REVIEW AND ANALYSIS OF PROPOSED AMENDMENT TO FLORIDA CONSTITUTION, ARTICLE I, SECTION 24 AND ARTICLE III, SECTION 4 SUBMITTED BY THE TRIAL LAWYERS SECTION OF THE FLORIDA BAR

I. INTRODUCTION AND OVERVIEW

This paper will address the proposed amendments to the Florida Constitution submitted as heuchanb-00081A-17 (Proposal #81), a true copy of which is attached as Exhibit "A" and incorporated herein (the "Proposal"). The Trial Lawyers Section ("the Section") of The Florida Bar was asked to review and comment on the Proposal as to the potential impact on the independence of the Florida judiciary. The following analysis was prepared and is submitted by the Executive Council of the Trial Lawyers Section on behalf of the Section. The paper will summarize the Proposal, examine the historical bases for separation of powers found in the United States Constitution, as well as review and report on similar legislation enacted in other jurisdictions and the impact of the similar legislation in those jurisdictions. Finally, the paper will comment on the potential pros and cons from enacting the Proposal in Florida.

II. SUMMARY AND OUTLINE OF THE PROPOSAL

The Proposal seeks to amend Section 24 of Article I and Section 4 of Article II of the Florida Constitution ("the Constitution") "to require that all meetings of the Legislature, the judicial branch, and any commission or task force at which official acts are to be taken or at which public business of such body is to be transacted or discussed be open and noticed to the public." *Proposal Preamble, p.1.* Article I, section 24 of the Constitution deals with access to public records and meetings. The Constitution currently requires all meetings of the legislature to be open and noticed as provided in Article III, Section 4(c), except for meetings which are otherwise exempt and closed pursuant to the Constitution. The Proposal would amend Article I, section 24(b) as follows:

> (b) All meetings of <u>the legislature; the judicial branch, including meetings between judges and justices;</u> 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; or any commission or task force, 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(c),~~ except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution. (additions underlined; redactions are stricken).

Article III, Section 4, governs the Legislature and contains a separate provision regarding quorum and procedure. The proposed revision to Article III removes existing language about the requirement for notice and access to legislative meetings and refers back to Article I, section 24. This paper shall address only the proposed amendment to Article I, section 24 as it relates to requiring notice and public access to all meetings and deliberation sessions involving judges and justices.

III. HISTORICAL AND CONSTITUTIONAL BACKGROUND OF JUDICIAL INDEPENDENCE IN THE UNITED STATES CONSTITUTION

In order to address the impact of the Proposal, a study of the historical framework underpinning the separation of powers and the independence of the judiciary is recommended to insure adherence to the principles established in the United States Constitution. One of the fundamental constructs of the new democracy invented by the delegates who attended the Constitutional Convention is the existence of a government dividing the powers of government among distinct, co-equal branches. *See* Kaufman, *The Essence of Judicial Independence,* 80 Colum. L. Rev. 671, 671 (1980). Recognition of a privilege protecting the judiciary from legislative or executive inquiry has accompanied the operation of the judicial branch in order to protect the independence of the judiciary. From the outset, the Founding Fathers established life tenure for the federal judiciary which the delegates considered to be an essential element in preserving judicial independence. *See* Smith, *An Independent Judiciary: The Colonial Background,* 124 U. Pa. L. Rev. 1104, 1155 (1976).

The confidentiality of judicial communications at issue includes those within an appellate or reviewing court that sits in panels of more than one judge, as well as discussions which may take place between a sitting judge and any law clerk employed to assist in the preparation of decisions and opinions. The doctrine of judicial privilege dates back to the Constitutional Convention of 1787. The delegates, in attempting to crystalize the judiciary's role in the governmental process, recognized that a balanced government would fail without a strong and independent judiciary. The delegates firmly intended that the judicial branch would maintain independence from the legislative and executive branches. Judicial independence included the protection of private judicial deliberations. *See The Doctrine of Judicial Privilege: The Historical and Constitutional Basis Supporting A Privilege for the Federal Judiciary,* 44 Wash. & Lee L. Rev. *213* (1987). The privilege was consistently followed throughout this country's history even though there have been few precedential decisions on this topic.

