also from the right of access in Section 24(a) of the Florida Constitution applies to judicial branch records independent of Rule 2.051.

Rule-Making Distinct from Adjudication

Policies and actions regarding court records should be based on the understanding that in making policy the Supreme Court is acting in its administrative capacity and the Court reserves judgment on legal issues that may arise which challenge aspects of the policy.

Recommendation Fifteen: GUIDANCE ON CONFIDENTIAL INFORMATION

YEA: Adamson, Adkins, Fine, Froomkin, Gardner, Griffin, Hall, Kaney, Kreeger, Mills, Scott, Skievaski, Smiley, Smith, Turner

NAY: None.

The Committee has concluded that protection of confidential information would be aided by the development of operational guidelines to assist attorneys, litigants, clerks of court, judges and court staff in identifying and protecting confidential information in court files. The Committee contemplates a collaborative effort that engages clerk staff, court staff and practicing attorneys in developing guidelines, and understands that the product of this effort would be neither legally authoritative nor binding, but rather would be advisory in nature and subject to modification pursuant to court decisions rendered in properly adjudicated cases.

Guidance on Definition of Confidential Information

The Committee recommends that the Supreme Court direct an initiative, under the oversight of the governance structure described in Recommendation Four, to provide specific guidance to clerks of court, attorneys, litigants, judges and court staff to assist in identifying and protecting confidential information in court files.

Best practices in operations

Recommendation Sixteen: **UNSEALING OF RECORDS**

YEA: Adamson, Adkins, Fine, Froomkin, Gardner, Griffin, Hall, Kaney, Kreeger, Mills, Scott, Skievaski, Smiley, Smith, Turner

NAY: None.

The Committee has concluded that consistent application of Rule 2.051 will require an efficient mechanism to review the status of records and to unseal records preliminarily closed by the Rule.

Process for Unsealing Records

The Committee recommends that Rule 2.051 be amended to provide a clear and effective mechanism through which a preliminary determination that a record is exempt or confidential can be challenged and reviewed.

Recommendation Seventeen: **RESPONSIBILITY OF FILER**

YEA: Adamson, Adkins, Fine, Froomkin, Gardner, Hall, Kaney, Mills, Scott, Skievaski, Smiley, Turner

NAY: Griffin, Kreeger, Smith

The Committee has concluded that the task of protecting confidential information can be substantially aided by requiring filers to identify confidential information at the time of filing. Further, a mechanism to provide notice to non-parties that confidential information about them has been filed in a court case would allow the non-party to act to protect their privacy interests. These requirements should be imposed only after adequate guidance is available that gives filers fair notice regarding confidential information.

Duty of Filer to Identify Confidential Information

The Committee recommends that Rule 2.051 be amended to provide that:

a. a filer shall indicate to the clerk of court at the time of filing whether information contained within the filing is confidential;
b. if so, the filer shall submit a certification of confidentiality that describes the information and the grounds for the confidentiality;
c. if the confidential information relates to a named non-party to provide notice to that individual, such notice to include a statement that the information is subject to unsealing, and certification of that notice;
d. parties should avoid duplicate filings and indicate whether a courtesy documents is such, and;
e. willful failure to comply may subject an attorney or party to sanctions by the court.

Recommendation Eighteen: AUTHORITY OF COURT

YEA: Adamson, Adkins, Fine, Froomkin, Gardner, Griffin, Hall, Kaney, Kreeger, Mills, Scott, Skievaski, Smiley, Smith, Turner

NAY: None.

The Committee finds that the ultimate authority to protect confidential information in court records belongs to the court. The Committee further finds that public access to records and the need to protect confidential information obligate the court to perform several functions.

Authority of Court

The Committee recommends that policies and actions of the judicial branch be based on the recognition that: ultimate authority to protect confidential information in court records belongs to the court; that the Supreme Court, the chief justice and the chief judges of the district and circuit courts have authority to provide administrative oversight to the clerks and court staff of the respective courts to ensure that confidential information is protected; and that the courts should provide prompt judicial resolution when the confidential status of a record is challenged pursuant to Rule 2.051.

Recommendation Nineteen: **RESPONSIBILITY OF CLERK OF COURT**

YEA: Adamson, Adkins, Fine, Froomkin, Gardner, Griffin, Hall, Kaney, Kreeger, Mills, Scott, Skievaski, Smiley, Smith, Turner

NAY: None.

The Committee has concluded that the responsibility for protecting confidential information in court records extends to the clerk of court as the custodian of the court's record pursuant to Article V of the Florida Constitution, and that certain obligations arise from this responsibility.

Responsibility of Clerk of Court

The Committee recommends that policies and actions regarding court records be based on the understanding that: responsibility for protecting confidential information in court records is delegated to the clerks of court as the custodians of court records pursuant to Article V of the Florida constitution; a clerk of court has a duty to exercise due diligence in inspecting court records to determine whether a record is confidential in part or in whole and to protect the confidential information; and to facilitate judicial resolution when the confidential status of a record is challenged.

Recommendation Twenty: AUTOMATED SEARCH TECHNOLOGY

YEA: Adamson, Fine, Froomkin, Gardner, Kaney, Mills, Scott, Skievaski, Smiley, Turner

NAY: Adkins, Griffin, Hall, Kreeger, Smith

The Committee considered the use of automated search technologies, such as "spiders," "crawlers," and similar technologies to extract information from court records without the direct exercise of human discretion. The Committee concluded that, so long as appropriate security precautions are in place, automated systems that extract and index data perform a valuable function by assisting in the location of records.

Automated Search Technology Not Prohibited
The Committee recommends that automated search technologies not be prohibited.

Recommendation Twenty-One: **REPLACEMENT OF COMMERCIAL COURT RECORDS DATABASES**

YEA: Adamson, Adkins, Fine, Froomkin, Gardner, Griffin, Kaney, Kreeger, Mills, Scott, Skievaski, Smiley, Turner

NAY: Hall, Smith

The Committee considered issues related to the release of records which are subsequently corrected or expunged. The Committee has concluded that, in the absence of a limiting statutory exemption or statutory authority to copyright records, the judicial branch cannot restrict the use of a court record subsequent to the lawful release of the record. The Committee notes that commercial data firms have indicated that it is considered a good industry practice to repopulate databases with replacement data which have been corrected or purged of the expunged records.[48]

Records Purges Encouraged

The Committee recommends that commercial users of court records be encouraged to enter into agreements to regularly replace records databases with data purged of erroneous, expunged and sealed records

[48] The Committee acknowledges that practical and legal constraints prevent requiring replacement of databases, but recommends that the practice be encouraged to the extent possible though voluntary agreements with large volume users of court records.

Recommendation Twenty-Two: USER ACCESS FEES

YEA: Adamson, Adkins, Fine, Froomkin, Gardner, Griffin, Hall, Kaney, Kreeger, Mills, Scott, Skievaski, Smiley, Smith, Turner

NAY: None.

The Committee considered the resources that would be required to administer the policies it has recommended and the fiscal demands necessary to support those efforts. The Committee has concluded that its recommendations would lead to increased workload on clerks of court, judges and judicial staff, local court administration and state court administration as well as expenditures for computer hardware, software and support services. The Committee does not have sufficient information to specifically identify the fiscal impacts of policy options but acknowledges that they would be substantial.

The Committee considered and rejected a recommendation that the costs of implementing electronic access be met through increases in filing fees. The Committee has found that electronic access is not a right but is provided as a matter of policy for the convenience of users of court records, and so it may be conditioned on payment. The Committee is therefore of the view that costs should be borne by the beneficiaries of remote electronic access, whether parties or non-parties, and that the appropriate vehicle for funding would be fees assessed at the point of access rather than at filing. The Committee considered but has no recommendation on the issue of whether user fees should be waived for small volume users, presumably individuals, and charged only to large volume, presumably commercial, users. The Committee does not have sufficient information to make projections of potential revenue amounts under various scenarios.

User Access Fees

The Committee recommends that costs of providing electronic access incurred by clerks of court, judges and judicial staff, local court administration and state court administration be funded through user fees. The user fee may be applied to all transactions, or waived for small volume transactions.

Recommendation Twenty-Three: USER IDENTIFICATION

YEA: Adamson, Adkins, Fine, Froomkin, Gardner, Griffin, Hall, Kaney, Kreeger, Mills, Scott, Skievaski, Smiley, Smith, Turner

NAY: None.

The Committee considered whether individuals and entities that access court records electronically should be required to identify themselves. Traditionally, information is not collected about persons who access court files in person. Further, transactional data about persons who access court records would also become a non-exempt public record. The Committee does not view the potential for such data to discourage misuse of court records as sufficiently compelling to require all users to identify themselves. The Committee also concluded that user fee payment systems can be implemented which do not require user identification.

No Identification Required

The Committee recommends that access control systems should not require that individuals and entities that access court records electronically identify themselves.

Recommendation Twenty-Four: **RELEASE OF FAMILY, JUVENILE AND PROBATE RECORDS**

YEA: Adamson, Adkins, Fine, Froomkin, Gardner, Griffin, Hall, Kaney, Kreeger, Mills, Scott, Skievaski, Smiley, Smith, Turner

NAY: None.

The Committee considered the limitations of subparagraph 28.2221(5)(a), Florida Statutes, which restricts the placement of court records in family, juvenile and probate cases on a publicly available Internet website. The Committee notes that juvenile case records are confidential by law. Consistent with this statute the Committee recommends that records in family or probate cases be restricted from remote electronic access. The Committee considers the release of Official Records in these cases to be appropriate but notes that the statute makes no exception for Official Records. The Committee also supports remote electronic access to non-confidential information for parties in a case, attorneys of record, and authorized governmental agencies.

Electronic Release of Family and Probate Records Prohibited

The Committee recommends, except as provided in Recommendation 5, that the Supreme Court prohibit the remote electronic release of court records that arise under the rules of family and probate procedure as well as any records under appellate review, except appellate briefs, orders and opinions. Official Records should be excepted from this restriction. Remote access should be permitted for a party, an attorney of record in a case, or an attorney expressly authorized by a party in a case to receive the record.

MEMBER COMMENTS of:

The Honorable Jacqueline Griffin

Joined by: Judge Judith Kreeger, Ms. Kristen Adamson, Mr. Walt Smith

INTRODUCTION

By the end of its deliberations, this committee was closely divided into two camps: those who concluded that the burdens of posting court records on the internet substantially outweighed the benefits of doing so and those who concluded that the technology was either so desirable or inevitable that the burdens had to be overcome or endured. This decision to embrace internet publication of court records by the bare majority has driven most of the other recommendations in the report, which, in the main, consist of strategies for lessening the harm.

The privacy interests of users of the courts and third parties are dealt with by warning litigants against filing information, by recommending rules disallowing the filing of information in court files except for "good cause" and by suggesting court users ask the legislature for help in controlling the public use of their information once the courts have published it. The problem of statutorily confidential information contained in court files is dealt with by recommending the

supreme court, by rule change, "reduce the scope" of the statutory confidentiality of information in court records and by requiring litigants and lawyers to bear the burden of identifying for the clerk whether any of the information in court files is subject to any of the more than one thousand statutory exemptions.

It is commendable that the majority ultimately has concluded that internet publication of court records is technologically, legally and practically impossible at present. The very fact that the best proposals they can offer to alleviate these problems are, at best, ineffective and, at worst, harmful to the essential function of the judicial branch demonstrates that public internet access to court records is a misguided goal.

THE FUNDAMENTAL FLAW

A substantial minority of the Committee opposes Recommendation Eleven entitled, "General Policy on Electronic Access to Court Records," which states:

> The Committee recommends that the judicial branch of Florida adopt as a goal the provision of general public electronic access to court records through remote means in jurisdictions where conditions described in Recommendation Twelve are satisfied.

There are many reasons for our disagreement with this recommendation, but the primary reason for our dissent is that this recommendation ignores the interests of the most important constituency of the courts - its users. Our society depends on respect for the rule of law: the commitment of our citizens to abide by the decisions of the courts for the resolution of civil disputes and the punishment of criminal offenses. The first duty of the courts is to provide fair and accurate decision-making, which requires the disclosure of information that is intensely personal or private in a great number of cases and which could be very damaging

in the hands of someone who would misuse it. If we do not respect the users' interest in this information and do all that we constitutionally can to limit its use to the purpose for which it was entrusted to us, we risk irreparable damage to our function. The loudest and most unrelenting voices the Committee has heard in support of remote electronic access to court records have come from interests who are not the users of the courts but collectors and/or purveyors of the information the court acquires from its users. Although the courts must meet their constitutional duty to these interests, they must not be the courts' first concern. The courts' first concern has to be the user; otherwise, the integrity of the decision-making process will suffer and the continued willingness of the people to rely on the courts to administer the rule of law may falter.

The records of Florida's courts have always been public and Florida's courts have been vigilant to ensure access to the maximum number and category of court records. In *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113, 116 (Fla. 1988), the supreme court said:

> [O]peness is basic to our form of government. Public trials are essential to the judicial system's credibility in a free society.

Our commitment to those important principles in the years since *Barron* cannot seriously be questioned. To our knowledge, no one on the Committee would contend that the courts of Florida have a duty to post court records on the internet. However, proponents of remote electronic access have apparently been successful in advancing the argument that the important guarantee of public access to court records implies maximum *convenient* access to court records. They urge that advances in technology have made it possible for records to be more public and more accessible; therefore, they should be more public and accessible. If public

access is good, the theory goes, then the maximum possible public access must be the maximum possible good. Why should citizens be required to go to the courthouse to examine court records when technology will permit them to examine them from the comfort of their own living-room? The answer, we believe, is that once the constitutional requirement that the records be open to public inspection is met, the courts must weigh the benefits of more convenient access against the burdens of more convenient access. If this is done, it is clear that remote electronic access to images of court records should not be allowed.

The majority report implicitly concedes the correctness of this position. It recognizes the obvious wisdom in the legislature's interim decision to prohibit the posting of court records on a publicly available web-site in the categories of family law and probate and to drastically control the publication of personal identifiers and bank account information. The action taken by the legislature illustrates the strong public policy against remote electronic access to personal information in court records. The legislature identified those categories that even a layman would recognize to be obvious problems; the mistake of the Committee majority was to fail to use the benefit of its far greater knowledge of the contents of court records to extend the protection to other categories of court records that contain as much, or in some instances, vastly more personal and financial information. Obvious examples are personal injury cases and criminal cases. A personal injury case typically will contain the entire medical history, work history and personal history of a plaintiff, and would provide a complete blueprint for an identity thief. Similarly, a criminal case contains detailed information about the (not yet convicted) accused and provides multiple reports, statements, depositions and trial testimony concerning the offenses committed against the victim, which can only add to the victim's stress. We cannot imagine what possible claim of convenience could stand up to this re-victimization by publication of the details of the crime.

Florida's sunshine amendment and privacy amendment, together with the statutes and rules currently in force, were crafted to strike a balance between competing interests in the context of the means of dissemination that were available at that time. It would be a mistake not to take into account the complete shift in the foundation of those policies – the fact that worldwide instantaneous transfer and manipulation of mass quantities of information and the risk to the integrity of that information – in formulating a new policy for Florida's courts. To suggest that court records be bublished on the internet, and that statutory exemptions be eliminated from court records because thay are now longer practical to apply, would destroy the balance entirely.

THE PROBLEMS REMAIN UNRESOLVED

The benefits of remote electronic access have been well identified in the majority report. Other factors, however, tilt the balance against remote electronic access.

As the direct result of the posting of court records on the internet, users of the courts will suffer an immediate and pervasive loss of privacy. In order to utilize the courts, individuals and corporations are obliged to provide detailed information that is not usually available to the public. We do not accept the proposition that by placing information in a court file, whether voluntarily or under subpoena, the information is stripped of any characteristic of private information. Unlike a chatroom or a bulletin board, where the posting of private facts represents a voluntary relinquishment of its privacy, a court is a place where the disclosure of private facts is voluntary only to the extent that the information is required to be given over for the purpose of the court proceeding. If, for example, a plaintiff in a medical malpractice case reveals his entire medical history in discovery, it is divulged because the defendant has a right to the information in order to test the

claim. It does not represent a consent for the courts to publish the information on the internet. The decision to allow such remote electronic access means that a citizen's right of access to the courts will be burdened unduly and unfairly. There is no doubt that some (even many) citizens in need of the courts to prosecute or defend a claim will forego that right because of this burden on their privacy. Those who can afford to do so may instead choose a "private judge" and remove the dispute from the public altogether. Whatever the effect on the notion of public justice, this would, at the very least, mean a dual system of justice: privacy for the wealthy, no privacy for those who cannot afford to buy it.

