APPELLATE PRACTICE SECTION WHITE PAPER

PROPOSED AMENDMENT TO INCLUDE THE JUDICIAL BRANCH IN THE OPEN AND NOTICED MEETING REQUIREMENTS OF ARTICLE I, SECTION 24.

I. SUMMARY

CRC Proposal 81 by Commissioner Heuchan would add the judicial branch to the list of government organizations that must provide notice to the public and an opportunity to attend "all meetings" "at which official acts are to be taken or at which public business of such body is to be transacted or discussed."

The Constitutional Revision Commission should understand that this proposal would require the courts to provide notice to the public and open all meetings at which cases are deliberated and decided. The National Center for State Courts has informed the authors of this paper that no state has a provision opening judicial deliberations, whether by judges or juries, to the public. There are no existing examples of this proposed system in operation anywhere in the United States.

Because the Appellate Practice Section has been unable to study the benefits and detriments of this proposal as implemented in another state, it has attempted to identify specific areas of concern that may be useful to the Commission in predicting what the outcome might be if the proposal were placed on the ballot and adopted by the voters.

The Appellate Practice Section suggests that the Commission consider at least six areas in which the proposal could have a negative impact on both the operation of the courts and on the State's budget:

1) **The speed and the quality of the decision-making process.**
2) **The daily process of conducting public business within the courts.**
3) **On the job training for both new and experienced judges.**
4) **Court security and court facilities.**
5) **The death penalty process.**
6) **The risk of increased litigation.**

The Appellate Practice Section, recognizing the limitations of its own expertise, also suggests that this Commission obtain evaluations from all four tiers of the judicial branch – the county courts, the circuit courts, the district courts of appeal, and the Supreme Court. Likewise, given that the judicial branch has had limited experience implementing both the statutory and constitutional provisions addressing Government in the Sunshine, the Commission should obtain an evaluation from attorneys who have had extensive experience implementing these provisions with local and county government.

II. THE CONSTITUTIONAL PROVISION AND THE PROPOSED AMENDMENT.

Article 1, Section 24(b), of the Florida Constitution currently provides:

(b) All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.

The proposed amendment changes this subsection as follows:

(b) All meetings of <u>the legislature; judicial branch, including meetings between judges and justices;</u> any collegial public body of the executive branch of state government<u>;</u> ~~or of~~ any collegial public body of a county, municipality, school district, or special district; <u>or any commission or task force,</u> at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public ~~and meetings of the legislature shall be open and noticed as provided in Article III, Section 4(e),~~

except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.

Although the proposed amendment contains additional changes that affect the Legislature, those changes are not addressed in this white paper.

III. SIX AREAS OF POTENTIAL CONCERN

This short paper focuses on the appellate courts, which include the circuit courts sitting in review of the county courts, the district courts of appeal that review decisions primarily from the circuit courts, and the Florida Supreme Court. These courts almost always make decisions collegially in groups of three or more. Their structure, as mandated by Article V of the Florida Constitution, requires that they engage in countless judicial meetings.

Some of the areas of concern discussed below, especially the matters discussed in subsections 2, 3, 4, and 6 will also affect the trial courts. Because those courts usually make one-judge decisions, the Appellate Practice Section believes that the matter discussed in subsections 1 and 5 will have less impact on those courts.

It is worth emphasizing, however, that the potential disruption of judicial on-the-job training will be as great in the trial courts as it is in the appellate courts.

1) The Speed and the Quality of the Decision-Making Process.

The five district courts of appeal and the Supreme Court review about 15,000 cases every year. In each of these cases, two or more judges are likely to make many decisions. The following discussion starts at the beginning of the case and concludes at the end:

a. <u>Pre-Conference Motions.</u>

The district courts of appeal and the Supreme Court receive thousands of motions every year. Other than the most routine of procedural matters, these motions are ruled upon by two or more judges or justices.

The courts handle this process in various ways. In the Second District, for example, the majority of these motions are handled in face-to-face meetings with two judges and the staff attorneys who have already reviewed the motions and are prepared to present the motions to the panel for decision. The motions presented are typically motions that have been filed no more than two weeks before the meeting. They meet in a small, internal room of the court. Some motions are resolved quickly. Others, especially the motions filed by pro se litigants, can take time. The judges often need to read the motions carefully, but this is rarely done aloud. Some motions, especially motions challenging jurisdiction, are very complex.

