FLORIDA SUPREME COURT
COMMITTEE ON ACCESS TO COURT RECORDS

FINAL REPORT AND RECOMMENDATIONS

September 2, 2008

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NOTE: THIS REPORT IS A COMPANION TO TWO SEPARATELY FILED PETITIONS FOR RULE AMENDMENTS, ENTITLED: "PETITION TO AMEND RULE OF JUDICIAL ADMINISTRATION 2.420" AND "PETITION TO AMEND VARIOUS RULES OF COURT."

I. Overview, Charge and Membership of the Committee

The Committee on Access to Court Records (the Committee) was formed pursuant to Administrative Order AOSC06-27, *In Re: Committee on Access to Court Records*, issued by Chief Justice R. Fred Lewis on August 21, 2006. The Committee was created to advance the implementation of a number of recommendations of the predecessor Committee on Privacy and Court Records (the Privacy Committee). The Privacy Committee had concluded, and the Supreme Court had agreed, that the Florida judicial branch should have as a goal providing electronic access to non-confidential court records when appropriate conditions are met. Administrative Order AOSC06-20, *In Re: Implementation of the Report and Recommendations of the Committee on Privacy and Court Records*.

While it embraced the goal of online availability of court records, the Court also emphasized a cautious and thoughtful approach:

> The same technology that offers substantial benefit can bring significant risk. The instantaneous and inexpensive dissemination of information contained in court records enhances accountability and supports efficiency but also poses a potential threat to the privacy interests of individuals and corporations. . . . The challenge for the judicial branch, as noted by the Committee, is "not merely to create an electronic access policy as a companion to an 'over the counter' records policy, but to create a blueprint for a comprehensive policy on court records that will serve the public and the courts as they move through the transition from a system of primarily paper records to one of primarily digital records.

Ibid at 4, 5.

Charge.

The charge to the committee included a number of tasks that flowed from recommendations made to the Privacy Committee related to creating the necessary

conditions for electronic public access to court records. Specifically, the Committee was directed to develop proposed rule changes described in recommendations two, eight, twelve, thirteen, sixteen and seventeen of the Privacy Committee report. In addition, the Committee was directed to advise the Florida Court Technology Commission and the Office of the State Courts Administrator regarding the terms and conditions the Committee finds advisable in implementation of a pilot program for access to court records in Manatee County. Finally, the Committee was directed to advise the chief justice regarding the advisability of altering the interim policy on electronic access to court records set out in Administrative Order AOSC06-21, *In Re: Interim Policy on Release of Court Records*.

In addition to the charges in Administrative Order AOSC06-27, the Court subsequently directed the Committee via letter from the Clerk of the Supreme Court, dated April 19, 2007, to review and make recommendations regarding a series of reports submitted by court rules of The Florida Bar committees as well as the Steering Committee on Families and Children in the Court. These reports were submitted to the Court in response to requests that the Court directed to these bodies in August, 2006, regarding implementation of recommendations six, seven, eight, nine and ten of the Privacy Committee report. These recommendations advocated a systematic review of court rules in order to minimize the unnecessary inclusion of personal information in court files.

The Court directed the Committee to submit an interim report that included its recommendations regarding the interim policy by June 1, 2007, a date which the Court subsequently extended to June 15, 2007. The Committee submitted that report.

The Committee consists of fifteen members:

The Honorable Judith L. Kreeger, Chair

Ms. Sharon Olsen Abrams

Ms. Kristin Adamson

Ms. Robin S. Berghorn

The Honorable David Ellspermann

The Honorable Mel Grossman

Mr. Jonathan D. Kaney, Jr.

The Honorable Melanie G. May

Mr. Timothy McLendon

Mr. Paul R. Regensdorf

Mr. Murray Bruce Silverstein

The Honorable Kim A. Skievaski

The Honorable Elijah Smiley

Mr. Walt Smith

The Honorable Charles E. Williams

In addition the Committee was assisted in its work by four non-members who aided the Committee on discrete aspects of its charge. The individuals were the Hon. Lisa Davidson, the Honorable Lydia Gardner, Mr. Larry Turner, and Ms. Judith Hodor. The Honorable Barbara J. Pariente, served as justice liaison.

II. Confidentiality and Rule 2.420

The major task assigned to the Committee was to propose revisions to Rule of Judicial Administration 2.420 (formerly 2.051) to effectuate several recommendations of the Supreme Court Committee on Privacy and Court Records (the Privacy Committee). Principal among these was a recommendation to address the effective scope of Rule 2.420 in terms of its relationship to statutory public records exemptions. (Privacy Report, Recommendation Two) This recommendation followed the conclusion of the Privacy Committee that a central obstacle to implementation of remote electronic access to court records in Florida is that in its present form, the rule is impracticable and inadvisable because it appears to indiscriminately incorporate all statutory exemptions, of which there are more than one thousand.