The majority view appears to rely in part on the notion that there already is or soon will be no private information to protect; that any information that might appear in a court file is already available on the internet from other sources. First, impressive as the cache of data already swept up by data aggregators may be, those of us who read court files for a living know that there is much that is *not* already public, and it certainly is not available in the organized way it appears in court files. If data aggregators can find this information from other sources, then let them expend the resources to do so. It makes no sense for the courts to package it up and just hand it over - or worse, sell it for a fee.

Perhaps the most disturbing aspect of the majority report is that it discounts the peril in which court users are placed when the courts turn over this private information to ready access by the public. Identity theft is the fastest growing and most pervasive crime in the United States, and court records offer the most detailed, most organized and most wide-ranging reservoir of personal facts imaginable. Civil litigants will be particularly attractive to those interested in identity theft for economic crimes since the litigation usually involves persons or organizations of means. Criminals or terrorists seeking cover will have a virtual Sears catalogue of personal histories to choose from. This risk burdens still further

the citizen's use of the courts. Given the precautions individuals are already taking or urged to take to protect themselves from identity theft, it is obvious that some who might need or wish to use the courts will simply not take the risk.

Given the current difficult budgetary environment for the judicial branch, it is important to consider that there will be considerable costs connected with any decision to publish court records on the internet. To begin with, courts will have a moral, if not legal responsibility to fully inform crime victims, court users and counsel of the consequences of their decision to use the courts -- that any information will be readily accessible to any member of the public worldwide and the capture of their data by data aggregators and the resale of that information to anyone interested in locating or targeting a particular person or category of persons must be assumed. A pharmaceutical distributor, for example, might logically purchase data concerning particular medical conditions or mental health issues in order to target solicitation of their products. Predictably, persons involved in foreclosure or collection cases will be targeted by persons interested in the financially distressed while, on the other side of the coin, persons shown to have significant financial resources in court records will be targeted by others. There will be a market for the recently divorced, the recently victimized, the recently injured, the recently arrested. The elimination of "practical obscurity" from court files and the consequences of it must, in fairness, be fully explained so that any court user can make an informed decision about whether to disclose certain information, whether to assert a particular claim, or even whether to participate at all in a civil or criminal case.

The public and the bar will also have to be educated about the new procedures the committee has recommended in light of internet publication of court records, including "informational minimization" and the duty imposed on litigants and counsel to identify statutorily confidential information. These

procedures will doubtless also generate a significant motion practice and will require substantial allocation of judicial resources.

Predictably, the greatest impact on judicial resources, as has been demonstrated in other jurisdictions where internet posting of court records has been implemented, is the significant increase in the number of motions to seal documents in order to keep them off the worldwide web. Many components of the balancing test in Rule of Judicial Administration 2.051(c)(9) by their terms are relevant to a decision whether to close a court record in order to prevent its publication over the internet. As we have learned recently in Florida, such as in the case of the proposed placement of Dale Earnhardt's autopsy photographs on the internet, the specter of worldwide publication and dissemination of a court record may, as a matter of common sense, and common decency, meet the rule's criteria of "effect on the administration of justice" or harm to a litigant or a third party. There can be little doubt that the law of sealer and/or "unsealer" will likely consume significant judicial resources after court records are published on the internet. Ultimately, the unintended consequence of placing court records on the internet may well be that the courts will, by order, identify more court records to be confidential than ever before, and the legislature may be obliged to create entire new categories of records as confidential so that they will not be placed on the worldwide web.

The majority also acknowledges that it recommends a fundamental shift in the posture of courts in Florida by limiting parties' and attorneys' authority to file documents with the court. Courts in this state historically have encouraged the filing of information for decision-making, not discouraged it, and generally have treated with liberality a litigant's right to file papers unless the court determines that the litigant has repeatedly abused the privilege. The majority's embrace of a "closed file" approach is inconsistent with the people's constitutional right of

access to their courts. This new approach, designed specifically to accommodate internet access, will also predictably increase the cost of litigation.

The clerks have protested that they cannot identify and redact all of the statutorily confidential information contained in court records so the majority recommends that the Court shift that responsibility to the parties and their lawyers. Is it reasonable to suppose that a pro se litigant or even attorneys will be in a better position to discharge that responsibility than the clerk, who will have the benefit of the specialized training and education that the majority recommends? The only filter for statutorily exempt and confidential information cannot be the filer. That solution is a recipe for widespread violation of the statutes – the only privacy protection court users have left.

MEMBER COMMENTS of:

The Honorable Barbara T. Scott

and

The Honorable Lydia Gardner

The Clerks of the Circuit Court members of the Committee on Privacy and Court Records commend the work of the Committee in addressing the charges of the Supreme Court on the important public interest in access to court records. Based on the conclusions of the majority of the committee, the Clerks cannot support the Committee Report as a whole and are compelled to submit this minority report to set forth their positions on matters they believe are of significant interest that should be considered by the Court and the public.

The Committee was presented no evidence that any court record obtained through Internet access has been used for any criminal activity. Another minority report submitted speaks of potential misuses that seem to lay a foundation for prohibiting access to paper records as well. The Clerks are aware that personal information in some court records could be used for criminal purposes and recommend that the Court establish procedures that require filers of court records

safeguard their information in court files – regardless of whether access is granted to paper files or through the Internet.

Unlike a recommended ban on access, the Clerks believe that--through the Internet or at the courthouse--access to court records is a right of the public. The Court should provide an uncomplicated method of segregating personal confidential information from public access or only require portions of numerical personal information to be provided in court filings. The Clerks also suggest that the Court delineate those statutory provisions applicable to records once filed with the Court.

THE ROLES OF THE CLERKS, THE COURT AND THE LEGISLATURE REGARDING ACCESS TO COURT RECORDS.

Clerks of the Circuit Court have a critical role complying with constitutional and statutory responsibilities of providing access to public court records and in complying with confidentiality provisions of state and federal law, court rule and court orders. As members of the Committee on Privacy and Court Records, we have provided input regarding the fundamental legal principles involved, the factual matters regarding privacy and the practical issues of balancing privacy and public access to court records.

The development of recommended policies and strategies involved in the balancing of public access and privacy interests regarding Internet access to court records has been a daunting task. At issue are some of the fundamental principles regarding the relative constitutional authorities of our branches of government and the constitutional officers whose duties include the provision of access to the state's records of its courts.

Clerks are in agreement with the Privacy Committee's finding that remote electronic access to court records brings efficiencies to the court not before

encountered and access should be a goal. However, based on the current state of the law, the Clerks cannot come to terms with the position set forth by the Committee that the Supreme Court has exclusive authority over all aspects of court records.

The Florida Legislature has enacted statutory language that indicates that court records are the property of the state.[49] The report claims that the Legislature has not exercised control over these records they have been apparently granted in Article I, Section 24 of the Constitution. It did, though, exercise its constitutional authority to establish laws regarding the "maintenance, control, destruction, disposal, and disposition of records" when it enacted provisions specifically encouraging agencies to provide remote electronic access and prohibiting public Internet access to family law and probate cases.[50] Clerks are under a statutory requirement to "follow procedures for electronic recordkeeping in accordance with rules adopted by the Division of Library and Information Services of the Department of State."[51] The Legislature further exercised its authority with the establishment of the Article V State Technology Board.[52]

As constitutional officers, Clerks have inherent authority to manage the performance of their constitutional and legislatively imposed duties such as providing the public access to court records. We believe Clerks cannot over emphasize the necessity of maintaining independence in our administrative and ministerial functions in order to protect the integrity of the court system.

The majority report appears to conclude that the manner of implementing the duties of the Clerk with respect to court records is not within the power of the

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[49] Section 28.24(12)(e)(1), Florida Statutes
[50] Section 119.01(2)(e) and Section 119.07(6)(gg), Florida Statutes
[51] Section 28.30(4), Florida Statutes
[52] Section 29.0086, Florida Statutes

Clerk to define and determine, but rather is solely within the purview of the Chief Justice of the Florida Supreme Court, as such power may be delegated to the Chief Judge of the Circuit Court. The Committee's conclusion rests upon an analysis which marginalizes the Clerks' role as set out in the Florida Constitution by equating references in decisional law to a "ministerial" role as essentially being equivalent to an inconsequential role, as the custodian of court records.

The 1822 Act of the Legislative Council of the Territory of Florida, created the position of Clerk of Court:

> Be it further enacted, That, there shall be appointed by the Governor in each County a well qualified clerk, whose duty it shall be to record all decrees, orders, judgments and other papers required by law, and to preserve all papers appertaining to suits in said Courts, and to docket all causes as required by law, and who shall take an oath faithfully to perform the duties which have and may hereafter be assigned him, and execute bonds in the Secretary's office of the Territory, or such other place as the Governor shall direct, in the penalty of five thousand dollars with approved security, conditioned for the performance of the duties of their said offices.

The duties of the Clerk under current legislation are substantially similar to those which have existed for almost 175 years in Florida. It is against this background that the Constitutions of 1885 and 1968 were adopted by the people of Florida. The 1968 Constitution, adopted under a framework where an independently elected Clerk of Circuit Court was charged with docketing, indexing and maintaining judicial records, defined the roles of the judiciary and the Clerk of the Court. Article V, section 3, creates the Supreme Court of Florida and provides under subsection 3(c) that the Supreme Court appoints a clerk to "perform such duties as the Court directs." Similarly, Section 4 creates the District Courts of Appeal and directs each District Court to appoint a clerk to perform such duties as the Court directs. In contrast, there is no provision under Sections 5 and 6 of

Article V for any court to appoint and direct the duties of the Clerk of the Circuit Court. The Clerk of the Circuit Court is separately authorized under section 16 of Article V. Section 2(d) of Article V, governing administration, practice and procedure of the judiciary states that a chief judge in each circuit shall be chosen and that the chief judge "shall be responsible for the administrative supervision of the circuit courts and the county courts in his circuit." There is no reference in this section to the chief judge being responsible for the administrative supervision of the Clerk, although this clause would have been the logical place for such a provision.

The above analysis is not intended to contravene the accepted notion that the Clerk's role is ministerial with regard to the function of the Court. This fact is established under Florida law and the Clerk does not have judicial powers. However, an analysis of the decisions by Florida courts regarding the Clerk's ministerial duty reveals that the reference to ministerial is with regard to the form, content, enforcement, execution and implementation of the content of judicial records which the Clerk is called upon to administer. With regard to those duties which the Legislature has affirmatively charged the Clerk to perform - maintaining a docket and orderly records of the court - the Clerk is a separate constitutional office with attributes of both the judicial and executive branches and cannot simply be marginalized as having no autonomy or discretion whatsoever with regard to the execution of these duties.

The Majority Report cites Gombert v. Gombert, 727 So.2d 355 (Fla 1st DCA 1999), for the blanket proposition that the judiciary has the inherent power "to control its records." In Gombert, a psychological evaluation was prepared for a child in the divorce proceeding of his parents. The evaluating expert filed a copy of the report with the court after the parties had entered into a settlement agreement regarding custody. The settlement agreement provided that the report should be

completed and released, but the trial court sealed the report notwithstanding the provisions of the settlement agreement. The reference in that opinion to the court's inherent power and duty to maintain its records and access to those records refers to whether the records should be sealed and confidential, subject to limited disclosure, or be part of the court file without any limitation on disclosure or access. Obviously, if the court determines that a record should be sealed or subject to limited access, it is the Clerk's role to maintain the record consistent with that judicial determination. However, if the record is not confidential, there is nothing in the Gombert opinion which supports the view that the court exercises complete dominion over the Clerk in terms of how the record is indexed, stored, and made available to the public, pursuant to the Clerk's statutory duties.

In Times Publishing Co. v. Ake, 645 So.2d 1003 (Fla. 2nd DCA 1994), the court held that Chapter 119 does not apply to the Clerk with respect to judicial records and that access to judicial records, under the Clerk's control, is governed by Florida Rule of Judicial Administration 2.051.

The issue presented was one of whether Times Publishing Co. was entitled to attorney fees under Chapter 119,after it and Ake (a Clerk of the Circuit Court) settled the underlying dispute regarding a broad document request for magnetic computer tapes containing court files. The District Court of Appeal determined that the Clerk of the Court was not an agency subject to the Public Records Act. As with Gombert, the underlying issue is the power of the court to determine that judicial records should have less than unfettered public access. This determination is clearly exclusively a judicial one.

However, once the record is established as being publicly available without restriction, or once the restriction is articulated by the court, the record then becomes a record of judicial proceedings which is under the custody and

responsibility of the Clerk in terms of its docketing, maintenance and availability for review by the public and the parties to the litigation.

The Committee Report comments on the significant role of the Legislature with regard to court records but then states that "the general power of the courts to supervise court records cannot be interfered with by the Legislature." The Committee Report arguably fails to distinguish between the power to determine the content of any record of judicial activity, the effect of any judicial decision, or the right of access to the record (such as an order, ruling, judgment, decree) and the power to determine how the order, judgment, etc, once memorialized and fixed by the court, shall be indexed, maintained, and made available to the public (consistent with any judicial determination of restricted access, which is the exception and not the rule as to court records generally). Thus, there would appear to be a distinction between control over court records with regard to content and effect and control over court records as a historical record of what has occurred in judicial proceedings. As to the former role, the court's authority is inherent and absolute; as to the latter role, the Clerk of Court, consistent to the duties imposed on the Clerk by the Legislature, has the historic and current responsibility for the maintenance, custody and indexing of those records.

The Committee Report quotes Times Publishing Co. v. Ake, 645 So.2d 1003 (Fla. 2nd DCA 1994), as decided by the Florida Supreme Court, to the effect that Clerks are the subject of the sole oversight and control of the Supreme Court of Florida with respect to judicial records, rather than the control of the legislative branch. However, it is the Legislature which has historically directed the Clerk to keep the Court's docket and to maintain custody of judicial records.

The involvement of the courts in the care and custody aspect of judicial records (with the exception of confidentiality and issues of sealing a record) appears to be a relatively recent concern of the courts, arising primarily as a result

of Public Records Act legislation. In State ex rel. Druissi v. Almand, 75 So.2d 905 (Fla. 1954), the appellant was arrested by a policeman of the City of Jacksonville and charged with disorderly conduct, etc., in violation of city ordinances. He was convicted in the municipal court and fined. He paid his fine but three days later filed a motion for a new trial. The judge of the municipal court granted the motion and ordered a new trial; he was found not guilty. The order of conviction was quashed and the disbursing officer of the City of Jacksonville was ordered to return the fine. The City Recorder, as Clerk of the Municipal Court, was ordered to note on the docket sheet that the convictions were reversed. The city attorney told the City Recorder not to note the reversal of the conviction. The Court held that the recorder is to act as the Clerk of the City Court, and so stands in the shoes of a Clerk of Court; thus, the making or keeping of court records is purely ministerial and that the Clerk has no power to pass upon or contest the validity of act of the Court. The Almand case involved a refusal by a Municipal Court Clerk to follow a judge's order as to the content or effect of an issued decree. The Clerk cannot pass on the validity or quality of the content or effect of any judicial record. However, Almand does not stand for the proposition that the Clerk has no authority with regard to the manner with which the record of the court, once entered and fixed, is maintained, stored and retrieved as a historical record of judicial proceedings.

In Pan American World Airways v. Gregory, 96 So.2d 669 (Fla 3rd DCA 1957), the court reversed a final judgment based upon a default entered for failure to file an answer. Plaintiff sued in state court; defendant removed to federal court and filed an answer. The federal court remanded but did not send the answer to the state court for inclusion in the court file. The defendant did not refile his answer in state court. Plaintiff moved for a default, which the Clerk entered. The motion for default certified that no answer had been filed. The case was tried before a jury without any further notice. The Court stated that the Clerk is an officer of the Court

whose duties are ministerial and does not involve any discretion. The rule in effect at the time required the failure to serve answer as a basis for default. The certificate filed by plaintiff stated that defendant had not filed an answer or other pleading directed to the complaint, but did not certify that an answer had not been served.

In Gregory, the characterization of the Clerk's ministerial role was again with reference to the implementation of an order, decree or judgment, as opposed to management of historical record once the court's judgment or decree is issued. The Clerk had no discretion to go beyond the terms of the default rule and enter a default, where it was not warranted.

