

**PROTECTING THE TREASURE:
AN ASSESSMENT OF STATE COURT RULES AND POLICIES FOR
ACCESS TO ONLINE CIVIL COURT RECORDS**

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These records, for that they contain great and hidden treasure, are faithfully and safely kept (as they well deserve) in the King's Treasury. And yet not so kept but that any subject for his necessary use and benefit have access thereunto, which was the ancient law of England, and so is declared by an act of Parliament

*Lord Coke*¹

ABSTRACT

State courts throughout the United States are rapidly implementing e-filing for civil court documents. Public access to these online records furthers the long-standing common law right of citizens to review court records. At the same time, online access exposes a wealth of personal information contained in these records. During the last decade state courts struggled to develop and implement rules and policies for public access as courts anticipated a transition from print to electronic records. Now, as e-filing becomes more prevalent, state courts must consider whether current rules and policies regarding public access to electronic court records are adequate to provide privacy protection.

This article discusses the ongoing development of courts rules and policies for public access to electronic court records. It assesses common approaches for providing and limiting access, and determines that these approaches do not adequately address privacy concerns. It recommends that courts adopt the alternative approach of the Florida courts. That approach required changes throughout the filing system to minimize the inclusion of personal information in court documents. Courts must rethink the nature and

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¹ 3 EDWARD COKE, REPORTS, at vi-vii (London, E. & R. Nutt & R. Gosling 1727) (n.d). Lord Coke was referring to 46 Edw. 3 (1372) (Eng.) (English translation in *Caddy v. Barlow*, (1827) 31 Rev. Rep. 325 (K.B.) 328 n.; 1 Man. & Ry. 275).

purpose of court filings and how the content of those filings furthers the resolution of disputes.

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I. Introduction

The United States has a long tradition of allowing public access to court records. The underlying reasons for allowing access include public review of judicial action. Court records, however, contain private and personal information about parties to lawsuits as well as about witnesses and other nonparties. These records can include names of children and spouses, social security numbers, addresses, financial information, and descriptions of alleged wrong doings. Concern for allowing access to these records and the wealth of information contained within them was minimal until the late 20th Century because the documents were difficult to access, and so cloaked in “practical obscurity.”² To obtain records for a particular state court case, an interested person had to go to a courthouse and navigate the system of obtaining access to the files, reviewing the documents, and copying the

² See text accompanying notes 34 - 37.

desired materials. Only a small number of people were likely to undertake this task.

At the end of the 20th Century the availability of computers with large storage capacity provided courts the opportunity to digitize court records and even require the filing of electronic records. Maintaining court records in electronic form facilitated records management. In addition, courts could provide wide public access to court records. Digitization has provided an alternative to the often difficult process of manually and physically accessing print records. Some states have constitutional and statutory provisions mandating public access to records, and expanding access through the Internet promotes this interest.

The practical obscurity of court records evaporates as a consequence of public online access. Once a court allows online access and makes records available, anyone with a computer can search and quickly access the records. As online availability increases, so do concerns about the exposure of private, personal information. Whatever “great and hidden treasure” Lord Coke thought was in records of the 17th Century, the great treasure in 21st Century records is the wealth of personal data they contain. Access to this information provides riches to those who wish to remove information about a person from its court context and sell the information as part of an aggregated package.³ It also serves the interests of persons who wish to engage in nefarious actions such as identity theft and stalking. There is a serious need for rules and procedures that address the tension between public access and protection of personal data and information.

In the first decade of the 21st Century, the movement to provide online access to court records grew. As state courts considered the best approach to handling online court records, national organizations produced and recommended guidelines for providing public access to online records. At the same time, the actual availability of online court records was limited or non-existent.⁴ In the second decade of the 21st Century, courts are still

³As one scholar noted, “Information belies the adage about sewing silk purses out of sow’s ears, for out of worthless bits [of] information we may sew assemblages that are rich in value.” Helen Nissenbaum, *Protecting Privacy in an Information Age: The Problem of Privacy in Public*, 17 L. & PHIL. 559, 587 (1998).

⁴ See David Schanker, *E-Filing In State Appellate Courts: An Appraisal*, FUTURE TRENDS IN STATE COURTS 2010, 137 (2010), <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1605>; Lynne Marek, *Patchwork E-Filing Frustrates Lawyers*, NAT’L L.J., (Feb. 26, 2008), available at <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=900005504188&slreturn=1>.

developing, revising and implementing policies and rules for providing public access to electronic court records. Implementation of e-filing is rising as courts, faced with limited budgets and lack of space, consider alternatives to maintaining print records.⁵ There is a continuing need to evaluate approaches to providing public access to online court records.

This article discusses the ongoing development of state court policies and rules governing public access to electronic civil court records.⁶ It assesses whether current policies and rules are effective in balancing public access rights with protection of personal information. Part II discusses the common law roots of the public right to access court records. Part III discusses the movement of states toward electronic records systems in the 1990s and the early development of state court policies. It also describes two important National Center for State Courts reports regarding electronic access. Part IV offers an assessment of current approaches to access, relying on a recognized set of national guidelines that reflect common approaches that state courts have adopted. This section examines and evaluates some suggested alternatives to providing full access to electronic records. This part also discusses several unresolved issues regarding publicly accessible electronic court records. These issues are becoming more serious. Part V discusses the more comprehensive approach that Florida adopted to address the challenge of protecting privacy while providing public access to online records. This approach involved rethinking the nature and purpose of court records and the reasons for including personal information in those records. The result was extensive changes in the nature of court filings and rules governing those filings. Part VI concludes that courts should adopt the

⁵ See Laura Ruane, *U.S. Courts Pare Down on Paper, Go Digital*, USA TODAY, Feb. 21, 2012, <http://www.usatoday.com/news/nation/story/2012-02-07/courts-digital-paper/53182540/1>.

⁶ This article does not discuss the development of rules governing criminal records. State courts have been developing rules governing criminal records separately from rules governing civil records. For discussion of the protection of information in electronic criminal records, see Rebecca Hulse, *Privacy and Domestic Violence in Court*, 16 WM. & MARY J. WOMEN & L. 237 (2010); Jack Losinger, *Electronic Access To Court Records: Shifting The Privacy Burden Away From Witnesses And Victims*, 36 U. BALT. L. REV. 419 (2007); Caren Myers Morrison, *Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records*, 62 VAND. L. REV. 921 (2009). This article also does not address protection of personal information in appellate court opinions. For a discussion of that subject, see Joel M. Schumm, *No Names, Please: The Virtual Victimization of Children, Crime Victims, the Mentally Ill, and Others in Appellate Court Opinions*, 42 GA. L. REV. 471 (2008).

Florida approach as an appropriate means to balance the competing goals of providing public access to court records and protecting personal information.

II. Public Access to Court Records – A Common Law Right

The basis for providing public access to court records lies in a long-standing common law right. Greenleaf in his *Treatise on the Law of Evidence* states that “it has been admitted, from a very early period, that the inspection and exemplification of the records of the King's courts is the common right of the subject.”⁷ In *Browne v. Cumming*,⁸ the King's Bench, in discussing a party's right to a copy of a record, cites Lord Coke's statement that the “ancient law of England” allowed subjects to access court records.⁹ American courts recognize this common law right.¹⁰ The United States Supreme Court, in *Nixon v. Warner Communications, Inc.*,¹¹ recognized that members of the public have a right to inspect judicial records, even if they do not have “a proprietary interest in the document or . . . a need for it as evidence in a lawsuit.”¹² Justice Powell, writing for the majority, recognized the English heritage of this right.¹³

Some Federal courts have linked the right of access to court records to the right of the public to attend trial proceedings. In *United States v. Mitchell*,¹⁴ the Federal Court of Appeals for the District of Columbia compared the policies supporting a right to access court records to those

⁷ 1 S. GREENLEAF, TREATISE ON THE LAW OF EVIDENCE §471 (16th ed. 1899) (emphasis omitted). In his discussion, Greenleaf refers to a 1372 English statute, 46 Edw. 3, *supra* note 1. For discussion of the common law right of public access to judicial records, see Note, *The Common Law Right to Inspect and Copy Judicial Records: In camera or On Camera*, 16 GA. L. REV. 659, 660-66 (1982) (discussing English common law); See also, 23 R.C.L. §12 (1929).

⁸ (1829) 109 Eng.Rep. 377 (K.B.); 5 Man. & Ry. 118.

⁹ *Id.* at 378 (quoting COKE, *supra* note 1).

¹⁰ See Stewart Wilder, *All Courts Shall Be Open: The Public's Right to View Judicial Proceedings and Records*, 52 TEMP. L.Q. 311, 337-39 (1979) (discussing American common law).

¹¹ 435 U.S. 589 (1978). This case addressed whether television networks and others could have copies of recorded tapes used as evidence in a criminal trial against former advisors of President Richard Nixon. The Court ultimately based its decision to deny access to the tapes on a Federal statute governing access to Presidential materials (the Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, 88 Stat. 1695 (1974)). For more discussion of the *Nixon* case in the context of access to judicial records, see *U.S. v. Criden*, 648 F.2d 814, 819-20 (3d Cir. 1981).

¹² *Nixon*, 435 U.S. at 597.

¹³ *Id.* Justice Powell cited *Browne v. Cumming*, *supra* note 8.

¹⁴ 551 F.2d 1252 (D.C. Cir. 1976), *rev'd on other grounds sub nom.* *Nixon v. Warner Comm'n*, 435 U.S. 589 (1978).

supporting the right to a public trial.¹⁵ The Third Circuit Court of Appeals, in *United States v. Criden*¹⁶ observed that the policies supporting public access to records identified in *Nixon* were similar¹⁷ to those identified in *Richmond Newspapers, Inc. v. Virginia*¹⁸ to support public access to a criminal trial.¹⁹ In *Publiker Indus., Inc. v. Cohen*,²⁰ the Third Circuit Court of Appeals observed that the rights of access to court records and access to court proceedings are linked and applicable to both civil and criminal trials.²¹ The court in *Cohen* noted that “the existence of a common law right of access to judicial proceedings and to inspect judicial records is beyond dispute.”²² The policy support for open access to court records and judicial proceedings lies in the need to inform citizens of the workings of the judicial process and to allow them to monitor the actions of the judiciary.²³ The link

¹⁵ *Id.* at 1257–58.

¹⁶ 648 F.2d 814 (3d Cir. 1981).

¹⁷ *Id.* at 820.

¹⁸ 448 U.S. 555 (1980). The opinion in *Richmond* contains an extensive discussion of the history of open access to criminal court proceedings. *See id.* at 564–73.

¹⁹ In *Richmond*, the Supreme Court held that the First Amendment guarantees public access to a criminal trial. *Id.* at 580. The Supreme Court did not address the public right to attend civil trials, but noted that “historically both civil and criminal trials have been presumptively open.” *Id.* at n.17. The Third Circuit in *Criden* did not consider applicability of the First Amendment, but determined that the same policy analysis should apply to the common law right of access to records. *Criden*, *supra* note 16, at 820. The Supreme Court has not recognized a First amendment right to access trial records or to attend civil trials. For a discussion of the lower Federal courts’ application of the First Amendment to access of court records, see Ronald. D. May, Recent Development, *Public Access to Civil Court Records: A Common Law Approach*, 39 VAND. L. REV. 1465 (1986).

²⁰ 733 F.2d 1059 (3d Cir. 1984).

²¹ *Id.* at 1066–67 (noting that “the public’s right of access to civil trials and records is as well established as that of criminal proceedings and records.”). The Third Circuit Court of Appeals referenced *Gannett Co. v. DePasquale*, 443 U.S. 368, 387 n.15 (1979) in which the Supreme Court discussed public access to civil and criminal trials. The Supreme Court in *Gannett* observed that many English commentators had described open proceedings in both criminal and civil proceedings. The Supreme Court referenced, among others, Lord Coke and Sir John Hawles. *Gannett*, 443 U.S. at 387.

²² *Cohen*, 733 F.2d at 1066.

²³ *See In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) (Policies of open access to courts and documents “relate to the public’s right to monitor the functioning of our courts, thereby insuring quality, honesty, and respect for our legal system.”); *Cohen*, 733 F.2d at 1070 (“Public access to civil trials also provides information leading to a better understanding of the operation of government as well as confidence in and respect for our judicial system.”); *U.S. v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976), *rev’d on other grounds sub nom. Nixon v. Warner Commc’ns*, 435 U.S. 589 (1978) (Right of access to judicial records is “fundamental to a democratic state.”); *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884) (Justice Oliver Wendell Holmes wrote that public access to court proceedings is important “because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to

between access to court records and access to judicial proceedings emanates from the notion that access to court records informs those citizens unable to attend court proceedings. In *United States v. Antar*,²⁴ the Third Circuit Court of Appeals observed that:

At the heart of the Supreme Court's right of access analysis is the conviction that the public should have access to *information* . . . True public access to a proceeding means access to knowledge of what occurred there. . . . Access to the documentation of an open proceeding, then, facilitates the openness of the proceeding itself by assuring the broadest dissemination. It would be an odd result indeed were we to declare that our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed, for what exists of the right of access if it extends only to those who can squeeze through the door?²⁵

While court records are subject to public access, an individual still has a privacy interest in information about that person contained in the records. Courts must balance the long established right of citizens to access records against the privacy rights of individuals. For example, in *United States Department of Justice v. Reporters Committee for Freedom of the Press*,²⁶ the Supreme Court determined that information contained in a government compiled “rap sheet” was not accessible, even though the information came from public records.²⁷ The Court noted that compilations of information can affect personal privacy far more than scattered “bits of information.”²⁸ In *Reporters Committee*, a reporter and a journalists’ association filed a Freedom of Information Act (“F.O.I.A”) request²⁹ for a FBI rap sheet for an individual.³⁰ The rap sheet was a compilation of information gathered from various public records. The requesters argued that since the information in the rap sheet came from records that were

satisfy himself with his own eyes as to the mode in which a public duty is performed.”); see also, Gregory M. Silverman, *Rise of the Machines: Justice Information Systems and the Question of Public Access to Court Records Over the Internet*, 79 WASH. L. REV. 175, 208–09 (2004).

²⁴ 38 F.3d 1348 (3rd Cir. 1994).