The Court also directed the Committee to address several other matters in its proposed revisions to Rule 2.420. First, as recommended by the Privacy Committee, the Court directed that Rule 2.420 be amended to clearly provide for the responsibilities of filers when submitting confidential information to the courts. Filing requirements included a certification to the clerk of court, notice to affected non-parties, and a good faith provision that subjects the attorney or party to sanctions. (Privacy Report at 64)

Second, the Privacy Committee noted that there appeared to be some confusion regarding the duty of both courts and clerks of court to protect confidential information:

> Whatever the scope of confidentiality is, a necessary condition for the electronic publication of court records is that all confidential information be protected from unauthorized release. The responsibility for protecting confidential information is a constitutional mandate on the judicial branch. It is not a policy option."

(Privacy Report at 36) The charge to the Committee therefore also directed the Committee to propose revisions to rule 2.420 to clarify that court records defined by the rule as confidential may not be released except as allowed by law.

Absorption and the Scope of Rule 2.420.

Regarding the effective scope of Rule 2.420, a central question, as posed by the Privacy Committee, is "whether the rule incorporates, or absorbs, state exemptions and federal confidentialities, thus making them confidentialities under court rule." Privacy Report at 29. The rule was adopted in 1992 in anticipation of passage of the Sunshine Amendment of the Florida Constitution. It provides in pertinent part:

> (c) Exemptions. The following records of the judicial branch shall be confidential:
>
> . . .
>
> (8) All records presently deemed to be confidential by court rule, including the Rules for 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.

Upon examination of these provisions, the history of the Sunshine Amendment, and other materials, the Privacy Committee concluded that subdivision 2.420(c)(8) was intended to embrace and does incorporate the statutory exemptions:

> The Committee believes that on its face this rule incorporates state statutory exemptions, making exempt information confidential within judicial branch records. The Committee believes that this is the interpretation given to the rule by the Florida Supreme Court in *State v. Buenoano*, 707 So. 2d 714, 718 (Fla. 1998).

(Privacy Report at 30-31 (footnote omitted))

In reaching this conclusion, the Committee relied on *State v. Buenoano*, in which the Court interpreted subdivision 2.420(c)(8) as it relates to several specific statutory exemptions for criminal investigative records. The Court held that the records in question, which were exempt under the statutory exemption, "are likewise exempt under rule [2.420]." *State v. Buenoano* 707 So. 2d at 718.

While the Privacy Committee agreed with the legal conclusion that the rule absorbs all statutory exemptions, it emphasized that this outcome leads to two serious problems. First, the Committee agreed that this result is contrary to Florida's open records tradition. It further observed that many statutory exemptions are either overbroad or inappropriate when applied to court records. Second, the Committee recognized the practical concern raised by clerks of court and others: the task of fully applying all statutory exemptions to all court records would be enormously burdensome and would present an insurmountable obstacle to the eventual implementation of public online access to court records. This problem is somewhat unique to electronic access because with traditional "over the counter" access practices, only records that are actually requested need be screened for confidential information. This leaves the vast bulk of court records protected by "practical obscurity," stored in clerks' vaults distant from public view. Instant electronic access, on the other hand, would require that all records that are to be made available be screened and redacted before being loaded onto the accessible system. A representative of the Florida Association of Clerks of Court informed the Privacy Committee that Florida courts receive some 19 million documents annually. This challenge came to be known as "the impossibility problem." The Privacy

Committee therefore determined that revising the rule was a necessary precondition to electronic access and it made the following recommendation:

> The Committee has concluded that implementation of a system that allows large volumes of court records to be released electronically cannot be responsibly achieved under the current [Rule 2.420]. The Committee therefore recommends that the Supreme Court direct a review of the effective scope of [Rule 2.420(c)(8)] and explore revision of the rule for the purpose of narrowing its application to a finite set of exemptions that are *appropriate in the court context* and are *readily identifiable*.

(Privacy Report at 47 (emphasis added) The Supreme Court concurred with this analysis, and subsequently charged the Access Committee with proposing rule revisions consistent with the recommendation of the Privacy Committee. Charge 1 to the Access Committee, therefore, is to:

> Review and explore revisions of rule [2.420] to narrow its application to a finite set of exemptions that are appropriate in the court context and are identifiable.

AOSC0627 at 2.

The Court added a significant caveat to its charge: "The Committee should note that the Supreme Court has not made a decision as to whether the absorption doctrine applies." *Id*. The Access Committee interpreted this to mean that the Court desires that the rule be applied to a limited set of circumstances where confidentiality is clearly appropriate to court records and the subject record or information is readily identifiable by staff of the clerk of court. The Court clearly indicated that it was reserving judgment about the question of whether the rule absorbs other statutory exemptions. This

interpretation is not inconsistent with *Buenoano,* where the Court ruled only that the specific criminal investigative records exemptions relevant to the subject records in that case remained exempt pursuant to the court rule. So, while the Court has not determined the scope of the absorption doctrine has, and the decided cases do not articulate a definitive construction of the scope and breadth of Rule 2.420(c)(8), the Court has indicated that absorption of applicable exemptions can be categorically applied in "a finite set of exemptions that are appropriate to the court context and are identifiable." The Access Committee was asked to define that "finite set." With respect to other, less clear exemptions outside of that set, the Court may later clarify the issue over time.