In *New York Times Co. v. United States,* 403 US 713 (1971), Chief Justice Warren Berger made specific reference to this important judicial privilege, i.e. the confidentiality of judicial deliberations. Subsequently, in *Soucie v. David,* 448 F.2d 1067 (D.C.Cir. 1971), decided after *New York Times Co.*, Judge Malcolm Wilkey stated that the judicial branch enjoys a privilege against disclosure of the decision-making process. In *Soucie, supra*, the plaintiffs filed a lawsuit to compel a federal agency to release a report that contained an evaluation of the Supersonic Transport System (SST). The District Court determined that the agency had prepared the report for the president's use in making a decision about the SST and that the privilege for intragovernmental communications protected the documents from disclosure. Judge Wilkey explained that the purpose of the privilege for judicial communications was to protect a judge's ability to consider the advice of persons who assisted a judge in the decision-making process. Judge Wilkey concluded that the judicial privilege should include communications between a

judge and his law clerks or other staff members with whom the Judge discusses the merits of cases pending in the judge's Court.

Further support of the judicial deliberation privilege is found in *Williams v. Mercer,* 483 F.2d 1184 (11th Cir). In *Williams,* two Federal District Court judges of the Eleventh Circuit Court instituted disciplinary proceedings against Federal District Court Judge Alcee L. Hastings, who was accused of bribery. The judges alleged that Hastings had engaged in conduct which was inconsistent with his position as a Federal Judge and that he had diminished the integrity of the federal bench. An investigating panel of the Eleventh Circuit issued subpoenas to Judge Hastings' present and former legal assistants to appear before the investigating committee. The subpoenas were designed to uncover the substance of confidential communications between the Judge and the legal assistants. Judge Hastings' staff asserted the communications were privileged and filed suit to enjoin enforcement of the subpoenas. The District Court dismissed the action for lack of subject matter jurisdiction, and Hastings and his staff appealed to the United States Court of Appeal for the Eleventh Circuit.

The Eleventh Circuit determined that a qualified privilege protected the communications between Judge Hastings and his staff. The *Williams* Court held that communications regarding a judge's performance of his official duties ordinarily should remain undisclosed to protect the integrity of the judicial-making process. *Williams,* 783 F.2d at 1520. Even though the Eleventh Circuit determined that a qualified privilege existed, the Court found that information regarding Judge Hastings' bribery allegations permitted limited intrusion into the confidentiality of the Judge's illegal actions.

Opponents of judicial confidentiality have asserted that the secrecy surrounding judicial decision-making is undemocratic and that judicial decisions impact significant social issues and affect substantial legal rights. Therefore, opponents contend that a judge must reveal the

influences which form the basis of his decisions, unrelated to political and economic influences. *See generally, The Doctrine of Judicial Privilege: The Historical and Constitutional Basis Supporting A Privilege for the Federal Judiciary,* 44 Wash. & Lee L. Rev. *213* (1987).

The judicial decision-making process is the beneficiary of communications between judges and their legal staff. A judge would be reluctant to disclose his uncertainties to his clerk and staff for fear that this information would be disclosed to, and utilized by, persons outside the judge's chambers. The privilege encourages the uninhibited exchange of ideas and enhances the judge's ability to make sound and prudent decisions.

No states have adopted an "open meeting" requirement for state courts to subject the deliberations to notice and public meeting. There are few reported instances of attempts to make judicial deliberations a matter of public record. Though some limited access to the deliberative process has been explored for the formation of Rules of Court, those jurisdictions undertaking this effort have abandoned the process as being unwieldy and chilling the deliberative process. *See Justice on Display: Should Justices Deliberate in Public?* Time Sept. 12, 2011; Strebel, *Justices Close Doors on Rules Deliberations with Some Disorder in the Court*, Wisconsin Law Journal (June 27, 2017).

At the federal level, there have been some limited instances in which the thought processes and bases for opinions were demanded, and rebuffed as being a violation of the independence of the judiciary. *See The Statement of the Judges*, 14 F.R.D. 335 (N.D. Cal. 1953)(Senate Judiciary Committee sought the basis for a decision on which Justice Rehnquist was a panel member and the judges of the U.S. District Court for the Northern District of California stated the doctrine of separation of powers precluded the executive or legislative branches from reviewing the judicial acts by inquiry into the deliberative process).

