
Minutes

August 20, 2004

**Supreme Court Committee on Privacy and Court Records
Hyatt Airport, Orlando, August 20, 2004**

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Jon Mills, Chair, opened the meeting at 10:00 a.m. Members present: Mr. Tom Hall, Ms. Kristin Adamson, Mr. Andrew Z. Adkins, Judge Edward Fine, Professor Michael Froomkin, Ms. Lydia Gardner, Mr. Jon Kaney, Judge Judith Kreeger, Jr., Judge Kim Skievaski, Judge Larry Turner. Also present: Tim McLendon, Peggy Horvath, Steve Henley, Jo Suhr, and Kris Blakeslee.

Chairman Mills welcomed those present and briefly reviewed the plan for the day's agenda. Tom Hall moved for approval of the April minutes, the motion was seconded and the minutes were approved.

Jo Suhr and Steve Henley reviewed the matrix of court records that had been previously disseminated to stakeholders in an effort to gather input on identifying and classifying the various types of documents and data elements that frequently find their way into court files. The members discussed the level of detail that was expected from the responses and noted that it was not anticipated that each respondent would attempt to research or provide every possible answer. Judge Skievaski noted that the committee is not asking for the breadth of exemptions. People are to simply provide input in the case types for which they have experience.

Chairman Mills noted that there is presently no general theory of exemptions; it is all isolated data. Perhaps exemptions should be summarized?

Judge Turner observed that the matrix may seem overwhelming to judges, reducing response. It should be user friendly. The committee discussed sending the instrument back out with simplified instructions and examples. This information is very important and the members acknowledged that they may need to go to focus groups.

Ms. Adamson reported to the committee on the wealth of personal information in family case files. She distributed examples. Mr. Kaney noted that much of the information in family files should not be filed, but if it is and it is not dispositive, we need to address how it should be treated. Presumably things that are required and are dispositive to the court's decision should be open.

Ms. Adamson observed that Mr. Kaney may be correct, but that the next question was whether it should be available electronically.

Judge Kreeger explained that the historical basis for adoption of Rule 12.285, Florida Family Law Rules of Procedure, was to reduce discovery disputes by requiring the exchange of financial affidavits. Compliance with the rule requires that a certificate of compliance with disclosure be filed, but does not require that the disclosed information be filed in the court record. Many lawyers file the affidavit, and awareness that this is not

required is an education issue for lawyers and self-represented litigants. Mr. Kaney suggested that the problem may be the passive sentence structure that does not clarify who the actor is. Judge Kreeger observed that there is a presumption of legitimacy and it goes in the official record – the final judgment.

Judge Turner inquired as to the purpose of the filing of the financial affidavit, so long as it is exchanged between the parties, noting that perhaps they could exchange them but not file them until or unless really necessary. The members discussed whether even the exchange of a financial affidavit was necessary in cases not involving financial issues. Judge Skievaski argued that Rule 12.285(d)(1) does not apply if there is no request for permanent financial relief. Ms. Adamson stated that in her opinion the litigants should not have to exchange affidavits until there is a hearing requiring it. Judge Kreeger addressed the federal requirements that necessitate the filing of a child support guidelines worksheet and noted that she thinks that it is part of the accountability for what judges decide.

Mr. Froomkin suggested that the “trade secrets” model would be a good model. Mr. Kaney noted that it would likely be abused without oversight. The questions that need to be addressed are: Does the judge need the information? When does the judge need it? Does the public need it?

Judge Skievaski stated that the committee needs to make sure that the appropriate Bar sections are involved in its recommendations.

Mr. Kaney reported on the legal research agenda, stating that there was no written work product available at this time, but noted that several issues had emerged:

1. Should clerks be considered the custodian who is responsible for responding/redacting the information – as they are ministerial warehouses?
2. What is the status of imported exemptions? Meaning, do chapter 119, F.S., exemptions carry over to the court file by reference in Rule 2.051? Mr. Kaney noted that in a case involving an executed search warrant on file with the clerk found that the exemption was clearly with the document.
3. Does an exemption cease in some circumstances within the court process? This has not been established clearly. Tom Hall asked whether there was some other “trigger,” such as when a judge used the record for decision-making?
4. The extent, if any, the right of privacy interdicts with the right of access to public records.
5. What is the scope of the rulemaking power of the Supreme Court in its express and inherent power? What is the source and scope of the Court’s authority to regulate the clerks regarding what they can put on the internet?