This view was reinforced in an opinion that the Court issued in April~~,~~ 2007, in adopting rules amendments proposed by the Rules of Judicial Administration Committee to address the issue of sealed cases:

> Rule 2.420 recognizes a narrow category of court records where public access is automatically restricted by operation of state or federal law or court rule. See Fla. R. Jud. Admin. 2.420(c)(7)-(8). For records in this category, the State itself, through law and court rule, has identified specific privacy or government interests that clearly outweigh the public's right to know. These interests have been identified through the democratic process either in the Legislature or through the Court's public rule-making process.

In re Amendments to Florida Rule of Judicial Admin. 2.420-Sealing of Court Records and Dockets, 954 So. 2d 16 (Fla. 2007). The Access Committee again interpreted this to mean the rule can be understood to incorporate some, but not all, statutory exemptions, a concept that may be referred to as "soft" absorption.

In addition to reinforcing the concept of limiting "automatic" or categorical absorption to a relatively small set of exemptions, the new amendments to Rule 2.420

also presented an opportunity to consider how those exemptions which are not categorically incorporated might otherwise be addressed. These amendments created a new motion process through which a party could request that circuit or county court records in a non-criminal case be made confidential under Rule of Judicial Administration 2.420(c)(9). This motion process, in new subdivision 2.420(d), provided formal procedures for filers to certify that a motion to make records confidential meets certain requirements. Such motions must be made in good faith subject to sanctions, be ~~for~~ publicly noticed, require~~s~~ a hearing for a contested motion, and specify the content of an order granting a motion in whole or in part. While the new subdivision was directed to non-criminal cases in county or circuit courts and limited the bases for motions to the elements of the *Barron* test codified in subdivision 2.420(c)(9), the Committee concluded that this motion process could be expanded. Specifically, the process might accommodate assertions of confidentiality that rely on statutory exemptions beyond those that are categorically absorbed.

Analysis and Preliminary Proposal.

The Access Committee directed the Rule 2.420 Workgroup (the Workgroup) to develop recommendations concerning the rule for consideration by the full committee. After reviewing the history and legal background of this issue, the Workgroup created a framework to guide its work. First, for purposes of revising the rule, the Workgroup developed a model that would conceptually organize all information in court records into three categories in terms of confidential status:

Type I: information which is subject to a clearly applicable court rule or statutory exemption *and* is readily identifiable.

Type II: information which is subject to a clearly applicable court rule or statutory exemption but which is *not* readily identifiable, *or* information which is not clearly subject to a court rule or statutory exemption.

Type III: information which is not subject to a court rule or statutory exemption.

The Workgroup then developed proposed revisions to the rule that would accomplish the following:

Type I: The rule would itemize the court rules and statutory exemptions that comprise Type I, require that a filer of such information identify it as such, require the clerk to review for facial validity the identification of the information as confidential, and direct the clerk to independently identify and keep the information confidential whether the filer identified the information or not. These concepts are incorporated in new subdivision (d)(1) of the proposed rule. [Appendix A].

Type II: Building on the motion process adopted by the Court in 2007, a filer or other affected person may file a motion to determine whether information not included in the Type I list is confidential. This concept is incorporated in new subdivision (d)(2) of the proposed rule. [Appendix A].

Type III: Any information which is not categorically confidential under Type I or determined to be confidential through a Type II motion is

Type III information and is an open public record, consistent with the general policy stated in subdivision 2.420(a). ("The public shall have access to all records of the judicial branch of government, except as provided below.")

Definition: Additionally, in response to the charge to clarify the status of confidential records, a definition of "confidential" would be developed consistent with existing law. This definition is contained in new subdivision (b)(4) of the proposed rule. [Appendix A].

In order to itemize those statutory exemptions that meet the criteria of being applicable in a court context, the Workgroup undertook a systematic review of all Florida statutory exemptions. At the request of the Committee, the Office of the State Courts Administrator contracted with the Center for Governmental Responsibility at the University of Florida School of Law (Center) to support this research. Under the direction of Professor Timothy McLendon, researchers at the Center compiled a database which included an inventory of all statutes that create a public records exemption. This inventory was then analyzed for operative language and statutory context that would indicate whether the exemption was expressly or impliedly applicable in a court context. The Workgroup directed that indicia of applicability include whether the statutory language, on its face, indicated legislative intent that the exemption apply to court records, and whether the underlying public policy strongly supported applying the exemption to court records. In addition, the Workgroup considered whether in practice

and by custom the exemption has been routinely and traditionally applied to court records.

