

CLERK FEES: LEGISLATION AND LITIGATION

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I. INTRODUCTION

Over the last three regular legislative sessions, the Florida Legislature has attempted to clarify what the clerks of the circuit courts are to charge for copying public records in their custody. However, none of the bills have passed the Legislature.¹ The perceived need for such legislation resulted from passage of House Bill 2481 in 1994.² Many clerks have construed this legislation as raising copying fees to one dollar per page for all copies made by the clerks, not just for copies of documents recorded in the Official Records books.³

In *WFTV, Inc. v. Wilken*,⁴ the Fourth District Court of Appeal held that section 28.24, Florida Statutes, requires clerks to charge one dollar per page for copying all court records.⁵ The court reached the rather disturbing and untenable conclusion that copying fees do not interfere with the constitutionally protected right to access public records,⁶ apparently irrespective of what amount might be charged. In so holding, the Fourth District Court expressly embraced the Florida Supreme Court's opinion in *Times Publishing Co. v. Ake*,⁷ which dealt with inspection and copying of court records. The author

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1. See Fla. HB 1739 (1995); Fla. HB 1295 (1996); Fla. HB 39 (1997). These bills generally provided that except for instruments recorded in the Official Records, a clerk is to charge 15 cents per one-sided page for copying public records not more than 14 inches by 8½ inches.

2. See Act effective June 3, 1994, ch. 94-348, § 5, 1994 Fla. Laws 2487, 2489 (amending FLA. STAT. § 28.24 (1993)).

3. See generally discussion *infra* Part III.

4. 675 So. 2d 674 (Fla. 4th DCA 1996).

5. See *id.* at 675.

6. See *id.* at 676; see also discussion *infra* Part III.

7. 660 So. 2d 255 (Fla. 1995); see also discussion *infra* Part IV.

contends that the Fourth District Court's decision, as well as the Florida Supreme Court's opinion in *Ake*, misconstrued or ignored certain statutory and constitutional provisions.

Part II of this Article briefly summarizes certain statutory provisions regulating clerks and the fees that they must charge for making copies. It then details the relevant legislative history, as well as applicable attorney general opinions that have interpreted these statutory provisions. Next, Parts III and IV carefully examine two court cases, one an opinion of the Fourth District Court of Appeal, the other a decision of the Florida Supreme Court. These cases deal in part with the power to regulate public access to court records. Part V discusses three provisions of the Florida Constitution with regard to the cases discussed in Parts III and IV, and in so doing raises serious questions about the cogency of those holdings. Finally, in Part VI, this Article concludes that the authority to set the fees that clerks of the circuit court must charge for copying public records rests in the hands of the Legislature, and that legislation is needed to maintain and preserve public access to those records.

II. LEGISLATIVE HISTORY AND ATTORNEY GENERAL OPINIONS

Chapter 28, Florida Statutes, sets forth with particularity the powers and duties of the clerks of the circuit courts.⁸ Each clerk is a record custodian of the Official Records books.⁹ Official records means "each instrument that the clerk of the circuit court is required or authorized to record in the series of books called 'Official Records' as provided for in s[ection] 28.222."¹⁰ Section 28.222, Florida Statutes, provides that the clerk is the county recorder of all instruments required or authorized by law to be recorded in the county the clerk serves.¹¹ Such instruments include deeds, leases, bills of sale, mortgages, notices or claims of lien, and judgments.¹² Upon payment of the service charge prescribed by law, the clerk will record all such instruments.¹³

Section 28.24, Florida Statutes, sets forth the charges the clerks of the circuit courts must assess for their services.¹⁴ Specifically, clerks must charge one dollar per page "for making copies by photographic process of any instrument in the public records consisting of pages of not more than 14 inches by 8½ inches."¹⁵ The controversy

8. See FLA. STAT. ch. 28 (1997).

9. See *id.* § 28.222.

10. *Id.* § 28.001(1).

11. See *id.* § 28.222.

12. See *id.* § 28.222(3)(a).

13. See *id.* § 28.222(3).

14. See *id.* § 28.24.

15. *Id.* § 28.24(8)(a) (emphasis added).

regarding what clerks must charge for records rests upon the interpretation of the language “any instrument in the public records.”

As early as 1963, the Legislature required clerks to charge one dollar per page for “[m]aking, by photographic process, copies of any instrument recorded in the public records . . . of not more than 14 inches by 8½ inches.”¹⁶ In 1970, the statutory language changed to provide a one dollar per page fee for “[m]aking copies of any instrument in the public records, by photographic process . . . of not more than fourteen (14) inches by eight and one half (8½) inches.”¹⁷ No legislative history exists with regard to the change made in 1970. Accordingly, one cannot determine whether the word “recorded” was omitted inadvertently or intentionally, and if intentionally, what the effect, if any, was to have been on fees charged.

A. Attorney General Opinions 85-80 and 91-76

In 1985, the Attorney General was asked the following question:

Do the provisions of s[ection] 28.24, [Florida Statutes,] which enumerate the charges to be imposed by the clerk of the circuit court for services performed by his office, specifically s[ection] 28.24(8)(a), prescribing the fee for copying by photographic process instruments in the public records, apply to all documents in the clerk’s custody?¹⁸

The Attorney General advised that “it appears that the service charge imposed pursuant to s[ection] 28.24(8)(a) refers to the photographic copying of instruments recorded in the public records and not to all public records which the clerk may maintain.”¹⁹

The issue arose again in 1991 when the Attorney General was asked:

Does the \$1.00 per page copying fee specified in s[ection] 28.24(8)(a), [Florida Statutes,] apply only to those instruments recorded in the Official Records Book, or does it apply to all court records as well?²⁰

The Attorney General again advised that the copying fee specified in section 28.24(8)(a) does not apply to all court records, but only to those records which have been recorded in the public records.²¹

16. Act effective July 1, 1963, ch. 63-45, § 1, 1963 Fla. Laws 87, 88 (amending FLA. STAT. § 28.24 (1961)) (emphasis added).