²⁵ *Id.* at 1360 (footnotes and citations omitted). In *Antar*, the court recognized the public’s right to access transcripts of jury voir dire transcripts. See *id.* at 1361.

²⁶ 489 U.S. 749 (1989).

²⁷ See *id.* at 764, 780.

²⁸ *Id.* at 765.

²⁹ 5 U.S.C. § 552.

³⁰ *Reporters Comm.*, 489 U.S. at 757.

publicly available, they should be able to obtain a copy of the rap sheet.³¹ The Department of Justice denied access to the rap sheet, relying on an exemption in FOIA that protected law enforcement records if providing the records “could reasonably be expected to constitute an unwarranted invasion of privacy.”³² In the lawsuit that followed, the District Court granted the Department’s summary judgment motion, and the Federal Court of Appeals for the District of Columbia reversed that decision.³³

On appeal to the Supreme Court, the Department argued that the “practical obscurity” of “widely scattered” public records that were the source of the rap sheet shielded the privacy of the individual.³⁴ In the Department’s view, the subject of the rap sheet had a protectable privacy interest in the obscurity of these records.³⁵ The compilation of information from these records destroyed that protection.³⁶ The Supreme Court, agreeing with the Department of Justice, distinguished access to the compiled rap sheet from access to the public records that were the source of the information in the rap sheet. The Court noted that “[p]lainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.”³⁷ While this case interpreted and applied FOIA with regard to a government agency document, it has become authority for the notion that the “practical obscurity” of scattered and difficult to access public records, including court records, provides a measure of privacy protection for the information in the records. This case affirmed that, while public records are open, the individual does “not necessarily forfeit a privacy interest in matters made part of the record.”³⁸ Courts must balance individual privacy interests against the common law public right to access the records containing the information.

³¹ *See id.*

³² *See id.* at 756; 5 U.S.C. § 552(b)(7)(C) provided the exemption.

³³ *Reporters Comm.*, 489 U.S. at 757, 759.

³⁴ *See* Reply Brief for Petitioners at 2, *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) (No. 87-1379), 1988 WL 1026019 at *2; *see also* Petition for Writ of Certiorari, *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) (No. 87-1379), 1989 WL 1174467 at *5.

³⁵ *See* Petition for Writ of Certiorari, *supra* note 34, at 5.

³⁶ *See* Reply Brief for the Petitioners, *supra* note 34, at 3–4.

³⁷ *Reporters Comm.*, 489 U.S. at 764.

³⁸ *Id.* at 762 n.15.

III. Development of State Court Policies on Public Electronic Access

State courts have long recognized the public's right of access to court records and allowed physical access to paper records housed at individual courthouses. Until the late 20th Century, there was little concern for protection of personal information in the records or need to balance an individual's privacy right against the right of public access. The challenges that anyone seeking state court records faced in obtaining access at a courthouse effectively limited wide-spread use of the records and the dissemination of the information they contained. Accessing any court record required physically going to a courthouse, which might require travel to another county or state. Once at the courthouse, the record requestor had to contend with everything from parking and limited courthouse hours to navigating the maze of procedures for requesting, receiving and copying documents.³⁹ These challenges effectively provided the practical obscurity that the Supreme Court discussed in *Reporters Committee*.⁴⁰

In the late 20th Century, courts began to consider the use of technology to manage documents and improve court services to the public.⁴¹ At the same time, courts considered how to address issues regarding the exposure of private information in online records. In 1995,⁴² the National Center for State Courts ("NCSC") published two companion reports⁴³ to provide guidance to courts considering electronic access: the Kilpatrick Report⁴⁴ and the Jennen Report.⁴⁵ The Kilpatrick Report examined

³⁹ See KEVIN P. KILPATRICK, NAT'L CTR. FOR STATE COURTS, ELECTRONIC HANDSHAKE: PUBLIC ACCESS TO COURT DATABASES 2 (1995), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/accessfair&CISOPTR=224> [hereinafter KILPATRICK REPORT]; Silverman, *supra* note 23, at 194–95 (discussing the challenges and process of accessing paper court records at a courthouse).

⁴⁰ See *supra* text accompanying notes 34–37.

⁴¹ Providing physical access to records also required extensive time and effort of court personnel, and courts sought ways to limit the costs associated with this work. See KILPATRICK REPORT, *supra* note 39, at 1, 2.

⁴² See *id.* at 3.

⁴³ *Id.*

⁴⁴ KILPATRICK REPORT, *supra* note 39.

⁴⁵ SUSAN M. JENNEN, NAT'L CTR. FOR STATE COURTS, PRIVACY AND PUBLIC ACCESS TO ELECTRONIC COURT INFORMATION: A GUIDE TO POLICY DECISIONS FOR STATE COURTS (1995), available at

<http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/accessfair&CISOPTR=222> [hereinafter JENNEN REPORT].

electronic access to court information and records⁴⁶ and discussed issues critical to the implementation of an electronic access system.⁴⁷ It offered guidance on development and implementation.⁴⁸ This report focused on systems that allowed remote access rather than courthouse access at public terminals.⁴⁹ It identified the reasons why courts with remote access systems implemented those systems.⁵⁰ Remote access through personal computers could: (1) accommodate the growth in case filings; (2) improve service to the public; and (3) reduce time demands upon public researchers and court staff.⁵¹

The Kilpatrick Report referred to the Jennen Report to address the issue of how to develop the policies for access to records in a system.⁵² The Jennen Report provided an extensive discussion of the conflicting privacy and open access concerns inherent in determining electronic record access policies. It determined that existing law was not adequate to guide state courts in developing policies, and courts therefore needed to examine other factors such as court operational issues.⁵³ The Jennen Report did not

⁴⁶ KILPATRICK REPORT, *supra* note 39, at 4. Research focused on data and information gathered from surveys of courts, state judicial information system directors and system users as well as from onsite visits to some courts. *See id.* at 5, 9; *see also*, J. DOUGLAS WALKER, NAT'L CTR. FOR STATE COURTS, THE CHALLENGING VOYAGE TO STATEWIDE COURT AUTOMATION (1994), *available at* <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/tech&CISOPTR=12> (discusses issues "involved in managing the process of statewide automation," and includes a detailed 50 state survey of trial court automation).

⁴⁷ KILPATRICK REPORT, *supra* note 39, at 45. At the time of the report, there were very few courts that had actually implemented an electronic public access system that would support the filing of case documents. *See id.* at 35.

⁴⁸ *Id.* at 55.

⁴⁹ Access was through dial-up and modem. *Id.* at 34.

⁵⁰ *Id.* at 33.

⁵¹ *See id.* at 1–2; *see also*, J. DOUGLAS WALKER, NAT'L CTR. FOR STATE COURTS, ELECTRONIC COURT DOCUMENTS: ASSESSMENT OF JUDICIAL ELECTRONIC DOCUMENT AND DATA INTERCHANGE TECHNOLOGY (1999), *available at* <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/tech&CISOPTR=5> 15 ("With the nearly continuous rise in volume and complexity of the paperwork involved in the judicial process . . . technology and electronic communications could offer a better alternative to the flood of paper forms and documents.") This report discusses the results of a study in Shawnee County Court in Kansas that compared the time necessary to process manually 100 documents with the time to process them electronically. The study showed that it took 9.75 hours to process the documents in paper and 8.8 minutes online. *Id.* at 18–19.

⁵² KILPATRICK REPORT, *supra* note 39, at 46.

⁵³ *See* JENNEN REPORT, *supra* note 45, at 38, 43, 44; *see also id.* at 25–34.

suggest specific language for policies but rather offered extensive guidelines for courts to consider in developing policies.⁵⁴

In discussing reasons for providing electronic access to court records, the Kilpatrick Report and the Jennen Report both referenced the 1990 Trial Court Performance Standards.⁵⁵ The Jennen Report also referenced these standards in discussing the development of access policies. The Trial Court Performance Standards, whose purpose was to support court reform and accountability, focused on measuring the *performance* of courts (outcomes) rather than on *resources and processes* (inputs).⁵⁶ The Kilpatrick Report noted the importance of public access identified in Performance Standard 1 (Access to Justice).⁵⁷ Performance Standard 1 recognized the “importance of the relationship between [access to] public records and access to justice” and the need to serve “persons seeking information from public records.”⁵⁸ The Jennen Report referenced the 1990 Trial Court Performance Standards to support broad access to records.⁵⁹ The Jennen Report noted⁶⁰ Performance Standard 4.2, which states that a trial court should “responsibly seek the resources needed to meet its judicial responsibilities, use those resources prudently . . . and account for their use.”⁶¹ The Jennen Report suggested that a court desiring to maintain a “high degree of accountability” under Performance Standard 4.2 could adopt a broad policy that “all records and court data should be open for public review and access.”⁶² The Jennen Report, however, also referenced the Trial Court Performance Standards to suggest exceptions to allowing open access to records. A court could make “legitimate exceptions” based upon “a clear showing of countervailing public policy or public or individual harm.”⁶³ Noting the Performance Standard on Public Trust and Confidence,⁶⁴ the Jennen Report questioned “whether the release of certain electronic data” would violate the public’s trust and confidence in the court system. If citizens perceive that the courts will not

⁵⁴ *Id.* at 38.

⁵⁵ COMM’N ON TRIAL COURT PERFORMANCE STANDARDS, NAT’L CTR. FOR STATE COURTS, TRIAL COURT PERFORMANCE STANDARDS WITH COMMENTARY (1990), <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=335> [hereinafter 1990 TRIAL COURT PERFORMANCE STANDARDS].

⁵⁶ *Id.* at 1.

⁵⁷ KILPATRICK REPORT, *supra* note 39, at 7.

⁵⁸ 1990 TRIAL COURT PERFORMANCE STANDARDS, *supra* note 55, at 7.

⁵⁹ *See* JENNEN REPORT, *supra* note 45, at 26.

⁶⁰ *Id.*

⁶¹ 1990 TRIAL COURT PERFORMANCE STANDARDS, *supra* note 55, at 19.

⁶² JENNEN REPORT, *supra* note 45, at 26.

⁶³ *Id.*

⁶⁴ 1990 TRIAL COURT PERFORMANCE STANDARDS, *supra* note 55, at 20.

protect personal information from dissemination, they may become reluctant to use the courts.⁶⁵

This discussion in the Jennen Report illustrates a conflict in court goals in providing public access to electronic court records. On the one hand, providing electronic access improves public service by making access to court records easier and cheaper. Electronic access, however, negates the obscurity of the documents, thus making private information more available and raising questions about the court's concern for individual citizens. As one scholar noted, many of the system users surveyed for the Kilpatrick Report expressed an interest in obtaining detailed data from court records. This same interest raises concerns about the use of personal information, perhaps for purposes unrelated to an interest in a court case.⁶⁶

During the late 1990's and the early 2000's courts began developing and adopting policies regarding public access to electronic court records for the reasons identified in the Kilpatrick and Jennen Reports. State courts focused on developing policies even though few courts had online filing systems and electronic records.⁶⁷ This process stood in stark contrast to the experience in the Federal courts, which adopted a uniform policy and an online filing system.⁶⁸

⁶⁵ JENNEN REPORT, *supra* note 45, at 20. The JENNEN REPORT references Performance Standard 5.2, which provides that "[t]he public has trust and confidence that the basic trial court functions are conducted expeditiously and fairly and that its decisions have integrity." 1990 TRIAL COURT PERFORMANCE STANDARDS, *supra* note 55, at 22. The Jennen Report does not acknowledge that this Performance Standard could also support a broad access policy.

⁶⁶ See Lynn E. Sudbeck, *Placing Court Records Online: Balancing Judicial Accountability with Public Trust and Confidence: An Analysis of State Court Electronic Access Policies and a Proposal for South Dakota Court Records*, 51 S.D. L. REV. 81, 99 n. 64 (2006) (citing KILPATRICK REPORT, *supra* note 39, at 37–38).

⁶⁷ See Peter W. Martin, *Online Access to Court Records-From Documents to Data, Particulars to Patterns*, 53 VILL. L. REV. 872, 872 (2008); see also Marek, *supra* note 4. For example, Vermont was one of the early states to adopt a policy on public access to electronic court records, but it did not adopt e-filing until much later. The concept for the Vermont rules originated in a Technology Committee study the Vermont Supreme Court adopted in 1998. The Court adopted Rules Governing Dissemination of Electronic Case Records in 2002. VT. R. GOVERNING DISSEMINATION OF ELECTRONIC CASE REC. (WEST). See *id.* Reporter's Notes. The Vermont state courts did not start implementing e-filing until October 2010. See VT. RULES FOR ELECTRONIC FILING §1 (WEST); see also, *E-filing Is Coming*, 36 VT. BAR J., Summer 2010, at 22.

⁶⁸ The states have not followed the Federal model, and therefore I will not discuss that system in detail. For researchers interested in the Federal model, I provide a summary of the key decisions that underlie the Federal system. For more discussion of the Federal system, see Martin, *supra* note 67. The online vehicle for accessing Federal court records is PACER

(Public Access to Court Electronic Records), <http://www.pacer.gov/> (last visited August 4, 2012). In 1988 the Judicial Conference of the United States authorized electronic access for Federal court records. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 83 (1988), *available at* <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/1988-09.pdf>; *see Electronic Public Access at 10*, THE THIRD BRANCH (September 2000), http://www.uscourts.gov/News/TheThirdBranch/00-09-01/Electronic_Public_Access_at_10.aspx. In 1990 Congress authorized funding. Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. 101-515, 104 Stat. 2101 (1990). By 1999, users could access the system on the Internet. *Pacer Arrives on the Internet*, THE THIRD BRANCH (July 1999), http://www.uscourts.gov/News/TheThirdBranch/99-07-01/PACER_Arrives_On_the_Net.aspx. In 2001 the Judicial Conference adopted privacy policy recommendations. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 48–50 (2001), <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/2001-09.pdf>). A history of the policy is available at <http://www.privacy.uscourts.gov/privacypolicy.htm>. A discussion of the development of the original policy is at <http://www.privacy.uscourts.gov/Policy.htm>. The Committee on Court Administration and Case Management, which recommended the policy, identified several reasons to provide public access to electronic court records. These included: attorneys in civil cases would have easy access to records in any Federal court, thus leveling “the geographic playing field;” clerks could better serve the bar and public; and data re-sellers would have less incentive to copy paper files and provide electronic access for a charge. JUDICIAL CONFERENCE COMM. ON COURT ADMIN. & CASE MGMT., REPORT ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES (as amended by the Committee on Court Administration and Case Management in December 2006), *available at* <http://www.privacy.uscourts.gov/Policy.htm>. The Federal policy regarding electronic court records is now embodied in Federal Rules adopted in 2007. *See* Fed. R. Civ. P. 5.2; Fed. R. Crim. P. 49.1; Fed. R. Bank. P. 9037. These were new rules that the Judicial Conference and the United States Supreme Court adopted to comply with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2915 (2002); *see also*, Memorandum from Judge David F. Levi to Honorable John G. Roberts 1 (November 1, 2006), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/supct1106/summary_proposed_amend.pdf); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 32–33 (Sept. 2006), *available at* <http://www.uscourts.gov/federalcourts/judicialconference/proceedings/proceedings.aspx?doc=/uscourts/federalcourts/judconf/proceedings/2006-09.pdf>. After adoption of these rules, the Judicial Conference limited its policy to those portions that remain in effect apart from the rules. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 7–8 (March 2008), *available at* <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/2008-03.pdf>; *see also* JUDICIAL CONFERENCE POLICY ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES (March 2008), *available at* http://www.privacy.uscourts.gov/privacypolicy_Mar2008Revised.htm.