In Corbin v. Slaughter, 324 So.2d 203 (Fla 1st DCA 1976), the court held that a Clerk may not challenge the validity of a court's order issued in the performance of the court's judicial function. A county court judge issued an order directing the Clerk to furnish the judge with the names of the deputy clerks assigned to him within the specified time which the Clerk refused to do. The judge issued an order to show cause, and the Clerk filed a petition for a writ of prohibition alleging that the judge did not have jurisdiction to proceed further against the Clerk. The Clerk contended that the judge's order purported to adopt a local rule, in contravention of the Florida Rules of Civil Procedure. The appellate court held that the judge's order directed the Clerk to perform a ministerial act and the Clerk did not have authority to question the order by writ of prohibition. The chief judge was the proper party to resolve the dispute. In stating that the Clerk is "merely a ministerial officer" of the court, the appellate court was referring to the fact that the Clerk cannot challenge the validity of any act of the court which purports to have been done in the performance of the court's judicial function. The opinion does not stand for the proposition that the Clerk has no role or status independent of the judiciary with respect to court records.

In Morse v. Moxley, 691 So.2d 504 (Fla. 5th DCA 1997), the Chief Judge of the Eighteenth Judicial Circuit issued an order directing the specific assignment of certain trial clerks to particular judges; the court's order directed to the Clerk stated that "the clerk is subject to regulation by the Court as authorized by the Supreme Court of Florida." The Clerk argued that she is vested with constitutional authority under Article V, Section 16 of the Florida Constitution and possessed statutory authority, pursuant to section 28.06, Florida Statutes, to appoint deputy clerks with the inherent power to fire or assign them to the position she deems appropriate. The Clerk argued that without having this inherent power, the Clerk cannot operate her office. The appellate court held in favor of the Clerk, finding that the assignment of deputy clerks is necessarily within the discretion of the elected clerk and not the chief judge. The reliance of the chief judge on Times Publishing Co. v. Ake, 660 So.2d 255 (Fla.1995), and Florida Rule of Judicial Administration 2.050 was rejected by the appellate court. The appellate court specifically referred to the "constitutional grant of power to the clerk of court."

In Security Finance Co. v. Gentry, 120 So.220 (Fla. 1923), the relevant statutes provided that the Clerk could enter a default and a subsequent default judgment. The Clerk entered a default and then entered a default judgment. The Clerk failed to keep a "default docket" as required by the statute and enter the default in that docket. Until the default had been in the default docket for a period of sixty days, the defendant could move to set it aside. Thus, the Clerk should not have entered the subsequent default judgment against the defendant. The observation by the court that the Clerk's authority is entirely statutory (relied upon by the majority report) was with regard to the fact that when a statute sets forth a procedure for the Clerk to follow, the Clerk should follow it, not with regard to Clerk's function under the Florida Constitution. The committee report notes that the Legislature, pursuant to the state funding mandated by the 1998 Revision 7 to

Article V, restricts the authority of the Chief Judge over Clerks of Court in the performance of court-related functions, including the management of court records. The Committee further notes that section 28.35(4) (a) Florida Statutes (2004) enumerates the court related functions Clerks of Court may fund from filing fees, etc., which includes case maintenance and records management. That the judiciary has no power to fix appropriations and that the Legislature has specifically appropriated funds for case maintenance and record management for the Clerks supports the view that the historical record component of the judicial records function of the Clerk cannot simply be eliminated by amendments to the Florida Rules of Judicial Administration.

Interestingly, the Committee states that while the Supreme Court of Florida essentially preempts any discretion or independent control of the historical record component of judicial records, nonetheless, the Clerk has complete responsibility for maintaining the confidentiality of confidential records. More properly, if the Privacy Committee is to suggest that the Florida Supreme Court assumes complete control over all aspects of judicial records in the custody of the Clerk, the Committee should similarly consider a recommendation to extend immunity to the Clerk, rather than articulating a specific basis of liability for the Clerk. While the Clerk may be unable to respond to changing conditions and perceived problems in maintaining judicial records in order to promote confidentiality, because the Clerk is "ministerial" and without authority independent of the court to make any rules, or regulations as to access, the Clerk is nonetheless charged with this duty to ensure confidentiality.

Although the committee report refers to Times Publishing Co. v. Ake, and its holding that the judiciary is not a "custodian" under Section 119.021 and so the Clerk and the judiciary are exempt from its provisions, the Committee nonetheless undertakes to define the Clerk as a "custodian" with the duties incumbent upon a

custodian under the Public Records Act. If the Clerk is a mere ministerial arm of the judiciary with regard to court records, and judicial records held by the Clerk are not to be within the ambit of the Public Records Act, the Committee should not place the duties of a custodian with regard to confidential information on the Clerk, particularly where there is no corresponding articulation of the Clerk's authority to make such rules and enforce such regulations as are necessary to perform that duty. If the Clerk has the duty of protecting exempt and confidential information, then the Clerk should have the power and authority to determine the manner in which the Clerk's procedures should meet the requirements of that duty, so long as such procedures are in accord with the Clerk's statutory duties and the judicial power vested in the courts.

The Clerk's role in maintaining court records serves as a check and balance on the Court system. In order to maintain the integrity of the Court system and avoid the appearance of control of public scrutiny of its actions, the performance of record keeping duties by an independent constitutional officer would seem to be preferential to the courts and in keeping with the principle of government in the sunshine.

While following both legislative enactments and Supreme Court rules, Clerks fully support the committee's ultimate conclusion that Clerks, the Legislature and the Court must work together to provide an efficient and safe system of providing remote access to court records.

THE APPLICATION OF CONFIDENTIALITY STATUTES TO COURT RECORDS.

The concept of the Clerk having an independent duty to protect confidential records is a sound concept. Clerks, however, do not agree with the position that the confidentiality provisions of all statutes necessarily carry over to the court when

records become a part of the court file. Clerks have pointed out that records containing trade secrets, confidential by Florida Statute, are by definition not known to Clerks at the time of filing. As such, it would be impossible for Clerks to determine a record to be a trade secret unless it was identified as such by the filer. The Committee on Privacy and Court Records was made aware at its last meeting of the policy of the United States District Court for the Middle District of Florida dated November 1, 2004. This policy addresses many of the same issues faced by the Committee on Privacy and provides a simple and effective method of resolving these issues. While the majority rejected this policy for use in the state courts, we recommend that the Court consider this policy in order to prevent the inclusion of and safe guard confidential information in court records. We recommend that the Court delineate those statutory confidentiality provisions that apply to records filed in the courts.

At least one other state that adopted access rules specifically listed which records are confidential when filed. A rule that specifies records that are confidential in Court files and those that would require an affirmative motion by the filer to make a record confidential would provide guidance to all users and participants in the court system. This would greatly assist the Clerks in performing this ministerial function. The parties to a case, especially pro se litigants, and the public would greatly benefit from a bright-line rule informing as to exactly which records would be public if filed with the Court. Clerks could publish such a rule on-line and at our offices to assist those participating with the courts or accessing the records.

THE CONCEPT OF THE "CONTROLLED FILE."

The Clerks do not agree with the Committee's proposed "controlled file" concept whereby a court rule would delineate "presumptive indicia of improper

filings" and Clerks would be authorized and trained to identify such pleadings and hold them in abeyance. According to the Committee, the reason for identifying such improper filings is to avoid "the gratuitous publication of extraneous and potentially damaging personal information." However, harmful unnecessary personal information does not only appear in pleadings that could be readily identified as improper.

For example, the Committee lists several types of unnecessary information frequently found in court records including "financial information, names, ages, addresses, driver records, information about family members, and medical and other intimate information." Realistically, the mere occurrence of any of the information in this list cannot serve to automatically render a filing improper. If the inclusion of names indicated impropriety, virtually every filing would be held in abeyance. Also, some of the information in this list may appear within the body of presumptively *proper* filings although the information may or may not be relevant and necessary. Whether such information in an otherwise proper filing is necessary to a cause of action requires consideration of the merits of the case and the relevant laws, surely not a decision to be rendered by the Clerks.

Clearly, making threshold determinations of the propriety of filings is a discretionary, judicial function that is wholly unfitting for Clerks to assume. The Report attempts to shore up the validity of such a process by pointing out that pre-filing screening and rejection of documents "would not be an entirely new undertaking" because all along parties could move to strike similar pleadings under the Rules of Civil Procedure. However, as a motion to strike is ultimately ruled upon by a judge, this illustration actually proves to undercut the proposal that arbitrating pleading propriety is anything short of a judicial function. To arm the Clerks with a court rule of guidelines and erect them as standards of judgment

between litigants and the courts is an inappropriate position that no amount of training and guidance will enable Clerks to perform within their proper functions.

Lastly, the Court should bear in mind the operational limitations on the Clerks when considering the Committee's proposal, as any policies and rules set forth by the Court must be practicable in order to be implemented. The Clerks maintain custody of literally hundreds of millions of pages of court files and neither have reasons or responsibility to know the content of those documents. As an example, the Clerk in Orange County processes over 34,000,000 pages of court records every year. To comply with the requirements that the Clerk protect from public disclosure all information considered confidential or exempt will result in one of two scenarios:

(a) an astronomical cost to the state in the hundreds of millions of dollars if Clerks are required to manually review and redact such information from all Court Records, or

(b) that access to Court Records as we know it today would cease if Clerks were to be required to review each file when access was requested by the public. The opportunity to go to a Clerk's office and review files on an intranet or microfilm terminal would be eliminated. The time the public would have to wait for access to the file would be extended from minutes to days as a deputy would have to manually review the requested documents and redact any confidential or exempt information found.

In summary, the ability for the office to efficiently serve the public would come to a halt. The cost to the state of this approach, while not as expensive as option (a) would be ongoing and prohibitive without significant increases in court filing fees and service charges.

Contrary to the belief held by some, there is no magic bullet computer program that identifies what is considered "confidential" and even to the extent that a program seeks to locate what are considered the most obvious of such protected information (social security numbers, drivers license numbers etc;), it is only applicable where the document has been scanned into an electronic form. This is currently a small portion of the inventory of court documents in the custody of the Clerks of the Circuit Court.

The Committee proposed other solutions that would be independently sufficient, such as simplifying court rules and forms that require unnecessary personal information and educating litigants, attorneys and the public about improper filings and extraneous information. Clerks agree with this recommendation.

MEMBER COMMENTS of:

Mr. Jon Kaney

Joined by: The Honorable Kim Skievaski, The Honorable Tom D. Hall, Mr. Larry Turner, and Professor A. Michael Froomkin joining in the comments beginning with the heading "MINIMIZATION"

This will express and explain my concurrence in "Access and Privacy: Report and Recommendations of the Committee on Privacy and Court Records,"[53] as well as my disagreement with arguments made in the minority reports.

I support the Report in its entirety and all recommendations taken together as a package. Individual members rightly feel that some recommendations are more agreeable than others, but not all members can be completely satisfied with every element of such a complex study as this. The Committee should respond to the Court's charge by presenting a workable set of recommendations.

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[53] I refer to *Access and Privacy: Report and Recommendations of the Committee on Privacy and Court Records*, inclusive of the 25 recommendations and comments thereon, as the "Report" and to the Committee on Privacy and Court Records as the "Committee." Sometimes in the point-counterpoint below, it is obvious that I use "committee" to refer to the majority and not to the entire group, as we do have disagreements.

I believe the Report achieves this goal. I am grateful to the staff and leadership of the Committee for producing this outcome. Also, I appreciate the cooperative work of my fellow members, including the dissenters, all of whom have performed substantial service in developing the final report.

CONCURRENCE WITH THE REPORT

In responding to the charge to the Committee stated in the Amended Administrative Order of February 12, 2004, the Report properly deals with the three major issues encountered in our studies.

Absorption

The question of the extent to which court records are required by law to be held exempt and confidential from public disclosure was the root question faced by the Committee (the "absorption issue"). We must resolve this question regardless of how we resolve the distinct question of whether to allow remote electronic access. At the outset, the Committee found that many Clerks of Circuit Court ("Clerks") held the view that statutorily exempt public records were no longer exempt when filed as court records, and consequently these Clerks were allowing statutorily exempt records to be disseminated to the public through various media, including publicly accessible websites, subscription websites, intranet websites maintained within a Clerk's office, and paper files at the Clerk's counter. Alternatively, some Clerks contended that regardless of the applicability of statutory exemptions to court records, the Clerks had no duty to enforce the exemptions.

After studying the legal premises of the absorption issue and considering the arguments of some Clerks, the Florida Bar's Media Law Committee, and others, the Committee concluded, as a matter of law, that Fla. R. Jud. Admin. 2.051(c) (8) ("Rule 2.051(c) (8)"), adopted on October 29, 1992, "absorbed" statutory

exemptions and made them applicable to court records and that it is the duty of Clerks to enforce these exemptions. It may be argued that Rule 2.051(c) (8) absorbs only exemptions in effect on the date of adoption, but that argument would be moot because the Legislature consistently has said that subsequent exemptions override the constitutional right of access under Fla. Const., Art. I, § 24 (a), which includes the right of access to court records.

Although the Committee did not agree with the legal argument against absorption, it did agree with the practical argument against full absorption.[54] As best explained in the Report, we found it well-nigh impossible to apply the entire body of statutory exemptions to court records. When the prospect of prompt publication of court records on the Internet is contemplated, the impracticability of enforcing all statutory exemptions is especially acute because Clerks must screen each court record before making it public. The problem is equally acute when individual Clerks publish court records on intranets available to public terminals within their offices. Here too, the Clerks must screen in advance every document filed. Even when court records are disclosed only on paper at the Clerk's counter, the same difficulty arises, and it is less acute only because it happens less often.

Therefore, the Committee adopted Recommendation 2, requesting that the Court study, or cause to be studied, narrowing the scope of exemptions absorbed under Rule 2.051(c)(8) and tailoring these exemptions to the judiciary in light of constitutional requirements for judicial openness. The Committee further resolved that the Court defer implementation of its recommendations for remote electronic access to court records until the completion of this study.

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[54] This has been clear from the earliest days of our work. See memorandum of November 7, 2004, agreeing that the Media Law Committee's memorandum against absorption contained "policy criticism [that] is useful and cogent").

The Court has the authority to narrow the scope of Rule 2.051(c) (8). This was foreseen in 1992 within the opinion of the Court adopting Rule 2.051(c) (8):

> Several individuals and groups requested the opening of even further judicial records, but the Court is unsure whether or not the opening of these additional records could have the effect of damaging or disrupting the judicial system. Because the proposed amendment prohibits the Court from later enacting a rule which would close any other records, the Court determined to deny such additional requests at this time. However, the Court is desirous of further input on these additional requests to assess their impact upon the integrity of our judicial system. This will permit further analysis of these requests and give the Court flexibility to open such additional records in the future as may be in the best interest of the public and the judicial system.

In re Amendments to Florida Rules of Judicial Administration-Public Access to Judicial Records, 608 So. 2d 472, 473 (Fla. 1992) (emphasis supplied).

The Report states that reconciling absorption with the constitutional right of access is one of the purposes of the proposed restudy of absorption. The question of the content of absorbed exemptions and of the process by which *a priori* statutory closure of records will be constitutionally tested must be addressed in that study. My comments here do not presuppose the outcome of that deliberation.

Minimization

A second major concern is reflected in the cluster of recommendations we have styled "minimization." Our study revealed that under present (and historical) practice, the law imposes no constraint on the ability of parties and their counsel to insert any document whatsoever into a court file. When inserted, the document becomes a court record and enjoys a highly privileged status under Florida law. The person who files the record is presumptively protected by judicial immunity from liability for reputational, privacy, or other harm resulting from the filing,

hence publication, of this information; the press (perhaps any person) is protected from liability when it fairly and accurately reports on the content of the court record; and the common law does not afford a cause of action for invasion of privacy resulting from publication of the contents of a court record.

The Committee found that a great deal of valid concern expressed by those who oppose Internet access to court records stems from this fact that court files are wide open to such extraneous matter. Court records often contain materials that are not legitimately a part of the record of court proceedings nor otherwise relevant or pertinent to the administration of justice. Without attempting to define it (or minimize the definitional problem), I will use the term "improper filings" to hold the place of the yet-to-be-defined object of the minimization policy.