With the inventory developed by the Center as a starting point, the Workgroup undertook a series of in-person and telephonic meetings to study, refine, and review the Type I list. Representatives of interested constituencies, including clerks of court, media interests, and the title insurance industry, participated in this review and refinement process, providing ~~to~~ the Workgroup invaluable insight and analysis.

Outreach.

By the fall of 2007, the Workgroup had refined the Type I list and developed a preliminary rule proposal. The full committee approved this preliminary proposal and Type I list on November 30, 2007. The preliminary proposal and Type I list were circulated for comment to all circuit and district court of appeal chief judges, all circuit and appellate clerks of court, and all other known interested parties. It was published in The Florida Bar News with an invitation to comment. The deadline for all comments was March 3, 2008.

Meanwhile, other activities related to Rule 2.420 impacted the Committee's work. On March 1, 2008, the Court published for comment two additional sets of proposed amendments to Rule 2.420 regarding the sealing of records, expanding on the 2007 amendments adopted in *In re Amendments to Florida Rule of Judicial Admin. 2.420-Sealing of Court Records and Dockets*, 954 So. 2d 16 (Fla. 2007). The first set included additional amendments filed on October 31, 2007 by the Rules of Judicial Administration Committee pursuant to the Court's opinion. These amendments included a new subdivision, 2.420(e), which addressed sealing county and circuit records in criminal

cases, and made several minor changes to other parts of the rule. The second set of amendments was the Court's own sua sponte alternative to this proposal, incorporating most of the Rules Committee's proposal but added subdivisions 2.420(f) and 2.420(g), which addressed appellate court records in non-criminal and criminal cases respectively.

As a result, by March 2008, the Workgroup was confronted with five different versions of Rule 2.420: 1) the rule as it existed in late 2006 when the Court charged the Committee with proposing revisions; 2) the rule after the amendments adopted in April~~,~~ 2007, which is the rule presently in effect; 3) the pending proposed amended rule filed that the Rules of Judicial Administration Committee filed on October 31, 2007; 4) the Court's own alternative sua sponte proposal published on March 1, 2008; and 5) the Access Committee's preliminary proposal circulated for comment at the beginning of 2008.

During the summer of 2008 the Committee attempted to initiate discussions with relevant rules committees regarding issues that the proposed rule revision raised. At the request of the Appellate Court Rules Committee a special joint committee workgroup was formed in August 2008. However, at the time of the preparation of this report the report of the joint committee is not complete, and so this proposal does not reflect input expected from the joint committee.

Final Proposal.

In April 2008, the Workgroup began to reconcile its proposal with the other proposals now pending before the Court. The Workgroup elected to use the Court's alternative amendments to the Rules of Judicial Administration Committee's proposal as a starting point. Most of the new elements of the Court's proposal, (which includes most

new elements of the proposal of the Rules of Judicial Administration Committee), are retained. The Committee's proposal is attached in Appendix C, in legislative mark-up from the currently effective rule. In addition a table comparing the Courts proposed language overlaid with the Committee's proposals is attached in Appendix D. Key differences are:

2.420(d): The subdivision requires that the clerk of court identify information itemized in this provision and keep it confidential. Subdivision 2.420(d)(1)(A) incorporates the existing provisions of subdivision (c) that are unaffected by the rule change. Subdivision 2.420(d)(1)(B) lists the Type I exemptions to be categorically protected.

The provision also requires filers to identify any such information to the clerk at the time of filing, and to identify the applicable provision of the rule. The clerk of court is required to review this identification for facial validity. A procedure is provided for instances where the clerk determines that the identification is not facially valid. Subdivision 2.420(d)(2) applies to instances where a statutory exemption that is not categorically incorporated under 2.420(d)(1) may constitute the basis for confidentiality. This provision directs the filer, or any interested person, to file a motion to request a

determination of confidentiality under the applicable subdivision that follows in the rule.

2.420(e): The Workgroup expanded the scope of present subdivision (d), now subdivision (e), to expressly allow motions based on any subdivision of 2.420(c). This would thus permit motions based on statutory exemptions or federal confidentialities that are arguably incorporated through 2.420(c)(8), but not included as Type I exemptions. This concept is continued in new subdivisions (f) (criminal trial court records), (g) (non-criminal appellate court records), and (h) (criminal appellate court records).

The titles and text throughout are modified, replacing the verb "make" with "determine" to clarify that consistent with article I, section 24 of the Florida Constitution, the rule would not purport to give the court new authority to convey confidential status to a record, or to expand the reach of the 1992 rule. Rather this new amendment to the rule would only provide a procedural mechanism to determine whether confidential status attaches to the information by authority of legislative act or existing court rule.

2.420(f): The pending language regarding sensitive criminal case records in subdivision (f)(2), and similarly in (h)(2) for appellate criminal records, permits filing a restricted motion for "any request to make court records confidential that may jeopardize either the safety of a person or an active criminal investigation." The Access Committee alternative describes the kinds of records subject to this subdivision and creates a higher and more specific threshold,– using language that mirrors existing language of the *Barron* test that is codified in subdivisions 2.420(c)(9)(A).