An adequate procedure to handle motions at noticed, public hearings would be a major challenge. It would be difficult to have a procedure by which the public would be given meaningful notice of the matters to be considered at the public hearing without substantially slowing the process. It would be difficult to modify the procedures at the hearing so that the public actually understood what was occurring on each motion. If the process were changed so that it was sufficient to allow the public to understand the process and the decisions being made on these motions, it would be an extremely slow process. The courts would be required to have more public courtrooms, or at least more access to time in such courtrooms. The budgets would need to include additional security for this process.

If motions could only be resolved at noticed, public hearings, the appellate process would be slowed. But some motions are emergencies that must be resolved quickly. After such a system was in place for a few months, it is likely that pro se litigants would learn how to use the motion process to hinder and delay cases. This would be particularly true in foreclosure and domestic relations cases, where a high percentage of the cases involve at least one unrepresented party.

b. The Process of Issuing Written Opinions.

Cases are decided by the appellate courts with and without oral argument. The judges and justices prepare in advance for the conference day on cases without oral argument, and they likewise prepare in advance for the day of oral argument. The practices of the five district courts and the Supreme Court are not identical. But what probably is identical is the fact that the decision-making process does not occur in one isolated meeting. A collegial court, typically making a decision with a three-judge panel or a seven-justice panel, can have a multitude of "meetings" in the process of deciding a case.

A district court panel, for example, may decide to view a video-recorded interrogation of a defendant prior to his arrest in a criminal case before or after an oral argument. The judges do this in order to discuss the video with one another while having the ability to replay it as needed. This is done to reach a collective assessment as to whether the defendant's constitutional rights were violated during the interrogation. In another case, the panel might meet with a staff attorney to better understand complex exhibits in a case involving a land transaction. Prior to oral argument, they may choose to have a discussion about issues that trouble one or more of the judges to make certain that proper questions will be asked. If there is a security concern with a specific case, the panel is likely to have a discussion of that security issue with the court's marshal prior to the argument.

It is quite possible that none of these meetings could occur without notice and an opportunity for the public to attend if this proposal became a part of the Florida Constitution. Certainly, there would be lawyers or pro se litigants who would take that position.

After the judges conference a case and make a preliminary decision to write a published opinion with an expected outcome, the opinion is likely to go through many edits. In a district court, for example, authoring judges are likely to walk down

the hall to ask one or both of their colleagues if a portion of the draft opinion seems correct. Once authoring judges complete their draft of the opinion, it is circulated to the other two judges. Often those judges will return to the authoring judge with suggested edits to the opinion or even with proposals for a different opinion with a different outcome. If one of the judges decides to write a dissenting opinion or concurring opinion, more meetings are likely. After each of the three judges has signed off on an opinion, it is typically distributed inside the court for review by all members of the court before it is issued. That process can also result in meetings over matters as simple as punctuation or as serious as a disagreement over the requirements of the United States Constitution.

This process, with its many mini-meetings, significantly improves the published opinions of the court. The proposed amendment would appear to disrupt this process and run the risk of resulting in a process where judges cannot or do not fully collaborate on a decision.

Public hearing and notice would likely slow down the litigants' appeals if the court attempted to maintain the same level of quality in the decision-making process and also provide the noticed public hearings required by this proposed amendment.

c. Post-decision motions.

The Florida Rules of Appellate Procedure give the parties the ability to file motions for rehearing and often motions for rehearing en banc. On some occasions, especially if a motion for rehearing has no merit, a panel of judges will resolve the motion without actually conducting a meeting. On other occasions, they will meet to discuss the motion. Occasionally, they will consult with other judges on the court considering the motion. It is unclear how the proposed amendment would affect this process. Possibly, the judges would be more tempted to resolve motions without meetings. If they resisted the temptation, the need for public meetings would slow this process, lengthening the time it takes to reach finality.

A motion for rehearing en banc is filed by a party who wants all of the judges of a district court to re-examine the case. This is intended to be a relatively rare motion, but pro se litigants tend to file them more often. Most district courts consider at least a handful of such motions in full court sessions each year.

Sometimes en banc discussions of the law are very straightforward. The case may turn on a paragraph in an earlier decision that contains a word or sentence that results in an unintended consequence in the pending case. The court as a whole may vote to write an opinion to correct this problem.