Direct communications from unrepresented parties (known as "Dear Judge" letters) make up a substantial part of such "improper filings." But unrepresented parties are not solely responsible for such "improper filings." Florida's liberal discovery rules allow parties to require the disclosure of private facts not relevant to the case for various reasons, including the speculative chance that such disclosures might lead to discovery of relevant evidence. As a result, the raw fruit of discovery often includes irrelevant and intrusive information, which parties and witnesses have been compelled to divulge on pain of judicial sanctions, including contempt. Such compelled disclosure is state action, and when it intrudes into matters with respect to which the target has a legitimate expectation of privacy, the compelled disclosure implicates the state constitutional right of privacy. Yet, when the raw fruit of discovery is filed in a court file for any reason, it attains the privileged status of a court record immune to the subject's right of privacy or reputation. Today, there is no constraint on the ability of a litigant to file such raw fruit of discovery as a court record, which opens it as a public court record regardless of whether it is disseminated on the Internet.

Similarly, despite identity-theft concerns associated with divulgence of a Florida Driver's License number, many lawyers routinely file a photocopy of a person's driver's license (complete with photograph) as proof of residency.

Rather than count this ill use (and sometimes abuse) of court filings as a reason for barring Internet access to court records, the Committee determined that the problem should be addressed at its source. Thus, we adopted the minimization recommendations. There is no denying this policy will be difficult to define and implement, but the Committee believes wide-open filing should be constrained when it results in needless disclosural harm. The recommendation is a conceptual recommendation and does not purport to resolve the definitional and administrative issues that arise when the specifics are addressed.

The suggestion that minimization infringes the right of access to courts is without merit. There is no right that grants an unabridged license to file extraneous papers with the Court. The constitution protects causes of action for "redress of injury" from unjustified abolition by the Legislature. *See* Fla. Const. Art. I, § 21 ("The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay"); *Kluger v. White*, 281 So. 2d 1 (Fla. 1973) (construing right of access to redress of injuries), *approving Rotwein v. Gersten*, 36 So.2d 419, 420 (1948) (sustaining abolition of "heart balm" actions because the actions had "been subject to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damages to many persons wholly innocent and free from wrongdoing").

Internet Access to Court Records

The third major issue before the Committee was whether to recommend that the Court allow remote access to nonexempt court records via the Internet and

similar media. Subject to the condition that the Court adopt rules narrowing and tailoring the confidentiality rules to the specific context of the courts and also adopt rules implementing appropriate minimization of "improper filings," the Committee concluded that Internet access to court records should be a goal of the judicial branch.

In large measure, the reasoning of the Committee is expressed by the (U.S.) Judicial Conference Committee on Court Administration and Case Management, Report on Privacy and Public Access to Electronic Case Files adopted in September of 2001 and still in effect:

> Providing remote electronic access equal to courthouse access will require counsel and pro se litigants to protect their interests through a careful review of whether it is essential to their case to file certain documents containing private sensitive information or by the use of motions to seal and for protective orders. It will also depend upon the discretion of judges to protect privacy and security interests as they arise in individual cases. However, it is the experience of the ECF prototype courts and courts which have been imaging documents and making them electronically available that reliance on judicial discretion has not been problematic and has not dramatically increased or altered the amount and nature of motions to seal. It is also the experience of those courts that have been making their case file information available through PACERNet that there have been virtually no reported privacy problems as a result.
>
> This recommended "public is public" policy is simple and can be easily and consistently applied nationwide. The recommended policy will "level the geographic playing field" in civil cases in federal court by allowing attorneys not located in geographic proximity to the courthouse easy access. Having both remote electronic access and courthouse access to the same information will also utilize more fully the technology available to the courts and will allow clerks' offices to better and more easily serve the needs of the bar and the public. In addition, it might also discourage the possible development of a "cottage industry" headed by data re-sellers who, if remote electronic

> access were restricted, could go to the courthouse, copy the files, download the information to a private website, and charge for access to that website, thus profiting from the sale of public information and undermining restrictions intended to protect privacy.[55]

If the practice of "improper filings" is reformed and if the current structure of absorbed exemptions is reformed to create an intelligible, and thus enforceable, set of policies for nondisclosure of sensitive court records, the Committee decided that there remains no reason to deny remote electronic access to court records.

COMMENTS ON THE DISSENT AUTHORED BY JUDGE GRIFFIN

With respect, I find it necessary to respond to the minority report so well written by my esteemed friend, Judge Griffin, and joined by members who I also hold in high esteem and affection. By way of apologia, I want to say that the stringent tone of my "counter-dissent" is not intended disrespectfully. Judge Griffin has written a strong (and artful) dissent, and I cannot see how to counter her argument in any less argumentative terms.

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[55] http://www.privacy.uscourts.gov/Policy.htm (last visited 7/11/2005 6:35 PM). There are significant differences between the Committee recommendation and the Federal practice, including our recommendation that anonymity of access be preserved.

The Dissent does not Advance the "Disclosural Privacy" Interest

The central error in the reasoning of the Dissent lies in its conflation of "practical obscurity" with privacy. The foundational assumption of the Dissent is that information which is "practically obscure" is "private." This is not true.

Consider the Dissent's reference to the autopsy photographs of Dale Earnhardt and compare the case of Neil Bonnett, another NASCAR driver who was killed in a crash at Daytona International Speedway. The important lesson, for our purposes, is taught not by Dale Earnhardt's case but by Neil Bonnett's case. His autopsy photographs were obtained in hard copy through a public records request made before the Earnhardt Act took effect. Then they were scanned and published on the web. By the Dissent's argument, Bonnett's photographs were "private" because they were "practically obscure." Yet Bonnett's daughter testified in the Earnhardt case that she opened a page on the Internet and found a picture of her father "naked and gutted like a deer." Privacy is NOT protected by practical obscurity.

This central error runs through the Dissent. It begins with the mistaken (and unnecessary) assumption that the Report is "driven" by the decision to favor Internet access to court records. There is no basis for this assertion. To my knowledge, the supporters of the Report believe the recommendations to narrow absorption and minimize "improper filings" stand alone and would urge the Court to adopt these recommendations even if it decides not to allow Internet publication of court records.

The Dissent inaccurately (argumentatively) says the majority concluded that Internet publication of court records is "impossible." On the contrary, the Committee concluded not that it is <u>impossible</u> but that it is <u>necessary</u> to "clean up" Florida's approach to what may become a nonexempt court record. Privacy rights

and disclosural interests may be invaded by wrongful filing of documents in court files and by failure to abide by the law of exemptions, regardless of whether the records are published on the Internet. It is a moral lapse for the State of Florida to condemn the suitability of court records for Internet publication while leaving them wide open to public records requests and thus available for secondary publication in any medium, from gossip to the Internet.

It is ironic that the Dissent objects to the recommendations for narrowing absorption and minimizing "improper filings" based on privacy concerns because the Committee was motivated to adopt these recommendations by its own privacy concerns. The Committee understands that the right of privacy must be protected prior to the creation of a court record and that exemptions from disclosure should be narrowed and tailored so that judicially appropriate policies of nondisclosure actually and practically can be enforced at the counter, on the Clerks' intranets, and in cyberspace.

In contrast, the Dissent would not protect any subject's interest in nondisclosure. It would leave the jungle of absorbed exemptions "impossible" to enforce in any medium (thus, not enforced); it would leave the privileged court file wide open to unnecessary abusive and intrusive filings; and it would leave subjects of court records unprotected from any form of publication, including secondary Internet publication.[56]

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[56] The Dissent argues that implementation of minimization asks too much of the bar and Clerks, but that cannot be justified. It is not reasonable to excuse Clerks or attorneys from the duty to know the law. Exemptions are law. Lawyers and Clerks should know and follow the law. "Ignorance of the law" is not a defense, nor is it a defense that overcoming such ignorance is too much trouble for either lawyers or public officers. Further, the problem of unrepresented parties is but a subset of the larger problem of handling unrepresented parties in the complex labyrinth of the judicial system. Judicial

Although the Dissent deploys the term "privacy" in support of its blanket objection to the Report, it neither states nor implies a definition or explanation of what it means by "privacy." That is not surprising. "The term 'privacy' is used frequently in ordinary language as well as in philosophical, political and legal discussions, yet there is no single definition or analysis or meaning of the term. [H]istorical use of the term is not uniform, and there remains confusion over the meaning, value and scope of the concept of privacy." DeCew, "Privacy", The Stanford Encyclopedia of Philosophy (Summer 2002 Edition), Edward N. Zalta (ed.).[57]

In the taxonomy of privacy discourse, the Dissent is concerned with that species of "privacy" which is sometimes called "informational privacy" or "disclosural privacy." *See* Fred H. Cate, Privacy in the Information Age (Brookings 1997) at 19-31. Cate favors the definition advanced by Alan F. Westin in Privacy and Freedom (Antheum 1967). "Privacy is 'the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others'". Cate at 22 quoting Westin at 7.[58]

But the information now under consideration already has passed beyond the individual's control. By necessity, implementation of the Report will result in

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transparency should not be limited by the lowest common denominator of the ability of unrepresented parties to deal with the law in this area.

[57] http://plato.stanford.edu/archives/sum2002/entries/privacy/>. (last visited 7/11/2005 7:29 PM).

[58] I admit similar imprecision in my use of "privacy" in this paper and elsewhere. In my usage, the term may refer to the prior right to prevent the creation of a public court record or to an interest in nondisclosure or limited disclosure of personal information recognized by public policy. It is devilishly handy shorthand for all that.

public dissemination of only that which is nonexempt public record information.[59] Such information is always and already public. If privacy is the right to "determine for ourselves when, how, and to what extent information about [us] is communicated to others," then the interest in informational privacy already has been overridden by the public nature of the nonexempt court file.

Thus, the objection to dissemination of nonexempt court records over the Internet cannot be justified by any reasonable notion of informational privacy. Nor can the Dissent's attempt to create a privacy-based distinction between public access to nonexempt court records through one medium but not another. That information in court records which would be disseminated under the recommendations of the Committee is fully accessible to the public. It readily can be reviewed and summarized by the "old media" and scanned and published by all forms of "new media." It is public, and keeping such information off the Internet does nothing to make it "private."

The Dissent implicitly relies on an unusual idea of "privacy." In essence, it objects to a change in the status quo regarding distribution of information. This is not justified, but it is also not unprecedented.[60]

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[59] Such information, by definition, is not banned from disclosure on public policy grounds.

[60] See, e.g., Richard A. Epstein, Privacy, Publication, And The First Amendment: The Dangers Of First Amendment Exceptionalism, 52 Stan. L. Rev. 1003-1004-05 (2000) ("Doctrinal analysis often requires us to reconcile traditional legal principle with modern technological innovation. Nowhere is this task of reconciliation more daunting than with cyberspace, where the speed and spread of information has been ratcheted up to levels that were unimaginable even a generation ago. And nowhere in cyberspace is it more important to tweak doctrine than on the general legal issue of privacy, which is here defined as the ability of individuals to keep private--that is, subject to limited distribution for specific persons--information about themselves that could prove harmful or embarrassing to them if made public or placed in the wrong hands. . . .

Somewhat surprisingly, the Dissent manages to stake out a position that is, at once, anti-privacy and anti-access. The Dissent is against privacy because it rejects reform of absorbed exemptions to make them understandable and "possible" to enforce, and it rejects the recommendation to deter "improper filings." Similarly, the Dissent is against the public right of access to court records because it insists on maintaining "practical obscurity" of such records, which impedes public access with no offsetting utilitarian benefit to "privacy" by any definition.

That said, however, there is a second danger that is, if anything, greater than the first: endowing the new challenges in cyberspace with such novelty that it becomes too easy to forget that the underlying problems have been with us for a very long time. (citation omitted). Just as with the rise of the camera and the parabolic microphone, the law must resolve a permanent tension between two ideals, each of which seems to be unexceptional until placed in juxtaposition to the other. The first ideal of privacy carries with it all the positive connotations of allowing individuals to control information about themselves. The second ideal is full disclosure of that same information to allow others to make full and informed decisions. Unfortunately, both ideals cannot be fully honored at the same time, and someone has to choose between them in many different contexts.

This clash of imperatives, moreover, long predates cyberspace: Individuals have always wanted to keep information about themselves private while finding out everything about others. Information is power, whether it is the information that you possess or that which you can deny to others. That said, the desires for privacy and disclosure cannot be satisfied for all people simultaneously. The challenge therefore is to examine the larger question in more specific contexts to determine the relative values of privacy and full disclosure.

The rise of cyberspace did not create this tension, but it does exacerbate it. A similar set of difficulties arose with the camera and the parabolic microphone. (citation omitted) Much the same may be said about mass publication, which got its first boost with the Gutenberg printing press. The ability to broadcast online has increased the scope of publication mightily, but it is far less clear that our contemporary problems have altered materially as we have moved beyond traditional print and broadcast media").

The Dissent Ignores the Value of Judicial Accountability

The Dissent's argument that "public internet access to court records is a misguided goal" proves too much. (e. s.) If that were true, and if the objections and claims of the Dissent were valid, then the conclusion should be that the public always would be barred from access to court records through any medium. Indeed, that seems to be the purpose of the Dissent's focus on "the most important constituency of the courts - its users."

That the courts exist to serve "users" in obscurity is anathema to our tradition of republican self government. The judiciary is a branch of government exercising sovereign powers granted by the people of the State. Against the settled doctrines of open courts in Florida, the idea that the public should stand aside and leave "justice" to the unobserved (or practically obscure) interaction between court and "user" is downright heretical. Judges exercise immense power conferred on them by the people to whom they are accountable.

In its adumbrated reference to *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113 (Fla. 1988), the Dissent turns Florida's law of open courts on its head. Whereas *Barron* held that openness is essential to the courts, the Dissent says *Barron* teaches that "practical obscurity" (which it mistakes for privacy) is essential. On the contrary, *Barron* (and Rule 2.051(c)) establish that concern for nondisclosure of intimate or embarrassing facts does not justify denial of public access to that which is "integral" to a case, whether it be a proceeding or a record. As our (dissenting but beloved) colleague, Judge Judith Kreeger, often states, "If I see it, the public should see it." Revelation of that which is "integral" is necessary to judicial transparency for reasons well articulated in *Barron* and its progeny.

In *Doe v. Museum of Science and History of Jacksonville*, 1994 WL 741009, 22 Media L. Rep. 2497 (Fla. 7th Jud. Cir. 1994), Judge Richard B. Orfinger, who was then a circuit judge and is now a judge of the Fifth District Court of Appeal,

denied a motion to close a trial sought by plaintiffs--minors who had been sexually abused by a museum employee and were suing a museum for allegedly failing to disclose the perpetrator's past bad acts in an employment reference.[61] Judge Orfinger explained how *Barron* applied to the intimate and embarrassing facts that necessarily would be divulged in the trial:

> *1Whenever other interests compete with the public interest in open judicial proceedings, "[o]ur analysis must begin with the proposition that all civil and criminal court proceedings are public events, records of court proceedings are public records, and there is a strong presumption in favor of public access to such matters." *Sentinel Communications Co. v. Watson*, 615 So.2d 768, 770 (Fla. 5th DCA 1993) (*citing Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113 (Fla.1988)). This presumption rests on the most fundamental values of American government.
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> "[T]he people have a right to know what is done in their courts.... [T]he greatest publicity to the acts of those holding positions of public trust, and the greatest freedom in the discussion of the proceedings of public tribunals that is consistent with truth and decency, are regarded as essential to the public welfare." *Barron*, 531 So.2d at 116-7 (*citing In re Shortridge*, 34 P. 227, 228-29 (Cal.1893)). Openness in courts has a salutary effect on the propensity of witnesses to tell the truth and of judicial officers to perform their duties conscientiously. It informs persons affected by litigation of its effect upon them and fosters "respect for the law [,] intelligent acquaintance . . . with the methods of government [, and] a strong confidence in judicial remedies ... which could never be inspired by a system of secrecy. . . ." *Id.*, (citing 6 WIGMORE, EVIDENCE § 1834 (Chadbourn rev.1976)). These fundamental values come into play whenever the court is in session, and the presumption of openness applies in hard cases as well as easy cases. "The reason for openness is basic to our form of government." *Id.*
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> *2 [T]he presumption of openness is of larger importance than the immediate interest of the press in the case of the moment. To be sure, the

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[61] I disclose that I represented News-Journal Corporation in this case and contributed a draft of Judge Orfinger's opinion. The Fifth District denied certiorari without opinion, no doubt on grounds that did not involve the merits.

press has a cognizable interest in maintaining open courts "because its ability to gather news is directly impaired or curtailed" by restrictions on access. [*State ex rel. Miami Herald Pub. Co. v. McIntosh,* 340 So.2d 904, 908 (Fla.1977)]. Moreover, the press is assigned a fiduciary role in enforcing public rights of access because the press "may be properly considered as a representative of the public [for] enforcement of public right of access." [*Id.*] Nevertheless, the values of openness in courts transcend the interests of the press because "[f]reedom of the press is not, and has never been a private property right granted to those who own the news media. It is a cherished and almost sacred right of each citizen to be informed about current events on a timely basis so each can exercise his discretion in determining the destiny and security of himself, other people, and the Nation." [*Id.*]. In serving the right of each citizen to be informed, judicial openness, of which the press is an instrument, sustains public confidence in the judiciary and thus serves the ultimate value of popular sovereignty.

