

Florida Electronic Recording Advisory Committee

Date: August 20, 2007

Time: 9 a.m. to 2-p.m.

Location: FACC Office, 3544 Maclay Blvd., Tallahassee, FL 32312

Members Present:

Hon. Martha O. Haynie

Hon. J. K. "Buddy" Irby

Hon. James Jett

Hon. R.B. "Chips" Shore

Ms. Sue Baldwin

Ms. Patricia P. Hendricks Jones

Mr. Steve T. Rumsey

Mr. Arnold "Skip" Straus

Mr. Scott Jenkins for Mr. John M. Hutchison

Members Absent:

none

Hon. Karen Rushing, President of the Florida Association of Court Clerks and Comptrollers, acting chair, opened the meeting at 9:10 a.m. Rushing addressed a variety of housekeeping issues for the meeting. She noted that the Florida Association of Court Clerks' (FACC) staff was required in the law to provide staff and technical support to this committee, that the law also required that all committee members would serve without compensation. She also clarified that part of the agreement for passage of the bill was that no state funds be expended on the administration of the committee, such as travel. As such, she informed the committee, it was agreed with the Department of State that all meetings would be held in Tallahassee.

Rushing explained further that as staff support, the FACC staff had worked with the Department of State to insure that the proper meeting notices were posted. Accordingly, the meeting was advertised in the Florida Administrative Weekly (FAW). Additionally, staff developed a button on the FACC homepage, www.flclerks.com, where meetings and associated information will be posted.

Rushing recognized the members of the committee and asked each one to introduce themselves and provide a brief explanation of their interest in the committee. Scott Jenkins, Florida Banker's Association, noted that he was just sitting in for their association appointee, John Hutchison, who would be in attendance at the next meeting.

Rushing recognized Ms. Judith Ring, the State Librarian and Director of the Division of Library and Information Services, with the Department of State (DOS). Ms. Ring introduced the following DOS attendees:

Staci Bienvenu, General Counsel

Jim Berberich, Information Resources

Kevin Gotfredson, Law Clerk

Logan Mitchell McFadden, Legislative Affairs

The chair recognized Fred Baggett, FACC General Counsel and asked him to review the Sunshine Law and its applicability to the committee. Mr. Baggett explained that the committee was formed by legislation, SB 2038, which went into effect on June 27, 2007. The committee must hold open meetings and advertise those meetings. He felt that the Attorney General opinions and case law were clear, that while this committee is one that makes recommendations, the Sunshine Law does apply to this committee. He stated that the committee members should feel free to communicate with committee staff and the public, but not with each other without proper notice. He noted that two or more members cannot meet to discuss issues that may come before the com-

mittee in the future unless notice is given. However members can meet on matters other than potential committee issues without having to give notice. In the event 2 or more members were to meet or communicate it must be advertised appropriately. Ms. Haynie asked, on the notice of written communications, if committee members write a letter or memo, can they copy everybody? Baggett responded that it would require notice as it would be deemed a meeting. Mr. Irby asked if it would be alright, if at an FACC meeting where another member or so may be present, to communicate to a group of Clerks to tell them what this committee is doing or has done. Mr. Baggett deemed it to be a report, as long as you and the other committee members weren't discussing issues together, but rather hearing the concerns of others.

Rushing presented a brief, high level review of Florida County Recorder Activities and Standards. She listed the Recorder responsibilities generally as maintaining one general series known as the Official Records which is open to the general public. On each filed instrument the recorder must enter the sequential filing number, affix time and date of recording, index the type of document, and list the parties who are affected by the instrument being filed. When a document comes into the recorder's office, a filing fee is due and the document may be subject to other required compensation, such as documentary stamps. Generally, the Clerk reviews the document for the following items: that it is an original, that it is signed, that, if it is required to be notarized or witnessed that it is, and generally, Clerks review the document to make sure that it is intended to be filed in the proper county. Once the review of the document has taken place, the information is captured in an automated system, and the fees and taxes are receipted. The fees for Clerks are generally assessed by the number of pages being filed. If there are more than a certain number of parties, there is an additional assessment. If documentary stamp taxes are collected they are sent to the Florida Department of Revenue, and any other accompanying documentation, like a DR 219, are sent to the property appraiser and department. There are a variety of instrument types in the Official Records besides deeds, such as plats, road maps, mechanics liens, bonds, homesteads, judgments or orders from the court and probate documents. Of note, the Recorder is also required to preserve the records and keep a permanent archive of those records.