With so many variations in state court structure, management and funding, each state court system had to develop its own policies. Courts struggled with the conflicting goals of providing access and protecting individual information. Addressing these conflicts inevitably lead to a divergence in courts' policies on electronic access to court records. Two approaches to providing access to court records have emerged: the "public is public" approach and the "practical obscurity" approach. The "public is public" approach views all records the same regardless of format or location. The focus of any limitation on access is on the type of information in the document and whether it should be public.⁶⁹ Any records and information available at a courthouse would be available online. Under this approach, any restriction on access to sensitive information in a document would apply to records in paper and electronic format. The "practical obscurity" approach focuses on concerns regarding exposure of information in electronic documents that are available online. Those courts following this approach would provide access to print records at the courthouse, perhaps electronic access at kiosks in the courthouse, and not electronic access otherwise. Those advocating this approach are sensitive to the danger inherent in the widespread availability of online records. By limiting access to records to physical access, there is greater protection of this information.⁷⁰ Variations of this approach limit remote access to certain types of users, e.g., judges, court personnel, litigants and counsel. The public might have no remote access or only access to documents not likely to contain personal information.⁷¹

IV. Current Approaches and Ongoing Challenges

The Jennen Report predicted that "the transition from paper to electronic records [would] extend over many years and [would] proceed at different rates for different courts."⁷² This prediction was certainly accurate. In the second decade of the 21st Century, courts continue to develop, revise and implement policies on public access to electronic records.⁷³ State courts

⁶⁹ See OFFICE OF JUDGES PROGRAMS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, PRIVACY AND ACCESS TO ELECTRONIC CASE FILES IN THE FEDERAL COURTS 7, 9 (1999), available at <http://purl.access.gpo.gov/GPO/LPS12879>.

⁷⁰ See *id.* at 7.

⁷¹ See *id.* at 10.

⁷² JENNEN REPORT, *supra* note 45, at 27.

⁷³ For example, see the discussion of developments in Florida, *infra* Part V. See also Robert P. Deyling, *Privacy and Public Access to the Courts in an Electronic World: Common Themes and Diverse Approaches to Policy Development*, 2 REYNOLDS CT. & MEDIA L.J. 5, 20 (2012) (discussing 2011 developments in New York and referencing the New York REPORT OF THE ADVISORY COMMITTEE ON CIVIL PRACTICE TO THE CHIEF

are also implementing e-filing.⁷⁴ With shrinking budgets, courts are finding electronic records attractive and so this movement has accelerated. Many state courts have discussed e-filing for years. It is now taking hold and simultaneously facilitating creation of a less expensive vehicle for public access to online records.

As more records actually go online through e-filing, it is increasingly important to address questions of how to provide access to court records. Courts' policies on access should evolve as systems for records evolve.⁷⁵ In this section I consider the issues that exist with current state approaches. State courts vary in their approaches to providing access to electronic court records, so I use representative guidelines. After I examine these guidelines in Part A, I will discuss in Part B the issues arising from the approaches that those guidelines suggest and the issues that those guidelines do not address or address only to a limited extent.

A. CCJ/COSCA Guidelines

To the extent state courts have followed any guidelines in developing policies for access to electronic court records, they have followed or at least consulted guidelines that the Conference of Chief Justices ("CCJ") and the Conference of State Court Administrators ("COSCA") adopted in 2002.⁷⁶ These guidelines ("the CCJ/COSCA Guidelines") were part of an extensive report (the "CCJ/COSCA Report")⁷⁷ that the National Center for State Courts

ADMINISTRATIVE JUDGE OF THE COURTS OF THE STATE OF NEW YORK (Jan. 2011), <http://nycourts.gov/ip/judiciary/legislative/2011-CivilPractice-ADV-Report.pdf>.

⁷⁴ See *supra* note 5. See also William Glaberson, *Amid Stacks of Paper, 'E-Court' Is Finally in Session*, N.Y. TIMES, July 7, 2011, <http://www.nytimes.com/2011/07/08/nyregion/at-state-supreme-court-in-manhattan-visions-of-paperless-future.html?pagewanted=all>; Jim O'Hara, *E-filing of court papers now a reality in Onondaga County Clerk's Office*, THE POST-STANDARD, March 29, 2012, http://www.syracuse.com/news/index.ssf/2012/03/e-filing_of_court_papers_now_a.html.

⁷⁵ JENNEN REPORT, *supra* note 45, at 27.

⁷⁶ CCJ and COSCA each adopted the guidelines on August 1, 2002. See Conference of Chief Justices, Res. 33 (Aug. 1, 2002), *available at* <http://ccj.ncsc.dni.us/AccessToJusticeResolutions/resol33PublicAccessCourtRecords.html>; Conference of State Court Administrators, Res. 02-A-IV (Aug. 1, 2002), *available at* <http://cosca.ncsc.dni.us/Resolutions/resolutionGuidelines4PolicyDvlpmntStateCts.html>.

⁷⁷ MARTHA WADE STEKETEE & ALAN CARLSON, NAT'L CTR. FOR STATE CTS. & JUST. MGMT. INST., DEVELOPING CCJ/COSCA GUIDELINES FOR PUBLIC ACCESS TO COURT RECORDS: A NATIONAL PROJECT TO ASSIST STATE COURTS (2002), *available at* <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/accessfair&CISOPTR=210> [hereinafter the CCJ/COSCA REPORT and the CCJ/COSCA GUIDELINES].

and the Justice Management Institute published in 2002. The CCJ/COSCA Guidelines remain the most comprehensive resource for developing access policies for court records although there have been no updates to the Guidelines since their original adoption in 2002.⁷⁸ They reflect state courts' policies,⁷⁹ including those policies that some states adopted without consulting the Guidelines. There were so many variations in state laws and in court operations that it would have been very difficult, if not impossible, to draft a national policy or model. The CCJ/COSCA Guidelines therefore are not model policies but serve as "a map of the policy-making terrain"⁸⁰ and a "starting point for drafting a policy."⁸¹ These Guidelines suggest appropriate language. Accompanying each Guideline is extensive commentary that highlights the reasons for the suggested language, possible alternatives, and issues the policy maker must address.⁸²

A key purpose of the CCJ/COSCA Guidelines is "to provide maximum public accessibility to court records."⁸³ The CCJ/COSCA Guidelines are therefore applicable to "all court records," regardless of

⁷⁸ A follow-up report in 2005 made no changes. It provided details and examples of language to use to educate litigants and the public; provided more detailed discussion regarding the development of internal court policies and procedures for handling records; and provided more discussion regarding access to family court records. MARTHA WADE STEKETEE & ALAN CARLSON, NAT'L CTR. FOR STATE CTS. & JUST. MGMT. LNST., PUBLIC ACCESS TO COURT RECORDS: IMPLEMENTING THE CCJ/COSCA GUIDELINES, FINAL PROJECT REPORT (2005),

<http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/accessfair&CISOPTR=196>.

⁷⁹ Creators of the CCJ/COSCA Guidelines relied on existing policies of several states to develop the Guidelines. The states were Arizona, California, Colorado, Minnesota, Vermont, and Washington. Martha Wade Steketee and Alan Carlson, *Privacy and Public Access to Court Records: Public and Private Dimensions Create a Diverse Group of Collaborators*, 2002 REPORT ON TRENDS IN THE STATE COURTS 24 (2002), available at

<http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=422> [hereinafter Steketee and Carlson].

⁸⁰ CCJ/COSCA REPORT, *supra* note 77, at 2. The advisory committee for the project made an early determination not to offer a "model" but instead to offer "guidelines." Steketee and Carlson, *id.* at 23, 24.

⁸¹ CCJ/COSCA REPORT, *supra* note 77, at 2. The CCJ/COSCA Guidelines are for statewide adoption or for local court adoption if there is not a state policy. *Id.* at 2, 24. Commentary in the Guidelines identifies additional necessary language if the state's judiciary adopts a statewide process. *See id.* at 24 (discussing whether a local court may adopt a more restrictive policy regarding access).

⁸² For example, the CCJ/COSCA Guidelines emphasize that in developing or refining policies, a state needs to consider its statutory and case law as well as existing records practices. *Id.* at 2.

⁸³ *Id.* at 4 (Commentary to Section 1.00, Purpose of the CCJ/COSCA Guidelines).

“physical form,” “method of recording the information,” or “method of storage of the information.”⁸⁴ This broad applicability suggests a “public is public” approach. Underlying the CCJ/COSCA Guidelines, however, are public policy concerns that support a balanced approach to providing access.⁸⁵ The commentary to the CCJ/COSCA Guidelines recognizes that there could be “sound reasons for restricting access” to records.⁸⁶ Some sections of the Guidelines therefore provide for restrictions or even prohibitions on access to certain records.⁸⁷

The CCJ/COSCA Guidelines cover many aspects of access to court records,⁸⁸ but at the heart of the Guidelines are the Section 4.0 Provisions, which address both the scope and possible limitations on access.⁸⁹ The Guidelines create a presumption of openness. *It is the method of access that the court should limit, not access to the document itself.*⁹⁰ The CCJ/COSCA Guidelines offer flexibility for developers of court rules and policies. For instance, commentary to the Guidelines offers alternative means of limiting access aside from providing access only at the courthouse.⁹¹ The Guidelines therefore provide both a “public is public” approach and variations of a limited access approach.

⁸⁴ *Id.* at 22 (Section 4.00, Applicability of Rule).

⁸⁵ *Id.* at 4 (Section 1.00, Purpose of the CCJ/COSCA Guidelines, lists eleven policy interests).

⁸⁶ *Id.*

⁸⁷ For example, the CCJ/COSCA Guidelines address the types of information in a court record that a state or individual court could designate as not accessible to the public in any format. See *id.* at 45 (Section 4.60, Court Records Excluded from Public Access).

⁸⁸ For example, Section 2.00 (Who has Access under These CCJ/COSCA Guidelines) *id.* at 10; Section 3.10 (Definition of Court Record) *id.* at 12; Section 4.40, (Access to Compiled Information from Court Records) *id.* at 29; and Section 5.00 (When Court Records May be Accessed) *id.* at 58.

⁸⁹ Section 4.50 (Court Records That are Only Publically Accessible at a Courthouse), for example, provides basic language for limiting remote access to certain types of records, with an option for a court to include a list of “information available only at a court facility.” *Id.* at 39. Commentary to another section, 4.60 (Court Records Excluded from Public Access) notes that in many situations, existing state or Federal law may dictate restrictions on accessibility of certain kinds of information or types of records. This Commentary offers examples of types of cases, documents, and information to which a state or individual court could restrict access. *Id.* at 45–52.

⁹⁰ *Id.* at 39.

⁹¹ *Id.* at 39, 41–43. The Commentary suggests that remote access could be only through a subscription service or only to one case at a time. *Id.* at 39. The Commentary also provides examples of types of records or information in records to which a court could restrict or prohibit online access. *Id.* at 40. Examples of records that could be available only at a courthouse are: medical records, family law proceedings, and photographs of victims.

B. Assessing Current Approaches

In Part IV.B.1, I discuss some problems with approaches that the CCJ/COSCA Guidelines suggest as alternatives to providing full electronic access to records. These approaches, such as limiting access to the courthouse for some records or information, reflect the choices that some state courts have made to control access to personal information. In Part IV.B.2, I discuss critical issues that the CCJ/COSCA Guidelines do not address or do not adequately address. Some of these issues arise from the transitional nature of the means by which courts maintain their records. As the Jennen Report notes: “The progressive transformation of the court record, from paper to electronic forms, complicates the process of developing coherent, consistent, and strategic policy about public access.”⁹² Courts reexamining existing policies or developing new policies should consider whether the approach they adopt will incorporate a means to address these issues on an ongoing basis.

This section is not intended to provide an exhaustive discussion of these problems and issues, many of which merit more detailed individual consideration. I highlight these problems and issues to note their place in the conversation about the development of policies for access to court records. Current policy approaches, as reflected in the CCJ/COSA Guidelines, fall short of adequately addressing these problems and issues. There should be more consideration of the underlying purpose for which information became part of a court record and a movement away from manipulating information in records or providing access only at the physical location of the information. In Section V, I discuss the approach of one state *that has gone beyond managing information in court records to redefining the nature and purpose of the records themselves*.

1. Limited Access Approaches - Problems

a. Access Only at the Courthouse

For hundreds of years the public could access court records only at the courthouse. The practical obscurity provided through this arrangement still offers appeal. The CCJ/COSCA Guidelines acknowledge that courts might decide to adopt policies that would treat records differently by

⁹² JENNEN REPORT, *supra* note 45, at 27.

restricting “the manner of access.”⁹³ Under one of the suggested Guidelines, courts could provide access to certain identified information only at a “court facility.”⁹⁴ The provided information could be in paper format or could be in electronic format accessible at a courthouse kiosk or terminal.⁹⁵ Limiting access to the courthouse, however, perpetuates inequality, contrary to a key purpose of providing online access. Moreover, limiting access does not stop enterprising data-gathers, who, through the use of readily available technology, can circumvent any protection that limiting access to the courthouse otherwise offers.