This higher purpose of openness is not always apparent in the public scrutiny of the daily business of the courts. Depending on the definition of newsworthiness, it may be possible to dismiss as unworthy much that transpires in civil courts. Here, it is easy to ask what public interest is served by subjecting these minor victims to the risk of public identification. However, *Barron* teaches that this is the wrong question because it overlooks the higher purpose of openness in the courts.

In *Barron*, a case involving privacy concerns inherent in a divorce case, the court strongly reaffirmed the presumption that Florida civil courts are open. In dissent, Justice McDonald saw the question in case-specific terms. He would have closed the proceeding because "the rights of the public to information contained in a domestic relations lawsuit is minimal, if existent at all." 531 So. 2d at 121. Implicitly, this approach would have required the proponent of openness to show a particular need to know facts of the specific case in order to gain access. The majority rejected this approach because it saw the conflicting interests in broader terms. "The parties seeking dissolution of their marriage are not entitled to a private court proceeding just because they are required to utilize the judicial system." 531 So. 2d at 119.

A closure request implicates the integrity and credibility of the judicial system itself and not just the immediate concerns of the parties. The balance to be struck is not between the people's need to know the particular facts of

the case versus the parties' need to keep these facts private but between the public interest in open courts versus the personal desire for a private forum. "Public trials are essential to the judicial system's credibility in a free society." *Barron* at 116.

The ability of the Committee to focus on this core point has been deterred by the absorption and minimization issues. The Committee has heard arguments against absorption and minimization that seem to be grounded on "newsworthiness" rather than judicial transparency. On the other hand, the Committee has heard arguments in favor of absorption which seem to be motivated by the desire to obscure the interaction between judge and "user." Despite these distractions, the Committee has acted on two significant insights:

1. The doctrine of open courts (judicial transparency) does not require public access to "improper filings."

2. Neither the "right" of privacy nor any public policy against unjustified disclosure of personal facts justifies the closure of court records and proceedings where such facts are integral to the case.

The Report addresses both points. It calls for reform of present policies and practices that allow "improper filings." It also calls for reform of the absorption rule of Rule 2.051(c)(8) to make it understandable and enforceable in the judicial context and to reconcile Rule 2.051(c)(8) with the First Amendment as construed and applied in Florida courts.

When the Dissent makes the utilitarian argument that the cost of making court records available to the public on the Internet exceeds the benefit thereof, it mistakes the cost of rendering Florida's court records "presentable" to the public

through any medium with the cost of making these records "presentable" to the public via the Internet. Absorption reform (and implementation of genuine enforcement thereof), as well as minimization reform, should be done in the interest of the sound administration of justice and the best interest of the people of Florida. Once this has been done, there no longer will be any valid reason to obscure court records and every reason to make them open and accessible to the public.

COMMENTS ON THE MINORITY REPORT OF THE CLERKS

With respect, I also find it necessary to comment on certain points made in the well-articulated Minority Report submitted by the Clerks, also held by me in high esteem and affection. I make the same apologia here as before.

The Clerks argue that "[a]s constitutional officers, Clerks have inherent authority to manage the performance of their constitutional and legislatively imposed duties such as providing the public access to court records." However, this claim relies not on "inherent" powers derived from the Constitution but on statutory powers granted by the Legislature. This is appropriate because Florida's constitutional officers derive no powers merely by virtue of the fact that they are named (*eo nominee*) in the constitution. Fla. Const. Art. II, § 5 (d). The Supreme Court has rejected the contention that "[A] court clerk is an elected constitutional officer who has the authority to exercise a share of the power of the sovereign." *Service Employees International Union v. Public Employees Relations Commission*, 752 So. 2d 569, 570 (Fla. 2000).[62]

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[62] The Clerks' dissent retreats strategically from the stronger constitutional claim made in the FACC amicus brief in the cited case. See 1998 WL 34086852 (Fla. 1998) (claiming "Clerks of the Circuit Court, as elected constitutional officers, are delegated a portion of the sovereign power").

The relevant powers pertaining to the Clerks' relationship to the Court are the express and inherent powers of the Court, not of the Clerks. As between the Clerks and the Court, the Clerks are ministerial officers of the Court. The Clerks' contend that:

> With regard to those duties which the Legislature has affirmatively charged the Clerk to perform - maintaining a docket and orderly records of the court - the Clerk is a separate constitutional office with attributes of both the judicial and executive branches and cannot simply be marginalized as having no autonomy or discretion whatsoever with regard to the execution of these duties.

Insofar as the Clerk is a part of the executive branch, the argument correctly admits that the Clerk is a creature of the statute with certain constitutionally specified (nonjudicial) powers. However, when the Clerks rely on statutory law to make them "autonomous" from the Court in their judicial branch functions, they depart from the realm of the Clerks' statutory powers and enter the realm of the constitutional express and inherent powers of the Court and of the separation of powers. The claim that a statute may grant the Clerks autonomy from the Court in performing judicial branch functions cannot be justified on any ground and especially not on statutory grounds. Nothing in the Clerks' report supports that contention.

The argument that Clerks should not be responsible for enforcing statutory/rule exemptions is without merit. These exemptions are the law. There is no authority for excusing Clerks from complying with the law.

The argument that the enforcement of statutory exemptions is not a ministerial duty is not consistent with Florida law because the duty of compliance with the public records law as to both access and exemptions is a ministerial duty. *Town of Manalapan v. Rechler*, 674 So. 2d 789, 790 (Fla. 4th DCA 1996); *Mills v.*

Doyle, 407 So. 2d. 348, 350 (Fla. 4th DCA 1981). By their terms, some exemptions require the exercise of discretion, and in that case the custodian may not be compelled to produce the record by mandamus and the court must determine the application of the exemption. *See Florida Society of Newspaper Editors, Inc. v. Public Service Commission*, 543 So. 2d 1262 (Fla. 1st DCA 1989) (holding that discretion would be required to determine whether certain records of the Public Service Commission constituted "proprietary confidential business information" and so mandamus would not lie"). This same distinction applies to Clerks as custodians of public court records.

Although the Clerks say they do not agree that Rule 2.051(c)(8) absorbs statutory exemptions, their objection is entirely practical and not legal. In that respect, the Clerks actually concur in the Committee's recommendation that the scope of Rule 2.051(c)(8) be narrowed and tailored.

The Clerks' objection to the minimization recommendation misses the mark. The Committee's recommendation is that there should be rules which set the criteria for "proper filings." The Clerks' objection is premature and based on speculation as to what such a rule might provide.

Finally, I appreciate that the Clerks concur in much of the Report, including Recommendation 11 that Internet access to court records should be a goal of the branch.

CONCLUSION

Finally, I thank the authors of the dissenting opinions because these reports draw out the hard questions implicated in the Report and challenge its supporters to think carefully and deeply about these difficult issues.

APPENDIX ONE

Legal Analyses

A. THE CLERKS OF THE CIRCUIT COURTS ARE SUBJECT TO THE AUTHORITY OF THE SUPREME COURT AND THE CHIEF JUDGE OF THE CIRCUIT COURT IN THE PERFORMANCE OF ARTICLE V FUNCTIONS, INCLUDING THE MAINTENANCE AND MANAGEMENT OF COURT RECORDS.

B. THE POWER OF THE SUPREME COURT TO CREATE POLICY REGARDING ELECTRONIC DISSEMINATION OF COURT RECORDS IS SUBJECT TO THE FIRST AMENDMENT AND THE STATE CONSTITUTIONAL RIGHT OF ACCESS.

C. INFORMATION THAT IS OTHERWISE CONFIDENTIAL OR EXEMPT MAINTAINS ITS CONFIDENTIAL STATUS WHEN PLACED IN A COURT FILE.

D. A CLERK OF COURT IS OBLIGATED TO PROTECT CONFIDENTIAL INFORMATION CONTAINED IN COURT RECORDS

E. A CLERK OF COURT MAY BE LIABLE UNDER LIMITED CIRCUMSTANCES FOR PERMITTING PUBLIC ACCESS TO CONFIDENTIAL INFORMATION CONTAINED IN COURT FILES.

F. THERE IS NO RELEVANT DISTINCTION BETWEEN

CONFIDENTIAL AND EXEMPT INFORMATION IN FLORIDA COURT RECORDS.

G. WHAT ARE THE PRIVACY RIGHTS OF THIRD PARTIES WITH RESPECT TO INFORMATION CONTAINED IN COURT FILES?

H. FLORIDA LAW DOES NOT AFFORD A CAUSE OF ACTION FOR DISCLOSURE OF PRIVATE FACTS WHEN THESE FACTS ARE A MATTER OF PUBLIC RECORD.

I. THE CLERKS OF COURT, BUT NOT THE FLORIDA ASSOCIATION OF CLERKS OF COURT, HAVE LIMITED STATUTORY AUTHORITY TO ASSESS FEES FOR ACCESS TO ELECTRONIC COURT RECORDS.

A. THE CLERKS OF THE CIRCUIT COURTS ARE SUBJECT TO THE AUTHORITY OF THE SUPREME COURT AND THE CHIEF JUDGE OF THE CIRCUIT COURT IN THE PERFORMANCE OF ARTICLE V FUNCTIONS, INCLUDING THE MAINTENANCE AND MANAGEMENT OF COURT RECORDS.

The powers of the Supreme Court and the lesser courts over the management of court records derive from the constitution, which mandates separation of powers, vests the judicial power in the Court, and prohibits the exercise of judicial powers by officers of any other branch. Fla. Const., Art. II, § 3. The constitution provides that "[t]he supreme court shall adopt rules for the practice and procedure in all courts [and] the administrative supervision of all courts. . . .", Fla. Const., Art. V, § 2(a) Fla. Const.. The constitution further provides that "[t]he Chief Justice . . . be the chief administrative officer of the judicial system." Fla. Const., Art. V, § 2(b), and makes circuit court chief judges responsible for the "administrative supervision of the circuit courts and county courts" within their circuit, Art. V, § 2(d).

That the judicial power includes the power to control its records is well-settled. This power has often been located within the inherent powers of the court. "[T]he general rule [is] that '[t]he judiciary has the inherent power and duty to maintain its records and to determine the manner of access to those records." *Gombert v. Gombert*, 727 So.2d 355, 357 (Fla. 1st DCA 1999) (*quoting Times Publishing Co. v. Ake,* 645 So.2d 1003, 1004 (Fla. 2d DCA), *approved,* 660 So.2d 255 (Fla.1995). It is possible but not necessary to view these inherent powers as a category different than the constitutional powers; the inherent powers are descriptive of the express judicial power to administer the judicial branch.

The power of the Court to administer the judicial branch is protected from encroachment by the separation of powers doctrine: "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Fla. Const., Art. II, § 3.

The judicial power to control its records includes the power to supervise the administration of these records by the Clerk when performing their function as part of the judicial branch. *See Ake*, 645 So. 2d at 257 (holding that "the clerks of the circuit courts, when acting under the authority of their article V powers concerning judicial records and other matters relating to the administrative operation of the

courts, 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").

The Clerk is a constitutional officer, but the creation of the office by itself confers no inherent power or discretion on the Clerk. Fla. Const., Art. II, § 5(c) provides that "[t]he powers, duties, compensation and method of payment of state and county officers shall be fixed by law." This provision, which appeared as early as the 1885 Constitution, rejects the doctrine, sometimes called the *eo nominee* doctrine, that holds that officers named in the constitution are vested with the common law powers of their common law counterparts. Florida firmly rejects that notion and holds that such officers are creatures of law.

Uniquely, the Clerk of Court in Florida is established in both the judicial and executive branches of government, and the express powers of the office are contingent in each realm. In the judiciary article, Fla. Const., Art. V, § 16 provides:

> There shall be in each county a clerk of the circuit court who shall be selected pursuant to the provisions of Article VIII section 1. Notwithstanding any other provision of the constitution, the duties of the clerk of the circuit court may be divided by special or general law between two officers, one serving as clerk of court and one serving as ex officio clerk of the board of county commissioners, auditor, recorder, and custodian of all county funds. There may be a clerk of the county court if authorized by general or special law.

In the local government article, Fla. Const., Art. VIII, § 1(d) provides:

> There shall be elected by the electors of each county, for terms of four years, a sheriff, a tax collector, a property appraiser, a supervisor of elections, and a clerk of the circuit court; except, when provided by county charter or special law approved by vote of the electors of the county, any county officer may be chosen in another manner therein specified, or any county office may be abolished when all the duties of the office prescribed by general law are transferred to another office. When not

> otherwise provided by county charter or special law approved by vote of the electors, the clerk of the circuit court shall be ex officio clerk of the board of county commissioners, auditor, recorder and custodian of all county funds.

Thus, in *Alachua County v. Powers*, 351 So.2d 32, 35 (Fla. 1977), a case concerned with the nonjudicial functions of the Clerk, the Court said:

> The Clerk is a constitutional officer deriving his authority and responsibility from both constitutional and statutory provisions. *Security Finance Company v. Gentry*, 91 Fla. 1015, 109 So. 220 (1926); Article V, Section 16, Florida Constitution.

In *Security Finance*, the Court said, "The clerk's authority is entirely statutory, and his official action, to be binding upon others, must be in conformity with the statutes." *Security Finance* aligns the Clerk with the sheriff as a "creature of law" lacking implied powers. Yet the Court also said the Clerk also derives authority from the constitution. This is true in the sense that the constitution specifies a contingent job description for the Clerk as "ex officio clerk of the board of county commissioners, auditor, recorder and custodian of all county funds." Fla. Const., Art. VIII, § 1(d). *Powers* did not attribute constitutionally implied powers to the Clerk but only referred to the express powers enumerated in the constitution, subject to legislative (or local) modification.

Thus, "[t]he settled law in respect to such officers [Clerks] is that the making or keeping of court records is a purely ministerial duty, and that in the performance of the duty such officers have no power to pass upon or contest the validity of any act of the court for which they act as clerk which purports to have been done in the performance of its judicial function." *State ex rel. Druissi v. Almand*, 75 So.2d 905, 906 (Fla. 1954) .

> The Clerk is merely a ministerial officer of the court. *Leatherman v. Gimourginas*, 192 So.2d 301 (Fla.App.3d, 1966). He does not exercise any discretion. *Pan America World Airways v. Gregory*, 96 So.2d 669 (Fla.App.3d, 1957). He has no authority to contest the validity of any act of the court for which he acts as clerk which purports

> to have been done in the performance of the court's judicial function. *State v. Almand*, 75 So.2d 905 (Fla.1954).

Corbin v. Slaughter, 324 So. 2d 203, 204 (Fla. 1st DCA 1976) (holding that Clerk was required to comply with circuit judge's order to provide the judge with a schedule of deputy clerks assigned to his court).

Therefore, the Clerk is a "creature of law" insofar as her nonjudicial duties are concerned and is equally subordinate to the Court insofar as judicial duties are concerned. When acting under the authority of their Article V powers concerning judicial records and other matters relating to the administrative operation of the courts, "clerks of court are an arm of the judicial branch and are subject to oversight and control of the Supreme Court of Florida, rather than the legislative branch." Times Publishing Co. v. Ake, 660 So. 2d 255 (Fla. 1995).

It may be that the appropriations power of the legislature, as exercised under recent laws enacted to implement state funding mandated by the 1998 Revision 7 to Article V, effectively restricts the authority of the chief judge over the clerks of court in the performance of court-related functions, including the management of court records. Section 28.35(4)(a), Florida Statutes (2004) enumerates the court-related functions clerks of court may fund from filing fees, service charges, court costs, and fines. This enumeration includes case maintenance and records management. The statute describes clerk of court functions that may not be funded by filing fees, services charges and courts costs, including such functions as are "assigned by administrative orders which are not required for the clerk to perform the functions" enumerated in section 28.35(4)(a). Amendments to rule 2.050(b) relating to the scope of authority of chief judges over the clerks of court have been proposed to The Florida Bar Rules of Judicial Administration Committee.

B. THE POWER OF THE SUPREME COURT TO CREATE POLICY REGARDING ELECTONIC DESSEMINATION OF COURT RECORDS IS SUBJECT TO THE FIRST AMENDMENT AND THE STATE CONSTITUTIONAL RIGHT OF ACCESS.