17. Act effective Aug. 1, 1970, ch. 70-134, § 5, 1970 Fla. Laws 459, 461 (amending FLA. STAT. § 28.24 (1969)) (emphasis added).

18. 85-80 Fla. Op. Att’y Gen. 227, 228 (1985) (emphasis added).

19. *Id.* at 230.

20. 91-76 Fla. Op. Att’y Gen. 237, 237 (1991).

21. *See id.* at 240.

B. Chapter 94-348

In 1994, the Legislature passed House Bill 2481, which became law as chapter 94-348, Florida Laws.²² Chapter 94-348 defined the term "Official records" as meaning "each instrument that the clerk of the circuit court is required or authorized to record in the series of books called 'Official Records' as provided for in s[ection] 28.222."²³ "Public records" has "the same meaning as in s[ection] 119.011 and includes each official record."²⁴ Public records is defined in section 119.011, Florida Statutes, to mean "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."²⁵

Chapter 94-348 did not amend the one dollar per page copying fee set forth in section 28.24, Florida Statutes. Furthermore, there is nothing in the legislative history of chapter 94-348 to indicate that the Legislature intended to otherwise modify the fee provision. Additionally, a closer analysis of the definition of public records, the definition of which supposedly expanded the application of the one dollar per page copying fee to include court records, reveals no mention of court records.²⁶ This definition relates only to documents "made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."²⁷ Case law provides that "agency" does not include the legislative or judicial branches of government.²⁸ Accordingly, an "instrument in the public records" for which the clerk may charge one dollar per page for copying could only include, by way of the definition of public records, official records and agency records, not court records.²⁹ Nonetheless, irrespective of the definition of public records, it is the author's contention that the Legislature did not intend chapter 94-348 to in-

22. See Act effective June 3, 1994, ch. 94-348, 1994 Fla. Laws 2487 (amending FLA. STAT. § 28.001(1) (1993)).

23. FLA. STAT. § 28.001(1) (1997).

24. *Id.* § 28.001(2).

25. *Id.* § 119.011(1) (emphasis added).

26. See *supra* text accompanying note 25; FLA. STAT. § 28.001(2) (1997).

27. FLA. STAT. § 119.011(1) (1997) (emphasis added).

28. See *Locke v. Hawkes*, 595 So. 2d 32, 36 (Fla. 1992); see also *infra* text accompanying notes 71-78.

29. See *Haynie v. Carlton*, No. 95-2247 (Fla. 9th Cir. Ct. Nov. 29, 1995). The Haynie court found that "the more specific statute establishing a schedule of fees which must be charged by the Clerk for certain services does not apply to the copying of judicial records." *Id.* at 3 (citations omitted). The court also noted that section 28.001(2), Florida Statutes, defines public records in relation to agency records under section 119.011. See *id.*

crease copying fees for any records held by the clerk, regardless of whether they were court records or agency records.³⁰

However, even if the Legislature intended to expand the fee provision, its attempt could prove unconstitutional. Article I, section 24 of the Florida Constitution requires that certain laws affecting public records appear in a separate bill not mixed with other law.³¹ Chapter 94-348 made many changes to other laws in addition to the bill's purported impact on public records by increasing copying fees. Thus, the Florida Constitution may require that the provisions affecting copying fees appear in a separate bill.³²

C. Attorney General Opinion 94-60

Following the enactment of House Bill 2841, the Attorney General was once again asked to address the clerk fees issue:

Do the recent amendments to Chapter 28, Florida Statutes, by Chapter 94-348, Laws of Florida, require the clerk of the circuit court to charge \$1.00 per page for all public records?³³

The Attorney General concluded that

while Chapter 94-348, Laws of Florida, would appear to subject additional records to the service fee imposed by section 28.24(8)(a), Florida Statutes, that charge is limited to the duplication of an "instrument" . . . [and] would not apply to every public record in the custody of the clerk of the circuit court but may be imposed only for those documents that fall within the definition of an "instrument."³⁴

The Attorney General opined that the newly added definition of public records, which was defined to include each official record, expanded the fee provision.³⁵ However, such expansion did not include all records held by the clerk, but only "instruments."³⁶ The Attorney

30. The author was the House Committee on Governmental Operations analyst on House Bill 2481 and was privy to committee and floor discussions, as well as discussions with those who sponsored the legislation. To the author's knowledge, no representations were made that this legislation would result in increased fees. In fact, representations were made that there would be no fiscal impact as a result of these provisions. See also Fla. H.R. Comm. on Govtl. Ops., HB 2481 (1994) Staff Analysis 1 (Apr. 15, 1994) (on file with comm.).

31. See FLA. CONST. art. I, § 24.

32. See 94-60 Fla. Op. Att'y Gen. 170 (1994). The Attorney General stated that "[i]n addition to defining the terms 'Official records' and 'Public records' . . . Chapter 94-348 addresses a number of issues relating to the operation of the clerk's office. In light of the above constitutional mandate, the Legislature may have inadvertently rendered the act vulnerable to attack." *Id.* at 171.