6. Whether payment for access (commercial vending of information the state has amassed) is a mechanism for increasing revenues without raising taxes. Should the state require information from people and then sell it? What are the issues with providing information only to those who pay?

Steve Henley asked Mr. Kaney to brief the committee on the First Amendment Foundation's project to catalog exemptions, and the recent Second DCA case, Thomas v. Smith (2DO2-4018). Mr. Kaney obliged and described the database the FAF is developing, expected to be completed in September. He noted that it may help to identify some unified theory of exemptions.

Regarding the case, Mr. Kaney reported that in his view much of the private information that is in the public domain got there in violation of Article I, section 23 of the Florida Constitution. The case concerned a homeowner who refused to provide a social security number as part of an application for a homestead exemption, asserting among other things that the requirement violated section 23. The Second DCA provides a discussion of the state constitutional right of privacy and articulated the test for satisfaction of section 23, including that the government must a compelling need for the information and should gather the information using the least intrusive means. The court found that the tax collector had not made a showing that the collection of the social security number was motivated by a compelling state interest, and remanded for further proceedings.

The committee broke for lunch.

Steve Henley provided background on the reasons for and schedule for the site visits. Committee members Griffin, Fine, Turner and Hall, as well as Henley, visited the clerk's offices in Charlotte, Sarasota and Manatee Counties on June 21. The site visit team observed the functions of screening and scanning operationalized differently in the several counties. Judge Turner added that there was some concern about the quality of redaction in terms of the redactor's level of interest and energy.

The Chair recognized Carl Youngs, General Counsel to the Clerk of Court in Manatee County, to explain the mechanics of scanning and redacting documents used in Manatee County. Tom Hall discussed the text search options.

Professor Froomkin presented an overview of data aggregation and consumer profiling. He thought it was important that the committee understand that any data element that is granular or linked to other data has weight beyond just itself. He specifically addressed the types of consumer data routinely collected and available, what the data is used for and by whom, and why people care. Regarding the types of data collected and available, he reported that credit-reports and LexisNexis compile all names, addresses and other demographic data from hundreds of independent sources. Financial services data is collected by financial institutions, but there are some limitations on sharing it. All data compilers, including the government, have accuracy problems, especially with linking data with the correct individual. The private sector uses for data were compared to the public sector uses.

Mr. Atkins provided an overview of records available through a search of court records and other local records.

Mr. Greg Brock of the Florida Association of Court Clerks presented information on the clerks' association case and data management systems for court records. Mr. Brock reported that the systems do not provide access to the public at this time but only to governmental users, including judges along with personnel from agencies such as State Attorney, Public Defender, Corrections, law enforcement, Children and Families, Juvenile Justice, etc.. He represented that the system restricts access such that only those with proper authority are able to access certain records. Mr. Hall inquired how clerks could provide electronic records to the FACC systems given the restrictions of the Administrative Order. Mr. Brock responded that they relied on the "governmental agency or agents" exception in the order. Mr. Kaney asked to clarify whether the FACC considered itself a governmental agency, or an agent of the clerks performing a governmental function on their behalf. Mr. Brock replied that the FACC is a non-governmental entity acting as an agent to the clerks, as well as referenced in the statutory scheme in Section 28.24, Florida Statutes, as the entity authorized to receive revenues for the purpose of implementing the Comprehensive Case Information System.

Judge Manuel Menendez reported on the purpose and activities of the Electronic Filing Committee of the Florida Court Technology Commission. The committee, pursuant to Rule 2.090, Rules of Judicial Administration, makes sure e-filing plans ensure integrity and that systems can be audited until follow-up with paper files is no longer indicated. They are also considering electronic and facsimile signature plans. Judge Menendez also gave a brief history of e-filing activities to date. The e-filing standards are available online at www.flcourts.org.

The committee discussed e-filing technology in the federal courts, where apparently the duty to redact is placed on the filer.

Adjourn.