



# Access to Court Records in North Carolina and Judicial Privilege

Michael Crowell

North Carolina law strongly favors public access to government records, including court records. The state recognizes a constitutional right of access to court records, albeit a qualified right. The public records statutes are broadly worded and apply to the judicial branch as well as to the executive and legislative branches. The statutes have been interpreted to include drafts as well as final documents.

But are the rules for court records really the same as the rules for the records of other parts of state government? The answer is no. First, the state supreme court has recognized the inherent authority of courts to limit access to records when necessary to assure the fair administration of justice, regardless of what the public records statutes say. That inherent authority can be the basis for denying the qualified constitutional right of access, too. Second, it seems highly likely that if faced with the question, the courts would recognize a judicial privilege to keep judges' notes and drafts away from the public eye, even though those documents might come within the statutory definition of a public record.

This bulletin briefly reviews the constitutional right of access and the public records law and then discusses the limitations that have been, or seem likely to be, applied to court records.

## The Different Kinds of Court Records

As discussed below, North Carolina's public records law defines a *public record* to include all documents "made or received pursuant to law or ordinance in connection with the transaction of public business. . . ."<sup>1</sup> When applied to the courts, that definition can cover a wide range of documents. In the broadest sense *court records* might include everything from complaints and answers and court orders to calendars and budgets and telephone records, all the way to emails between judges and even judges' and law clerks' notes and draft opinions. For the discussion that follows, it will be useful to sometimes identify and speak of three different kinds of court records:

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1. N.C. GEN. STAT. (hereinafter G.S.) § 132-1.

- *Records of court proceedings.* These are documents required for adjudicating cases or that memorialize judicial actions. Examples include pleadings, affidavits filed with the court, motions, evidence admitted into court, notices, orders, and the like. Everything in a typical case file would fall in this category. With a few specific statutory exceptions—for example, records of grand jury proceedings—these records of court proceedings are public records and the case law mostly concerns whether they may be withheld from inspection for a period of time to protect other interests. For instance, as discussed below, a search warrant might be sealed for a short time to protect an ongoing investigation.
- *Court administration records.* These are documents necessary for the administration and operation of the courts but not directly related to the adjudication of cases. Examples include court calendars, juror lists, proposed and completed budgets, receipts, time sheets, telephone logs, and the like. These documents, like records of court proceedings, clearly are public records, but there are fewer instances when access to them might be restricted. Court administration records, except perhaps those involving jurors, usually do not include sensitive personal information or other data that might jeopardize the fairness of a proceeding if made public.
- *Court officials' personal records.* These are documents created by individual court officials or personnel in connection with judicial activities but maintained for the individual's own use and not part of a case file. Examples include judges' and law clerks' notes, email exchanges between judges and lawyers or between judges and law clerks or judicial assistants, court clerks' rough notes, and drafts of orders and opinions. These documents present more difficult questions than records of court proceedings or court administration records. Although they might meet the definition of public records under North Carolina's broad statute, it seems likely that if public access were ever sought for such documents the courts would say either that they are not really public records or that they may be withheld under judicial privilege. Those issues are discussed below.

To date the case law on court records in North Carolina has involved only the first kind of documents, the records of court proceedings. Those cases generally would apply just as well to court administration records. This bulletin will review those cases. It will also suggest how the courts might treat records in the last category, court officials' personal records.

## Constitutional and Common Law Rights of Access to Court Records

### Federal Law

While the United States Supreme Court has found a First Amendment right of the public to attend criminal proceedings,<sup>2</sup> it has not addressed whether the same right applies to civil proceedings or to access to court documents. The Fourth Circuit Court of Appeals, however, has recognized a qualified First Amendment right to view court records. In *Baltimore Sun Co. v. Goetz*<sup>3</sup> the court held that the right exists when the proceeding to which the documents

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2. *Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555 (1980). The First Amendment right applies not only to criminal trials but also to jury *voir dire* and to preliminary hearings. *Press-Enterprise Co. v. Superior Court of Cal. (Press-Enterprise I)*, 464 U.S. 501 (1984); *Press-Enterprise Co. v. Superior Court for the Cnty. of Riverside (Press-Enterprise II)*, 478 U.S. 1 (1986).