The Constitutional Right of Access Applies to Records of the Judicial Branch.

The Declaration of Rights of the Florida Constitution was amended in November of 1992 to guarantee every person a right of access to the records of state and local government. See Fla. Const., Art. I, § 24 (the "Sunshine Amendment"). Fla. Const., Art. I, § 24(a) provides that "[e]very person has the right to inspect or copy any public record." It further provides that "[t]his section specifically includes the legislative, executive, and judicial branches of government." (e.s.). Fla. Const., Art. I, § 24(c) provides that "[t]his section shall be self-executing. Fla. Const., Art. I, § 24(c). Therefore, the public right of access to judicial records must be taken into account when the Court regulates access to judicial records.

The self-executing right of access exists independently of either legislative or judicial action to effectuate it. On the contrary, the right serves as a constraint on the actions of any branch that affect access to public records. This constrains the exercise of the Court's power to control access to its records, and it is possible that the substance of the right may be infringed in ways other than through the adoption of exemptions.

The statutory public records law (Chapter 119) was not repealed or amended by the Sunshine Amendment, and the courts generally have held that the right of access protected by the constitutional amendment is the same right which exists under Chapter 119 as construed and applied by the courts since 1909. *Media General Convergence, Inc. v. Chief Judge of the Thirteenth Judicial Circuit,* 840 So. 2d 1008, 1013-14 (Fla. 2003). So, although Chapter 119 does not apply to the judiciary, the constitutional right of access does, and the substantive scope of that right can be no broader nor narrower than the traditional right as developed over the past century.

The Sunshine Amendment is only narrowly concerned with the Court's powers over its records. In granting a right of access to the people and expressly making it applicable to records of the judicial branch, the amendment does nothing to disturb the Court's express and inherent power over its records. It simply forbids the exercise of that power in a manner that abridges the substantive right of access. Thus, the constitutional right of access serves as a constraint on the authority of either the Legislature or the Court to restrict access to public records.

The Court May Not Create Exemptions From Public Access.

The Sunshine Amendment has restricted the Court's power to enact exemptions by rule. Fla. Const., Art. I, § 24(d) provided a "window" for the Supreme Court to enact rules of court before the amendment was adopted:

> All laws that are in effect on July 1, 1993 that limit public access to records or meetings shall remain in force, and such laws apply to records of the legislative and judicial branches, until they are repealed. Rules of court that are in effect on the date of adoption of this section that limit access to records shall remain in effect until they are repealed.

The Supreme Court acted on this opportunity and enacted Rule 2.051. This Rule is discussed further in Section C.

Subsequent to the enactment of Rule 2.051 and July 1, 1993, the effective date of the amendment, only the Legislature can create an exemption from the right of access. The Legislature may provide by general law passed by a two-thirds vote of each house for the exemption of records "provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law." Fla. Const., Art. I, § 24(c).

The Sunshine Amendment does not Create a Right of Electronic Access to Records nor Compel the Government to Publish Records in Electronic Form

The Sunshine Amendment in its self-executing force does not compel agencies and branches of government to provide remote or bulk electronic access to its records because the right of access does not include an affirmative right to compel publication of records on the Internet or the dissemination of records in electronic form. No Florida court has ever held that the right of access includes a right to Internet publication.

There are current statutory provisions relating to electronic access in § 119.01(2). These were adopted in 1995, three years after the Sunshine Amendment was adopted. At that time, the Legislature said, "Providing access to public records by remote electronic means is an additional method of access that agencies should strive to provide to the extent feasible." These statutes concern access to "agency" records in electronic form and do not apply to court records. Further, passage of this aspirational statement into the statutory language in 1995 belies any intent that the 1992 amendment was intended to compel Internet publication or electronic or the dissemination of records by government. The Legislature has not construed the Sunshine Amendment to require remote electronic access. Instead, by referring to electronic access in 1995 as an "additional method of access," it signaled the contrary.

Additional evidence suggests that the Legislature does not view electronic access as mandated by the Sunshine Amendment. When the Legislature enacted § 28.2221 (barring and removing publication of certain records on the Internet) it did not treat the bill as an exemption and did not in any respect undertake to comply with Art. I, § 24(c).

There is a Right of Access to a Nonexempt Record in Electronic Form

Public records can exist in multiple forms, and are all equally subject to the right of access. A non-exempt public record that exists in electronic form is therefore subject to the right of access and, while Internet access is not mandated, the record must be made available for inspection and copy.

A rule of court that forbids the clerk to publish certain records on the Internet (such as § 28.2221 has done) is not an exemption and is within the express and inherent power of the court. It is not, however, lawful to deny the public a right of access to the record in its electronic form. Any policy that offers to regulate Internet and electronic dissemination of court records must accommodate the right of access.

The Power of the Legislature to Enact Laws Governing the Enforcement of the Sunshine Amendment Does Not Transfer the Judicial Power to Control Records to the Legislature.

Art. I, § 24(c) provides that "The legislature shall enact laws governing the enforcement of this section, including the maintenance, control, destruction, disposal, and disposition of records made public by this section . . . ." The relationship between this power and the judicial power to control its records has never been authoritatively discussed.

It is doubtful that the clause "enforcement of this section" in *ejusdem generis* with "maintenance, control, destruction, disposal, and disposition" extends legislative power to control the ways and means of access to records such that it would authorize the Legislature to enact a law compelling (or forbidding) Internet publication of nonexempt court records or any other records of the judicial branch. Access to records and dissemination of records only tangentially implicates the housekeeping functions of "maintenance, control, destruction, disposal, and disposition."

Aside from not repealing Chapter 119, the Legislature has not purported to exercise this power. The Study Committee on Public Records concluded that this sentence did not authorize such restrictions on Internet publication of records.

The scope of this power is far from clear at this time. Nevertheless, it is clear that whatever authority over Court Records that this sentence gives the Legislature is not exclusive. The question of the relative authority of the Court versus the Legislature under this sentence could not arise unless and until a rule and statute came into direct conflict.

C. INFORMATION THAT IS OTHERWISE CONFIDENTIAL OR EXEMPT MAINTAINS ITS CONFIDENTIAL STATUS WHEN PLACED IN A COURT FILE.

Florida Rule of Judicial Administration 2.051 (Rule 2.051) governs public access to the records of the judicial branch. Rule 2.051(a) provides for public access to all records of the judicial branch, mandated by Art. I, § 24, except for those made confidential by rule. Rule 2.051(c) enumerates exemptions to the general rule. Among the exemptions, Rule 2.051(c)(7), provides that "All records made confidential under Florida and United States Constitutions and Florida and federal law" are exempt from disclosure. Rule 2.051(c)(8) additionally provides that "All records presently deemed to be confidential by court rule, including the Rules of Admission to the Bar, by Florida Statutes, by prior case law of the State of Florida, and by the rules of the Judicial Qualifications Commission" are exempt from public disclosure. The question arises whether the Rule incorporates, or absorbs, all statutory exemptions to the right of access. Several cases have held that it does.

The rule's plain meaning is to incorporate by reference all exemptions applicable to statutory public records as rule exemptions applicable to records of the judicial branch. The rule apparently first came to judicial attention in *Florida Publishing Company v. State*, 706 So. 2d 54, 56 (Fla. 1st DCA 1998), where the court held that the exemption for active criminal investigative material provided in § 119.07(3)(b) could apply to an executed search warrant in a court file because Rule 2.051(c)(7) incorporated the exemption by reference.

The Supreme Court held in *State v. Buenoano,* 707 So. 2d 714, 718 (Fla. 1998) that Rule 2.051(c)(8) absorbs statutory exemptions. In deciding that the records in question were exempt court records, the Court reversed a contrary holding by the trial court. The trial court had assumed the records had lost their exemption in light of their disclosure to the defendant and, turning its attention to the balancing standard of Rule 2.051(c)(9), found no grounds to seal the records. Reversing, the Supreme Court explained that:

> Rule of Judicial Administration 2.051 does not change our conclusion that the documents at issue are not subject to public inspection. Although the documents when given to Buenoano were placed in Volume IV of the court record, rule 2.051(c)(8) specifically adopts

> statutory public records exemptions. *See Florida Publ'g Co. v. State,* 706 So.2d 54 (Fla. 1st DCA 1998). That rule exempts from public access "all records presently deemed to be confidential by ... Florida Statutes." Since we have determined that the documents are exempt from public access under chapter 119, they are likewise exempt under rule 2.051.

Buenoano at 718.

The holding that the rule absorbs the relevant exemption was essential to the result that the information remained inaccessible, and cannot be disregarded as dictum. *Buenoano* articulated three holdings of law: (i) unauthorized disclosure of information covered by the exemption of § 119.072 does not strip the information of its exemption; therefore (ii) such information in the hands (or files) of the prosecutor is still exempt under § 119.072; and (iii) such information in the court file is exempt because Rule 2.051(c)(8) incorporates, *inter alia*, the exemption of § 119.072. Because the third point is necessary to rule that the records remained exempt, it is not dictum but a holding on a matter of law.

Assuming that the blanket absorption of statutory exemptions in Rule 2.051 is a constitutional exercise of the judicial power over its records as of the time it was adopted, the application of an absorbed exemption to court records would be unconstitutional only when the right of access (or presumption of openness) derives from the higher law of the First Amendment, rather than the state constitutional right. The First Amendment affords the public a qualified right of access to criminal proceedings and records thereof. *See Press-Enterprise v. Superior Ct.*, 478 U.S. 1 (1986) (access right extends to preliminary proceedings in criminal cases); *Press-Enterprise v. Superior Ct.*, 464 U.S. 501 (1984) (order sealing transcript of voir dire proceedings in death case violated First Amendment right of access); *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596 (1982) (statute imposing *per se* exclusion of public and press from trial testimony of minors who are complaining witnesses in sex crime cases is unconstitutional); *Richmond Newspapers, Inc. v. Commonwealth Virginia*, 448 U.S. 555 (1980) (order excluding public and press from criminal trial in its entirety violates First Amendment) (hereafter collectively cited as *First Amendment Access Cases*).

This potential conflict was illustrated in an opinion by Judge Costello of the 14th Judicial Circuit in *Florida Freedom Newspaper, Inc. v. State*, 2004 WL 1669663, 32 Media L. Rep. 1734 (Fla. 14th Cir. Ct.). In this criminal case, the

county court relied on *Florida Publishing Company* in issuing an order sealing executed search warrants and related affidavits. Judge Costello distinguished *Florida Publishing Company* because that case expressly disclaimed any ruling on the applicability of the statutory exemption and noted that no constitutional claim had been asserted by the media party there. See *Florida Publishing Company* at 55, note 1. In *Freedom Newspaper*, however, the media had asserted a constitutional challenge to the sealer at the outset. In light of that distinction, Judge Costello wrote:

> Since constitutional claims were made from the beginning of these proceedings, it is necessary to review the ruling of the County Court with a keen eye to detect whether its findings meet constitutional muster. This Court must conclude that the public's right to be involved and knowledgeable about its Court system cannot be impugned by a blanket rule that makes no distinction between executed and unexecuted search warrant materials.
>
> The bright glare of sunlight should be focused on the Court's records to insure that the respect enjoyed by the Courts will endure. Secrecy without atticulable reasons can only diminish that respect. The state has an obvious and clear interest to protect its citizens while it is pursuing an ongoing criminal investigation. This interest must be balanced by the public's right of access to court proceedings and records. It is illogical to call this case an ongoing criminal investigation, especially after the warrant has been executed, the person arrested and prosecuted in open court. Without some showing by the prosecutor that the revelation of the search warrant, its supporting affidavits and other materials would tend to hinder some other ongoing criminal prosecution or some other reasonable rationale, such a blanket rule limiting access must be considered unconstitutional.

As authority, the Judge cited *Miami Herald Pub. Co. v. Lewis*, 426 So. 2d 1 (Fla. 1982). However, he also relied upon *Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113 (Fla.1998) for the strong presumption of openness that attaches to court proceedings. *Lewis* sets out Florida's standard for closure in criminal matters.

Under *Lewis* and its Florida progeny, the proceedings and records of a criminal trial are subject to a qualified right of public access derived from the First

Amendment, i.e. presumptively open. A trial court may not close or seal proceedings or records unless the proponent of closure carries the burden of showing that:

A. Closure is necessary to prevent a serious and imminent threat to the administration of justice;

B. No alternatives are available, other than change of venue, which would protect a defendant's right to a fair trial; and

C. Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.

Lewis at 6. *See also, e.g., WESH Television, Inc. v. Freeman*, 691 So.2d 532, 534 (Fla. 5th DCA 1997).

At this time Rule 2.051(c)(7) operates on its face to carry over into court records all statutory exemptions. However, the constitutionality of applying an exemption to records of a criminal proceedings is dependent on the *Lewis* standard. In fact, to the extent that Rule 2.051(c)(7) purports to override the First Amendment presumption of openness, it seems to be in conflict with that presumption of openness. See also *Press-Enterprise v. Superior Ct.*, 464 U.S. 501 (1984) (order sealing transcript of voir dire proceedings in death case violated First Amendment right of access); *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596 (1982) (statute imposing *per se* exclusion of public and press from trial testimony of minors who are complaining witnesses in sex crime cases is unconstitutional).

There is no parallel constitutional argument that would overcome the *per se* sealer of civil court records under the Rule because the presumption of openness in civil cases is a common law presumption that is overridden by the exemption carryover of Rule 2.051.

At the moment the state of the law can be summarize as follows:

1. In a civil case, any statutorily exempt public record automatically becomes an exempt court record under Rule 2.051(c)(7) at the moment it becomes a court record because the rule overrides the common law (*Barron*) presumption of openness.

2. A trial court has no discretion to release an exempt court record from closure under Rule 2.051(c)(7) because the rule binds the courts with the force of law.

3. However, records of criminal proceeding are presumptively open notwithstanding Rule 2.051(c)(7), because the presumption of openness derives from the First Amendment and may not be overridden by a blanket rule of Court. *See First Amendment Access Cases*. Therefore, as applied to reverse that presumption as to records of a criminal trial, Rule 2.051 is unconstitutional under the First Amendment and *Lewis* (when understood as a First Amendment holding). Closure must be justified in advance under the three pronged *Lewis* test.

Finally, the presumptive closure of all statutorily exempt records in civil cases collides abruptly with our traditional *Barron* presumption that civil matters are open unless and until closed under the standards set out in Rule 2.051(c)(9). Further study of this conflict, as a matter of policy, is appropriate.

D. A CLERK OF COURT IS OBLIGATED TO PROTECT CONFIDENTIAL INFORMATION CONTAINED IN COURT RECORDS

Rule 2.051, Florida Rules of Judicial Administration, places the obligation to protect confidential and exempt information contained in court records on the clerks of court in their capacity as custodians of these records. Rule 2.051(b)(3) defines custodian as "the official charged with the responsibility of maintaining the office having the care, keeping, and supervision of such records. Rule 2.051(e)(2) specifies that custodian shall be solely responsible for providing access to records of the custodian's entity, and "shall determine whether the requested record is subject to this rule and, if so, whether the record or portions of the record are exempt from disclosure." In addition, the rule provides that the clerk as custodian "shall determine the form in which the record is provided."

In addition to the rule, section 28.13, Florida Statutes, provides that clerks have a general duty to secure and maintain all records filed in the clerk's office. The statute states that clerks must "keep all papers filed in the clerk's office with the utmost care and security, arranged in appropriate files (endorsing upon each the time when the same was filed), "and shall not permit "any attorney or other person to take papers once filed out of the office of the clerk without leave of the court. . . ."

"Custodian" is also defined under section 119.021, Florida Statutes, in language similar to that contained in rule 2.051(b)(3), as the "appointed state, county, or municipal officer charged with the responsibility of maintaining the office having public records." Section 119.07(2)(a) clearly places the responsibility to assert exemptions from public disclosure, and to protect exempt information from disclosure, on the custodian, stating: "A person who has custody of a public record and who asserts than an exemption . . . applies to a particular public record or part of such record shall delete or excise from the record only that portion of the record with respect to which an exemption has been asserted and validly applies, and such person shall produce the remainder of such record for inspection and examination." In asserting an exemption, the law requires that the custodian "shall state the basis of the exemption which he or she contends is applicable to the record, including the statutory citation to an exemption created or afforded by statute, and, if required by the person seeking the right under this subject to inspect, examine, or copy the record, he or she shall state in writing and with particularly the reasons for the conclusion that the

record is exempt." Case law construing this statutory language supports a conclusion that custodians bear the responsibility both to assert exemptions from public disclosure, and to protect exempt information. See e.g. Mintus v. City of Palm Beach, 711 So. 2d 1359 (Fla. 4th DCA 1998).