2.420(g)-(h): The Workgroup modified the two subdivisions proposed in the Court's alternative proposal directed to appellate records with respect to identification of confidential information transmitted from a trial court to an appellate court. The pending proposal assumes that any confidential information is covered by an active order of the lower court, and the pending rule requires the clerk of the circuit court to indicate the date and docket number of any such order. The Access Committee alternative contemplates that information may be categorically confidential under

subdivision (d)(1) or may be determined to be confidential in response to a motion.

2.420(i): Existing subdivision 2.420(d), renumbered 2.420(h) in the pending proposal and 2.420(i) in this proposal, is modified to clearly limit its application to administrative records of the judicial branch and to remove inappropriate reference to an appellate remedy.

Type I Exemptions.

The final list of statutory exemptions enumerated in subdivision 2.420(d)(1)(B) contains 19 items. Most of these are well established by law and practice and are routinely applied by the clerks of court. In all cases, however, it is necessary to go to the statutory language to understand the precise scope of the exemption in order to correctly apply it. Many of the statutes are difficult to interpret and could be misconstrued in their application. In several cases, the exemption expressly relates to the subject record while *in the custody of* a particular entity. For example, Fl. Stat. § 384.29 exempts records related to cases of sexually transmitted diseases "held by the department [of Health] or its authorized representatives." The proposed amendment to the rule would apply this exemption in the event the department or its representative provides such a record to a court. Similar records in the custody of any other party would not, however, be subject to the categorical protection of subdivision (d)(1), although they might be determined to be confidential upon a motion filed under (d)(2). To facilitate correct and consistent

implementation of the rule in the event the Court approves this proposal, the Committee recommends that guidelines be formulated for the application of these exemptions, including guidance about controlling access to confidential records consistent with law and court rules. This recommendation is consistent with Recommendation Fifteen of the Privacy Committee.

There are several exemptions that merit special discussion. These are exemptions, such as the sexually transmitted disease exemption discussed above, which provide various degrees of protection to potentially sensitive records that are of a clinical or therapeutic nature, typically involving documentation of a person's medical or psychological wellbeing. The statutory exemptions for these records are frequently targeted to states agencies, such as the Department of Children and Families, or service providers. In most cases the statutes that create these exemptions do not expressly state that they are intended to apply to such records when included in a court file, and it appears unlikely that the Legislature ever considered the question of whether the exemption would or would not apply to court records. Following lengthy discussion and study of these statutes, the Committee ultimately elected to exercise caution and include these exemptions on the Type I list. In the event this rule is adopted and these exemptions are categorically applied to court records, the Legislature may wish to revisit these statutes and express its intent, one way or the other, as to the application of the exemption to court records.

In developing the proposal, a technical question arose regarding whether the list of Type I exemptions should be included in the body of the rule, or attached to the rule as a freestanding appendix that could be revised administratively. While there are

arguments to be made for itemizing the exemptions in an appendix that can be modified without the procedural requirements of a rules amendment, the Committee decided that the list must be included within the body of the rule. This conclusion relies on the Court's recent opinion in *In Re: Amendments to Florida Rule of Judicial Administration 2.420,* 973 So. 2d 437 (Fla. 2008), concerning records retention schedules. In this opinion, the Court made a firm distinction between the management of administrative records of the judicial branch and the management of court records. The Court explained that while policies controlling administrative records could be promulgated administratively, it expressed a clear preference, when dealing with a matter affecting the right of access to court records, for the "well-established procedure that provides for public scrutiny" of the rules amendment process.

RECOMMENDATION ONE: The Committee recommends that its proposed amendments, presented in a separate submission entitled "Amendments to Rule of Judicial Administration 2.420" be adopted.

III. Minimization of Personal Information

The Committee was charged with studying court rules to determine whether they should be amended to prohibit the filing of documents where the filing is not authorized by court rule or statute, or where no relief is sought, and whether the rules should strengthen sanctions to be imposed against those who are responsible for unauthorized filings.

In addition, in a letter from Thomas D. Hall dated April 30, 2007, the Committee was requested to review a series of reports being prepared by rules committees of The Florida Bar. The Court had directed the rules committees "to conduct a comprehensive review of court rules and approved forms for the purpose of modifying the rules and forms to discourage the unnecessary filing of personal information, in accordance with Recommendation Seven" of the Committee on Privacy and Court Records. The Court had also asked the rules committees "to study whether rules exist or rules should be adopted that would require attorneys to refrain from filing discovery information with the court until such time as it is filed for good cause."

The Committee was directed to review the submissions of the rules committees and to provide to the Court a comprehensive report summarizing and evaluating each of those committees' recommendations and its advice about what action the Court should take based upon those recommendations. This review was to be completed by December 1, 2007. The Committee completed its review of the committee reports that had been submitted, and has previously provided a summary report to the Court. The Committee was further directed to compile all of the proposals it supports into one submission petitioning for rules amendments.

