

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 revised⁴⁵ 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;

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, Fromkin, 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.

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 confidentiality 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 confidentiality.

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.

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 through 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.