IV. PRACTICAL CONSIDERATIONS IN APPLICATION OF THE PROPOSAL

The Proposal requires all court deliberations be noticed and open to the public, which would affect Florida's appellate courts, and would effectively govern the day-to-day activities of every judge in the State. Every instance of discussion of public business of the "body", i.e. the courts, would affect every instance in which an appellate court engaged in its deliberations, and also, involve every trial court in which a trial court judge sought any input or discussed a pending case with any other judge, or with legal staff such as law clerks. The expense of the proliferation of the required notices would be entirely cost-prohibitive to an already under-funded court system. Judicial hearings and decisions would be halted and stalled by having to await scheduled and noticed meetings. In addition, the courts would be hamstrung by the added expense and logistical challenge of every meeting being held in a facility that would accommodate a public meeting.

For the Florida District Courts of Appeal, every discussion or deliberation amongst the three-judge panel members would require coordination of the schedules of the sitting judges and their law clerks. The deliberative process is often not completed in one sitting. Therefore, multiple "open meetings" would be needed in order to complete the decision in each appeal. With the exception of appellate matters in which all issues are so obvious no deliberation is needed, every appeal would be subject to multiple meetings each requiring a notice and arrangement of a meeting for the discussion. The court's ability to collaborate and to test and explore issues and theories with reasoned contemplative analysis would be destroyed. Appeals in Florida courts would mandate exponentially more time to reach a final conclusion. The people of Florida would suffer, as their opportunity to have their matters resolved expeditiously would be severely impacted. "Justice delayed is justice denied" must be avoided at all costs, as litigants are entitled to have judicial matters resolved expeditiously.

In addition to the extensive costs, extraordinary delays and logistical challenges, the Proposal would expose the members of the judiciary to influence and censure that was specifically identified by the original delegates to the Constitutional Convention as one of the greatest threats to the balance of powers. As one commentator notes, "Maintaining the confidentiality of judicial communications is not necessarily inconsistent with the ideals of a democratic society, but rather facilitates a fair and impartial adjudication of complex issues. *The Doctrine of Judicial Privilege: The Historical and Constitutional Basis Supporting a Privilege for the Federal Judiciary.* 44 Wash. & Lee L. Rev. 213, 231 (1987).

Support for this conclusion is found in *Chandler v. Judicial Council of the Tenth Circuit,* 398 U.S. 74 (1969). The Supreme Court indicated that a judge must observe impartiality during the decision-making process in order to render opinions based on reasoned and equitable principals and not in accordance with the dictates of a majority. *Id. at 84.* Courts are tasked with deciding issues that may be volatile and imbued with political views on many sides. Justice Earl Warren noted the Supreme Court managed to arrive at a unanimous decision in *Brown v. Board of Education,* 347 U.S. 483 (1954), only because the Justices did not have to formally commit to a decision until they deliberated informally for weeks. *See* Tribe, *Trying California's Judges on Television: Open Government or Judicial Intimidation?* 65 A.B.A. J. 1175, 1178 (1979)(confidentiality in judicial deliberations promotes candid exchange of often unpopular ideas and concepts without which the judicial decision-making process is ineffective).

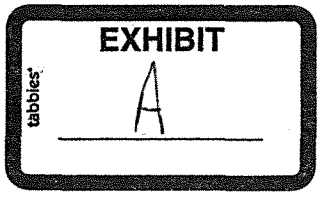
It should not be overlooked that requiring the cumbersome process described here by the implementation of the proposed open forum presents not just a hardship and denial of speedy justice to parties and the public, but is also likely to dissuade qualified judicial candidates from seeking a position on the bench because of the highly-charged public confrontation that could result. Also, the Proposal opens a vast magnitude of challenges in keeping matters which are

confidential to the parties from public scrutiny, such as cases involves minors and victims of assault; there is no exclusion in the Proposal for confidential and private matters.