Allowing access to the same records online as are available at the courthouse provides the broadest access to the public. Just as few people can attend court proceedings in person and hear evidence,⁹⁶ few can (realistically) go to the courthouse and obtain records. If courts keep some information at the courthouse, whether in paper or electronic format, mainly those with the most resources will be able to access it. Adopting a “public is public” approach can “level the geographic playing field” for those who are not in the same jurisdiction as the records⁹⁷ or who cannot easily visit a courthouse. Even limiting access to only some information or documents perpetuates the inequality that remote access should overcome.

Arguing that limiting access to the courthouse for some information provides better protection for those to whom the information relates also ignores current technological realities. Practically anyone with access to a paper document can scan it and post the resulting digital document online. Optical character recognition (OCR) capability enables users to capture bits of text. Paper is no longer a fixed medium. What appears on paper can now become digital.⁹⁸ Even if courts limit access to the courthouse, those with the resources or determination can digitize print records for their own use.

⁹³ Section 4.50 Commentary, CCJ/COSCA REPORT, *supra* note 77, at 39.

⁹⁴ Section 4.50, *id.*

⁹⁵ Section 4.50 Commentary, CCJ/COSCA REPORT, *supra* note 77, at 39.

⁹⁶ *See* U.S. v. Mitchell, 551 F.2d 1252, 1258 (1976) (one of the cases in the litigation regarding the Nixon tapes), in which the Court of Appeals for the District of Columbia noted that “the right of inspection serves to promote equality by providing those who were and those who were not able to gain entry to Judge Sirica’s cramped courtroom the same opportunity to hear the White House tapes.”

⁹⁷ JUDICIAL CONFERENCE COMM. ON COURT ADMIN. & CASE MGMT., REPORT ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES (*As amended by the Committee on Court Administration and Case Management in December 2006*), *supra* note 68 (discussing one of the reasons for adopting a “public is public” approach for Federal Court records).

⁹⁸ Of course, textual court documents are now often “born digital,” so the paper is just a medium of capture, a transitory vehicle.

One motivating reason for the Judicial Conference Committee to adopt a “public is public” approach for Federal court records was to discourage “data re-sellers who, if remote electronic access were restricted, could go to the courthouse, copy the files, download the information to a private website, and charge for access . . . thus profiting from the sale of public information and undermining restrictions intended to protect privacy.”⁹⁹ If the limited access is to electronic rather than paper records, the result is the same if users can print or download the records.

Limiting access to the courthouse does not prevent someone from disseminating court records online, as a member of the Florida Supreme Court Committee on Privacy and Court Records noted.¹⁰⁰ As an example, he discussed how in 2001 graphic autopsy photos of a race car driver killed while racing appeared on an Internet website. The website owner had obtained print photos from the Volusia County (Florida) Office of the Medical Examiner.¹⁰¹ At the time, the photos were available as public records under Florida’s public records laws.¹⁰² That same year, the Florida legislature enacted a law¹⁰³ to exempt autopsy photographs from the public

⁹⁹ JUDICIAL CONFERENCE COMM. ON COURT ADMIN. & CASE MGMT., REPORT ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES (*as amended by the Committee on Court Administration and Case Management in December 2006*), *supra* note 68.

¹⁰⁰ COMMITTEE ON PRIVACY AND COURT RECORDS, PRIVACY, ACCESS, AND COURT RECORDS: REPORT AND RECOMMENDATIONS OF THE COMMITTEE ON PRIVACY AND COURT RECORDS (Aug. 15, 2005), Part 3 at 105, available in seven parts at http://www.floridasupremecourt.org/pub_info/index.shtml#Privacy under 2006 Court Order & Limited Moratorium, Full Report. *See infra* note 213 for additional discussion of this report [hereinafter the FLORIDA 2005 REPORT].

¹⁰¹ *Id.* He was referring to photographs of race car driver Neil Bonnett. Gory autopsy photographs of another race car driver, Rodney Orr, also appeared online at the same time. Both drivers had died in accidents at the Daytona 500 International Speedway. Michael Uribe obtained the photos and posted them on his website, WEBSITECITY.com. *See*: Chris Jenkins, *Web Site Posts Autopsy Photos of NASCAR Racers*, USATODAY.com, April 2, 2001, available at <http://www.usatoday.com/sports/comment/jenkins/2001-04-02-jenkins.htm>; Dave Rodman, *Earnhardt Victory Marred By Web Exposure*, March 30, 20001, NASCAR.com, http://www.nascar.com/2001/NEWS/03/29/earnhardt_bill/index.html; Don Coble, *Ten After 3: Fight Over Dale Earnhardt’s Autopsy Photos Leads to Victory for Family Privacy*, February 11, 2011, Jacksonville.com, <http://m.jacksonville.com/sports/racing/2011-02-11/story/ten-after-3-fight-over-dale-earnhardts-autopsy-photos-leads-victory>. For an extensive discussion of the Dale Earnhardt photo controversy, see Samuel A. Terilli & Sigman L. Splichal, *Public Access to Autopsy and Death-Scene Photographs: Relational Privacy, Public Records and Avoidable Collisions*, 10 COMM. L. & POL’Y 313 (2005).

¹⁰² *See* FLA. CONST. Art. I § 24 and FLA. STAT. § 119.07 (1)(a).

¹⁰³ FLA. STAT. § 406.135. The statute was upheld in *Campus Comm., Inc. v. Earnhardt*, 821 So. 2d 388 (Fla. Dist. Ct. App. 2002), *rev denied*, 848 So.2d 1153 (Fla. 2003), *cert. denied*, 540 U.S. 10 (2003) against a challenge of unconstitutionality.

records law after the same website owner and others attempted to access autopsy photographs of race car driver Dale Earnhardt.¹⁰⁴ While the photos were not court records, the situation illustrates that if a record is public, restricting access to a single physical location does not provide protection. Anyone with the motivation, like the website owner who posted the autopsy photos, can obtain a copy of the record, scan it, and post it. Although providing records only at the courthouse may limit the number of people who can access documents, it only takes one person to make the documents widely available. Thus, simply managing the “manner of access” as the Guidelines suggest offers only limited - or illusory - protection.

The web-posting of the autopsy photographs of the race car driver demonstrates that the balance between remote access and access only at the courthouse is really meaningless. Resolution must turn on the nature of documents and information themselves. If records are public, then they should be accessible through all available means. There may be reasons, based on the nature of the record or information, to limit or deny all access to those records. As Helen Nissenbaum states in her book *Privacy in Context*, “‘public’ is not synonymous with ‘up for grabs’. . . [E]ven if something occurs in a public space or is inscribed in a public record there may still be powerful moral reasons for constraining its flow.”¹⁰⁵ The determination should be whether to provide access at all rather than whether to limit access to the courthouse. Ultimately, the question is whether anyone should have access to the records or information.¹⁰⁶ Also, if the record or information is extraneous to the proceedings, then not filing it in the first place alleviates the concern.¹⁰⁷

b. Sealing

The CCJ/COSCA Guidelines offer approaches by which courts might

¹⁰⁴ See Coble, *Ten After 3*, *supra* note 101; JON L. MILLS, *PRIVACY: THE LOST RIGHT* 188-189, 242, 309 (2008); Terilli & Splichal, *supra* note 101.

¹⁰⁵ HELEN F. NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* 217 (2010).

¹⁰⁶ For example, the Florida legislature determined that it was a “public necessity” to exempt autopsy photographs from the public access to records granted in the Florida constitution and public records law. 2001 Fla. Laws 1, 2. The legislature noted the injury to the person’s family if there was public access to graphic autopsy photographs, particularly if these photographs were posted on the Internet. *Id.* at 2. The legislature also noted that there were other types of autopsy information available to the public that would “provide for public oversight.” *Id.* The Florida legislature can exempt certain records from the state public records access law. See FLA. STAT. § 119.15 and FLA. CONST. Art. I § 24(c).

¹⁰⁷ See further discussion of this approach in Section V.

protect personal information, other than simply segregating documents for courthouse access only. The CCJ/COSCA Report includes a guideline for courts, upon request, to prohibit access to information in a court record.¹⁰⁸ This denial of access essentially seals the record. The information protected in the record would be otherwise publicly available.¹⁰⁹ Sealing is contrary to the notion of public and open access. This guideline therefore requires “sufficient grounds” to restrict access as well as consideration of the “least restrictive means” to address the requestor’s concerns.¹¹⁰

The CCJ/COSCA Report states that in developing court record policies, courts must review their existing “procedures and standards for sealing records, making them confidential, or otherwise restricting public access.”¹¹¹ They must consider how these procedures and standards might apply to electronic records. This review must ensure that procedures and policies balance the requests of a party against a strong public access policy. People and businesses often do not want *any* information about a lawsuit made publicly available and will seek protection through sealing. In the last decade there was a public outcry, fostered by media reports, against indiscriminate sealing of records.¹¹² Some states enacted or revised sealing laws.¹¹³ For example, in 2007 the Florida Supreme Court adopted revisions to court rules that governed sealing and unsealing records, after media exposure of “hidden cases and secret dockets.”¹¹⁴ The Court further refined these rules in 2010.¹¹⁵ Florida’s review of its rules regarding sealing and confidential documents illustrate the thorough consideration a court should make as part of developing and adopting policies regarding electronic court records. The policies should address the underlying concerns regarding sealing, regardless of the format of the documents.

¹⁰⁸ Section 4.70, CCJ/COSCA REPORT, *supra* note 77, at 53.

¹⁰⁹ See Commentary to Section 4.70, *id.* at 54.

¹¹⁰ Section 4.70(a), CCJ/COSCA REPORT, *supra* note 77, at 53.

¹¹¹ CCJ/COSCA REPORT, *supra* note 77, at 2.

¹¹² See Thomas Mitchell, *The Heavy Lifting Begins*, LAS VEGAS REV.-J., Jan. 6, 2008, at 2D, available at 2008 WLNR 388914 (discussing reform in Nevada); *Florida Supreme Court Enacts Interim Rules for Sealing Civil Records*, Jacksonville Daily Record, April 27, 2007, http://www.jaxdailyrecord.com/showstory.php?Story_id=47427.

¹¹³ See, for example, NEV. SUP. CT. R. Pt. VII; S.C. R. CIV. PROC. 41.1; FLA. R. JUD. ADMIN. 2.240; OHIO SUP. R. 45.

¹¹⁴ *In re* Amendments to Fla. Rule of Jud. Admin. 2.420, 954 So. 2d 16, 17 (Fla. 2007).

¹¹⁵ *In re* Amendments to Florida Rule of Jud. Admin. 2.420 and the Florida Rules of App. Procedure, 31 So. 3d 756 (Fla. 2010).

c. Redaction

Another CCJ/COSCA Guideline suggests blocking access to sensitive information, such as social security numbers,¹¹⁶ and discusses specific *types* of information that a court could exclude from public access. The CCJ/COSCA Guidelines do not specifically discuss *how* to block access to this information. A common means of blocking specific information is redaction, but the section on exclusion of information does not discuss redaction. Commentary to two sections of the Guidelines notes the difficulty a court may experience in redacting information in documents.¹¹⁷ The comments focus the costs and feasibility of having court personnel redaction information. There is no discussion of whether the parties should be responsible for redaction, or suggestions of policies that would place the redaction burden on the parties and their counsel.

Redaction of information is a common choice for courts adopting electronic records policies. This approach protects sensitive information, while still allowing access to most of the information in a document. As sensible as redaction may seem, it presents logistical problems. The limited discussion in the CCJ/COSCA Guidelines notes the demands of having court personnel handle redaction. Parties and their counsel are in a better position to identify and block information. This burden may still be too great and its requirements too confusing, as efforts to apply redaction rules in Montana illustrate.¹¹⁸ Parties may find it more practical to request that a court seal an entire document or record than try to redact selected bits of information.¹¹⁹ For example, in Montana, parties coped with redaction rules by sealing the records.¹²⁰ Electronic record policies that require redaction or allow for

¹¹⁶ See Section 4.60, CCJ/COSCA REPORT, *supra* note 77, at 45.

¹¹⁷ See Commentary to Sections 3.20 (mentioning that redacting information can be “quite costly”), *id.* at 17-18, and Commentary to Section 4.70 (mentioning the feasibility of reviewing documents to redact information), *id.* at 55.

¹¹⁸ See discussion *infra* Section IV.B.2a.

¹¹⁹ Commentary to Section 4.70, CCJ/COSCA REPORT, *supra* note 77, at 55. The commentary to the CCJ/COSCA Guidelines, in discussing the feasibility of redacting information, notes that: “The work needed to exhaustively review a large file or document to find information to be redacted may be prohibitive, so that access to the whole file or document [should] be restricted, rather than attempting redaction.” *Id.*

¹²⁰ See Petition of Montana Legal Services Association and State Law Librarian Judy Meadows, *In re* Amending the Rules for Privacy & Pub. Access to Court Records in Mont. (October 12, 2010),

<http://supremecourtdocket.mt.gov/view/AF%2006-0377%20Rule%20Change%20-%20Petition?id={1327D05A-4588-4D17-AE60-AF345CFEBF57}> at 2 [hereinafter 2010 Petition]. See discussion *infra* Section IV.B.2a.

redaction upon request may increase the use of sealing as an easier way to prohibit access to the information. The public will lose access to the entire record. Section V discusses an approach that would eliminate personal information from inclusion in court documents, thus reducing the need for resources to redact the information.

2. *Other Issues and Concerns*

a. **Implementation Planning: Montana's Experience**

The CCJ/COSCA Guidelines provide a framework for developing *what* rules will provide, but implementation requires another process to consider *how* the rules will work. The Guidelines do not “prescribe standard implementation and operating guidelines for state and local courts.”¹²¹ There is little information in the CCJ/COSCA Guidelines concerning redaction, for example.¹²² One Guideline considers limits on remote availability of documents and information, but provides limited commentary as to who would have responsibility for deciding what specific information or documents cannot be made available remotely.¹²³ Commentary to this Guideline briefly discusses the “added burdens” that court staff would have to assume if the parties do not bear the burden of providing a list of information items to which the court will restrict access¹²⁴ but offers no further advice. Implementation can be the most challenging aspect of defining the information and documents to which the public has access, particularly as courts are transitioning to e-filing.