Ms. Rushing recognized Mr. Baggett to review chapter 2007-233, Laws of Florida, the law creating the committee. This new law became effective June 27, 2007. He commented that prior to this bill, current law provided for electronic transactions, but did not clearly provide for electronic recording of documents that affect real property titles. This bill adopted the Uniform Real Property Electronic Recording Act as provided by the National Conference of Commissioners on Uniform State Laws, (NCCUSL), and was supported by the Clerks, Title Industry, Real Property Section of the Bar, and all other interested parties.

He noted that the act clarifies the authorization for the electronic recording of real property documents with county recorders. This bill authorizes county recorders to receive records in electronic form and store electronic records. Clerks can electronically record, there are just no uniform standards at this time. Electronic Recording would be permissive and not mandated. The bill equates electronic documents and electronic signatures to original paper documents and manual signatures, so that any requirement for originality (paper document or manual signature) is legally satisfied by the electronic document and signature. The bill provides that the standards and practices for electronic recording be promulgated by rule by the Secretary of State after consultation with the Electronic Recording Advisory Committee so as to establish uniform rules for any Clerk that implements an electronic recording system. Until these rules become promulgated, there are no uniform standards in the state.

The bill requires the committee to consider:

- Standards and practices of other jurisdictions.
- The most recent standards adopted by national standard-setting bodies, such as the Property Records Industry Association.
- The views of interested persons and governmental officials and entities.
- The needs of counties of varying size, population, and resources.
- Standards requiring adequate information security protection to ensure that electronic documents are accurate, authentic, adequately preserved, and resistant to tampering.

The Electronic Recording Advisory Committee is made up of five members appointed by the FACC, one of whom must be the Broward County Recorder, two representatives of the Florida Land Title Association, one representative from the Florida Banker's Association, and one attorney from the Real Property, Probate and Trust Law section of The Florida Bar. The committee is to dissolve in 2010. The date was set by the Legislature with the expectation that the rule promulgation process, while it should not be lengthy, the committee would have time to offer any "tweaks" needed or updating needed after the rule goes into effect.

Baggett clarified that there is no fiscal impact as the bill requires the FACC to provide administrative support and technical expertise to the Electronic Recording Committee and the Department of State. Baggett expressed appreciation to the Department of State for their willingness to allow FACC to staff the group and for the department to undertake the rulemaking process later on.

He noted that the bill equates electronic records to paper records in whatever form.

Ms. Jones asked Baggett for clarification by asking, "You made a statement that clerks were not precluded from accepting electronic recording; they are just doing so with out uniform standards." Baggett responded that the law is clear and did not prohibit the Clerks from the acceptance of electronic documents. There is acceptance for electronic signatures and electronic notarization. The bill does not require the Clerks to refrain from accepting documents in electronic form. Straus explained that the title underwriters have issued direction that until the committee issues their standards, if the document was electronically recorded, they would not make title insurance available. Mr. Baggett explained that the bill, effective in June, gave Clerks clear authority to accept electronic documents. It does not prohibit the clerks from taking electronic documents until a rule is promulgated. Haynie explained that she felt the Uniform Electronic Transactions Act (UETA) passed in 2000 gave us the authority to accept electronic documents. Baggett agreed and explained that this bill was passed to clarify that you could take recorded documents in electronic format and provided for the adoption of standards.