3. 886 F.2d 60 (4th Cir. 1989).

pertain historically has been open to the public and when public access plays a significant role in the process. If either is missing, there is no First Amendment right. The First Amendment right means that access to court records may be restricted only to serve a compelling state interest and the restriction must be narrowly tailored to serve that interest. To allow proper appellate review, the trial court must state on the record its reasons for restricting access.

The United States Supreme Court has recognized a common law right of access to court documents, although it has said little about that right other than that it is subject to the trial court's discretion.<sup>4</sup> Once again, though, the Fourth Circuit has provided guidance in the *Baltimore Sun* decision, elaborating on the difference between the federal constitutional and common law rights of access. In fact, there seems little practical difference between the two. According to *Baltimore Sun*, when there is a First Amendment right—because the related proceeding historically has been open and public access plays a significant role in the process—access can be denied only to serve a compelling state interest and the restriction on access must be narrowly tailored to serve that interest. If there is no First Amendment right, the common law right means access may be denied only when “essential to preserve higher values,” and again the restriction must be narrowly tailored. It would seem a strain to try to articulate a difference between the “compelling interest” and “essential to preserve higher values” standards.

### North Carolina Law

The North Carolina Court of Appeals has accepted the Fourth Circuit's recognition of a potential First Amendment right of access to court records, but it used the *Baltimore Sun* analysis to decide that even if there is such a right, it does not apply to search warrants and related documents. In *In re Search Warrants of Cooper*<sup>5</sup> the court found that proceedings related to search warrants historically have not been open to the public and thus are not entitled to First Amendment protection under *Baltimore Sun*.

The *Cooper* court, though, relying on the North Carolina Supreme Court's earlier decision in *Virmani v. Presbyterian Health Services Corp.*<sup>6</sup> found a qualified right of access to court records, including search warrants, in Article I, Section 18, of the North Carolina Constitution, which declares that “All courts shall be open . . .” This state constitutional right can be limited by a countervailing higher interest, such as preserving the defendant's right to a fair trial or protecting witnesses or innocent third parties. In *Cooper* the court found that such higher interests existed and allowed the sealing of the search warrant affidavits and inventories for a limited time. Those higher interests were the protection of the defendant's right to a fair trial, the preservation of the integrity of an ongoing investigation, and protection of the state's right to prosecute a defendant.

The *Cooper* court also incorporated the procedural safeguards from *Baltimore Sun* into its decision, requiring the trial court to state its reasons for restricting access on the record in order to allow proper appellate review. It further required the trial court to consider less-restrictive alternatives to denying access to a document altogether, such as redacting sensitive portions or restricting access only for a short period of time. Those requirements mirror the “narrowly tailored” standard of the Fourth Circuit.

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4. *Nixon v. Warner Commc'ns*, 435 U.S. 589 (1978).

5. 200 N.C. App. 180 (2009).

6. 350 N.C. 449 (1999).

### Summary of Constitutional and Common Law Rights

In sum, North Carolina courts might recognize a First Amendment right of access to court records if the *Baltimore Sun* test is met, but regardless of that right, both the North Carolina Constitution (“All courts shall be open . . .”) and the common law provide a limited right of access that may be overridden only by a higher interest, such as protection of an ongoing investigation or a defendant’s right to a fair trial.

All of the cases about a constitutional right of access have involved records of court proceedings, the first category of records discussed above—documents that memorialize court action or are required for adjudication of cases. In those cases, therefore, there was no question that the documents would be considered public records; the issue for the court was whether other interests justified withholding them from public inspection. Those cases did not require consideration of the other kinds of court records—the categories of administrative records or personal records. There should be no difference in the legal analysis for court administrative records, but court officials’ personal records present additional issues, as discussed later in this bulletin.

The principal reason there are so few North Carolina appellate court decisions on constitutional rights of access to court records is the nature of the state’s public records law. With an expansive definition of a public record in the statutes, most litigation occurs under the public records law and there is no need to raise constitutional arguments.

## The Public Records Law

### Scope of the Law

North Carolina’s public records law is found in Chapter 132 of the General Statutes (hereinafter G.S.). The law broadly defines a public record to include

all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business . . . .<sup>7</sup>

Chapter 132 itself exempts some kinds of documents from public disclosure, including billing records of public utilities,<sup>8</sup> confidential communications with government lawyers,<sup>9</sup> trade secrets,<sup>10</sup> and records of criminal investigations by public law enforcement agencies.<sup>11</sup> Statutes outside Chapter 132 may exclude specific categories of records from the public records law, such as tax returns<sup>12</sup> and most state personnel records.<sup>13</sup> As noted below, there are several exceptions for court records, such as juvenile records.