The Committee provides its proposed rules amendments in a separately filed rules petition, and includes below a summary of its evaluation of the separate committee reports.

A. The Court should adopt the recommended revisions submitted by the rules committees and Steering Committee on Families and Children in the Courts except as provided. Further, as progress is made in the coming years

regarding electronic filing and access to court records, and practical experience is gained, the separate rules committees should periodically revisit the issues of privacy, security and transparency as they relate to the rules within their purview and should consider whether additional revisions should be made within their regular rules cycles to minimize the unnecessary inclusion of personal information in public court records.

B. The Rules of Civil Procedure Committee recommends a new provision within Rule of Civil Procedure 1.280, (GENERAL PROVISIONS CONCERNING DISCOVERY) entitled "Court Filing of Documents and Discovery." The proposed rule provides that discovery information not be filed without good cause, that the existence of a mandatory filing requirement constitutes good cause, and it provides authority to sanction those who violate the rule. The workgroup supports this approach.

C. The Civil Procedure Rules Committee reported that in most instances, complete social security numbers and tax account numbers are unnecessary. That Committee proposed revisions to several rules and one new rule that would require the filer to include only the last four numbers of a social security number or tax account number unless directed otherwise by the court. Further, most of the rules committees recommended either eliminating social security numbers from documents filed with the court or truncating them to the last four digits. The Family Law Rules Committee recommended truncating to the last three digits of account numbers and personal identifiers, which is generally consistent with the majority of recommendations in terms

of truncation but deviates from the others in that it does not recommend the use of the last four digits. The Committee on Access to Court Records recommends that where rule changes are made to truncate numbers that the changes be standardized to require the use of the last four digits.

D. As they were directed to do by the Court, several of the rules committees made recommendations that pertain not to the minimization of personal information in court files but to the issue of confidentiality of records that would continue to be filed with the court, particularly various types of mental health evaluations. The recommendations are for rules changes to make certain types of records confidential. Under Article I, section 24 of the Florida Constitution, however, the Court does not have authority to make records confidential that are not made confidential by general law or by rule existing prior to November of 1992. For this reason the Committee does not support the recommendations of the Criminal Law Rules Committee regarding Rules 3.211, 3.212, 3.216, 3.218, and 3.219. Access to the subject records should instead be controlled by the proposed revision of Florida Statutes and Rule of Judicial Administration 2.420.

E. Several rules committees recommended that no changes be made to their respective rules. These include the Juvenile Court Rules Committee, the Traffic Court Rules Committee and the Rules of Judicial Administration Committee. The Committee is of the view that it lacks the subject matter expertise to question the view of these committees about the central question of whether any particular rules require filing information that may not be

necessary for purposes of adjudication or case management. The Committee therefore refrains from expressing an opinion about whether the responses from these committees adequately address the concerns of the Court and the recommendations of the Privacy Committee that court rules respect the right of privacy created by Article I, section 23 of the Constitution of Florida. The Committee would point out, however, with reference to the report of the Juvenile Court Rules Committee and its observation that all delinquency and dependency records are confidential pursuant to Florida statutes, that regardless of whether information is held in a confidential status, the very collection of personal information which is not needed for the court to perform its function implicates the right of privacy created by the Florida Constitution. Furthermore, under Florida law certain confidential records, including delinquency and dependency records, can be lawfully accessed by specified persons and state agencies, including law enforcement agencies. In addition a clerk of court has advised the Committee that as a matter of course juvenile court records are routinely made available for such inspection by law enforcement officers.

RECOMMENDATION TWO: The Committee recommends that the proposed amendments to various rule of court intended to minimize personal information, presented in the separate submission entitled "Amendments to Various Rules of Court," be adopted.

IV. Manatee County Pilot Program

During public meetings of the Florida Supreme Court in spring 2006 to consider the report and recommendations of the Privacy Committee, the Clerk of Court for Manatee County, the Honorable R. B. "Chips" Shore, offered to conduct a pilot program in Manatee County to provide public internet-based access to court records in that jurisdiction on such terms as the Court would require. The Court responded favorably to this proposal and authorized its implementation.

The chief justice subsequently assigned primary responsibility for oversight of the pilot project to the Florida Court Technology Commission in Administrative Order AOSC060-48, *In Re: Florida Court Technology Commission*, including specifying terms and conditions controlling the project, identifying project goals, criteria for evaluation, reporting requirements, and a timeframe to conclude the project and report results.

In addition, the chief justice also directed the Committee to provide input to the Florida Court Technology Commission and the Office of the State Courts Administrator regarding "terms and conditions the Committee finds advisable in the implementation of the pilot program." To address this aspect of the Committee's charge in an expedited manner, the Committee created a Manatee Pilot Project Workgroup to review the pilot proposal and to prepare its recommended terms and conditions. The workgroup presented its proposed initial terms and conditions to the full Committee in January, 2007. The full Committee approved these recommendations, and forwarded them to the Florida Courts Technology

Commission. The Committee's recommended terms and conditions are attached in APPENDIX E.