33. *Id.* at 170-71.

34. *Id.* at 173.

35. See *id.*

36. *Id.*

General then relied upon opinion 85-90 for the definition of instrument and concluded that “[t]he Legislature, however, may wish to consider defining the term ‘instrument’ for purposes of Chapter 28, Florida Statutes, to remove any ambiguity which may attach by its use in section 28.24(8)(a), Florida Statutes.”³⁷

III. WFTV, INC. V. WILKEN

WFTV, Inc. v. Wilken³⁸ arose when the Clerk of the Circuit Court for Palm Beach County, Florida began charging one dollar per page for copies of court records.³⁹ Prior to the enactment of House Bill 2481, the clerk had only charged one dollar per page for documents recorded in the Official Records.⁴⁰ The clerk asserted that charging one dollar per page for copying all court records was consistent with section 28.24(8)(a), Florida Statutes,⁴¹ which requires a copying fee of one dollar per page for any instrument in the public records of not more than fourteen inches by eight and one-half inches.

The Fourth District Court of Appeal agreed with the clerk that limiting the phrase “instruments in the public records” to documents recorded in the Official Records would be inconsistent with chapter 94-348’s newly provided definitions of official records and public records.⁴² Accordingly, the court held that the one dollar per page copying fee codified at section 28.24(8)(a) was applicable to court records.⁴³

The court further stated that if section 28.24(8) had not encompassed court records, then the fee provisions in section 119.07(1)(a) would have been applicable.⁴⁴ Section 119.07(1)(a) requires the custodian of a public record to furnish “a copy or a certified copy of the record upon payment of the fee prescribed by law or, if a fee is not prescribed by law, for duplicated copies of not more than 14 inches by 8½ inches, upon payment of not more than 15 cents per one-sided copy.”⁴⁵ The Fourth District Court’s recognition that but for section 28.24(8), provisions in section 119.07(1) would be applicable to copying court records seems antithetical to the Florida Supreme Court’s opinion in *Times Publishing Co. v. Ake*.⁴⁶

37. *Id.*

38. 675 So. 2d 674 (Fla. 4th DCA 1996).

39. *See id.* at 675.

40. *See id.*

41. *See id.*; *see also* FLA. STAT. § 28.24(8)(a) (1997).

42. *See* WFTV, 675 So. 2d at 678.

43. *See id.* at 679.

44. *See id.* at 677.

45. FLA. STAT. § 119.07(1)(a) (1997).

46. 660 So. 2d 255 (Fla. 1995).

In *Ake*, the Florida Supreme Court, quoting the district court, noted that the clerk “is immune from the supervisory authority of the Legislature. Thus, chapter 119 does not apply to the clerk . . . [as records custodian for the court] and the access to judicial records under his control is governed exclusively by rule 2.051 [of the Rules of Judicial Administration].”⁴⁷ The WFTV court did not adequately resolve the inherent conflict between its position and the Florida Supreme Court’s holding in *Ake*, even though the district court expressly embraced the *Ake* opinion.

The district court also held, contrary to WFTV’s position, that “charging a fee for copying judicial records does not interfere with appellants’ constitutionally protected right to access.”⁴⁸ In other words, the charge imposed to copy court records is inconsequential to the right of access. This conclusion is disconcerting. If the Fourth District Court was equating “access” with the right to inspect, then copying fees would be irrelevant. However, this reasoning ignores both existing case law and article I, section 24 of the Florida Constitution, which clearly provide that the right of access includes the right to inspect and the right to copy.⁴⁹

If the clerk were required to charge fifty dollars a page for copying court records, would the court continue to hold that charging a fee for copying judicial records does not interfere with the constitutionally guaranteed right to access judicial records? Is the court in WFTV suggesting that an unreasonable fee could not be challenged as a violation of article I, section 24? Or, is the court simply trying to say that the amount of the fee, one dollar per page, does not interfere with the right of access? If the latter interpretation is correct, then the court has determined that the fee is not unreasonable and therefore not unconstitutional. This would seem a logical interpretation, except for the court’s contradictory comment that “[w]e do not address appellants’ contention that the charge of \$1.00 per page is unreasonable because this point was not raised in the trial court.”⁵⁰

The court’s comment suggests that if the reasonableness of the one dollar per page copying fee were properly before the court, then the issue could be reached. However, the court also stated that a fee for copying judicial records does not interfere with the constitutionally protected right to access public records. This raises the question

47. *Id.* at 257 (emphasis added).

48. WFTV, 675 So. 2d at 676.

49. See *Fuller v. State ex rel. O’Donnell*, 154 Fla. 368, 370, 17 So. 2d 607, 608 (1944); see also *infra* text accompanying notes 111-14.

50. WFTV, 675 So. 2d at 675-76 n.1.

as to the grounds available to challenge the reasonableness of a copying fee.⁵¹

The WFTV court cited *Roesch v. State*⁵² to support its proposition that “charging a fee for copying judicial records does not interfere with appellants’ constitutionally protected right to access.”⁵³ However, the court does not identify what “constitutionally protected right to access” it is referencing. Therefore, one must presume from the context of the case that the court is referring to article I, section 24 of the Florida Constitution, which provides for the public’s right to inspect and copy public records.

