APPENDIX ONE

Legal Analyses

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

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

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

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

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

F. THERE IS NO RELEVANT DISTINCTION BETWEEN

CONFIDENTIAL AND EXEMPT INFORMATION IN FLORIDA COURT RECORDS.

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

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

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

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

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

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

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

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

courts, are an arm of the judicial branch and are subject to the oversight and control of the Supreme Court of Florida, rather than the legislative branch").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Court May Not Create Exemptions From Public Access.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Buenoano at 718.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In simplest terms:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The very fact that [the facts] were contained in a public record is sufficient to negative the idea that their publication was a violation of a right of privacy. When the incidents of a life are so public as to be spread upon a public record, they come within the knowledge and into the possession of the public and cease to be private.
>
> *Melvin v. Reid,* 297 P. 91, 93 (Cal. 1931).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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