The public records statute is applicable to every agency of North Carolina government, which G.S. 132-1 says includes “every public office, public officer or official (State or local, elected or

7. G.S. 132-1.

8. G.S. 132-1.1(c).

9. G.S. 132-1.1(a).

10. G.S. 132-1.2.

11. G.S. 132-1.4.

12. G.S. 105-259, 132-1.1(b).

13. G.S. 126-22 *et seq.*

appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government.” There is nothing in the law to suggest that it does not cover the court system as well as the executive and legislative branches, and that is how it is understood.

Chapter 132 itself does not address court records in particular except to define two narrow exceptions to the law. The first exception is the provision of G.S. 132-1.3(a) allowing the withholding of settlements in medical malpractice actions against public hospitals. (Settlements by other government agencies must be made public, however.) The other exception is the language of G.S. 132-1.4(k) making arrest and search warrants confidential until they have been returned.<sup>14</sup>

### Statutes about Court Records

In addition to the public records law, a statute in the courts chapter, G.S. 7A-109(a), also declares that records maintained by the clerk of court pursuant to Administrative Office of the Courts (AOC) rules are public. Those rules are found in the AOC’s voluminous *Rules of Record Keeping*, the bible for clerks of court.

Various statutes outside the public records law treat some court documents as confidential. These include records of grand jury proceedings;<sup>15</sup> most adoption records;<sup>16</sup> and reports of cases of juvenile abuse, neglect, or dependency.<sup>17</sup> Other than these significant exceptions, almost all court records are subject to public inspection under the public records law.

### Personal Communications Are Not Public Records

Communications that are truly of a personal nature are not considered public records, even though they may be created or received by a public official or employee while at work and on a government computer.<sup>18</sup> A letter or email to a relative, a vacation schedule, a hotel reservation, fantasy football league standings, and other kinds of obviously personal documents would not fit within the definition of a public record in G.S. 132-1. The statute says that a public record

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14. The remainder of G.S. 132-1.4 concerns the confidentiality of records of criminal investigations conducted by law enforcement agencies, but those records generally would not be in court files anyway.

15. G.S. 15A-623.

16. G.S. 48-9-102.

17. G.S. 7B-2901.

18. On the other hand, emails and other communications about official business are public records even if sent on private computers or via personal email addresses or by private phones. It is the nature of the document that determines whether it is a public record, not the means by which it is created or transmitted. See DAVID M. LAWRENCE, PUBLIC RECORDS LAW FOR NORTH CAROLINA LOCAL GOVERNMENTS 17–19 (UNC School of Government, 2d ed. 2009). The Department of Cultural Resources email policy discourages public officials and employees from using private email accounts for public business and requires that copies be kept so they will be available to the public. “If a personal e-mail account is used for government business, employees are required to forward all e-mail messages to their government e-mail account.” NORTH CAROLINA DEPARTMENT OF CULTURAL RESOURCES, E-MAIL AS A PUBLIC RECORD IN NORTH CAROLINA: A POLICY FOR ITS RETENTION AND DISPOSITION 5 (revised July 2009).



is a document made or received “in connection with the transaction of public business.”<sup>19</sup> The personal documents listed above have nothing to do with public business.<sup>20</sup>

### Drafts as Public Records

In *News and Observer Publishing Co. v. Poole*<sup>21</sup> the North Carolina Supreme Court held that draft reports are public records the same as the final report. The documents in question were two draft reports prepared by members of a commission appointed by the university president to investigate athletic problems. Although in this instance the final report already had been published by the time the drafts were requested, the decision does not specifically limit the holding to that situation; it might be read to require the release of drafts even while work on the final version of the report is ongoing.