In *Roesch*, the defendant was convicted of three crimes and sentenced to prison in 1990.⁵⁴ His convictions and sentences were affirmed in 1991.⁵⁵ Thereafter, *Roesch* filed a motion to compel the state attorney to turn over his file pursuant to chapter 119, Florida Statutes.⁵⁶ The court held that section 119.07(1)(a) requires the court to charge a fee and that there is no provision in chapter 119 for providing copies of the public records to indigent persons free of charge.⁵⁷ In 1990, section 119.07(1)(a), Florida Statutes, required “payment of 15 cents per one-sided copy.”⁵⁸ However, the mandatory fee provision was amended in 1991 by the enactment of Senate Bill 422.⁵⁹ The law removed the mandatory nature of the fee provision, amending section 119.07(1) to now read “upon payment of not more than 15 cents per one-sided copy.”⁶⁰ The Fourth District Court failed to note this significant change in the law when relying on *Roesch* as legal precedent.

Furthermore, the *Roesch* court relied upon *Yanke v. State*.⁶¹ In *Yanke*, the court determined that an incarcerated indigent defendant was not “entitled to the documents free of charge under applicable

51. If state constitutional provisions are ignored, there are federal constitutional provisions protecting access to judicial records. See *Applications of NBC, Inc. v. Presser*, 828 F.2d 340, 345 (6th Cir. 1987) (asserting that there is a First Amendment right of access to documents and records pertaining to court proceedings); *Oregonian Publ’g Co. v. United States*, 920 F.2d 1462, 1465 (9th Cir. 1990) (holding that there is a qualified First Amendment right of access to court proceedings and documents); *Sentinel Communications v. Watts*, 936 F.2d 1189, 1205 (11th Cir. 1991) (stating that “[t]he government may not profit by imposing licensing or permit fees on the exercise of first amendment rights . . . and is prohibited from raising revenue under the guise of defraying its administrative costs”).

52. 633 So. 2d 1 (Fla. 1993).

53. WFTV, 675 So. 2d at 676.

54. See *Roesch*, 633 So. 2d at 1.

55. See *id.*

56. See *id.*

57. See *id.* at 2.

58. FLA. STAT. § 119.07(1)(a) (Supp. 1990).

59. See Act effective May 28, 1991, ch. 91-130, § 1, 1991 Fla. Laws 1305, 1305-06 (amending FLA. STAT. § 119.07(1)(a) (1989)).

60. FLA. STAT. § 119.07(1)(a) (1997) (emphasis added).

61. 588 So. 2d 4 (Fla. 2d DCA 1991).

principles of due process relating to a criminal proceeding.”⁶² However, the author submits that “applicable principles of due process relating to a criminal proceeding” have nothing to do with the right to access public records guaranteed by article I, section 24 of the Florida Constitution. In fact, that constitutional provision did not become effective until 1993, after the Yanke decision.⁶³ Finally, though the court rendered the Roesch opinion almost five months after the effective date of article I, section 24,⁶⁴ the court failed to mention that constitutional provision. Thus, the applicability and enforcement of article I, section 24 were never considered in the Roesch and Yanke cases. Accordingly, the WFTV court failed to engage in a relevant analysis of existing law when it relied on these cases to conclude that charging a fee for copying judicial records does not interfere with the right to inspect and copy records.

IV. TIMES PUBLISHING CO. V. AKE

Despite the Fourth District Court’s arguably erroneous conclusion in WFTV, the court was fully cognizant of the Legislature’s authority to set copying fees for court records. However, the same cannot be said for the Florida Supreme Court in *Times Publishing Co. v. Ake*.⁶⁵

In *Ake*, the Times Publishing Company made three written requests to inspect and copy certain court records in the custody of Richard Ake, Clerk of the Circuit Court for Hillsborough County.⁶⁶ Ake refused to make the records available to Times Publishing and filed for a declaratory judgment as to whether “the records of the Court in the custody of the Clerk are subject to Chapter 119 under the separation of powers doctrine.”⁶⁷

After proceedings began in *Ake*, the Florida Supreme Court adopted Rule of Judicial Administration 2.051, which provides a framework for determining public access to judicial records.⁶⁸ This rule provides specific exemptions for certain judicial records and sets forth criteria that must be met for a court to keep a record confidential.⁶⁹ Rule 2.051 also provides a process for review when a court denies access to a record.⁷⁰

62. *Id.* at 5.

63. See FLA. CONST. art I, § 24 (effective July 1, 1993).

64. See *id.*

65. 660 So. 2d 255 (Fla. 1995).

66. See *id.* at 255.

67. *Id.* at 256 (footnote omitted).

68. See FLA. R. JUD. ADMIN. 2.051.

69. See *id.*

70. See *id.* The WFTV court determined that “[i]n adopting the comprehensive provisions of [R]ule 2.051 governing access to court records, our supreme court did not adopt any provisions dealing with the costs to be charged to obtain copies of those records.” *WFTV, Inc. v. Wilken*, 675 So. 2d 674, 676 (Fla. 4th DCA 1996). There are those, however,

After the adoption of Rule 2.051, Ake advised the court that the rule resolved the issue raised in the first count of his declaratory action.⁷¹ While the supreme court did not specify the contents of the first count, the first enumerated issue in the declaratory action was whether the records of the court in the custody of the clerk were subject to chapter 119, Florida Statutes, under the separation of powers doctrine.⁷² How the adoption of Rule 2.051 resolved this issue is unclear.

