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 <u>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</u>.

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." S*entinel 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

[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]

[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.