While the clerks' custodial duties and responsibilities with respect to court records are properly articulated in rule 2.051, section 28.2221, Florida Statutes, additionally recognizes clerks' responsibilities, as custodians, to protect information contained in records to which public access is restricted. The statute compels the clerks of court to refrain from electronically posting on clerk web sites images of records contained in specified court files, and it requires the clerks to remove images of records contained in specified court files from clerk web sites.

Rule 2.050(b), Florida Rules of Judicial Administration, places administrative responsibility and authority for the circuit with the chief judge. That authority includes supervision over officers of the court, including clerks of court in the performance of the Article V responsibilities. If a clerk's rule 2.051(e) record keeping duties are articulated in an administrative order issued by the chief judge, a clerk who fails to protect exempt or confidential information contained in court records from public disclosure arguably is subject to sanctions under rule 2.050(h). The rule provides that failure of any clerk, or other officer of the court, to comply with an order or directive of the chief judge shall be considered neglect of duty, and shall be reported to the chief justice, who may report the neglect of duty to the appropriate person or body.

Whether the present scheme for protection of exempt and confidential information under rule 2.051(e)(2) is the most effective manner in which such information can be protected from disclosure, clearly is in question. Determinations as to whether information contained in court records is exempt or confidential may at times require the exercise of nuanced judgments that realistically are not within the ability of employees of clerks' offices.

E. A CLERK OF COURT MAY BE LIABLE UNDER LIMITED CIRCUMSTANCES FOR PERMITTING PUBLIC ACCESS TO CONFIDENTIAL INFORMATION CONTAINED IN COURT FILES.

The improper release of an exempt or confidential record can occur intentionally or negligently.

Regarding claims for the intentional release of an exempt or confidential record, the law does not protect from civil liability custodians of public records who unnecessarily or abusively revealed records. In Williams v. Minneola, 575 So. 2d 683, 686 (Fla. 5th DCA 1991), the Court explained that a custodian of public records was not protected from tort liability resulting from the intentional release of an exempt public record except for two instances. A custodian could be protected from liability if the person inspecting the records had made a bona fide request to respect them in accordance with the Public Records Act. Additionally, a custodian could be protected if it was necessary for the agency to reveal the records to a non-requesting person. The court noted that the law would not protect from civil liability custodians of public records who unnecessarily or abusively revealed records to persons outside of the agency controlling the records. The court reasoned that the right of public access in Florida's Constitution did not license agency personnel to do whatever they pleased with public records. The policy underlying the Public Records Act is to hold governmental agencies publicly accountable for their own actions, not to provide immunity from the safeguards of individual rights that the common law had painstakingly developed over centuries. The court concluded its analysis by holding that the City of Minneola was not immunized from tort liability by the mere fact that the documents were public records. The court reversed the lower court's grant of summary judgment holding that the plaintiffs had stated a cause of action for the outrageous infliction of emotional distress.

Regarding the negligent release of an exempt or confidential record, there have been several cases addressing negligence claims against governmental entities. In Trianon Park Condo. Ass'n. Inc. v. City of Hialeah, 468 So. 2d 912, 914 (Fla. 1985) the Supreme Court addressed the issue of whether a governmental entity could be held liable in tort for negligence. The Court attempted to clarify the law and set forth basic principles related to governmental tort liability. The Court explained that for there to be governmental tort liability, there must be an underlying common law or statutory duty of care with respect to

the alleged negligent conduct. The Court further explained that legislative enactments for the benefit of the general public did not automatically create an independent duty to either individual citizens or a specific class of citizens. In addition, Florida Statute 768.28, which waived sovereign immunity, did not establish a new duty of care of governmental entities. The court stated that there had never been any common law duty for a governmental entity to enforce the law for the benefit of an individual or group of individuals.

In Holodak v. Lockwood, 726 So. 2d 815, 816 (Fla. 4th DCA 1999), the Court relied on Trianon to hold that a clerk of court could not be sued in tort for negligence. The Court stated that Trianon required that a plaintiff allege and prove two elements: The plaintiff must allege that the governmental entity owed the claimant either a statutory or common law duty of care that was breached, and that the challenged conduct of the government was an operational rather than a planning level of decision-making.

F. THERE IS NO RELEVANT DISTINCTION BETWEEN CONFIDENTIAL AND EXEMPT INFORMATION IN FLORIDA COURT RECORDS.

The distinction between "exempt" and "confidential" was most recently recognized in *WFTV, Inc. v. School Board of Seminole*, 874 So. 2d 48, 54 (Fla. 5th DCA 2004) (explaining that "[i]f records are not confidential but are only exempt from the Public Records Act, the exemption does not prohibit the showing of such information"). The court cited *Williams v. City of Minneola,* 575 So.2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So.2d 289 (Fla.1991), *appeal after remand*, 619 So.2d 983 (Fla. 5th DCA 1993), where the court explained that "the exemption does not prohibit the showing of such information. There are many situations in which investigators have reasons for displaying information which they have the option not to display."

In simplest terms:

> Exempt. Where the Legislature has provided only that a record is exempt from the right of access, an agency has no duty to release the record to a requester but does have discretion to release to a requester or to *sua sponte* release the information where that is deemed to be in the interest of the agency.
>
> Confidential. Where the Legislature has provided that a record is confidential and exempt, the record may not be released to any person other than those specified in the relevant statutory provision. No official has discretion to waive the confidentiality of the record.

Due to the operation of Rule 2.051, the distinction has little relevance in the context of court records. In general, a clerk of court would not have discretion to release a merely exempt record because the office is ministerial and lacks discretion of this sort. While a police investigator may waive the exemption for active criminal investigative information when the investigator determines this will assist the investigation, such a discretionary judgment is not committed to the clerk. For purposes of dissemination of court records by a clerk, there is actually no distinction between exempt records versus exempt and confidential records. The custodial duty to protect the exempt information is not different than the mandatory duty to protect the confidential information.

G. WHAT ARE THE PRIVACY RIGHTS OF THIRD PARTIES WITH RESPECT TO INFORMATION CONTIANED IN COURT FILES?

Third parties and litigants can be adversely affected by the release of private information contained in court files. As such, courts have recognized instances where a litigant or third party's constitutional right of privacy prevents the release or discovery of such information. Much of the litigation related to this issue concerns the rights of third parties as related to discovery requests. This memo addresses case law related to both issues.

In Post-Newsweek Stations Fla. Inc. v. Doe, 612 So. 2d 549 (Fla. 1992), the supreme court addressed the privacy rights of non-parties to litigation. The court held that a non-party claiming a right of privacy in public documents held by the state attorney had standing to seek an order to deny public access to the documents. Id. at 550. The non-parties sought closure of documents containing the names and addresses of individuals in a prostitute's Rolodex pursuant to rule 3.220(m). Id. Rule 3.220(m) allows any party to move for an order regulating disclosure of sensitive matters. Id. On the facts of the case, the court denied the non-parties order. Id.

The court began with the general proposition that all government records are open to the public. Id. The court explained that the information was covered by an exemption which would last until the information was given to the accused. Id. The court was forced to balance the public's statutory right of access with the Doe's constitutional right to privacy. Id. In analyzing the non-parties' privacy rights, the court applied the Barron standard and noted that the privacy amendment had not yet been interpreted to protect names and addresses contained in public records. Id. at 552. The court declined to extend a right of privacy to the names and addresses associated with a criminal prostitution scheme. Id. Although the court did not grant a right of privacy in the documents, the court recognized that there were instances when a third party's privacy interest in court records would prevent disclosure of those records.

Third parties also have a privacy right in information potentially subject to discovery by depositions and interrogatories. Discovery may seriously implicate the privacy interests of litigants and third parties. See Seattle Times Co. v. Rhinehart, 467 U.S. 20, 35 (1984). In Rasmussen v. South Fla. Blood Serv., 500 So. 2d 533, 534 (Fla. 1987), the supreme court held that the privacy interests of

voluntary blood donors outweighed a plaintiff's interest in discovering the names and addresses of the blood donors.

The plaintiff in Rasmussen had been in an accident requiring a blood transfusion. Id. Approximately a year later, the plaintiff contracted AIDS and died. Id. The plaintiff served a subpoena upon the blood bank requesting any materials which would indicate the names and addresses of the blood donors. Id. The blood bank moved for the trial court to issue a protective order barring disclosure and the trial court denied. Id. On appeal, the appellate court held that the requested material should not be discovered. Id. The supreme court affirmed the appellate court recognizing that the donor's right of privacy outweighed the probative value of the discovery request. Id. at 538.

In Amente v. Newman, 653 So. 2d 1030, 1033 (Fla. 1995) the supreme court recognized that there were situations under which a nonparty would have a constitutional right of privacy with respect to his or her medical records which were subjected to discovery. In Amente, the plaintiff brought suit against a doctor for injuries sustained by the plaintiff's child as a result of the doctor's alleged negligence. Id. at 1031. The plaintiff sought to discover all medical records of patients physically similar to the plaintiff. Id. The plaintiff also specifically requested that all patient identifying information be redacted from the medical records prior to production. Id. The doctor utilized several arguments in justifying his refusal of the records. Id. In one of his arguments, the doctor asserted that discovery of the medical documents violated the patient's constitutional right of privacy. Id. In addressing this argument, the court recognized that there may be circumstances under which a person would have a constitutional right of privacy. Id. at 1033. In these situations, a trial court could order the sealing of the medical records. Id. Based on the facts of the instant case, the court concluded that the redaction of all identifying information adequately protected the patient's privacy rights. Id. The Amente court's express recognition of the privacy rights of third parties to documents subject to discovery was relied upon in Cedars Healthcare Group, LTD. v. Freeman, 829 So 2d 390, 391 (Fla. 3rd DCA 2002).

In Cedars, the plaintiff brought suit against a psychiatric ward for the alleged assault that occurred during her stay. Id. The plaintiff requested production of all photographs of male patients present during her stay. Id. The psychiatric ward objected to the request arguing that it violated the privacy rights of the patients. Id. The psychiatric ward relied on Amente arguing that the request violated the privacy rights of nonparty patients. Id. In analyzing the

request, the court stated that the plaintiff had not demonstrated a compelling need for the discovery which would outweigh the privacy rights of the nonparty patients. Id. The court explained that the hospital could be held liable without the names or faces of the assailants and discovery of the photos might lead to the inadvertent discovery of the patients' identities. Id. The court concluded that absent a showing of such need, the privacy rights of nonparty patients must prevail. Id.

In Berkeley v Eisen, 699 So. 2d 789, 791 (FLA 4th DCA 1997), the court addressed the privacy rights of nonparty investors. In Berkeley, the plaintiff brought suit against an investment manager alleging the manager placed the plaintiff's funds in unsuitable high-risk investments. Id. at 790. The plaintiff moved to compel the discovery of addresses and telephone numbers of other of Berkeley's clients. Id. The court explained that the party requesting private information must establish a need for the information which overrides the nonparty's privacy rights. Id. at 791. The court concluded that since the requested information was not necessary to establish the plaintiff's claim the information could not be discovered. Id. at 792.

Nonparties to litigation have a right of privacy in information contained in court records or information sought to be discovered. Each instance requires a factual inquiry which balances the compelling need of the party requesting discovery with the privacy rights of the third party. If the compelling need doesn't outweigh the third party's privacy rights, the third party's right of privacy will not be violated.

H. FLORIDA LAW DOES NOT AFFORD A CAUSE OF ACTION FOR DISCLOSURE OF PRIVATE FACTS WHEN THESE FACTS ARE A MATTER OF PUBLIC RECORD.

There is no constitutional or tort-based disclosural right of privacy in a Florida Sometimes called as the "private facts tort," this tort is recognized in Florida according to its formulation in the Restatement. "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not a legitimate concern to the public." See *Cape Publications, Inc. v. Hitchner*, 549 So. 2d 1374, 1377 (Fla. 1989) *appeal dismissed*, 493 U.S. 929 (1989(quoting Restatement (Second) of Torts § 652D

The essence of the tort is the unwarranted publication of a fact that otherwise is private, and a third party subject of a public record that discloses an embarrassing fact cannot satisfy this essential element if the publication complained of is based on the public record. "The right of privacy does not protect against publication of public records and matters of legitimate public interest." *Woodard v. Sunbeam Television Corp.*, 616 So. 2d 50, 503 (Fla. 3d DCA. 1993) (citing *Cox Broadcasting v. Cohn,* 420 U.S. 469 (1975) and *Cape Publications*, 549 So. 2d at 1374). See also Restatement (Second) Torts, § 652D, Comment c, at 114.

When information about the private affairs of an individual has become a part of the public record and thus disclosed to the public, however, the information is no longer protectable as "private" information. In the seminal California privacy case the California Supreme Court denied recovery under this tort for information that had become a part of the record of a trial. The court explained:

> The very fact that [the facts] were contained in a public record is sufficient to negative the idea that their publication was a violation of a right of privacy. When the incidents of a life are so public as to be spread upon a public record, they come within the knowledge and into the possession of the public and cease to be private.

Melvin v. Reid, 297 P. 91, 93 (Cal. 1931).

The rule that there is no right of action for publication of information that is a matter of public record is not only integral to the definition of the tort but also inherent in the First Amendment.

In *Cox*, the father of a rape victim brought an action for damages for publication of a private fact. During a news report of a rape case, a television station broadcast the deceased rape victim's name, which it had obtained from the indictments, which were public records available for inspection. The father relied on a Georgia statute making it a misdemeanor to broadcast a rape victim's name, claiming that his right to privacy had been invaded by the broadcast of his daughter's name. *Id.*, 420 U.S. at 469. The Court observed that "even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record. The conclusion is compelling when viewed in terms of the First and Fourteenth Amendments and in light of the public interest in a vigorous press. held that recovery was barred by the First Amendment." Id., 494-5 It said, "At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." *Id.* at 496.

The rule that there is no right of action for publication of facts disclosed in the public records is firmly settled both as a matter of tort and constitutional law in Florida. In *Shevin* 379 So. 2d at 639, the Florida Supreme Court held unequivocally that there exists no disclosural right of privacy in public records of the state:

> We conclude that there is no support in the language of any provision of the Florida Constitution or in the judicial decisions of this state to sustain the district court's finding of a state constitutional right of disclosural privacy.

See also Laird v. State, 342 So. 2d 962 (Fla. 1977) (holding that Florida had no general state constitutional right of privacy).

After the Supreme Court's decision in *Shevin*, the people of Florida amended their Constitution to create a right of privacy. Art. 1, § 23, Fla. Const. The right of privacy is explicitly subordinated to the right of access to public records, as follows:

> Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.
>
> Fla. Const. Art. I, § 23 (1998) (emphasis added).

In *Michel v. Douglas*, 464 So. 2d 545, 546 (Fla. 1985), the Court said that "[b]y its specific wording, article 1, section 23 of the state constitution does not provide a right of privacy in public records:" *See also Forsberg v. Housing Authority*, 455 So. 2d 373, 374 (Fla.1984).

The Supreme Court has also held that any Federal disclosural right of privacy will not overbalance the public right of access. "Additionally, we recently found no state or federal right of disclosural privacy to exist." *Michel v. Douglas,* 464 So. 2d 545, 546-7 (Fla. 1985) (citing *Forsberg*).

I. THE CLERKS OF COURT, BUT NOT THE FLORIDA ASSOCIATION OF CLERKS OF COURT, HAVE LIMITED STATUTORY AUTHORITY TO ASSESS FEES FOR ACCESS TO ELECTRONIC COURT RECORDS.

Statutory authorization exists in chapters 28 and 119 for clerks of circuit courts to assess fees under contractual arrangements for access to electronic court records. Revenue generated by fees for access to electronic court records is to be deposited into the clerks of courts fine and forfeiture fund, under section 142.01(6), Florida Statutes (2004), for use by the clerks in performance of court-related functions.

As a threshold matter, section 28.24, Florida Statutes (2004), authorizes the clerks of the circuit courts to provide a "public record in an electronic format in lieu of a paper format when capable of being accessed by the requesting party." Section 28.24, Florida Statutes (2004), enumerates all charges the clerks may assess for services rendered in recording documents or performing other statutory duties relating to records. Section 28.24(28) authorizes clerks to charge a fee "as provided for in chapter 119" for "furnishing an electronic copy of information contained in a computer database."