According to the court, all remaining issues were resolved by the parties, except for Times Publishing's claim for attorneys' fees pursuant to section 119.12, Florida Statutes, which was the "sole issue on appeal."⁷³ Section 119.12 provides:

(1) If a civil action is filed against an agency to enforce the provisions of this chapter and if the court determines that such agency unlawfully refused to permit a public record to be inspected, examined, or copied, the court shall assess and award, against the agency responsible, the reasonable costs of enforcement including reasonable attorneys' fees.

(2) Whenever an agency appeals a court order requiring it to permit inspection of records pursuant to this chapter and such order is affirmed, the court shall assess a reasonable attorney's fee for the appeal against such agency.⁷⁴

"Agency" is defined in Chapter 119, Florida Statutes, to mean:

any state, county, district authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.⁷⁵

The Florida Supreme Court approved the decision of the Second District Court.⁷⁶ The district court had held that clerks, as custodians of court records, were not subject to the attorneys' fees provisions in section 119.12, Florida Statutes, because chapter 119 ap-

who would argue that Rule 2.051 does indirectly address fees for judicial records. Rule 2.051 provides that "[r]equests and responses to requests for access to public records under this rule shall be made in a reasonable manner." FLA. R. JUD. ADMIN. 2.051. The court in *Haynie v. Carlton* reasoned that Rule 2.051 simply requires a reasonable fee for copying court records. See *Haynie v. Carlton*, No. 95-2247 (Fla. 9th Cir. Ct. Nov. 29, 1995).

71. See *Ake*, 660 So. 2d at 256.

72. See *id.*

73. *Id.* at 255.

74. FLA. STAT. § 119.12 (1997) (emphasis added).

75. *Id.* § 119.011(2).

76. See *Ake*, 660 So. 2d at 257.

plies solely to agencies.⁷⁷ The district court had reasoned that “the judiciary, as a coequal branch of government, is not an ‘agency’ [as defined in chapter 119] subject to the supervision or control by another coequal branch of government.”⁷⁸

The Florida Supreme Court also responded to the following certified question: “ARE THE COURT RECORDS MAINTAINED BY THE CLERK OF THE CIRCUIT COURT SUBJECT TO THE INSPECTION AND COPYING REQUIREMENTS OF CHAPTER 119 OF THE FLORIDA STATUTES?”⁷⁹

The court answered that court records held by the clerk of the circuit court are not subject to the inspection and copying requirements of chapter 119, Florida Statutes.⁸⁰ The court quoted with approval the Second District Court’s opinion that:

[t]he clerk, when acting in the exercise of his duties derived from article v, is acting as an arm of the court and, as such, is immune from the supervisory authority of the legislature. Thus, chapter 119 does not apply to the clerk in such capacity and the access to judicial records under his control is governed exclusively by rule 2.051 [of the Rules of Judicial Administration].⁸¹

Does the court really mean to suggest that the entirety of chapter 119 is inapplicable to the judiciary and, more specifically, to the clerks of the circuit courts? Clearly, most provisions of chapter 119 expressly apply to agencies, and thus, by way of case law, would not apply to the judicial branch. However, not all of the provisions in

77. See *Times Publ’g Co. v. Ake*, 645 So. 2d 1003, 1005 (Fla. 2d DCA 1994).

78. *Id.* at 1004. The Second District Court referred to the judicial branch as a “co-equal” branch of government and cited the Florida Constitution in support of that proposition. See *id.* Contrary to those assertions, the Florida Constitution does not state that the three branches of government are “co-equal.” It simply divides state government into three branches. As to the federal government, our founding fathers noted the disparity in the three branches of government, or as they called them, the three departments of government. Madison noted that “[t]he legislative department derives a superiority in our governments As the legislative department alone has access to the pockets of the people . . . and in all, a prevailing influence over the pecuniary rewards of those who fill the other departments.” *THE FEDERALIST NO. 48* (James Madison). However, “it is not possible to give to each department an equal power of self-defence. In republican government the legislative authority, necessarily, predominates.” *THE FEDERALIST NO. 51* (James Madison). Hamilton also acknowledged the non-equal status of the branches of government:

The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will but merely judgment It proves incontestibly that the judiciary is beyond comparison the weakest of the three departments

THE FEDERALIST NO. 78 (Alexander Hamilton).

79. *Ake*, 660 So. 2d at 255.

80. See *id.* at 257.

81. *Id.* (emphasis added).

chapter 119 are so limited. For example, section 119.085 addresses remote electronic access to public records. It provides:

As an additional means of inspecting, examining, and copying public records of the executive branch, judicial branch, or any political subdivision of the state, public records custodians may provide access to records by remote electronic means. Unless otherwise required by law, the custodian may charge a fee for remote electronic access, granted under a contractual arrangement with a user, which fee may include the direct and indirect costs of providing such access. Fees for remote electronic access provided to the general public shall be in accordance with the provisions of s[ection] 119.07(1).⁸²

Section 119.085 clearly limits the fee that the judicial branch may charge for remote electronic access to court records pursuant to a contractual arrangement. Furthermore, it requires the judicial branch to comply with section 119.07(1) with regard to the fees charged to the public for remote electronic access.⁸³

Has the Florida Supreme Court, in *Ake*, indirectly held that section 119.085 is unconstitutional, even though that particular statutory provision of law was not before the court for review? Does this mean that now the judicial branch can set its own fees for remote electronic access to court records?