In requiring disclosure of the drafts the court rejected the argument for a “deliberative process privilege” recognized by other states. It is up to the legislature, not the judiciary, to decide whether there should be such a privilege or exception for preliminary drafts, the court said. The court also rejected the argument that a deliberative process exception was necessary to prevent the legislature from intruding upon the decision-making processes of other branches of government in violation of separation of powers. The court’s answer to the separation of powers issue was this:

The Public Records Law allows intrusion not by the legislature, or any other branch of government, but by the public. A policy of open government does not infringe on the independence of governmental branches.<sup>22</sup>

19. An instructive recent case on judges’ personal emails is *Associated Press v. Canterbury*, 688 S.E.2d 317 (W. Va. 2009). The case was a follow-up to the very controversial West Virginia litigation in which Justice Elliot Maynard refused to recuse himself from a case even though one of the parties, Don Blankenship, had spent millions of dollars to support Maynard in his re-election campaign. The United States Supreme Court eventually held in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), that due process had been denied by Justice Maynard’s participation in the decision. In *Canterbury* the news media sought emails between Maynard and Blankenship, but the court held that the emails were personal communications not “relating to the conduct of the public’s business” as required by the West Virginia public records statute and therefore did not have to be disclosed.

20. The inapplicability of the public records law to personal communications, even if those communications are composed or transmitted on a public computer, is recognized in the policies of the Department of Cultural Resources, the agency responsible for determining how long public records must be retained. In describing “public records with short-term value” that may be destroyed as soon as their reference value ends, the agency’s website includes “personal messages (including electronic mail) not related to official business.” The department’s email policy likewise classifies as “non-record material,” i.e., *not* public records, personal messages “received from family, friends, or work colleagues which have nothing to do with conducting daily government business.” NORTH CAROLINA DEPARTMENT OF CULTURAL RESOURCES, E-MAIL AS A PUBLIC RECORD IN NORTH CAROLINA: A POLICY FOR ITS RETENTION AND DISPOSITION 7 (revised July 2009). The same reasoning would apply to other kinds of documents that are personal.

21. 330 N.C. 465 (1992).

22. *Id.* at 484. Later, in *News and Observer Publishing Co. v. Easley*, 182 N.C. App. 14 (2007), the court of appeals said it did not construe the quoted language from *Poole* to mean that the public records law never could raise a separation of powers issue. It took the quote to mean only that no such issue had been shown in that particular case. This issue is discussed further on page 12.

Notwithstanding the broad language in that quotation and the rejection of a deliberative process exemption for executive branch records, it seems likely that if the issue were raised the courts would find a judicial privilege exception to the public records law to protect judges' notes and draft orders and opinions. That issue is discussed below.

### **Inherent Authority of the Court to Limit Access to Records**

To what extent does separation of powers free the courts from the legislature's enactments about public records? At least one other state's supreme court has said that the legislature may not exert any control over court records.<sup>23</sup> The North Carolina Supreme Court has not gone that far. Still, the court has held that separation of powers prevents public records statutes from limiting the court's inherent authority to restrict access to documents when necessary for the proper administration of justice. In *Virmani v. Presbyterian Health Services Corp.*<sup>24</sup> the supreme court upheld the trial court's inherent authority to seal documents containing confidential medical peer reviews, regardless of the public records law:

Notwithstanding the broad scope of the public records statute and the specific grant of authority in N.C.G.S. § 7A-109(a), our trial courts always retain the necessary inherent power granted them by Article IV, Section 1 of the North Carolina Constitution to control their proceedings and records in order to ensure that each side has a fair and impartial trial. "The paramount duty of the trial judge is to supervise and control the course of the trial so as to prevent injustice." *In re Will of Hester*, 320 N.C. 738, 741, 360 S.E.2d 801, 804 (1987). Thus, even though court records may generally be public records under N.C.G.S. § 132-1, a trial court may, in the proper circumstances, shield portions of court proceedings and records from the public; the power to do so is a necessary power rightfully pertaining to the judiciary as a separate branch of government, and the General Assembly has "no power" to diminish it in any manner. N.C. Const. art. IV, § 1; see *State v. Britt*, 285 N.C. 256, 271-72, 204 S.E.2d 817, 828 (1974); *Miller v. Greenwood*, 218 N.C. 146, 150, 10 S.E.2d 708, 711 (1940).<sup>25</sup>

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23. The Florida Supreme Court has held that the state's public record law is not applicable to the court system because it is not an "agency" covered by the statute but instead is a co-equal branch of government, and that clerks of court are subject to the oversight and control of the supreme court, not the legislature, with respect to judicial records. *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). When the Florida court earlier held that an expunction statute was inapplicable to the courts, it said: "To permit a law to stand wherein the Legislature requires the destruction of judicial records would permit an unconstitutional encroachment by the legislative branch on the procedural responsibilities granted exclusively to this Court." *Johnson v. State*, 336 So. 2d 93, 95 (Fla. 1976). The court nevertheless honored the legislature's intent by adopting its own expunction rule, which was essentially the same as the statute it found inapplicable to the judicial branch.