CONCLUSION

The Proposal does not provide a clear need and basis for the proposed amendment to the Florida Constitution. Pundits espousing open access to the deliberations of the judiciary conclude this is needed as part of a public's "right to know" the thought processes of the judiciary. In Florida, parties who wish to know more about the reason for a decision or appellate opinion already have remedies to further inquire. *See Fla. R. Civ. P. 1.530; Fla. R. App. P. 9.330.* A party who has an objective belief that a judge is biased may seek the disqualification of a judge. *Fla. R. Jud. Admin. 2.330*. The Proposal is likely to chill the deliberative process, politicize the decision-making process, and create unbearable time delays and massive expenses to the parties and the system of justice.

The Trial Lawyers Section of The Florida Bar recommends the Proposal not be enacted or sponsored because: (1) the expected costs outweigh any perceived benefit; (2) the staggering logistical difficulty in noticing and coordinating meeting dates and times is unrealistic; (3) the people of Florida would be adversely impacted by the substantial delay caused by this program; and (4) the existing process, which has served the public well for centuries, would be extinguished.



By Commissioner Heuchan

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A proposal to amend

Section 24 of Article I and Section 4 of Article III of the State Constitution to require that all meetings of the Legislature, the judicial branch, and any commission or task force at which official acts are to be taken or at which public business of such body is to be transacted or discussed be open and noticed to the public.

Be It Proposed by the Constitution Revision Commission of Florida:

Section 24 of Article I of the State Constitution is amended to read:

ARTICLE I

DECLARATION OF RIGHTS

SECTION 24. Access to public records and meetings.—

(a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

(b) All meetings of the legislature; the judicial branch, including meetings between judges and justices; any collegial public body of the executive branch of state government; ~~or of~~ any collegial public body of a county, municipality, school

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

district, or special district; or any commission or task force, 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.

(c) This section shall be self-executing. The legislature, however, may provide by general law passed by a two-thirds vote of each house for the exemption of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b), provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. The legislature shall enact laws governing the enforcement of this section, including the maintenance, control, destruction, disposal, and disposition of records made public by this section~~, except that each house of the legislature may adopt rules governing the enforcement of this section in relation to records of the legislative branch~~. Laws enacted pursuant to this subsection shall contain only exemptions from the requirements of subsections (a) or (b) and provisions governing the enforcement of this section, and shall relate to one subject.

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

to records shall remain in effect until they are repealed.

Section 4 of Article III of the State Constitution is amended to read:

ARTICLE III

LEGISLATURE

SECTION 4. Quorum and procedure.—

(a) A majority of the membership of each house shall constitute a quorum, but a smaller number may adjourn from day to day and compel the presence of absent members in such manner and under such penalties as it may prescribe. Each house shall determine its rules of procedure.

(b) Sessions of each house shall be public; except sessions of the senate when considering appointment to or removal from public office may be closed.

(c) Each house shall keep and publish a journal of its proceedings; and upon the request of five members present, the vote of each member voting on any question shall be entered on the journal. In any legislative committee or subcommittee, the vote of each member voting on the final passage of any legislation pending before the committee, and upon the request of any two members of the committee or subcommittee, the vote of each member on any other question, shall be recorded.

(d) Each house may punish a member for contempt or disorderly conduct and, by a two-thirds vote of its membership, may expel a member.

(e) The rules of procedure of each house shall provide that all legislative committee and subcommittee meetings of each house, and joint conference committee meetings, ~~shall~~ be open

and noticed to the public in accordance with Article I, section 24. ~~The rules of procedure of each house shall further provide that all prearranged gatherings, between more than two members of the legislature, or between the governor, the president of the senate, or the speaker of the house of representatives, the purpose of which is to agree upon formal legislative action that will be taken at a subsequent time, or at which formal legislative action is taken, regarding pending legislation or amendments, shall be reasonably open to the public.~~ All open meetings shall be subject to order and decorum. This section shall be implemented ~~and defined~~ by the rules of each house, and such rules shall control admission to the floor of each legislative chamber and may, where reasonably necessary for security purposes or to protect a witness appearing before a committee, provide for the closure of committee meetings. ~~Each house shall be the sole judge for the interpretation, implementation, and enforcement of this section.~~

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