It is possible that the Florida Supreme Court simply overstated the case when making the sweeping generalization that chapter 119 does not apply to the clerks of the circuit courts. One could argue a narrower construction of the court's holding. That is, because the question certified to the court only addressed the inspection and copying requirements of chapter 119, then only those requirements are inapplicable to the clerks of the circuit courts, as well as the attorneys' fees requirement that the court otherwise expressly held inapplicable. Nonetheless, even this interpretation ignores the requirements of article I, section 24 of the Florida Constitution.⁸⁴

However, if *Ake* was actually intended to stand for the proposition that the clerks of the circuit courts are immune from the supervisory authority of the Legislature, that the "court has the inherent and exclusive constitutional authority over its agencies who act in its behalf,"⁸⁵ and that access to judicial records is governed exclusively by Rule 2.051, then the Florida Supreme Court has made an egregious error. It has either ignored or misconstrued critical constitutional

82. FLA. STAT. § 119.085 (1997) (emphasis added).

83. See *id.*

84. See discussion *infra* Part V.C.

85. *Times Publ'g Co. v. Ake*, 645 So. 2d 1003, 1005 (Fla. 2d DCA 1994) (emphasis added).

provisions found in article V, section 15; article II, section 3; and article I, section 24 of the Florida Constitution.

V. THE FLORIDA CONSTITUTION

A. Article V, Section 15

Article V, section 15 of the Florida Constitution provides:

Section 15. Attorneys; admission and discipline. — The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.⁸⁶

In *Ake*, the Florida Supreme Court, quoting the lower court, advised that “[t]he clerk, when acting in the exercise of his duties derived from article V is acting as an arm of the court and, as such, is immune from the supervisory authority of the legislature.”⁸⁷ The Second District Court divined this conclusion from its more general assertion that “[t]he court has the inherent and exclusive constitutional authority over its agencies who act in its behalf.”⁸⁸ In support of this assertion, the Second District Court cited *In re Florida Bar*,⁸⁹ which concerns whether the records of a committee of the Florida Bar were subject to chapter 119.⁹⁰ The Florida Supreme Court, in *In re Florida Bar*, concluded that these records were not subject to chapter 119 because “the Florida Constitution by its express terms vests exclusive jurisdiction in this Court to regulate the admission of persons to the practice of law.”⁹¹ However, the fact that the Florida Constitution specifically grants the supreme court exclusive jurisdiction to regulate the admission and discipline of lawyers does not support the assertion that the supreme court has exclusive jurisdiction over the clerks of the circuit courts with regard to access to public records.

Nothing in article V, or for that matter the entire Florida Constitution, grants exclusive jurisdiction over the clerks of the circuit courts to the judiciary. The Florida Constitution can grant exclusive jurisdiction, as it did with respect to the regulation of lawyers, but no such language exists regarding clerks. Accordingly, for the Florida Supreme Court to announce such exclusive jurisdiction is to overstep its constitutional authority.⁹²

86. FLA. CONST. art. V, § 15.

87. *Times Publ'g Co. v. Ake*, 660 So. 2d 255, 257 (Fla. 1995).

88. *Ake*, 645 So. 2d at 1005.

89. 398 So. 2d 446 (Fla. 1981).

90. See *id.*

91. *Id.* at 447.

92. This is not the first time the court has carved out exclusive jurisdiction where none existed. In *In re Clarification of Florida Rules of Practice and Procedure*, 281 So. 2d

B. Article II, Section 3

Article II, section 3 of the Florida Constitution provides:

Section 3. Branches of government.—The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.⁹³

Unfortunately, the Florida Supreme Court did not specifically cite or discuss article II, section 3, when it rendered its decision in *Ake*. Nonetheless, the separation of powers doctrine played a significant role in the decision. The court impliedly referenced the doctrine by citing *Chiles v. Children A, B, C, D, E, and F*⁹⁴ in support of the proposition that the judiciary is not subject to the supervision or control of another branch of government.⁹⁵ *Chiles* dealt exclusively with separation of powers issues.⁹⁶ Additionally, *Ake's* declaratory complaint asked for judgment as to whether “the records of the Court in the custody of the Clerk are subject to Chapter 119 under the separation of powers doctrine.”⁹⁷ Finally, the certified question to the Florida Supreme Court was nearly identical to the language in *Ake's* declaratory complaint although the separation of powers language was omitted.⁹⁸

The Florida Supreme Court, in affirming the Second District Court's opinion, concluded that

204 (Fla. 1973), the court noted that the new constitutional provision—article V, section 2(a)—authorized the supreme court to adopt rules regarding “practice and procedure in all courts.” *Id.* at 204. The court added that the Legislature had the constitutional authority to repeal such rules by a two-thirds vote, but concluded that the Legislature “has no constitutional authority to enact any law relating to practice and procedure.” *Id.*

However, nothing in the Florida Constitution provides such exclusive jurisdiction. As noted by Ernest Means, had the framers of that constitutional provision intended exclusive jurisdiction in the court they could have clearly so provided. See Ernest Means, *The Power to Regulate Practice and Procedure in the Florida Courts*, 54 *FLA. B.J.*, 276, 279 (1980).

[I]t is evident that the framers of the revision knew how to vest exclusive authority when they so intended. Section 15 of the same article forthrightly provides that the court “shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.”

Id. at 279.

93. FLA. CONST. art. II, § 3 (emphasis added). This constitutional provision is often misquoted as providing for three “co-equal” branches of government though the term “co-equal” is not used in the Florida Constitution. See *supra* note 78.

94. 589 So. 2d 260 (Fla. 1991).