A compelling example of the effects of lack of implementation planning is the experience in Montana. The process of adopting rules for public access to electronic court records started in Montana in 2005. While rules went into effect in 2008, by 2011 the Montana Supreme Court had suspended the rules for an indefinite period of time. Lack of procedures derailed implementation. The initial process for creation and adoption of rules moved very quickly. In 2005, the Montana Supreme Court's Commission on Technology created a task force to develop rules for access to electronic court records.¹²⁵ This task force used the CCJ/COSCA

¹²¹ Steketee and Carlson, *supra* note 79, at 24.

¹²² *See supra* Part IV.B.1.c.

¹²³ Section 4.50, CCJ/COSCA REPORT, *supra* note 77, at 39.

¹²⁴ *See id.* at 41.

¹²⁵ *See Order In re: Rules for Public Access to Court Records 1* (May 23, 2006), available at

Guidelines as its model, extensively adopting language from the Guidelines and the commentary to the Guidelines.¹²⁶ The task force proposed rules in less than a year.¹²⁷ In February 2007, the Montana Supreme Court adopted the rules,¹²⁸ which were to become effective on December 31, 2007.¹²⁹

Concerns arose almost immediately. By December 2007, the concerns had reached such a high level that the Chairs of the Task Force filed a petition requesting postponement of the implementation of the rules to July 2008 in order to allow time to gather comments and provide more implementation guidance.¹³⁰ The Chairs stated in the petition that, after attempting to educate court personnel about the new rules, they were

<http://supremecourtdocket.mt.gov/view/AF%2006-0377%20Comments-Request%20-%20Order?id=%7b506005E1-1CB3-43D7-8125-92C8CFD1CBD0%7d> [hereinafter 2006 Order]. The impetus for creation of rules came in 2003 when the Montana Supreme Court adopted a goal of providing “electronic access and exchange of information.” Goal 1, MONTANA JUDICIAL BRANCH, INFORMATION TECHNOLOGY STRATEGIC PLAN MARCH 2003 11, available at <http://wcc.dli.mt.gov/E-Filing/MT%20Jud%20Branch%20StrategicPlanMarch2003.pdf>; see also MONTANA JUDICIAL BRANCH, INFORMATION TECHNOLOGY STRATEGIC PLAN 2006 8, available at http://courts.mt.gov/content/cao/docs/it_strategic_plan_06 (discussing appointment of the task force).

¹²⁶ See 2006 Order, *supra* note 125, at 1. The Task Force provided proposed rules that included extensive commentary from the CJC/COSCA Report. For a copy of the original proposed rules and commentary, see *In Re* Rules for Public Access to Court Records (February 13, 2007), Appendix A, available at <http://supremecourtdocket.mt.gov/view/AF%2006-0377%20Rule%20Change%20-%20Order?id={B8D81F96-A18A-4CF5-A613-8CB5514D06CB}>. The Task Force adapted the CCJ/COSCA Guidelines to fit Montana laws and rules and to comply with Montana’s constitutional provisions guaranteeing the right of individual privacy and the right to know. See 2006 Order, *supra* note 125, at 1–2. The constitutional provisions are: MONT. CONST. art. II, §9 (“No person shall be deprived of the right to examine documents . . . of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.”) and §10 (“The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”).

¹²⁷ See 2006 Order, *supra* note 125, at 1–2. The Supreme Court’s Commission on Technology established the Task Force in November 2005. The Commission voted to recommend the proposed rules on May 15, 2006, so the production of the rules and commentary took approximately six months.

¹²⁸ See *In Re* Rules for Public Access to Court Records, *supra* note 126, at 2.

¹²⁹ *Id.*

¹³⁰ Petition to Amend and Extend Implementation Deadline at 1, *In re* Adopting Rules for Public Access & Privacy to Court Records in Montana (2007) (No. AF 06-0377), available at

<http://supremecourtdocket.mt.gov/view/AF%2006-0377%20Other%20-%20Petition?id={F9C38A6E-92CA-47E7-B3ED-E33CDA7B386A}> [hereinafter Petition to Amend].

genuinely concerned that “the Courts [were] not yet ready to implement the Rules.”¹³¹ One issue was that many court forms required information to which the rules restricted access, even though state law did not require disclosure of the information.¹³² This created confusion in how to apply the rules. The Montana Supreme Court granted the requested postponement.¹³³ At the same time that the Chairs filed this petition, a group of Montana district court judges and two attorneys filed a petition¹³⁴ questioning the implementation of the rules at a time when there was no system in existence for e-filing.¹³⁵ They requested that the court suspend implementation of the rules until electronic filing was available.¹³⁶ The Court ruled that the proceedings regarding the new rules were administrative, not adversarial, and referred the petition to the Task Force.¹³⁷

In June 2008, the Montana Supreme Court adopted revised rules that the task force recommended.¹³⁸ The revised rules provided that courts

¹³¹ *Id.* at 1.

¹³² *Id.*

¹³³ Order *In re* Public Access and Privacy to Court Records in Montana (Dec. 12, 2007), available at <http://supremecourtdocket.mt.gov/view/AF%2006-0377%20Grant%20--%20Order?id={30B411BF-A416-4619-A28E-5FCD8EFDB691}>.

¹³⁴ Petition for Original Jurisdiction and Order at 1, *In Re* Rules for Privacy & Public Access to Court Records in Montana (2007), available at <http://statecasefiles.justia.com/documents/montana/supreme-court/2007-12-20-DCFD82F3-CA54-4AC2-A54E-D2F63265C1C1.pdf> [hereinafter Petition for Original Jurisdiction].

¹³⁵ See *id.* at 6 (“No technology is currently available to the District Courts or attorneys practicing before the District Courts for any of these documents to be filed in electronic form.”). The petition noted that the Montana Supreme Court in its 2006 Information Technology Strategic Plan had set objectives to develop and implement an electronic filing system within four years. *Id.* at 4–5, (referencing the MONTANA JUDICIAL BRANCH – INFORMATION TECHNOLOGY STRATEGIC PLAN – 2006 18, Objectives 2.6.4 and 2.6.5 (2006), available at http://courts.mt.gov/content/cao/docs/it_strategic_plan_06.) Since this system was not in existence, the new rules would only apply to paper filings. There were no procedures or forms available to assist with compliance. The petitioners argued that there would need to be procedures, forms and training relating to the application of the rules to paper filings, and then additional procedures, forms and training when e-filing became available. See Petition for Original Jurisdiction, *supra* note 134, at 10.

¹³⁶ Petition for Original Jurisdiction, *supra* note 134, at 14.

¹³⁷ Order *In re* Public Access & Privacy to Court Records in Montana (Jan. 9, 2008), available at <http://supremecourtdocket.mt.gov/view/AF%2006-0377%20Other%20--%20Order?id={6D22BFAA-EA4A-4684-9C69-613E1C0480FE}>.

¹³⁸ Order *In re* Amending the Rules for Public Access and Privacy to Court Records in Montana 2–3 (June 24, 2008), available at <http://supremecourtdocket.mt.gov/view/AF%2006-0377%20Rule%20Change%20--%20Order?id={73D46187-DE84-4746-A56C-05D93004B066}>. The two rules with

should not place court records online, with certain exceptions, until rules for electronic filing were in place.¹³⁹ At the same time, the rules concerning the type of information that had to be excluded from records remained in effect, regardless of format.¹⁴⁰ By 2010, just two years after the effective date of the new rules, there were questions and doubts about compliance. A petition filed with the Montana Supreme court in October 2010¹⁴¹ argued that compliance with the rules was “haphazard at best.”¹⁴² Particularly challenging was compliance with rules governing exclusion from public access of sensitive information and certain documents.¹⁴³ Some people were “struggling to comply” even though courts were not consistently interpreting and applying the rules, while others were “making no attempt whatsoever to comply.”¹⁴⁴ Of additional concern was that some people were simply “moving to seal court records in most or all cases,” thus removing the entire record from public access.¹⁴⁵

The 2010 petitioners observed that since the Court had not adopted an e-filing system and rules, the rules on access to court records operated in “a sort of limbo between the current ‘paper world’ and the largely unknown future e-filing and remote access world.”¹⁴⁶ It did not appear that the implementation of an e-filing system would occur “in the near future”¹⁴⁷ and

revisions were 4.0 and 4.20. The other rules were not changed. The original rules, with revisions, became effective July 1, 2008. *Id.* at 5. The revised rules were in a task force report submitted in June 2008. MONTANA SUPREME COURT COMMISSION ON TECHNOLOGY PRIVACY AND ACCESS TASKFORCE, REPORT TO THE COURT FOLLOWING 2008 COMMENT PERIOD (May 27, 2008) (filed June 18, 2008), *available at* <http://supremecourtdocket.mt.gov/view/AF%2006-0377%20Other%20--%20Other?id={49293049-B47C-4AB2-AA0A-1B658AF8715A}>.

¹³⁹ See Order *In re* Amending the Rules for Public Access and Privacy to Court Records in Montana, *id.* at 3–4. The exceptions were listed in Section 4.20 and included party indexes, listings of new case filings, and calendars or dockets. *Id.*

¹⁴⁰ See MT R. PRIVACY AND ACCESS RULES §§ 4.0, 4.50 (suspended 2011).

¹⁴¹ 2010 Petition, *supra* note 120; see Order *In re* Temporarily Suspending the Rules for Privacy & Public Access to Court Records in Montana 1 (September 14, 2011), <http://supremecourtdocket.mt.gov/view/AF%2006-0377%20Other%20--%20Order?id={9D33F333-4838-4ED4-9302-6EB4EFA01640}> [hereinafter 2011 Order] (noting that the Court requested the filing of the petition in October 2010).

¹⁴² 2010 Petition, *supra* note 120, at 2.

¹⁴³ See *id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* There were also concerns that the rules needed to provide more protection for information about children.

¹⁴⁶ *Id.* at 11.

¹⁴⁷ *Id.* at 10. The 2010 Montana Judicial Branch Information Technology Strategic Plan identified as an action item for 2011-2014 continuance of “the efforts of the Electronic Filing Task Force to procure and implement a statewide system for electronic filing in all Montana courts.” Objective 3.1.3., Montana Judicial Branch, Information Technology

the Petitioners recommended that the Court consider suspending all or part of the access rules until adoption of an e-filing system and related rules.¹⁴⁸ The Montana Supreme Court in September 2011 ordered that the rules were to be “temporarily suspended, for an indefinite period of time.”¹⁴⁹ The court noted that its desire to have rules regarding privacy of information in court records “further considered, reviewed and refined” as part of the process of adopting and implementing e-filing.¹⁵⁰

Montana’s experience demonstrates the need to examine the effects of proposed rules and to develop strategies to determine how the rules will work in practice prior to adoption. One participant in the process stated that providing an ideal court records system was “much easier said than done.”¹⁵¹ The Montana task force was made up of a wide range of stakeholders to insure input from those with the most interest in the policies.¹⁵² The task force based its recommendations on the CCJ/COSCA Guidelines, which provided a thorough and thoughtful roadmap. Yet, implementation of the rules quickly became problematic and ultimately the Montana Supreme Court suspended the rules. The task force developed the rules, but no task force or committee was charged with developing the procedures for implementation.¹⁵³ The result was confusion in interpretation,

Strategic Plan 2010 15, http://courts.mt.gov/content/cao/docs/it_strategic_plan_2010.pdf.

¹⁴⁸ 2010 Petition, *supra* note 120, at 10. The petition also contained alternative proposals for amending the rules if the Court did not decide to suspend the rules. *Id.* at 3.

¹⁴⁹ 2011 Order, *supra* note 141, at 2. The suspension was effective as of October, 1, 2011. One justice did not sign the order. He noted the extensive work of the task force, and argued that the existing rules remained “a solid and workable platform.” *Id.* at 3-4 (statement of Justice James C. Nelson). In his view, it was better that the bench and bar became “accustomed . . . to the sorts of requirements that e-filing will eventually dictate.” *Id.* at 4.

¹⁵⁰ *Id.* at 2. The Court also noted the adoption in April 2011 of Montana Rule of Civil Procedure 5.2 would provide some privacy protections. *See* 2011 Order, *supra* note 141, at 1. The adoption of this rule was part of the adoption of comprehensive revisions to the Montana Rules of Civil Procedure. *See* Order *In re* Revisions to the Montana Rules of Civil Procedure (April 26, 2011), <http://supremecourtdocket.mt.gov/view/AF%2007-0157%20Rule%20Change%20--%20Order?id={E034623C-49D4-46B7-85A1-CE3DBBED0D04}>. The new rule is similar to Federal Rules of Civil Procedure 5.2 in providing for redaction of sensitive information. MONT. R. CIV. P. 5.2 Committee Notes.

¹⁵¹ 2010 Petition, *supra* note 120, at 1.

¹⁵² *See In re* Rules for Public Access to Court Records, *supra* note 126, at 1.

¹⁵³ *See* Petition for Original Jurisdiction, *supra* note 134, at 6-7 (“Neither the Task Force appointed by the Commission on Technology nor any other commission or task force has been authorized . . . to establish procedures or adopt official forms to establish how . . . to comply with the Access Rules.”)

compliance, and enforcement.¹⁵⁴

b. Retention of Records

Some of the more far-reaching issues with providing access to electronic court records focus on the retention of these records. Some issues are rooted in the “dual nature of today’s court record-keeping system.”¹⁵⁵ Courts are maintaining both paper and electronic records, and may hold the same records in both formats. The CCJ/COSCA Report does not contain specific guidelines for records retention, but in commentary notes some of issues with a dual system.¹⁵⁶ Problems can arise when there are changes in records, when a court removes records, or when a court destroys records that have a short retention period.¹⁵⁷ The initial consideration in these situations is to provide equivalent treatment for the print record and its electronic counterpart.¹⁵⁸

The goals of providing equal treatment are to ensure that there is not an outdated version of a record available and that there is no longer public access to a record that the court has removed or destroyed. This “equal treatment” policy seems straight forward. The nature of electronic records, however, raises additional issues. In developing and adopting remote public access policies, courts must examine existing laws, policies and procedures beyond just determining how to equalize treatment of print and electronic records. Courts should consider the purpose of existing provisions and their

¹⁵⁴ See 2010 Petition, *supra* note 120, at 2 (“Nor do the Privacy rules contain specific guidance about their implementation . . . which has led to diverging interpretations over how to protect information and what kinds of information must be redacted or included.”)