Other times, en banc discussions may involve legal issues where judges have very strong disagreements about what the law is or how it should be applied in a context that could affect many litigants. All the courts work hard to make those discussions collegial and professional, but it is important that every judge feel free to discuss the case fully. Judges need the flexibility to suggest ideas that have not been fully developed to see if they withstand scrutiny. It is not clear how the presence of the public would affect this process.

d. Two additional matters to consider about the court's decision-making process.

These cases typically are the litigants' cases. It is Bob and Mary Johnson who are getting divorced. It is someone's teenage son who robbed an elderly woman. It is a mother whose rights to her child are being terminated because she has mental health issues. It is a woman who died of ovarian cancer allegedly because her doctor was negligent.

The public has an interest in seeing that these parties receive due process and that their disputes are resolved fairly and peacefully. But these cases are not reality TV. They involve people whose privacy, even in public litigation, deserves consideration. Given that court proceedings in appellate courts are now presented

live over the internet as a matter of course, it should be assumed that these public meetings would receive similar treatment.

In an executive or legislative branch public meeting normally the public is given an opportunity to speak, to express their opinions, and to influence the outcome of the votes cast by their elected representatives. That is democracy.

In the judicial branch, a public meeting is not a place where the public can speak, express their opinions, or attempt to influence the judges. They can only observe. The judges are often called upon to protect the rights, including the constitutional rights, of one person against the wishes of the majority. The Commission should consider whether noticed public meetings would have the same beneficial effect in the judicial context that they have had in the context of the other two branches of government.

Some litigants, especially pro se litigants, would use the requirement for noticed, public meetings as a method to delay litigation and to obstruct the workings of the courts. The public is often surprised to learn that nearly 2/3 of all appeals district courts involve at least one litigant who is unrepresented by an attorney. This is common in prisoner postconviction appeals, divorce appeals, foreclosures, unemployment benefit claims, and *Anders* criminal appeals in which the public defender has found no issue of merit. Some of these litigants become quite sophisticated at methods to delay the process and to make it more expensive for the courts and for the parties on the other side of the lawsuit. The recent foreclosure crisis demonstrated that litigants are often motivated to slow the process of justice for their own personal reasons. The Commission should consider whether the procedures giving access to the public to view the decision-making process of the court will cause some litigants to file additional motions primarily to delay the courts.

2) The Daily Process of Conducting Public Business Within the Courts.

The daily operation of the courts results in many meetings involving the judges. Even if meetings with staff attorneys and other personnel are regarded as outside this proposed amendment, the clerk of the court and the marshal are officers that the Florida Constitution requires these courts to appoint. It may be that many meetings involving one or more judges and the clerk or the marshal are covered by this proposal.

Every day, judges have a need to talk to one another about an array of issues related to the operation of the courts. They have committees that address technology issues. They have committees involved in personnel decisions. Like everyone else they get sick or have an accident and need another judge to cover for them. All of these things require judges to talk to one another in "meetings" that take place in person, over the telephone, or by email. Some of these meetings probably do not qualify as meetings involving "public business." But there are currently no regulations or formal judicial decisions explaining which meetings between judges would be excepted from the "all meetings" requirement.

Chief judges spend a significant portion of their time coordinating the efficient, daily operation of their courts. They are likely to have discussions with the clerk of the court or the marshal in order to make decisions affecting the public's business at least several times every day. To provide prior notice and an opportunity for the public to attend the meetings necessary for the daily operation of the courts might be impossible. Certainly it would seem to slow the process and add significant expense to the process.

3) On-the-Job Training for Both New and Experienced Judges.

New judges at all levels of the judicial branch are required to receive training. In most situations, a new judge is formally assigned to a more experienced judge

who provides daily guidance. Often, a new judge will turn to other experienced judges as well to learn the skills necessary to make good decisions efficiently. These judges meet to discuss procedural matters that a new judge may not understand and sometimes to discuss substantive areas of the law with which the new judge has no prior experience. At the trial level, even an experienced judge will transfer from one division to another in a larger circuit. A judge who has been in a criminal division is likely to need guidance from another judge when she is transferred to the probate division. It is unclear whether the proposed amendment would require the public be entitled to attend these meetings.

District court judges are not assigned to divisions. They are required to make decisions involving a wide spectrum of civil, criminal, and administrative issues. The "learning curve" when one first becomes a district court judge is immense. That learning process takes less time as the years pass, but it never goes away. That learning process involves judges seeking the counsel of their colleagues when they are engaged in the decision-making process. Collegiality among the judges, a process that involves meetings of all varieties, helps a court to make informed, consistent quality decisions. This proposed amendment may limit the exchange of knowledge between appellate judges if they fear that they would violate the Florida Constitution by meeting with another judge to better understand the law.