95. See *Times Publ'g Co. v. Ake*, 660 So. 2d 255, 257 (Fla. 1995).

96. See *Chiles*, 589 So. 2d at 263.

97. *Ake*, 660 So. 2d at 256 (emphasis added) (citation omitted).

98. See *id.* at 255. For the text of the certified question, see *supra* text accompanying note 79.

the clerks of the circuit courts, when acting under the authority of their article V powers concerning judicial records and other matters relating to the administrative operation of the courts, are an arm of the judicial branch and are subject to the oversight and control of the Supreme Court of Florida, rather than the legislative branch.⁹⁹

By implication, the supreme court relies upon the separation of powers doctrine found in article II, section 3 of the Florida Constitution in an attempt to establish exclusive jurisdiction regarding access to judicial records. However, the court ignored a critical part of article II, section 3, which provides for separation of powers unless otherwise expressly provided in the Florida Constitution. Article I, section 24 expressly provides otherwise and therefore governs.

C. Article I, Section 24

Article I, section 24 of the Florida Constitution provides:

Section 24. Access to public records and meetings.—

(a) Every person has the right to inspect or copy any public record . . . except with respect to records exempted pursuant to this section This section specifically includes the legislative, executive, and judicial branches of government

. . . .

(c) The legislature, however, may provide by general law for the exemption of records from the requirements of subsection (a)

. . .

(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.¹⁰⁰

These provisions establish a constitutional right to inspect and copy legislative, executive, and judicial branch records and only the Legislature can exempt such records from inspection and copying. Article I, section 24(d) does, however, grandfather in any rule of court in existence on July 1, 1993, which “limits public access to records.”¹⁰¹ Obviously, such rules are not exclusive because the Legislature can limit access to judicial records through its exemption power. Thus, at best, the Florida Supreme Court’s assertions in *Ake* that the court has “exclusive constitutional authority” over the clerks of the circuit court and that the clerk’s records are “governed exclusively by rule 2.051” were inartfully crafted. At worst, the supreme court

99. *Ake*, 660 So. 2d at 257.

100. FLA. CONST. art. I, § 24 (emphasis added).

101. *Id.* § 24(d) (emphasis added).

scoffed at the provisions of article I, section 24 of the Florida Constitution.

Unfortunately, the supreme court avoided an analysis of article I, section 24, making only one reference to it:

In *In re Amendments to Rule of Judicial Administration 2.051—Public Access to Judicial Records*, 651 So. 2d 1185 (Fla. 1995), this Court recently implemented article I, section 24, of the Florida Constitution, by setting forth the openness of court records, the standards for exemptions, and, in an extensive commentary, an explanation of the rule's application.¹⁰²

This reference to article I, section 24 warrants two observations. First, there was nothing for the court to "implement." If a rule of court was in effect July 1, 1993, then it was grandfathered in by article I, section 24.¹⁰³ In order to retain significant, though not exclusive, control over its records in 1992, the court, pursuant to *In re Amendments to the Florida Rules Of Judicial Administration—Public Access to Judicial Records*,¹⁰⁴ adopted a rule setting forth exemption provisions.¹⁰⁵

Second, the Ake court cited *In re Amendments to Rule of Judicial Administration 2.051—Public Access to Judicial Records*¹⁰⁶ as implementing article I, section 24.¹⁰⁷ This 1995 case approved amendments to Rule 2.051.¹⁰⁸ The original rule was adopted by the Florida Supreme Court in 1992.¹⁰⁹ While provisions that limit access to records in the original Rule 2.051 are grandfathered in by article I, section 24, it would seem that any of the 1995 amendments that further limit access to records are invalid.¹¹⁰

Other than stating that Rule 2.051 implemented article I, section 24, the Florida Supreme Court failed to address that section of the Florida Constitution. As a result, it reached an erroneous conclusion regarding the applicability of chapter 119, Florida Statutes, to the

102. Ake, 660 So. 2d at 257 (emphasis added).

103. See FLA. CONST. art. I, § 24(d).

104. 608 So. 2d 472 (Fla. 1992).

105. See *id.* at 473. The court, in discussing article I, section 24, said that it "essentially provides that all records of the judicial branch shall be public except those exempted by Court rule in effect on the date of the adoption of the amendment [creating article I, section 24] or those exempted by the legislature." *Id.* at 472 (emphasis added). The court, at least in 1992, acknowledged that the Legislature has the authority to exempt judicial branch records. See *id.*

106. 651 So. 2d 1185 (Fla. 1995).

107. See Ake, 660 So. 2d at 257.

108. See *In re Rule 2.051*, 651 So. 2d at 1188.

109. See *In re Fla. Rules*, 608 So. 2d at 473.

110. The Florida Supreme Court has acknowledged this assertion. In its 1992 *In re Fla. Rules* opinion, it stated that "[b]ecause the proposed amendment [creating article I, section 24] prohibits the Court from later enacting a rule which would close any other records, the Court determined to deny such additional requests [for opening additional records] at this time." *Id.*

judiciary as a whole, and, more particularly, to the clerks of the circuit courts as custodians of court records, if, indeed, a literal interpretation of *Ake* is warranted.