In July, 2007, the then existing Florida Courts Technology Commission recommended, and the Court approved, a two-phase pilot project. During Phase One, which was to conclude on January 1, 2008, remote electronic access to certain Manatee County digital court records was given to certain users. Phase Two, to begin upon completion of Phase One and the completion of a study of Phase One, would permit expanded remote electronic access to those records. As the contemplated end of Phase One neared, however, the term of the predecessor Florida Courts Technology Commission had expired, while the new and presently existing Florida Courts Technology Commission had not been organized. In addition, budget reductions had eliminated the funds that were allocated to support the project study. Under these circumstances, the Committee continued to monitor the operation of the project, and recommended to the chief justice that Phase One of the project be extended for a limited period of time to allow the newly created Florida Courts Technology Commission to assume responsibility for oversight of that project and to identify funding for the project study. The Court accepted that recommendation, extending phase one of the Manatee pilot project, and the Commission has since assumed responsibility for supervising the program.

On July 28, 2008, under the auspices of the Florida Courts Technology Commission, the Florida Association of Court Clerks and the National Center for State Courts reached an agreement to conduct a study of Phase One of the pilot

program. Under the agreement, the study is scheduled to be completed by November 30, 2008.

The Committee has no addition recommendations regarding the Manatee County Pilot Program.

V. Interim Policy on Electronic Access

The Committee was directed to advise the chief justice regarding the advisability of altering the interim policy on electronic access to court records set out in Administrative Order AOSC06-21, as well as to give the Court a progress report, by June 1, 2007. The Committee subsequently submitted a report entitled: *"Interim Progress Report and Recommendations on Modification to the Interim Policy on Access to Court Records."*

The recommendations of the Committee were approved by the Chief Justice and are reflected in the current policy set out in Administrative Order AOSC07-49, *In Re Revised Interim Policy on Electronic Release of Court Records.* (APPENDIX F)

The Committee has no additional recommendations regarding the interim policy.

VI. Educational Outreach.

The courts have begun a transition from a system that relies on the physical delivery, storage and transmittal of paper documents to a system of electronic filing of digital documents, maintaining its records in digital form, and providing electronic access to those documents. This transition will be less disruptive if it is preceded and

accompanied by an aggressive and comprehensive education program to orient lawyers, judges, mediators, government agencies, court staff, other users of court records, and the public to how this transition will change how they interact with courts, the implications of electronic access to information contained in court records, how to protect information and records that are claimed to be confidential, and how to seek access to information and records that are withheld from view.

Organizations of professional users such as The Florida Bar, local and other voluntary bar associations, the Florida Association of Court Clerks, the Florida Prosecuting Attorneys Association, the Florida Public Defender Association, associations of mediators and paralegals, state agencies, etc., should organize and make available to their members educational programs presented in various modalities. These programs should describe the applicable rules of court that will affect how and under what conditions they may access digital records and the application of those rules to filers, participants to a case, and other persons mentioned or described in court records. The Committee recognizes that new policies and procedures concerning access to court records are a discrete subset of the new policies and procedures that will confront users of Florida's court system, and that other Supreme Court Committees have submitted and will likely submit in the future similar recommendations for education about other aspects of the transition to digital court records. Therefore the Committee recommends that the comprehensive educational plan should include various components, including but not limited to:

A. Programs for lawyers and judges should include substantive law that establishes rights of privacy and the public's rights of access to court records, and court rules that prescribe procedural processes to exercise those rights.

B Application of Rule 2.420 to filing practices

C. Forms that may be developed to implement Rule 2.420

D. Identifying confidential information in court records and court document

E. How to request a hearing concerning sealing or unsealing a court record or access to information in court records

F. Best practices consistent with minimization principles

G. Other ramifications of courts receiving, maintaining, and providing access to digital records that are recommended by other committees or commissions such as the Florida Court Technology Commission, the E-Filing Committee, the Task Force on Management of Cases Involving Complex Litigation, the Steering Committee on Children and Families in the Courts, etc.

The Committee recommends that the Florida Court Education Council (FCEC), in consultation with the Dean of the College of Advanced Judicial Studies, develop a comprehensive course on the substantive and procedural ramifications of filing, maintaining, and providing remote electronic access to court records. The Committee further recommends that in developing the program, the planners of judicial education collaborate with the Florida Association of Court Clerks, The Florida Bar, and the other above-mentioned professional organizations, so that maximum use can be made of all educational programs and materials that are developed. The Committee recommends an

initial two-day comprehensive statewide program with presentations designed for the various professional judicial branch users of the court's records. All aspects of that program should be recorded in digital format so that it can be made available thereafter on the internet for distance learning.