24. 350 N.C. 449 (1999).

25. *Id.* at 463.

The *Virmani* court was careful to say that judges should not use their authority to restrict access to records except in compelling circumstances:

This necessary and inherent power of the judiciary should only be exercised, however, when its use is required in the interest of the proper and fair administration of justice or where, for reasons of public policy, the openness ordinarily required of our government will be more harmful than beneficial.<sup>26</sup>

As discussed above, in *Cooper* the court of appeals went further in explaining the kind of higher interest that must be present to justify restricting access to court records and the procedure that must be followed, including consideration of alternatives short of sealing documents.

The *Cooper* decision listed several possible higher interests that might justify withholding an otherwise public record, including the need to protect the defendant's right to a fair trial, preserving the integrity of an ongoing investigation, protecting witnesses and innocent third parties, and safeguarding the state's right to prosecute a defendant. In *Virmani* the interest supporting the sealing of court testimony was preservation of the effectiveness of the medical peer review process.

There may be other interests that would carry equal weight. A jury questionnaire in a high-profile murder or rape case, for example, might include very personal questions about the potential juror's experience with and views on domestic violence or marital infidelity, and keeping those responses confidential to the court and lawyers might be necessary to assure that jurors are willing to serve. Jury questionnaires seem to fit under the definition of a public record, but they could be withheld if a judge found that there was a higher interest in preserving the privacy of jurors.

## Personal Notes

As discussed above, court records might be divided into several different categories, and at least one of those categories—court officials' personal records—would seem to include some documents that the courts are likely to find are not public records at all. One such item is personal notes, that is, notes kept by a judge, clerk, or other court official for the official's own use that are not part of the court file. There is no North Carolina case law on the status of such personal notes, but other jurisdictions have said that they are not public records. In California, for example, the courts have distinguished between Category I court records, such as official court minutes, written orders, master calendars, and so forth, which undeniably are open to public inspection, and Category II writings, which are not:

Before a judgment goes out there is usually a draft prepared and then edited. Jury instructions are written and rewritten. Informal notes are prepared by judges to assist them in conducting voir dire. Most judges keep personal notes of the testimony and argument brought to their court. Court reporters keep original notes, which are corrected and amplified before a final reporter's transcript is issued. If we look to the courts of appeal, we will find enormous quantities of initial drafts, memoranda, critical analyses of others' work, and all kinds of

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<sup>26</sup>. *Id.*



preliminary writings. All of this material, which we will call Category II writings, is created in the course of judicial work and for the purposes of carrying out judicial duties. We submit, however, that none of such material should be the subject of public inspection.<sup>27</sup>

Many public officials other than judges keep personal notes of the sort described above. These are notes kept by a public official or employee as part of the person's duties but only for the person's own use. Examples would be notes a city council member makes during a public hearing or while talking to a city employee on the phone, notes a department head makes during a job interview, or notes a county manager makes in preparation for a budget presentation. There is no North Carolina case law exempting such personal notes from the public records law, but the majority view from courts in other jurisdictions is that such notes are not public records.<sup>28</sup>

Regardless of how a North Carolina court might rule on personal notes kept by mayors and county managers and the like, it seems almost certain that the court would hold that judges' notes and similar court-related documents are covered by a judicial privilege that would keep them from the public even if they fit within the statutory definition of a public record. Judicial privilege has been addressed in other jurisdictions but not yet in North Carolina.

### Judicial Privilege in Other Jurisdictions

The concept of judicial privilege is widely accepted even though there is remarkably little case law to support it or explain its parameters. The idea behind judicial privilege is that a judge's deliberative process in reaching a decision must be private to protect the independence of the judiciary and that, therefore, there should be no public questioning of a judge or of the judge's law clerk or assistant or any other court personnel about the judge's decision making, nor may the public have access to the judge's notes, draft opinions, emails, or other writings showing how the decision was reached.

The United States Supreme Court has mentioned judicial privilege only in passing. When the court in 1971 rejected the Nixon administration's argument for an executive privilege to forbid publication of the Pentagon Papers concerning the Viet Nam war, Chief Justice Burger in dissent said that there should be an executive privilege comparable to the judicial privilege the court enjoyed to protect the confidentiality of its deliberations and internal communications.<sup>29</sup> Burger explained that the privilege arose from the inherent authority of the court and the separation of powers.