Furthermore, in *Ake*, the court did not discuss the provision in article I, section 24(d) of the Florida Constitution, which provides: "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 legislature and judicial branches until they are repealed." In order to effectively analyze this provision, one must determine what laws "limit public access to records."¹¹¹ To do that, one must understand "public access." As early as 1944, the Florida Supreme Court, in *Fuller v. State ex rel. O'Donnell*,¹¹² held that public access to records includes the ability of the public to inspect and copy records.¹¹³ Furthermore, article I, section 24, expressly provides for the right to inspect or copy public records.¹¹⁴ Accordingly, laws that restrict, impede, or prohibit the public's ability to inspect or copy public records would appear to limit public access. Three types of laws seem to fit this description.

First, laws that govern when and under what conditions records can be inspected or copied appear to restrict access. Second, fee provisions for inspecting and copying public records may impede and thus limit public access. For example, a person may want copies of a number of documents but may simply be unable to pay for such copies. Third, public records made confidential and/or exempt from public disclosure restrict access. Accordingly, pursuant to article I, section 24(d) of the Florida Constitution, these types of laws in effect on July 1, 1993, are grandfathered in and remain in force and effect until they are repealed.

This grandfather provision implies that a law limiting public access to records of a specific branch of government continues to apply

111. FLA. CONST. art. I, § 24(d).

112. 154 Fla. 368, 17 So. 2d 607 (1944).

113. See *id.* at 369, 17 So. 2d at 608. The Fuller court stated:

The best-reasoned authority in this country holds that the right to inspect public records carries with it the right to make copies. This on the theory that the right to inspect would in many cases be valueless without the right to make copies To say that the agent can deny the right of the stockholder to inspect and make copies of the records of the corporation would give countenance to the very evil that Jefferson warned against in his famous aphorism, "Every government degenerates when trusted to the rulers of the people alone. The people themselves are the only safe depositories". Not only this, to uphold such a doctrine would make rubbish of the well known trilogy of Abraham Lincoln and in place of government of, for, and by the people, we would have government by petty autocrats.

Id. at 369, 17 So. 2d at 607 (citations omitted); see also *Winter v. Playa del Sol, Inc.*, 353 So. 2d 598, 599 (Fla. 4th DCA 1977) (holding that the right to inspect public records carries with it the right to make copies).

114. See FLA. CONST. art. I, § 24(a).

to that branch. For example, public records exemptions applicable to the Legislature continue to be applicable to the Legislature.¹¹⁵ This grandfather provision does not appear to render laws limiting access to records of one branch of government applicable to the other two branches of government. However, article I, section 24(d) is more than just a simple grandfather provision. Its complexity arises by the additional language providing that “such laws apply to records of the legislative and judicial branches.”¹¹⁶ Because executive, legislative, and judicial branch laws limiting access to public records in effect on July 1, 1993, are grandfathered in with regard to the respective branch of government, then arguably the phrase “such laws” references executive branch laws that limit public access to records. Thus, article I, section 24(d) appears to render executive branch laws limiting public access to records applicable to the judicial branch.¹¹⁷ Arguably, then, the general fee provisions of chapter 119 are applicable to the judicial branch.

The Florida Supreme Court could have avoided apparent conflict with article I, section 24, if it had limited the decision in *Ake* to the issue of attorneys’ fees under section 119.12, Florida Statutes. The court could have reached the same result had it held that the provision was inapplicable to the clerks as custodians of court records because the judicial branch is not an “agency” affected by section 119.12. Such a holding would not have been contrary to article I, section 24 because the attorneys’ fees provisions do not “limit public access” but, to the contrary, encourage public access. Instead, the court created a great deal of confusion by reaching beyond the attorneys’ fees issue and stating that the whole of chapter 119 is inapplicable to the judiciary.¹¹⁸

VI. CONCLUSION

The Legislature has the authority to establish copying fees for court records despite the confusion fostered by the Florida Supreme Court’s opinion in *Times Publishing Co. v. Ake*. Chapter 94-348 created section 28.011, Florida Statutes, which provides the definitions

115. A list of public records exemptions for the Legislature can be found in section 11.0431, Florida Statutes. Other statutory provisions are also applicable to legislative records. See FLA. STAT. § 15.07 (1997) (providing that the journal of the executive session of the Senate must be kept free from inspection or disclosure except upon order of the Senate or a court of competent jurisdiction); *id.* § 11.26(1)(a) (providing that legislative employees are forbidden from revealing to anyone outside the area of their direct responsibility the contents or nature of any request for services made by any member of the Legislature except with the consent of the legislator making the request).

116. FLA. CONST. art I, § 24(d) (emphasis added).

117. A discussion of the full ramifications of this assertion is beyond the scope of this Article.

118. See *Times Publ’g Co. v. Ake*, 660 So. 2d 255, 257 (1995).

for official records and public records. In so doing, there was apparently no intent by the Legislature to expand the fee provisions set forth in section 28.24, Florida Statutes. Nonetheless, the Fourth District Court of Appeal in *WFTV, Inc. v. Wilken* took the opportunity to construe House Bill 2481 as grounds for increasing what clerks of the circuit courts are to charge for court records. This holding does support, however, the proposition that the Legislature is the branch of government charged with setting such fees. Accordingly, it is within the Legislature's constitutional power to change the fees charged for court records, just as it has attempted to do in House bills 1739, 1295, and 39.

The fact that such legislation has failed to pass the Legislature does not diminish the concerns many have that charging one dollar per page for copying court records is excessive and not in compliance with existing statutory provisions or legislative intent. Excessive fees interfere with a person's constitutionally guaranteed right to access public records. Furthermore, one must compare this fee to the fifteen cents per page copying fee that agencies are allowed to charge. This disparity highlights the possible impropriety of the one dollar fee.