¹⁵⁵ JENNEN REPORT, *supra* note 45, at 27. The reference to “today” is still valid, although the statement is from 1995.

¹⁵⁶ Commentary to Section 4.10 General Access Rule, CCJ/COSCA REPORT, *supra* note 77, at 25.

¹⁵⁷ *Id.* Noted in the Commentary are examples of these situations. Some of the examples are: (1) a change in a reduction in criminal conviction after probation completion; (2) expungement of a record; and (3) destruction of certain types of records, such as traffic citations, after a short period of time.

¹⁵⁸ *See id.* An example of a state court system that has standardized retention policies for electronic and print records is Pennsylvania. Once the retention period for the paper records expires, the electronic record will no longer be available. *State Destroying Online Court Records, Raising Debate over Privacy, Consistency*, TRIB. REV. July 2, 2012, <http://triblive.com/news/2134478-74/records-public-privacy-state-court-pennsylvania-policy-schell-copy-courts>; Press Release, Administrative Office of Pennsylvania Courts, Retention of Paper and Electronic Court Records to be Consistent Under New Guidelines, (March 30, 2012), http://www.pacourts.us/NR/rdonlyres/B32BC4F6-925A-471B-9EC4-45933A7D15C8/0/CourtRecordRetention_033012.pdf.

effectiveness when applied to electronic records.¹⁵⁹

As an example of considering the purpose of existing provisions, the CCJ/COSCA Report commentary considers a rule regarding destruction of traffic citations after one year.¹⁶⁰ The purpose of the rule could be to free up storage space occupied by paper documents. In this case, the court should consider the need for this rule if the records are electronic.¹⁶¹ Maintaining documents in electronic form furthers the policy of public access. On the other hand, if the purpose of destroying the citation records is to clear a person's record of this type of violation, then the policy of destroying records after one year should remain in place whether the record is in electronic form or in paper.¹⁶²

Another problem arises from the inability to destroy records. “[I]t is impossible to ensure destruction of all copies of the electronic record that have been obtained by, or delivered to, third parties beyond the court's control.”¹⁶³ Of course, it is also possible that there could be copies of the paper record still available.¹⁶⁴ If a record was ever publically available, a copy may still exist. Moreover, the dissemination of electronic records is much more far reaching and therefore destruction becomes more problematic. With respect to paper records, it takes only one person to scan and disseminate a record.¹⁶⁵

The issues discussed above occur when there is a dual print and electronic system of court records. Questions arise of how to treat electronic versions of records also maintained in paper. While courts will inevitably consider resolution of these issues, they should go further than just adopting

¹⁵⁹ See *id.* at 3.

¹⁶⁰ *Id.* at 25.

¹⁶¹ See *id.* It is unclear in this scenario if the records are now all electronic or whether the paper still exists. If there is no other reason to destroy the record other than for space-saving, then perhaps the court should retain the electronic record. If there are both paper and electronic versions, then the court could destroy the paper version.

¹⁶² *Id.*

¹⁶³ *Id.* As Viktor Mayer-Schönberger discusses in *DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE* 87 (2009): “In the digital age, it has become very hard to recall information, and to stop others from sharing it, especially once a piece of information has begun to spread. . . .”

¹⁶⁴ In *THE VERDICT* (20th Century Fox 1982), a witness in a trial reveals while she is on the stand that she has a photocopy of the original, unaltered version of a critical document in the case. She made the copy before she had to alter the original under threat. This example illustrates that the existence of even one copy of a document, no matter how obtained, can be devastating.

¹⁶⁵ See *supra* text accompanying notes 100-104.

rules for electronic records. As the Florida Committee on Privacy and Court Records noted in its 2005 Report, the task 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.”¹⁶⁶

Policy development must include consideration of the nature of electronic records and how that impacts records retention. Just as the nature of electronic records affects the way people access records, it also has implications relating to ongoing retention. Yet, as authors Jean-François Blanchette and Deborah Johnson note, discussions regarding electronic information management focus on access “and address retention only as an afterthought – if at all.”¹⁶⁷ They maintain that “data retention must be . . . part of a comprehensive data protection policy”¹⁶⁸ because “the endurance of data is a feature that has invisibly but powerfully changed with the shift from paper-and-ink to electronic systems of record-keeping.”¹⁶⁹ In a “paper-and-ink world, the sheer cumbersomeness of archiving and later finding information often promoted a form of institutional forgetfulness.”¹⁷⁰ Electronic records, on the other hand, remain easily and indefinitely accessible, thus preserving their contents for immediate consideration at any time.

The indefinite life of online data and information raises a concern that “the Internet records everything and forgets nothing.”¹⁷¹ Blanchette and Johnson observe that “In many cases, as storage technologies have gained in practicality, ease of remote access, and lowered in price, the shift to an electronic medium changed the default position from one of forgetfulness to one of memory.”¹⁷² What they are referring to is a loss of “social forgetfulness, which allows individuals a second chance, the opportunity for

¹⁶⁶ FLORIDA 2005 REPORT, *supra* note 100, Part 1 at 7.

¹⁶⁷ Jean-François Blanchette & Deborah Johnson, *Data Retention and the Panoptic Society: The Social Benefits of Forgetfulness*, 18 INFO. SOC’Y 33, 33 (2002).

¹⁶⁸ *Id.* at 43.

¹⁶⁹ *Id.* at 34.

¹⁷⁰ *Id.*

¹⁷¹ Rosen, Jeffrey, *The End of Forgetting*, N.Y. TIMES MAG., July 25, 2010, at 30, 32.

¹⁷² Blanchette & Johnson, *supra* note 167, at 34. *See also* Mayer-Schönberger, *supra* note 163 at 91 (“Through cheap storage technology, keeping digital information has become not only affordable, but frequently cheaper than taking the time to selectively delete some of it . . . The result is a world that is set to remember, and that has little if any incentive to forget.”)

a fresh start in life.”¹⁷³ Cases settle, defendants found liable pay damages, defendants in criminal cases serve jail time. People should be able to move on, start over, get a fresh start, and leave the past behind. The constant and easy availability of electronic records, however, can inhibit the ability of people to transcend the past.¹⁷⁴ As Daniel Solove notes: "People grow and change, and disclosures of information from their past can inhibit their ability to reform their behavior, to have a second chance, or to alter their life's direction.”¹⁷⁵ An extensive discussion of electronic records retention and social forgetfulness is beyond the scope of this article.¹⁷⁶ Suffice it to say that policy development for electronic records requires a consideration of the nature of information in the records and a rethinking of retention rules. This consideration should include how preservation of a person's past in a highly accessible form might change the approach to both access *and* retention of records.¹⁷⁷

c. Accuracy Problems and Dossier Creation

The ease of access to electronic court records also raises concerns about the *use* of the information in the records. Court records contain more than the details of an episode in a person's life. They contain a treasure trove of personal information. Some bits of personal information may seem unimportant in isolation, and in the context of a court case may serve merely as identifiers. Yet certain pieces of information, such as a social security number, can provide the keys to assuming the identity of an individual as

¹⁷³ Blanchette & Johnson, *supra* note 167, at 33. See Daniel J. Solove, THE FUTURE OF REPUTATION, GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 72-73 (2007) (discussing “The Land of Second Chances”).

¹⁷⁴ Blanchette & Johnson, *supra* note 167, at 35. See also, Gary T. Marx, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 223 (1988), *quoted in* Blanchette & Johnson, at 35 (“[W]ith the mass of easily accessible files, one's past is always present.”); J.D. Lasica, *The Net Never Forgets*, November 25, 1998, http://www.salon.com/1998/11/25/feature_253/ (“[O]ur pasts are becoming etched like a tattoo into our digital skins.”)

¹⁷⁵ Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 531(2006).

¹⁷⁶ For more discussion of social forgetfulness, see: Blanchette & Johnson, *supra* note 167; Mayer-Schönberger, *supra* note 163; Rosen, *supra*, note 171; Lasica, *supra* note 174; Morrison, *supra* note 6 at 919 (2009).

¹⁷⁷ The CCJ/COSCA Report, in its short discussion of retention of records, struggled with how to adapt a short retention policy for certain records such as traffic citations to electronic versions of these records. If the reason for a short retention period is to clear a person's record, then the Report suggests “a policy that the electronic record not be accessible” or a policy that “no electronic version of the record would be made.” The concern is that once the record is in electronic form, the information is no longer under the court's control. See CCJ/COSCA REPORT, *supra* note 77, at 25. See *supra* text accompanying notes 160-162.

well as learning highly personal information. Also, third-party collection of this information can lead to what Daniel Solove calls “the aggregation effect.”¹⁷⁸ This effect arises from combining bits of information about an individual. The individual may provide these pieces of information in different contexts and at different times. As Solove explains, once these pieces are combined, they “begin to form a portrait of a person. The whole becomes greater than the parts When analyzed, aggregated information can reveal new facts about a person that she did not expect would be known about her when the original, isolated data was collected.”¹⁷⁹ Public records, including court records, are a rich source of aggregated information.¹⁸⁰ This aggregated information can become part of an individual “digital dossier.”¹⁸¹ This dossier or digital portrait of a person can be very blurry, distorted and superficial. The portrait is often inaccurate. Sometimes data is simply incorrect (the person never lived at a certain address). Other times distortion comes from lack of detail and loss of the information’s context.¹⁸² This issue especially arises with court records that contain unproven allegations that may simply have been false.¹⁸³ Also, the outcome of a lawsuit and the effect on a party to that suit might not be readily known.

It is possible to create an instant snapshot of a person simply through a Google search. The view that emerges from such a search (even if the searcher eliminates false hits) is murky, a hodgepodge of hits from disparate sites. It is now common in conducting an Internet search to “net” court records, particularly pleadings. Pleadings, of course, are merely the tip of a lawsuit. Lawsuits often settle, and the context of the suit disappears. Some searchers, when finding evidence of a lawsuit, may investigate further. Others might simply note the person’s role in the lawsuit. The problems multiply for persons who are defendants in a lawsuit. Allegations about defendants are often distorted or untrue, and a misleading view of the

¹⁷⁸ DANIEL J. SOLOVE, *THE DIGITAL PERSON* 44 (2004); *See also* Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1185 (2002) (in which Solove discusses the “aggregation problem”).

¹⁷⁹ DANIEL J. SOLOVE, *UNDERSTANDING PRIVACY* 118 (2008) (citation omitted).

¹⁸⁰ *See* Solove, *Access and Aggregation*, *supra* note 178, at 1145 (“Court records are potentially the most revealing records about individuals.”)

¹⁸¹ *See* SOLOVE, *THE DIGITAL PERSON*, *supra* note 178, at 1-3.

¹⁸² *See* Solove, *A Taxonomy of Privacy*, *supra* note 175, at 507. *See also* Solove, *Access and Aggregation*, *supra* note 178, at 1189.

¹⁸³ *See* Paul H. Anderson, *Future Trends in Public Access: Court Information, Privacy and Technology* in *FUTURE TRENDS IN STATE COURTS* 2011 10 (National Center for State Courts, 2011),

<http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1820> (discussing “the integrity of court data”).

defendant emerges. The person ultimately may not be liable (or guilty) but this piece of information may be lost. There are also problems for plaintiffs. Some people may infer that if a person is a plaintiff in a lawsuit, that person is a “complainer” or someone who will “make trouble”¹⁸⁴ irrespective of the merits of the plaintiff’s claim. While the collection of information in a digital dossier or portrait often represents a distorted and inaccurate view of a person, people may rely on this information to make judgments and decisions. As Daniel Solove describes: “The problem is that such records often fail to tell the entire story, yet an individual is frequently judged on the basis of this information and important facets about her life - whether she gets a loan, a job, or a license are decided based upon this information.”¹⁸⁵

d. Loss of Context

The digital dossier consists of information that gatherers take out of its original context, e.g., a court case. The person who provided the information in a lawsuit usually has no knowledge of this information gathering. The information compilers then incorporate this information into other, unrelated contexts.¹⁸⁶ As Helen Nissenbaum notes: “[T]he process of compiling and aggregating information almost always involves shifting information taken from an appropriate context and inserting it into one perceived not to be so.”¹⁸⁷ According to Nissenbaum, this shift violates contextual integrity.¹⁸⁸ “Contexts” are “structured social settings” with “activities, roles, relationships, power structures, norms (rules) and internal values (goals, ends, purposes).”¹⁸⁹ A lawsuit is one context in which information disclosure occurs in a structured setting with the characteristics

¹⁸⁴ For an example of negative impressions of plaintiffs, see HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* 55 (2010), quoting *Higg-a-Rella, Inc. v. County of Essex*, 660 A.2d 1163, 1172 (N.J. 1995) ([D]octors can search for medical-malpractice claims to avoid treating litigious patients; employers can search for workers-compensation claims to avoid hiring those who have previously filed such claims)

¹⁸⁵ Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 *STAN. L. REV.* 1393, 1424 (2001). See also, Solove, *A Taxonomy of Privacy*, *supra* note 175, at 507. Solove notes in *A Taxonomy of Privacy* that the focus on the “digital person” for decision-making “increasingly is affecting the flesh-and-blood individual in realspace.” *Id.* (citation omitted).

¹⁸⁶ See Solove, *Taxonomy*, *supra* note 175, at 507. (“Data compilations are often both telling and incomplete. They reveal facets of our lives, but the data is often reductive and disconnected from the original context in which it was gathered.”)

¹⁸⁷ Helen Nissenbaum, *Protecting Privacy in an Information Age: The Problem of Privacy in Public*, 17 *LAW & PHIL.* 559, 587 (1998).

¹⁸⁸ See *id.* at 581-82.

¹⁸⁹ NISSENBAUM, *PRIVACY IN CONTEXT*, *supra* note 184, at 132.