4) Court Security and Court Facilities.

Current court security and court facilities were not designed to handle the operation of the judicial branch under rules requiring the courts to accommodate public attendance at many meetings at which official acts are taken or public business is discussed. This Committee should consider the cost of increased court security and the cost of alterations in court facilities to accommodate this new constitutional right. If a criminal defendant who is on probation is entitled to attend the court's discussion as to whether his judgment and sentence should be affirmed,

security will need to be heightened. If two parents fighting in a divorce over the custody of their children can likewise attend the court conference, security will need to be increased not only in the courtroom, but on the entire campus of the court. The families of victims of robbery, sexual battery, and murder will be entitled to attend deliberations along with the families of the convicted defendants. As discussed in the next section, these issues would be even greater in cases involving the death penalty. No appellate court currently has been built with facilities designed to handle such meetings. It is doubtful that any court budget contains adequate funding for the increased security that this amendment would require.

5) The Death Penalty Process.

The Supreme Court itself could provide a better assessment of how this proposed amendment would affect their death penalty deliberations. Before this commission votes to place this proposed amendment on the ballot, it should consider how the amendment would affect cases in which the death penalty has been imposed. Will this amendment speed up the process in the circuit courts and in the Supreme Court? If it slows the process, how much additional delay does this amendment add to a process that many members of the public already believe is painfully slow?

The Commission should consider whether the rights of the defendants and the rights of the victims would be improved by a more public process. Is it a good idea to prohibit justices from discussing their concerns about a case in private when making this ultimate decision?

In the final stages of the death penalty process, with the many motions for stay of execution, the need to provide noticed, public meetings is likely to make this process even longer than it is today. Presumably in the hours before the execution, in order to handle the last minute efforts to stay the execution, this proposed amendment would require the justices to sit in open session in the open, public courtroom. It is unclear how this would benefit or harm the process.

6) Increased Litigation.

The breadth of the language in this proposed amendment is likely to spur substantial litigation over its meaning. If this provision were a statute, the statute would probably contain definitions of many of the key words. But constitutional provisions do not typically have definitions. Given the large number of pro se litigants, a significant portion of this litigation will likely be filed by pro se litigants. Frankly, it is rarely a healthy thing for the court system itself to need to interpret provisions in the Constitution that impose limitations upon the judiciary. It is essential that the courts decide the meaning of the Constitution, but to some members of the public, this process looks like self-dealing. The question this Commission must consider is whether the perceived benefits of the proposed amendment would be offset by both the economic costs of this litigation to the State and the possible damage that it may do to the public's sense of the legitimacy of the judiciary as a neutral forum for the resolution of their own disputes.

Additionally, it seems clear from case law interpreting the present language of the constitution regarding the open meetings law in Florida that the open meeting requirement applies, with certain exceptions, to those governmental collegial bodies that make decisions that impact the operation of government at every level. It also applies to those bodies that make formal recommendations to the bodies who make the final decisions. It should be considered that juries do make factual findings which are generally binding on the judge who will make the legal decisions in the case. Juries decide who wins the case and the factual findings the jury makes apply even during an appeal of the case. It is not clear if this was intended by the sponsor, but we would be remiss in not pointing out this may be a consequence of the change. If jury deliberations are open to the public and a record is made of the deliberations, it seems certain there would be more reasons to take an appeal, resulting in more delay and more uncertainty in the law.

FISCAL IMPACT

A. Tax/Fee Issues

The provision may not have a substantial fiscal impact on state revenue, but it will likely have a substantial impact on the court's budget. As explained above, courts would likely need additional employees to deal with ensuring meetings are public and handling public records requests. Security staff would have to be increased since many of the cases before the appellate courts involve criminal, family, or other sensitive legal issues that might evoke high emotions setting the stage for violent confrontations. Court facilities would have to be modified to ensure public meetings could be held.

B. Private Sector Impact

Delays in appellate litigation and additional steps to the appellate process will almost certainly have an impact on private litigants, from increased attorney fees to the costs of transcription and additional filings. The delay in finality will financially impact any litigant subject to or in receipt of a money judgment.

C. Government Sector Impact.

As discussed above, this proposed amendment would likely have a significant impact upon the government sector. It is not anticipated that this impact would be beneficial; it is likely to be detrimental.