A few decisions from other courts have addressed judicial privilege explicitly. In the 1980s the Eleventh Circuit Court of Appeals had to consider the extent to which judicial privilege

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27. *Copley Press, Inc. v. Superior Court*, 6 Cal. App. 4th 106, 114 (Ct. App. 1992). The court went on to find that a court clerk's rough notes, used to prepare official court minutes, did not clearly fall within either category I or II, but that they should be made available for public inspection because they were relied upon by court officials other than the courtroom clerk, and the supervising clerk had directed that they be retained for reconstructing the record when necessary.

28. DAVID M. LAWRENCE, *PUBLIC RECORDS LAW FOR NORTH CAROLINA LOCAL GOVERNMENTS* 19–22 (UNC School of Government, 2d ed. 2009).

29. *New York Times Co. v. United States*, 403 U.S. 713, 752 n.3 (1971) (Burger, C.J., dissenting).

limited its investigation of federal district judge Alcee Hastings.<sup>30</sup> The allegations against the judge included bribery; abdication of his decision-making authority to a law clerk; misrepresentation to counsel that he had read a precedent; and improper solicitation of funds from a convicted felon. The court determined that a judicial privilege restricted access to communications between Judge Hastings and his law clerks and secretary but that the privilege was qualified and had to be weighed against the need for the evidence in the proceeding. Its conclusion was that the surpassing importance of the proceeding—to decide whether the judge would be exonerated or recommended for impeachment; the serious nature of the charges; and the lack of any adequate substitute for questioning the clerks and the secretary meant that the privilege had to give way in that particular circumstance.

On the other hand, the Illinois Appellate Court has held that the judicial privilege is absolute and that it extends to communications with fellow judges and their clerks.<sup>31</sup> An Illinois Supreme Court justice sued a newspaper for defamation in its coverage of the court's handling of a disciplinary proceeding. The newspaper in turn subpoenaed other justices and their clerks for documents related to the disciplinary proceeding. The appellate court barred the subpoenas based on judicial privilege:

If the confidentiality of these intra-court communications were not protected, judges and their staffs would be subject to the pressures of public opinion and might well refrain from speaking frankly during deliberations. Because it is the public who benefits from the impartial and independent resolution of matters which come before a court, the communications between judges and their colleagues and staffs are among those which ought to be protected for the public good.<sup>32</sup>

The Illinois court extended the privilege to communications with other judges' law clerks and staff and to communications between law clerks and held that the privilege was absolute because "[a]nything less than the protection afforded by an absolute privilege would dampen the free expression of ideas and adversely affect the decision-making process."<sup>33</sup>

The Wisconsin Court of Appeals has applied judicial privilege to a judge's personal notes concerning sentencing that were placed in the case file but sealed.<sup>34</sup> The defendant wanted access to the notes to see whether the judge had relied on inaccurate information or improper factors in sentencing. The opinion includes a useful discussion of the purpose of judicial privilege, including an admonition that a judge's personal notes should not be placed in the court file.

Ohio has rejected requests for judges' personal notes, even those placed in court files, on the ground that such notes do not fit within the state's statutory definition of a public record—they are "simply personal papers kept for the judge's own convenience and not official records."<sup>35</sup>

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30. In the Matter of Certain Complaints under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit, 783 F.3d 1488 (11th Cir), *cert. denied*, 477 U.S. 904 (1986).

31. *Thomas v. Page*, 837 N.E.2d 483 (Ill. App. 2005).

32. *Id.* at 490.

33. *Id.* at 494.

34. *State v. Panknin*, 579 N.W.2d 52 (Wis. Ct. App. 1998).

35. *State ex rel. Steffen v. Kraft*, 619 N.E.2d 688, 689 (Ohio 1993); *State ex rel. Pauer v. Ertel*, 776 N.E.2d 1173 (Ohio Ct. App. 2002).