Nissenbaum describes. Nissenbaum does not view the Internet as a separate context.¹⁹⁰ Context exists *aside from* the Internet. The expectations of a person providing information do not change merely because the information is online. For example, people have certain expectations regarding confidentiality of banking and financial information and expect retention of this confidentiality, even when the information is accessible online.¹⁹¹

A violation of contextual integrity is a violation of a person's expectations regarding the use of information that he or she gave for a specific purpose. Daniel Solove observes that “[r]ules of evidence determine the admissibility of information based not only on the information's content, but also on the circumstances in which it is gathered, who is disclosing it, and what purpose its disclosure aims to achieve.”¹⁹² Applying this approach to information that people have provided, he argues that the instead of a distinction between what information may be private or public, the focus should be on “the appropriateness of the disclosure in context.”¹⁹³

Some might argue that people are not very concerned about privacy as evidenced by the extensive use of social networking and other online means of disseminating personal information.¹⁹⁴ Many of the postings that people make are voluntary, but it is highly unlikely¹⁹⁵ that posters really

¹⁹⁰ Helen Nissenbaum, *A Contextual Approach to Privacy Online*, 140 DÆDALUS 32, 38 (2011) (“The Net does not constitute (drawing on the terminology of contextual integrity) a discrete context.”)

¹⁹¹ *See id.* at 39, 41.

¹⁹² Solove, Daniel J., *The Virtues Of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 1013 (2003). For example, there is protection of communications between attorney and client and husband and wife. *See id.* at 1015.

¹⁹³ *Id.* at 1013. He states that “A disclosure that may be appropriate in one public context . . . may not be appropriate in another public context.” *Id.* For further discussion, *see id.* at 1013-1019. Helen Nissenbaum has also noted that relationships such as doctor and patient change the expectation regarding disclosure of information. *See* Nissenbaum, *supra* note 187, at 594.

¹⁹⁴ *See* NISSENBAUM, PRIVACY IN CONTEXT, *supra* note 184, 105-107 (“Skeptics would have us conclude that people’s actions convey the message loudly and clearly that privacy is not of great value after all” *Id.* at 105). *See also*, Interview by TechCrunch Founder Michael Arrington with Mark Zuckerberg, CEO, Facebook, at “The Crunchies” in San Francisco, Cal. (January 8, 2010), <http://www.youtube.com/watch?v=LoWKGBloMsU>. In that interview, Zuckerberg stated “People have really gotten comfortable not only sharing more information and different kinds, but more openly and with more people. That social norm is just something that has evolved over time.”

¹⁹⁵ *See* NISSENBAUM, PRIVACY IN CONTEXT, *supra* note 184, at 105 (“People often are not fully aware that at certain critical junctures information is being gathered or recorded. Nor do they full grasp the implications of the information ecology in which they choose and

understand the uses to which their information can be put. Many people probably are not aware that court records are open,¹⁹⁶ much less that third-parties might use the information from those records. The CCJ/COSCA Report contained provisions regarding education of the public concerning the implications of public access to court records.¹⁹⁷ A follow-up report in 2005 provided a template for educational materials, recognizing that “the public, and litigants in particular, may not always be aware that the information in court records is open. Some may assume some or all of it is private.”¹⁹⁸ There are concerns that once people understand the implications of open court records on the Internet there might be a chilling effect on participation and willingness to disclose information.¹⁹⁹

Posting information on Facebook or a video on YouTube is different from disclosing information in other contexts, such as in a lawsuit. As noted above, the Internet is not a context. Expectations regarding the use of information relate to the original context of its disclosure. As Solove states: “Information is disclosed for a particular reason or goal. Disclosure occurs through particular uses of information, and therefore, not all disclosures of information are the same.”²⁰⁰ The use of the Internet as a medium does not change these expectations.²⁰¹ The posting of court records online therefore raises significant issues about the loss of contextual integrity and its implications for those involved in lawsuits.

If third parties harvest information from court records, their use of the information may be unrelated to the purposes and context of allowing open access to court records. The focus of many online searches of public records is an individual, not evidence of how well government functions or even the

act.”)

¹⁹⁶ Daniel Solove suggests that people have little idea of potential secondary uses of information, even when they receive policies that suggest there can be secondary use. See Solove, *Taxonomy*, *supra* note 175, at 520.

¹⁹⁷ CCJ/COSCA REPORT, *supra* note 77, at 64.

¹⁹⁸ ALAN CARLSON & MARTHA WADE STEKETEE, NAT’L CTR. FOR STATE CTS., PUBLIC ACCESS TO COURT RECORDS: IMPLEMENTING THE CCJ/COSCA GUIDELINES, FINAL PROJECT REPORT 1 (2005).

¹⁹⁹ See JUDICIAL MANAGEMENT COUNCIL OF FLORIDA, PRIVACY AND ELECTRONIC ACCESS TO COURT RECORDS, REPORT AND RECOMMENDATIONS (2001) 36, <http://www.floridasupremecourt.org/decisions/probin/sc02-659.pdf> [hereinafter FLORIDA 2001 REPORT].

²⁰⁰ Solove, *The Virtues of Knowing Less*, *supra* note 192, at 1014.

²⁰¹ See Nissenbaum, *A Contextual Approach*, *supra* note 190, at 43 (“We should not expect social norms, including informational norms, simply to melt away with the change of medium to digital electronic any more than from sound waves to light particles.”)

substance of a court case in which information disclosure occurred.²⁰² The United States Supreme Court, in the *Reporters Committee* case,²⁰³ noted that the plaintiffs' interest was in information about a private citizen that came from agency documents and that this information would "reveal little or nothing about an agency's own conduct." Although the Court was interpreting FOIA, the argument applies as well to information that is disconnected from court records. Separating information from original court records does not serve the purposes of allowing public access to the records.

V. Another Approach – A Fundamental Shift: Florida's Experience

For nearly 20 years courts have struggled to develop policies and rules governing public access to electronic records, even as development and implementation of electronic records systems lagged.²⁰⁴ As implementation of e-filing systems gains momentum, the importance of these rules and policies increases. Florida courts have taken an approach that serves as a new model for considering how to address issues regarding electronic records access.

In 2005, the Florida Supreme Court Committee on Privacy and Court Records noted that: "Digital records create novel challenges, and so novel solutions are called for if the resolution of the tension inherent in a system that seeks to encourage public transparency while appropriately protecting privacy is to be resolved."²⁰⁵ The "novel solution" that Florida courts have adopted is to examine the nature of court records and their core purpose and to devise rules to ensure that those records serve that core purpose. Florida policy developers considered "whether the existing framework of laws, policy and practice controlling access to court records, developed over decades prior to the emergence of electronic records"²⁰⁶ was adequate to

²⁰² See Solove, *Access and Aggregation*, *supra* note 178, at 1197.

²⁰³ *U.S. v. Reporters Comm.*, 489 U.S. at 773. For a discussion of the case, see *supra* text accompanying notes 26-38.

²⁰⁴ The JENNEN REPORT was certainly correct in predicting that "courts will be faced with the challenge of analyzing and revising public access policies for some time." JENNEN REPORT, *supra* note 45, at 27.

²⁰⁵ FLORIDA 2005 REPORT, *supra* note 100, at 26.

²⁰⁶ FLORIDA 2001 REPORT, *supra* note 199, at 31. The developers of Florida's policy were working with existing laws on public records access, including over a thousand exemptions. See *In re* Amendments to Florida Rule of Judicial Administration 2.420 and the Florida Rules of Appellate Procedure, 31 So. 3d 756, 765 (Fla. 2010). They also had to consider Florida's separate constitutional provisions on public access to court records and on privacy. Fla. Const. art. I, § 23 ("Every natural person has the right to be let alone and free from governmental intrusion into the person's private life"); FLA. CONST. art. I, § 24 (ensures a right "to inspect or copy any public record made or received in connection with

address the goals of protecting privacy while allowing public access in an electronic age. Ultimately, the answer was that the framework had to change. The solution was to embed changes throughout the system rather than just adding a special set of rules.

The adoption of policies regarding court records in Florida has been an ongoing process for more than ten years.²⁰⁷ The process in Florida started in 2000 when the Florida Supreme Court directed the Judicial Management Council²⁰⁸ to “examine issues relating to balancing privacy interests and the public’s access to information in the context of the electronic access to court records.”²⁰⁹ The Judicial Management Council issued its report in 2001.²¹⁰

the official business of any public body, officer, or employee of the state . . .”).

²⁰⁷ One Florida Supreme Court Justice expressed frustration with the long process. See Bill Kaczor, *Florida Supreme Court Justice Frustrated by Lack of Privacy Rules for Records*, THE LEDGER.COM (LAKELAND, FL.), February 11, 2011, available at <http://www.theledger.com/article/20110211/NEWS/102115051>.

²⁰⁸ The Judicial Management Council is a judiciary branch advisory council. See *In Re: Judicial Management Council*, Fla. Admin. Order No. AOSC06-62 at 2 (October 30, 2006), <http://www.floridasupremecourt.org/clerk/adminorders/2006/sc06-62.pdf>.

²⁰⁹ *In re* Report and Recommendations of the Judicial Management Council of Florida on Privacy and Electronic Access to Court Records, 832 So. 2d 712, 713 (Fla. 2002). The Court provided this direction in Objective IV D of Horizon 2002, The 2000-2002 Operational Plan for the Florida Judicial Branch, Florida Supreme Court (2000). *Id.* at 713 n. 1.

²¹⁰ FLORIDA 2001 REPORT, *supra* note 199. The Florida Supreme Court postponed its decision regarding the Judicial Management Council’s recommendations until it could review the report of a legislative Study Committee on Public Records. *In Re* Report and Recommendations of the Judicial Management Council, 832 S. 2d at 715. In 2002, the Florida legislature created the Study Committee on Public Records to address “issues of privacy and public access as they relate to . . . information contained in public court records.” 2002 Fla. Laws 2385, 2386. The Study Committee produced its report in 2003. STUDY COMMITTEE ON PUBLIC RECORDS, EXAMINATION OF THE EFFECTS OF ADVANCED TECHNOLOGIES ON PRIVACY AND PUBLIC ACCESS TO COURT RECORDS AND OFFICIAL RECORDS (2003), http://www.floridasupremecourt.org/pub_info/summaries/briefs/02/02-659/filed_02-15-2003_studycommitteereport.pdf [hereinafter EXAMINATION OF THE EFFECTS OF ADVANCED TECHNOLOGIES]. The recommendations in that report were consistent with the 2001 Judicial Management Council recommendations. See *In re* Comm. on Privacy and Court Records, Fla. Admin. Ord. No. AOSC04-04 (Feb. 12, 2004) (substituted for AOSC03-49, November 25, 2003) at 3, http://www.floridasupremecourt.org/pub_info/documents/orders/02-13-2004_AmendedOrderPrivacyCourtRecords.pdf. Both noted the need to develop court rules and to restrict the posting of electronic records until appropriate policies were in place. Compare FLORIDA 2001 REPORT, *supra* note 199, at 9 (rules needed) and 10 (moratorium) with EXAMINATION OF THE EFFECTS OF ADVANCED TECHNOLOGIES at 8 (moratorium) and 9 (adoption of rules). The Florida Supreme Court, after reviewing the reports of the Council and the Study Committee, adopted the recommendations of both groups and imposed a moratorium on the online release of records. See *In re* Comm. on Privacy and Court

More recent developments continued in 2011 when the Florida Supreme Court adopted and implemented court rule amendments.²¹¹

The core changes in the Florida system originated in the Committee on Privacy and Court Records²¹² 2005 recommendations.²¹³ The Committee viewed its task as creating “a blueprint for a comprehensive policy on court records.”²¹⁴ Rather than recommend policies and rules,²¹⁵ the Committee presented “a plan, or roadmap, to develop and effectuate a comprehensive set of policies to provide electronic access to court records while appropriately protecting privacy interests.”²¹⁶ The Florida Supreme Court characterized the report as presenting recommendations to address “obstacles” that prevented immediate implementation of remote electronic access and to develop “the necessary conditions for responsible electronic access.”²¹⁷

Records at 6.

²¹¹ *In Re* Implementation of Committee on Privacy and Court Records Recommendations, 2011 WL 2566360 (June 30, 2011). This decision was revised and superseded by *In Re* Implementation of Committee on Privacy and Court Records Recommendations, 78 So.3d 1045 (Fla. 2011). The Court noted that this adoption was “another necessary step in the Court’s ongoing effort to provide the public with electronic access to nonconfidential court records.” *In Re* Implementation of Committee on Privacy and Court Records Recommendations, 78 So.3d at 1046.

²¹² The Florida Supreme Court appointed this Committee in 2003. *In re* Comm. on Privacy and Court Records, Fla. Admin. Ord. No. AOSC04-04 (Feb. 12, 2004) (substituted for AOSC03-49, November 25, 2003) at 5, http://www.floridasupremecourt.org/pub_info/documents/orders/02-13-2004_AmendedOrderPrivacyCourtRecords.pdf.

²¹³ FLORIDA 2005 REPORT, *supra* note 100. This report is available in seven parts at http://www.floridasupremecourt.org/pub_info/index.shtml#Privacy under 2006 Court Order & Limited Moratorium, Full Report. The parts are: Cover, Cover Letter, Part 1, Part 2, Part 3, Part 4, and Part 5. The parts are consecutively numbered. Parts 1 and 2 contain the report and recommendations of the committee. Part 3 contains the comments of some members of the committee who had divergent views. Part 4 is Appendix 1 (Legal Analyses) and Part 5 is Appendix 2 (Draft Rule Changes).

²¹⁴ *Id.* Part 1 at 7. The committee viewed this policy as supporting the “move through the transition from a system of primarily paper records to one of primarily digital records.” *Id.*

²¹⁵ The Florida Supreme Court had directed the committee to recommend policies and rules. *In re* Comm. on Privacy and Court Records, *supra* note 210, at 4. The committee provided draft amendments to Florida Rule of Judicial Administration 2.051. *See id.*, Part 2 (Appendix 2), http://www.floridasupremecourt.org/pub_info/documents/privacy_5.pdf.