Section 119.085, Florida Statutes, enacted in 1990, authorized public records custodians to provide remote electronic access to records of the judicial and executive branches, and to charge a fee for such access. The statute was repealed, effective October 1, 2004. In its place, section 119.07(2), Florida Statutes (2004), effective October 1, provides as follows:

> (a) As an additional means of inspecting or copying public records, a custodian of public records may provide access to public records by remote electronic means, provided exempt or confidential information is not disclosed.
>
> (b) The custodian of public records shall provide safeguards to protect the contents of public records from unauthorized remote electronic access or alteration and to prevent the disclosure or modification of those portions of public records which are exempt or confidential from subsection (1) or s. 24, Art. 1 of the State Constitution.

(c) Unless otherwise required by law, the custodian of public records may charge a fee for remote electronic access, granted under a contractual arrangement with a user, which fee may include the direct and indirect costs of providing such access. Fees for remote electronic access provided to the general public shall be in accordance with the provisions of this section. (e.s.)

While section 119.085 arguably exceeded legislative authority with respect to authorizing electronic access to judicial branch records, section 28.24 authorizes clerks to charge a fee for electronic access in accordance with section 119.07. Generally, fees must be authorized by statute, in accordance with the legislative appropriations power. See Broward County v. Michaelson, 674 So.2d 152 (Fla. 4th DCA 1996); Williams v. State, 596 So.2d 758 (Fla. 1992). Section 119.07(2) authorizes custodians of public records to assess fees, under contractual arrangements, for access to electronic records. Clerks clearly have authority under these statutory provisions to assess fees for access to electronic court records.

Section 142.01, Florida Statutes (2004), establishes the clerks of court fines and forfeiture fund "for use by the clerk of the circuit court in performing court-related functions." The fund consists of revenue generated from fines and forfeitures, and "all other revenues received by the clerk as revenue authorized by law to be retained by the clerk." The above statutory provisions and analysis apply to the clerks individually. Significantly, no statutory authority presently exists for clerks acting collectively through the Florida Association of Court Clerks and Comptroller, Inc., to assess fees for electronic access to court records.

The Florida Association of Court Clerks and Comptroller, Inc. (FACC), a private non-profit organization, has established the Comprehensive Case Information System (CCIS), an electronic database system owned and operated by the clerks of circuit courts collectively. FACC maintains only an index of documents on its Internet site; individual documents are maintained on the each of the participating clerks' Internet sites. Although FACC has characterized itself as an "agent" of the individual clerks of circuit courts for purposes of the subsection (c) "government agent" exception to the moratorium on access to electronic court records, see AOSC04-4, page 7, FACC does not appear to have any direct authority under law, administrative order or court rule to "have access to" court records. The FACC does receive public fees through section 28.24(12), for "the cost of development, implementation, operation, and maintenance" of the CCIS. Section 28.24(12)(e)(1) presently states that "[a]ll court records and

official records are the property of the State of Florida, including any records generated as part of the Comprehensive Case Information System, . . . and the clerk of court is designated as the custodian of such records." Section 28.24(12)(e)(1) further states: "The clerk of court or any entity acting on behalf of the clerk of court, including an association, shall not charge a fee to any agency . . . the Legislature, or the State Court System for copies of records generated by the Comprehensive Case Information System or held by the clerk or court or any entity acting on behalf of the clerk of court, including an association." FACC as an entity does not presently have statutory authorization to charge a fee through contractual arrangements or otherwise for access to the CCIS by members of the public.

APPENDIX TWO

Draft Rule Changes

The draft amendments to Rule of Judicial Administration 2.051 provided below incorporate many of the Committee's recommendations. This is work product of the Committee and staff that generally reflects the views of a majority of the Committee. The Committee did not, however, have ample opportunity to fully discuss the specific language in detail, and did not and vote on the amendments.

RULE 2.051. PUBLIC ACCESS TO JUDICIAL BRANCH RECORDS

(a) Generally.

Subject to the rulemaking power of the Florida Supreme Court provided by article V, section 2, Florida Constitution, the following rule shall govern public access to the records of the judicial branch of government. The public shall have access to all records of the judicial branch of government, except as provided below.

(b) Definitions.

(1) "Records of the judicial branch" are all records, regardless of physical form, characteristics, or means of transmission, made or received in connection with the transaction of official business by any judicial branch entity and consist of:

> (A) "court records," which are the contents of the court file, including the progress docket and other similar records generated to document activity in a case, transcripts filed with the clerk, documentary exhibits in the custody of the clerk, and electronic records, videotapes, or stenographic tapes of depositions or other proceedings filed with the clerk, and electronic records, videotapes, or stenographic tapes of court proceedings; and

(B) "administrative records," which are all other records made or received pursuant to court rule, law, or ordinance, or in connection with the transaction of official business by any judicial branch entity.

(2) "Judicial branch" means the judicial branch of government, which includes the state courts system, the clerk of court when acting as an arm of the court, The Florida Bar, the Florida Board of Bar Examiners, the Judicial Qualifications Commission, and all other entities established by or operating under the authority of the supreme court or the chief justice.

(3) "Custodian." The custodian of all administrative records of any court is the chief justice or chief judge of that court, except that each judge is the custodian of all records that are solely within the possession and control of that judge. As to all other records, the custodian is the official charged with the responsibility of maintaining the office having the care, keeping, and supervision of such records. All references to "custodian" mean the custodian or the custodian's designee.

(4) "Electronic form" means information which exists in a digital medium, including: a digitized representation of text or a graphic image; a digitized visual image of a document, exhibit or other thing; a digitized visual or audio recording of an event, including recordings of court proceedings; or data in the fields or files of a database.

(c) **Exemptions.**

The following records of the judicial branch shall be confidential and may not be released by a custodian except as provided by parts (f) or (g) of this rule:

(1) Trial and appellate court memoranda, drafts of opinions and orders, court conference records, notes, and other written materials of a similar nature prepared by judges or court staff acting on behalf of or at the direction of the court as part of the court's judicial decision-making process utilized in disposing of cases and controversies before Florida courts unless filed as a part of the court record;

(2) Memoranda or advisory opinions that relate to the administration of the court and that require confidentiality to protect a compelling governmental interest, including, but not limited to, maintaining court security, facilitating a criminal investigation, or protecting public safety, which cannot be adequately

protected by less restrictive measures. The degree, duration, and manner of confidentiality imposed shall be no broader than necessary to protect the compelling governmental interest involved, and a finding shall be made that no less restrictive measures are available to protect this interest. The decision that confidentiality is required with respect to such administrative memorandum or written advisory opinion shall be made by the chief judge;

(3) (A) Complaints alleging misconduct against judges until probable cause is established;

(B) Complaints alleging misconduct against other entities or individuals licensed or regulated by the courts, until a finding of probable cause or no probable cause is established, unless otherwise provided. Such finding should be made within the time limit set by law or rule. If no time limit is set, the finding should be made within a reasonable period of time;

(4) Periodic evaluations implemented solely to assist judges in improving their performance, all information gathered to form the bases for the evaluations, and the results generated therefrom;

(5) Only the names and qualifications of persons applying to serve or serving as unpaid volunteers to assist the court, at the court's request and direction, shall be accessible to the public. All other information contained in the applications by and evaluations of persons applying to serve or serving as unpaid volunteers shall be confidential unless made public by court order based upon a showing of materiality in a pending court proceeding or upon a showing of good cause;

(6) Copies of arrest and search warrants and supporting affidavits retained by judges, clerks, or other court personnel until execution of said warrants or until a determination is made by law enforcement authorities that execution cannot be made;

(7) All records made confidential under the Florida and United States Constitutions and Florida and federal law;

(8) All records ~~presently~~ deemed to be confidential by court rule as of October 29, 1992, including the Rules for Admission to the Bar, by Florida Statutes, by prior case law of the State of Florida decided prior to October 29, 1992, and by the rules of the Judicial Qualifications Commission;

(9) Any court record determined to be confidential in case decision or court rule on the grounds that

(A) confidentiality is required to
(i) prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice;
(ii) protect trade secrets;
(iii) protect a compelling governmental interest;
(iv) obtain evidence to determine legal issues in a case;
(v) avoid substantial injury to innocent third parties;
(vi) avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of proceeding sought to be closed;
(vii) comply with established public policy set forth in the Florida or United States Constitution or statutes or Florida rules or case law;

(B) the degree, duration, and manner of confidentiality ordered by the court shall be no broader than necessary to protect the interests set forth in subdivision (A);

(C) no less restrictive measures are available to protect the interests set forth in subdivision (A); and

(D) except as provided by law or rule of court, reasonable notice shall be given to the public of any order closing any court record.

(10) The names and any identifying information of judges mentioned in an advisory opinion of the Committee on Standards of Conduct for Judges.

(d) Electronic Access.

(1) To promote efficiency and accountability, courts should aspire to provide access to court records in electronic form. Precautions must be taken prior to the release of records in electronic form to protect private and confidential information and to ensure the proper administration of justice.

The release of court records in electronic form, remotely or directly, is authorized for all records enumerated in subdivision (2) of this part, and for

(I) records may be transmitted to an governmental agency or agent;
(J) records in civil cases in which an agency, as defined in subsection 119.011(2), Florida Statutes, is a party.

(4) The Supreme Court may authorize remote access to records in electronic form in a jurisdiction pursuant to a certification and authorization process established by the Court to ensure compliance with all applicable laws and rules of court, including subdivision (5) or this part. If a custodian fails to comply with this rule or condition of authorization established by the Supreme Court, the Court may withdraw its authorization for that custodian to provide remote access.

(5) Access to court records in electronic form, other than those enumerated in subdivisions (2) and (3), may be authorized for a jurisdiction pursuant to subdivision (4) only when the following conditions are present:

(A) the custodian has implemented processes and provides training to personnel to screen and redact court records to ensure against the unauthorized release of confidential information;

(B) procedures are in effect to limit the amount of extraneous personal information entered into court files;

(C) court records continue to be available for inspection and copying at the courthouse;

(D) policies for access to court records, including access for judges, court staff and attorneys, are approved by the chief judge of the jurisdiction;

(E)adequate revenues are available to ensure ongoing fiscal support for electronic access; and

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[64] The Committee agrees with testimony received that it will not be possible to adequately inspect large numbers of records, and so contemplates that large volume, or "bulk" requests, would not be consistent with this provision.

records enumerated in subdivision (3) provided the clerk of court for the jurisdiction ensures that the described records are manually inspected and no confidential information is released. No other court records shall be released in electronic form unless authorized by order of the Supreme Court pursuant to subdivision (4) of this part.

(2) Any jurisdiction may release the following records in electronic form:

(A) progress dockets, limited to case numbers and case type; party name, race, gender and year of birth; names and address of counsel; lists or indices of any judgments, orders, pleadings, motions, notices or other documents in the court file; notations of court events, clerk actions and case dispositions; name and date of death of deceased in probate cases, address of attorney of record or pro se party in probate case;

(B) court records which are Official Records;[63]

(C) court schedules and calendars;

(D) traffic court records;

(E) appellate court briefs, orders and opinions;

(3) The following records may be released electronically provided the clerk of court for the jurisdiction ensures that the described records are manually inspected and no confidential information is released:

(F) the chief judge of a jurisdiction may, sua sponte, direct the electronic release of a record or records in a case of significant public interest;

(G) records may be transmitted to a party, an attorney of record in a case, or an attorney expressly authorized by a party in a case to received the record;

(H) a record that has been individually and specifically requested;[64]

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[63] Certain Official Records, such as records in adoption cases, remain confidential by statute. In addition, Subsection 28.2221, Florida Statutes, prohibit clerks of court from publishing on an Internet website records in cases arising out of Family, Probate and Juvenile Rules. Nothing in this recommendation should be construed to negate these statutory restrictions.

signed "Certification of Confidential Information." The Certificate of Confidential Information, see Form 2.---, shall describe the nature of the information that the filer considers confidential but without disclosing the confidential information itself, and shall identify the statute, court rule, or court order which the filer believes makes the information and/or document confidential and exempt from public disclosure

A filer must file under seal a document that is identified as confidential under seal. The custodian shall place the Certificate of Confidential Information in the court file and shall not seal the Certificate.

(4) Notice to Non-Parties. If the confidential information described pursuant to subdivision (3) concerns or refers to a named non-party to the case, the filer shall inform such non-parties of the filing by mailing a copy of the Certificate of Confidential Information, together with a copy of the document that is designated confidential, to that person. The filer shall also notify such non-party that the document is subject to unsealing and that the non-party may move to have the record sealed. The filer shall certify within the Certificate of Confidential Information that the filer has given such notice to such non-parties.

(5) Duplicate Filings. Parties shall avoid duplicate filings. Courtesy copies of documents already filed within a court file must be clearly marked "COURTESY COPY DO NOT FILE."

(6) Compliance:

(A) Any document submitted by a pro se litigant that does not include an indication of non-confidentiality or confidentiality pursuant to subdivision (2), or any document that includes an indication of confidentiality but does not include a Certification of Confidential Information pursuant to subdivision (3), may be accepted by the clerk of court but shall not be made available by remote electronic access.

(B) Any document submitted by an attorney that is not in conformity with subdivisions (2) and (3) shall be date and time stamped by the clerk and returned to the filer for failure to comply with this rule. The date and time stamped on the original filing shall be the controlling date and time for purposes of any time limits under any statutes of limitations for initial pleadings or time limits for responsive pleadings to avoid default, but

(F) records, other than official records, arising under the rules of family, juvenile or probate law may not be made available for remote electronic release.

(e) Privacy Notice and Certification of Confidential Information.

(1) Privacy Notice. Every clerk of court of an appellate or circuit court shall post in a location within the public area of the office of the clerk and on the clerk's website a prominent notice that states:

"PRIVACY NOTICE:

- Under Florida law court records are public records that may be released to the general public both at the court and via electronic means.
- The inclusion of personal information in court records may be detrimental to your privacy and the privacy of other persons.
- Every document filed with this court must indicate whether the document contains confidential information in accordance with Rule of Judicial Administration 2.051(e)(2)."

(2) Indication of Confidentiality. Each document filed with the clerk or court shall include a 2 inch high by 1 inch wide box in the upper right hand corner on its first page. Within that box the filer shall indicate whether the document contains or does not contain information that is confidential under state or federal law or court rule or order. The filer must indicate either:

(A) that the filer believes the document does not contain confidential information, indicated by the inclusion of the words "Not Confidential" in bold font in the box, or,

(B) that the filer believes the document contains confidential information, indicated by the inclusion of the word "CONFIDENTIAL" in capital letters and bold font in the box. A pleading or motion indicating confidential information must be accompanied by a "Certification of Confidential Information" pursuant to subparagraph (3) of this part.

(3) Certification of Confidential Information. Each document filed with the clerk of court which contains information that is confidential must include a

shall not have any affect on any other time limit for compliance with any time requirements in law or court rule.

(C) Failure to comply with this part may subject an attorney or party to sanctions by the Court.

~~(d)~~ (f) **Procedure.**

Requests and responses to requests for access to records under this rule shall be made in a reasonable manner.

(1) Requests for access to records shall be in writing and shall be directed to the custodian. The request shall provide sufficient specificity to enable the custodian to identify the requested records. The reason for the request is not required to be disclosed.

(2) The custodian shall be ~~solely~~ responsible for providing access to records of the custodian's entity. The custodian shall make an initial determination ~~determine~~ whether the requested record is subject to this rule and, if so, whether the record or portions of the record are confidential or exempt from disclosure. The custodian shall hold a court record which is initially determined to be confidential or exempt under seal.

(3) Any person may challenge an initial determination that a record or a portion of the record is confidential by filing a motion with the court having jurisdiction of the case. The movant shall serve the motion all parties and any non-party who is identified pursuant to subdivision (e)(4). Any non-party identified pursuant to subdivision (e)(4)shall have standing to move to maintain the sealing.

~~The custodian shall determine the form in which the record is provided~~.

(~~3~~4) Fees for copies of records in all entities in the judicial branch of government, except for copies of court records, shall be the same as those provided in part 119.07, Florida Statutes (2001).

~~(d)~~ (g) **Review of Denial of Access Request.**

Expedited review of denials of access to records of the judicial branch shall be provided through an action for mandamus, or other appropriate appellate remedy, in the following manner:

(1) Where a judge who has denied a request for access to records is the custodian, the action shall be filed in the court having appellate jurisdiction to review the decisions of the judge denying access.

(2) All other actions under this rule shall be filed in the circuit court of the circuit in which such denial of access occurs.