Similarly, Washington courts have held that court files are not covered by the state's public records statute and that there is no common law right of access to a judge's personal notes.<sup>36</sup>

Some state supreme courts have used their rule-making authority to establish a judicial privilege. The Texas Supreme Court's Rules of Judicial Administration, for example, exempt from disclosure "[a]ny record that relates to a judicial officer's adjudicative decision-making process prepared by that judicial officer, by another judicial officer, or by court staff, an intern, or any other person acting on behalf or at the direction of the judicial officer."<sup>37</sup> In Arizona the supreme court's rules keep confidential "[a]ll notes, memoranda or drafts prepared by a judge or other court personnel at the direction of a judge and used in the course of deliberations . . ."<sup>38</sup> In Florida confidentiality applies to

[t]rial and appellate court memoranda, drafts of opinions and orders, court conference records, notes, and other written materials of a similar nature prepared by judges or court staff acting on behalf of or at the direction of the court as part of the court's judicial decision-making process utilized in disposing of cases and controversies before Florida courts unless filed as a part of the court record.<sup>39</sup>

### Judicial Privilege in North Carolina

While there is no North Carolina case law on judicial privilege, the practice of the state's appellate courts makes it virtually certain that they would rule against any attempt to obtain the personal notes of judges or their communications with law clerks or staff. The two state appellate courts have their law clerks and staff sign a confidentiality statement that commits them to not communicating to outsiders "any information, knowledge, opinion, rumor, or gossip about the decision-making process of a court."<sup>40</sup> The statement says it remains in effect after a decision is filed and is applicable after the clerk or other employee leaves the court. The court of appeals also has a Code of Conduct for Staff Attorneys and Law Clerks that parallels the Code of Judicial Conduct and prohibits the disclosure of confidences gained during employment with the court.<sup>41</sup> The examples of confidential information listed in the code include "when a decision is likely to be filed, the substance of draft opinions or *per curium* opinions, who is writing or may write an opinion, how any judge of the Court as a whole is likely to vote or has voted, and how a case is progressing inside the Court."<sup>42</sup>

36. *Beuhler v. Small*, 64 P.3d 78 (Wash. Ct. App. 2003).

37. Rule 12.5(a), Rules of Judicial Administration, Supreme Court of Texas (2009).

38. Rule 123(e)(9)(B), Rules of the Supreme Court of Arizona (2011).

39. Rule 2.420(c)(1), Rules of Judicial Administration, Florida Supreme Court (2011).

40. North Carolina Appellate Courts, Confidentiality Statement (undated) (on file with author).

41. North Carolina Court of Appeals, Code of Conduct for Staff Attorneys and Law Clerks (undated) (on file with author).

42. Although the problem has not arisen in North Carolina, tell-all articles and books by former law clerks and attempts by lawyers to gain confidential information from clerks in other courts have prompted several law review articles on the subject. See, for example, D. Lane, *Bush v. Gore, Vanity Fair, and a Supreme Court Clerk's Duty of Confidentiality*, 18 GEO. J. LEGAL ETHICS 863 (2004–05), and Charles W. Sorenson, Jr., *Are Law Clerks Fair Game? Invading Judicial Confidentiality*, 43 VAL. U. L. REV. 1 (2008–09).

Although the courts' own policies suggest that the court of appeals and state supreme court believe in judicial privilege, existing case law would pose a problem if the issue were litigated. As mentioned earlier, in *News and Observer Publishing Co. v. Poole*<sup>43</sup> the Supreme Court in 1992 rejected the executive branch's argument that separation of powers required the court to recognize a deliberative process privilege exempting draft documents from the public records law. If the legislature's public records law allowed access to drafts, it was argued, the statute would constitute legislative interference with the decision-making process of another branch of government. The supreme court's rejection of a deliberative process privilege for the executive branch in *Poole* would seem to make it harder for the court to claim a similar privilege for the judicial branch.

A way to sidestep the *Poole* decision appears in the court of appeals' 2007 decision in *News and Observer Publishing Co. v. Easley*, also mentioned above.<sup>44</sup> In a dispute over access to correspondence to the governor and other papers related to clemency applications, the court first decided that *Poole* had not intended to suggest that the public records law could never raise separation of powers issues; the *Poole* court had only held that there was no such issue in that case. In *Easley*, though, the court concluded, a separation of powers question arose because the case involved "a specific, broad constitutional commitment of power to the executive branch [the governor's authority to grant pardons] and an accompanying narrow grant of authority to the legislature [to prescribe the "manner of applying for pardons"]".<sup>45</sup>

If a court faced with having to decide whether a judicial privilege exists in North Carolina took the *Easley* approach, it would begin by comparing the broad declaration of judicial authority in Article IV, Section 1—"The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government . . ."—with the limited authority given to the General Assembly over the organization and procedures of the court system. The legislature's constitutional interest in court organization and administration might support its authority to require that court administrative records—records related to court operations such as financial records, calendars, travel records, and telephone logs—be made public, but it would not support the General Assembly's interference in the judicial decision-making process. And the constitutional importance given to inherent judicial authority and judicial independence would strongly favor the court's authority to recognize judicial privilege.