²¹⁶ FLORIDA 2005 REPORT, *supra* note 100, Part 2 at 43. The Committee presented twenty-four recommendations, many of which focused on specific issues with existing rules and policies.

²¹⁷ *In re* Comm. On Access to Court Records, Fla. Admin. Ord. No. AOSC06-27 (August 21, 2006) 1, http://www.floridasupremecourt.org/pub_info/documents/08-21-2006_AdminOrderAccessRecords.pdf.

The Committee noted that development of its recommendations “must include the engagement of many entities and individuals and cannot be accomplished quickly.”²¹⁸ The Committee concluded that it was not possible at the time of the report to implement a system of remote access to electronic records.²¹⁹ From 2005 forward, all work focused on implementation of the Florida Committee on Privacy and Court Records’ recommendations. In 2006 the Florida Supreme Court issued an administrative order directing various actions to implement most of the recommendations.²²⁰ Given that implementation of some recommendations would require additional work, the Court established by separate order a Committee on Access to Court Records.²²¹ This Committee filed its final report in 2008.²²² The Florida Supreme Court first considered recommendations from this 2008 report in 2010,²²³ and it addressed additional recommendations in 2011.²²⁴ The

²¹⁸ See *id.* at Part 1, p. 44.

²¹⁹ See *id.* at Part 1, p. 33.

²²⁰ *In re* Implementation of Report & Recommendations of the Committee on Privacy & Court Records, Fla. Admin. Ord. No. AOSC06-20 (June 30, 2006), http://www.floridasupremecourt.org/pub_info/OrderOnPrivacyCourtRecords.pdf. In a chart, the Court’s outlined the actions taken on the committee’s recommendations. *Id.* at 18-23. One of the immediate actions was to impose a moratorium on release of electronic court records. See *id.* at 1,13. This action implemented Recommendation Five of the Florida 2005 Report. The Court provided details of the moratorium in a separate order. *In re* Interim Policy on Electronic Release of Court Records, Fla. Admin. Ord. No. AOSC06-21 (June 30, 2006), <http://www.floridasupremecourt.org/clerk/adminorders/2006/sc06-21.pdf>. This order superseded *In re* Committee on Privacy and Court Records, *supra* note 210.

²²¹ *In re* Implementation of Report and Recommendations, *supra* note 220, at 11. The Court also directed certain existing groups, such as Florida Bar rules committees, to address some of the recommendations. See, e.g., direction that the Florida Bar rules committees review rules and forms and propose amendments to implement Recommendation Seven (Revision to Rules and Forms Leading to Extraneous Personal Information), *Id.* at 15.

²²² FLORIDA SUPREME COURT, COMM. ON ACCESS TO COURT RECORDS, FINAL REPORT AND RECOMMENDATIONS (Sept. 2, 2008), http://www.flcourts.org/gen_public/stratplan/bin/Access%20Files/Full%20Report.pdf. In 2007, the Committee on Access to Court Records had filed an Interim Report, FLORIDA SUPREME COURT, COMM. ON ACCESS TO COURT RECORDS, INTERIM PROGRESS REPORT AND RECOMMENDATIONS ON MODIFICATION TO INTERIM POLICY ON ELECTRONIC ACCESS TO COURT RECORDS (June 15, 2007), http://www.floridasupremecourt.org/pub_info/documents/07-20-2007_InterimProgressReport.pdf. The primary consequence of this report was that the Florida Supreme Court revised its earlier moratorium order. See *In re*: Revised Interim Policy on Electronic Release of Court Records, Fla. Admin. Ord. No. AOSC07-49 (Sept. 7, 2007), http://www.floridasupremecourt.org/pub_info/documents/09-07-2007_Interim_Policy.pdf. This order revised and superseded *In re*: Interim Policy on Electronic Release of Court Records, *supra* note 220.

²²³ *In re* Amendments to Florida Rule of Judicial Administration 2.420 and the Florida

adopted amendments, along with changes adopted in 2010, went into effect October 1, 2011.²²⁵

Many of the Committee's recommendations were part of a strategy to "curtail, or minimize, the inclusion of personal information in court files that is unnecessary for purposes of adjudication and case management."²²⁶ The Committee observed that a "court file is primarily a conduit and repository of information exchanged among parties and the court."²²⁷ The Committee urged the Florida Supreme Court to consider that "a court file is not a public common, where anyone is free to post anything."²²⁸ It recommended addressing the inclusion and dissemination of personal information in court records at the source: the requirements in rules of procedure and an open process that allowed parties to include non-required documents and information in a file. The Florida Committee on Privacy and Court Records focused on Florida's constitutional-based right of privacy.²²⁹ The Committee interpreted this right as "operat[ing] to keep personal information out of government hands in the first place."²³⁰

A major focus of the recommendations that the Court adopted was on minimization of unnecessary personal information in court filings. The Florida Committee on Privacy and Court Records stated that these changes represented "a fundamental shift in the posture of courts in Florida regarding

Rules of Appellate Procedure, 31 So. 3d 756 (Fla. 2010). In the interim, the order that had created the committee expired. The Court directed the Chair of the Florida Court Technology Division to form a Subcommittee on Access to Court Records essentially to represent the former committee as the Court considered the recommendations in the 2008 Report. See *In re: Florida Courts Technology Commission, Subcommittee on Access to Court Records*, Fla. Admin. Ord. No. AOSC09-3 (Jan. 27, 2009) 1, 2, <http://www.floridasupremecourt.org/clerk/adminorders/2009/AOSC09-3.pdf>.

²²⁴ *In re: Implementation of Committee on Privacy and Court Records Recommendations* (Fla. 2011), <http://www.floridasupremecourt.org/decisions/2011/sc08-2443.pdf>. The decision was effective October 1, 2011. *Id.* at 21.

²²⁵ *Id.* at 21. For a discussion of the new rules, see Dan Bushell, *A Primer on the New Privacy Rules for Florida Court Filings*, FLORIDA APPELLATE REVIEW (July 4, 2011), <http://www.floridaappellatereview.com/florida-supreme-court/new-privacy-rules/>.

²²⁶ *In re: Implementation of Committee on Privacy and Court Records Recommendations*, *supra* note 224, at 23. See *id.* at 22-27 for more discussion.

²²⁷ FLORIDA 2005 REPORT, *supra* note 100, Part 2 at 54. The Florida Supreme Court quoted this statement in its 2011 Order implementing recommendations that originated in the 2005 Report. See *In re Implementation of Report & Recommendations of the Committee on Privacy & Court Records*, Fla. Admin. Ord. No. AOSC06-20 (June 30, 2006), http://www.floridasupremecourt.org/pub_info/OrderOnPrivacyCourtRecords.pdf, at 4.

²²⁸ FLORIDA 2005 REPORT, *supra* note 100, Part 1 at 25.

²²⁹ See FLORIDA 2005 REPORT, *supra* note 100, Part 1 at 27.

²³⁰ *Id.*

the very acceptance of filings.”²³¹ The intent was to eliminate the filing of personal information “which is not needed for purposes of adjudication or case management.”²³² In its 2005 Report, the Florida Committee on Privacy and Court Records observed that the recommended changes represented a shift from an “open” court file to a “controlled” file.²³³ The Committee concluded that “the electronic release of court records cannot be achieved if court files remain open to receipt of unnecessary and immaterial personal information.”²³⁴ Recommendation Seven of the 2005 Report specifically addressed this concern.²³⁵ In response, the Florida Supreme Court approved amendments to court rules and forms to eliminate filing of extraneous personal information.²³⁶ It also adopted a new Rule of Judicial Administration 2.425,²³⁷ designed specifically to implement Recommendation Seven.²³⁸ This new rule identifies “categories of personal information that must not be filed or must be truncated or redacted before filing, and provides exceptions that allow for the filing of complete information in appropriate circumstances.”²³⁹ The Court also approved a new Rule of Civil Procedure 1.280(f),²⁴⁰ which prohibits the filing personal information generated in discovery unless it is filed for “good cause.”²⁴¹

²³¹FLORIDA 2005 REPORT, *supra* note 100, Part 1 at 25.

²³²*Id.* at 23.

²³³*Id.* at 26.

²³⁴*Id.*

²³⁵FLORIDA 2005 REPORT, *supra* note 100, Part 2 at 53.

²³⁶The rules amended were the Florida Rules of Civil Procedure, the Florida Rules of Judicial Administration, the Florida Rules of Criminal Procedure, the Florida Probate Rules, the Florida Small Claims Rules, the Florida Rules of Appellate Procedure, and the Florida Family Law Rules of Procedure. The amendments included changes to forms. *See In re: Implementation of Committee on Privacy and Court Records Recommendations*, *supra* note 224 at 8. A number of groups, including bar committees, contributed to the drafting of the changes. *See id.* at 20.

²³⁷FLA. R. JUD. ADMIN. 2.425 (2011). The Court noted that the new rule is loosely based on FED. R. CIV. PROC. 5.2. *In re Implementation of Committee on Privacy and Court Records Recommendations*, *supra* note 224, at 9.

²³⁸*See In re Implementation of Committee on Privacy and Court Records Recommendations*, *supra* note 224, at 8. Recommendation Seven provided for modifying rules and forms to eliminate requests for extraneous information. The Committee proposed this recommendation because it determined “that a systematic review of court rules and approved forms would reveal that a number of rules and forms are written in ways that lead to routine filing of personal information which is not needed by the court for purposes of adjudication or case management.” FLORIDA 2005 REPORT, *supra* note 100, Part 2, p. 53.

²³⁹*In re Implementation of Committee on Privacy and Court Records Recommendations*, *supra* note 224, at 8.

²⁴⁰FLA. R. CIV. PROC. 1.280(f) (2011).

²⁴¹*See In re Implementation of Committee on Privacy and Court Records Recommendations*, *supra* note 224, at 15. This new provision implemented the Privacy Committee’s Recommendation Ten. *Id.* The Committee’s intent in recommending the

The Committee on Privacy and Court Records also recognized a need to include some personal information in court documents. Other Committee recommendations therefore focused on examining exemptions and means of making information or documents confidential.²⁴² In response, the Florida Supreme Court approved an amendment to Florida Rule of Judicial Administration 2.420²⁴³ to provide a means to identify and address confidential information in court documents.²⁴⁴ The amendment included a provision that provided requirements for filers to identify confidential information.²⁴⁵ The Court explained that Rule 2.425 provides protection for information being filed, while Rule 2.420 provides procedures for “determining the confidentiality of information after it has been filed.”²⁴⁶ The result was a comprehensive overhaul of court filing rules and system that minimized the information going into records, and provided protections for the remaining, necessary information.

VI. Conclusion

For nearly 20 years courts have struggled to develop policies and rules to govern public access to electronic records. As implementation of e-filing systems gains momentum, determining how to address public access to

creation of this rule of procedure was “to restrain parties who gain possession of information pursuant to compelled discovery from unnecessarily and gratuitously publishing such information into a court file.” FLORIDA 2005 REPORT, *supra* note 100, at 27. The Report of the Civil Rules Committee, which recommended the rule, noted in its 2007 report that there were filings of discovery materials “for the purpose of embarrassment, intimidation, or mere perceived tactical advantage” rather than to further resolution of the case. *See* Report of the Civil Procedure Rules Committee, *In re* Report and Recommendations of the Committee on Privacy and Court Records, (2007), http://www.floridasupremecourt.org/decisions/probin/sc08-2443_AppendixG4.pdf at 3.

²⁴² *Id.* at 27, 35. In response to these recommendations, the Florida Supreme Court adopted revisions in court rules. *See In re* Amendments to Florida Rule of Judicial Administration 2.420 and the Florida Rules of Appellate Procedure, 31 So. 3d 756, 765 (Fla. 2010).

²⁴³ FLA. R. JUD. ADMIN. 2.420 (2011). This rule had been designated Rule 2.051, and was renumbered in a reorganization of the rules in 2006. *See In re* Amendments to the Fla. Rules of Judicial Admin.- Reorganization of the Rules, 939 So. 2d. 966, 1005-10 (Fla. 2006) (per curiam).

²⁴⁴ *See id.* at 762. The amendment included a clarification of the public record exemptions that are appropriate under the rule. *See id.* at 763-765. The adoption of this amendment addressed Recommendations Two (Scope of Confidentiality), Thirteen (Confidential Information), Sixteen (Unsealing of Records) and Seventeen (Responsibility of Filer) of the Privacy Committee’s 2005 recommendations. *See id.* at 759, n. 9, 762-767.

²⁴⁵ *See id.* at 765.

²⁴⁶ *Id.* at 9.

electronic court records remains an ongoing challenge. Approaches such as those described in the CCJ/COSCA Guidelines (e.g., limiting access, redaction) are still a starting point for discussion. These approaches, however, offer only transitory resolution.

The more comprehensive approach of Florida focuses on embedding changes throughout the system rather than merely creating a set of special set of rules in addition to existing filing rules. Not placing personal information in public records eliminates later inappropriate exposure. This approach requires examining all existing court filing rules and requirements and their purposes. Many courts have not considered the need to rethink the nature and purpose of filings.²⁴⁷ The core purpose of court documents is to facilitate resolution of disputes. That purpose should define the extent of public access to information. The ultimate focus finally turns to the manner in which the very content of court records furthers the main purpose of the courts. As Professor Arthur Miller wrote: “public access to information produced in litigation has always been a secondary benefit - a side effect – of civil adjudication. If public access assumes an importance on a par with the system's concern for resolving disputes . . . the courts [would be] diverted from their primary mission.”²⁴⁸ While public access to court records is a fundamental right, courts must consider how access to records actually serves the goal of resolving disputes. Examining and revising rules governing the nature of court filings is a time-consuming process that will result in a fundamental shift in “the way our courts conduct business and interact with the public.”²⁴⁹ This shift is nevertheless necessary to achieve a satisfactory accommodation of the competing goals of public access and protection of private information.

²⁴⁷ See Anderson, *supra* note 183, at 10 (noting that due to the “existence of practical obscurity and limited access to court information,” courts have given little consideration to what is in a court file, how it is accessed, or how it is used).

²⁴⁸ Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 431 (1991) (article discussing proposals to limit judges’ discretion to issue protective orders).

²⁴⁹ FLORIDA 2005 REPORT, *supra* note 100, Part 2 at 44.