In addition, materials developed for the statewide conference educational programs should be woven into substantive and procedural continuing education courses presented in various formats by The Florida Bar in locales around the State, and by various modalities, such as at statewide and local conferences and continuing education programs, and web-based presentations. In addition, Florida's law schools should include in their substantive law, procedure, and clinical courses information and materials about public records and privacy laws and the ramifications of courts receiving, maintaining, and giving widespread remote electronic access to court records.

Similarly, mediators should be required to complete course material consistent with this recommendation, as a condition of their gaining and maintaining certification.

The clerks should have available in the public areas of their offices video or web-based presentations, brochures and visible signs that are readily visible to and available for filers and other persons who seek access to court records in the clerks' offices about the substantive and procedural ramifications of filing, maintaining, and providing remote electronic access to court records.

RECOMMENDATION THREE: The Committee recommends that the Court convene the State Courts System, the clerks of court, and The Florida Bar, to plan and present educational programs designed to educate lawyers, judges, mediators,

court administrators and staff, clerk staff, and the public regarding the transition to courts receiving, maintaining, and providing electronic access to digital court records.

VII. Additional Recommendations.

The Committee recognizes that in the event the rule is amended, a range of activities will be necessary in the coming months and years to implement it. Initially, the rule petition filed concurrent with this report must be advocated throughout the amendment process. Then, if the rule becomes effective in the foreseeable future, its initial implementation period will provide important experience in its application. It is foreseeable that within the first year it will be evident that some procedural or substantive aspects of the rule may require re-examination and modification. To carry out these tasks the Committee urges the creation of a smaller Committee on Access to Court Records as a subcommittee of the Florida Court Technology Commission, consisting of some members of the current Access Committee as well as members of the Florida Courts Technology Commission.

RECOMMENDATION FOUR: The Committee recommends that a smaller successor Committee on Access to Court Records be created under the auspices of the Florida Court Technology Commission and that this committee be tasked with advancing the rule petition through the rule amendment process.

RECOMMENDATION FIVE: The Committee recommends that the smaller successor Committee on Access to Court Records be tasked with monitoring

implementation of the rule and proposing, as appropriate and upon consultation with the Rules of Judicial Administration Committee, future amendments to the rule.

The predecessor Privacy Committee recognized that implementation of a new regime for identifying and protecting confidential information would require practical guidance for those most directly involved with administering the rule. The Committee therefore restates the Privacy Committee's recommendation that a practitioner group be charged with developing guidance on the application of the rule. In the course of its work the Committee has learned that current policies and practices regarding the release of confidential information, such as to law enforcement agencies, might not fully comply with Florida law. Clerks of court should be provided with clear guidance on the release of confidential information.

RECOMMENDATION SIX: The Committee recommends, consistent with Recommendation Fifteen of the Privacy Committee, that the successor committee convene a practitioner workgroup with representation from trial and appellate clerks of court, the judiciary, and the bar, and that this workgroup compile materials for guidance for clerks of court, attorneys, litigants, judges and court staff to assist in implementation of the revised rule.

The Committee was charged with recommending amendments to Rule 2.420 to allow for remote access to court records in electronic form where the necessary

conditions are met. Separately, the Florida Courts Technology Commission has been charged with advising the Court with respect to a number of policy issues regarding access to court records, including policies for distribution of records to commercial users, security, search technology, user fees, and the development of technical and substantive standards to govern electronic access to court records. Such standards "should assimilate recommendations that are to be provided by the Committee on Access to Court Records" and others (AOSC07-59). The Florida Courts Technology Commission is also charged with oversight of electronic filing programs, and with the development of a comprehensive governance framework for the implementation of technology in Florida's courts.

The Committee views operational matters and policy issues related to implementation of electronic access to court records as inherently related to those of electronic filing specifically and the use of technology in the courts in general. In light of the central role of the Florida Courts Technology Commission in governance of technology in the Florida court system, and the presently unresolved status of many of the policy questions assigned to the technology commission regarding electronic access, this Committee does not propose specific rule changes at this time, but does urge the following recommendations:

RECOMMENDATION SEVEN: The Committee recommends that policy and operational guidance for electronic access programs, including technical standards, oversight requirements, and project approval procedures be developed in a

comprehensive manner under the governance of the Florida Courts Technology Commission.

RECOMMENDATION EIGHT: The Committee recommends that an approval process for authorization to allow remote electronic access to court records be coupled with the approval process for electronic filing presently assigned by Rule of Judicial Administration 2.525.

RECOMMENDATION NINE: The Committee recommends that user fees for electronic access to court records be structured to provide sufficient funding for all costs associated with the implementation and operation of digital court records systems, and that differentiated fees be considered for categories of users (self-represented litigants, attorneys of record, etc.) No fee should be charged for access to court records at the courthouse.

RECOMMENDATION TEN: The Committee recommends that electronic access systems be designed to prevent access by automated search programs.