The outcome of the judicial privilege question seems obvious enough; the only question is how the court would explain its conclusion.

## Judicial Privilege at the Trial Level

While judicial privilege seems a certainty for appellate judges and their clerks and employees, its scope is less clear at the trial level.

43. 330 N.C. 465 (1992).

44. 182 N.C. App. 14 (2007). See note 22.

45. 182 N.C. App. at 21. The governor's and the legislature's authority are both contained in Article III, Section 5(6). The *Easley* court went on resolve the matter by holding that the legislature had exercised its limited authority to the extent it desired by enacting statutes dealing specifically with a register of pardon applications and setting the form of pardons, and that it had not intended the public records law to apply. Consequently, the court decided, there really was no conflict between the two branches.

It would seem highly likely that judicial privilege would cover the personal notes and draft orders of superior and district court judges as well as magistrates and clerks of court while performing judicial functions.<sup>46</sup> There is no obvious difference between those notes and the notes kept by appellate judges.

Harder to determine is whether judicial privilege would extend to emails or other communications by trial judges (or magistrates or clerks acting in a judicial capacity) in connection with pending cases.<sup>47</sup> Because they do not have law clerks, superior court and district court judges sometimes email fellow judges or lawyers on the AOC staff or lawyers at the School of Government for assistance with unusual legal issues. The AOC even created an attorney's position for such inquiries and kept other lawyers on the staff from seeing his work. Given the trial judge's circumstance, it would seem that such communications should be treated as the functional equivalent of discussions with a judge's personal law clerk.<sup>48</sup>

## Summary

North Carolina has a broad public records statute and our appellate courts also have recognized a limited constitutional right of access to court records under the "All courts shall be open" provision of Article I, Section 18, of the state constitution. There are statutes other than the public records law, however, that require certain specific court records, such as grand jury proceedings and most juvenile records, to be kept confidential. Moreover, the state supreme court has declared an inherent right of judges to limit access to any court record when necessary to preserve the fair administration of justice. Such power is to be used sparingly; it must be justified by reference to a specific higher interest being served; and the limitation on access must be no more restrictive than necessary. An untested area of North Carolina law is the status of judges' notes and drafts, but it seems likely that if the news media ever sought such documents, the courts would consider them protected by judicial privilege.

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46. Judicial immunity applies to non-judges when they are acting in a judicial or quasi-judicial capacity. Consequently, a clerk of court is entitled to judicial immunity when acting as a judge of probate. *Martin v. Badgett*, 149 N.C. App. 667, 2002 WL 485187 (2002) (unpublished). A court-appointed referee in an equitable distribution case has been considered an agent of the court and thus entitled to judicial immunity. *Sharp v. Gulley*, 120 N.C. App. 878 (1995).

47. There would be no basis for applying judicial privilege to emails that concern only scheduling or other housekeeping matters. Because of limited staff, trial judges often communicate directly with lawyers in cases about schedules or preparation of orders or the like. Judges likewise use email to communicate with court clerks and judicial assistants about similar issues. Those exchanges between judges and lawyers or court personnel either do not involve the judge's deliberative process or are with outsiders (the parties' lawyers) with whom no confidentiality should be expected.

48. A separate question is whether the judge might ethically be required to disclose the communication to the lawyers in the case. The North Carolina Code of Judicial Conduct Canon 3A allows a judge to have ex parte communications on legal issues with disinterested experts. School of Government faculty are considered such disinterested experts. See Judicial Standards Commission opinion in letter of September 29, 2005, from Paul R. Ross, Executive Secretary, to Judge Catherine C. Eagles. The North Carolina code has been criticized because, unlike the American Bar Association Model Code of Judicial Conduct and the codes of some other states, it does not require the judge to disclose to the lawyers in the case that the judge has had such communications, nor does it require the judge to give the lawyers a chance to respond to the advice from the disinterested expert. See *State v. Phillips*, 171 N.C. App. 622, 633 (2005) (Wynn, J., concurring).



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