Ms. Judith Ring, DOS, spoke to the rulemaking process found on www.flrules.org and the general process for rulemaking. She noted that in a regular rulemaking process that there are at least two opportunities for public hearings and discussion of the proposed rules. The general timeframe for rulemaking is about 7-9 months.

Ms. Baldwin noted that adoption of standards should not be difficult as all those in Florida were already using the nationally accepted PRIA standards.

Jett felt that he had been told that he should put his efforts for electronic recording on hold and wanted to make sure he was hearing that he could move forward. Representatives from the Department of State (DOS) expressed that they would have no objection at this point. Professor Fry was recognized and she clarified that in her perspective, because of Florida's UETA law, that Florida recorders could accept electronic documents.

Straus again asked for clarification if the Clerks could accept level 1 electronic documents(starts as paper and converts to electronic). Baggett explained that this decision was outside the scope of the committee.

Shore asked if this committee provides recommendations to the DOS and they accept it, is the committee over or does it continue to 2010? Baggett responded that the requirement is to meet annually and generally noted how many more meetings could be required under the current law.

Rushing told the committee that Tim Reiniger, National Notary Association, was unable to be present at this meeting but would like to appear at a later date.

Rushing introduced Professor Pat Fry, Professor of Law Emeritus, University of Missouri-Columbia, who presented the Purpose for the Uniform Real Property Recording Act (URPERA), the role of the National Con-

ference of Commissioners on Uniform State Laws (NCCUSL) and how the UETA and Electronic Signature (E-Sign) Act work together.

Marty Haynie asked if there was a conflict between the recently passed Florida Electronic Notary Act and the bill creating the Uniform Electronic Recording Act. Mr. Baggett and Ms. Fry both commented that there was no conflict. While the bill says the notary signature must “be capable of verification,” it is not the recorder’s place to verify an electronic notarization.

Straus asked Professor Fry her comment wherein she noted it was hard to track the “original.” He queried, “Between paper and electronic – which is the original?” Professor Fry said it does not matter under either URPERA or UETA.

Carmen Bramante was recognized and noted that while all records in a closing document can get from paper to electronic and from electronic to paper, a promissory note cannot. Once it is paper it must stay paper; if it is electronic, it must stay electronic.

Straus continued, “So, if I prepare a package (electronically) and send it to the county recorder, can she accept it? Professor Fry answered, “Yes, if she agrees to it.”

Straus asked Professor Fry if the NCCUSL commissioners drafting the URPERA have an opinion as to what this committee is to do? Professor Fry explained that, while she was not on that committee, she did not believe there was any reason or attempt to interfere or disrupt the processes underway. It was to help establish a format or process under which in any state you could work towards interoperability.

Rushing introduced Ms. Carol Foglesong, Assistant Comptroller, Orange County Comptroller’s Office and President of the Property Records Industry Association (PRIA). She presented to the committee an overview of the association and what activities they have undertaken since inception in 2002.

Rushing then introduced Mr. John Jones, Arion Zoe, and Mr. Carmen Bramante, CDB Consultancy, who presented a powerpoint slideshow about an eRecording Committee and Its Responsibilities, including an overview of UETA, eSIGN and URPERA, and the purpose and organization, challenges, deliverables, producing success, ongoing responsibilities, and next steps.

They noted that Florida was far ahead of other states in that they have already undertaken a lot of the work needed to establish a framework upon which e-recording can be built. Bramante and Jones also noted that Florida chose the advisory committee model instead of passing the responsibility directly to a state agency. They urged the committee to look over what had already been done by the industry and in the other states and to carefully consider what else should be addressed. They mentioned the Kansas Electronic Recording Commission draft report as a good example of the type work this committee could review.

The chair thanked Mr. Jones and Mr. Bramante for their presentation and moved to the election of the chair.

Rushing entertained motions for committee chair nominees. Irby nominated Shore, seconded by Jett. Baldwin nominated Haynie, seconded by Rumsey. The vote was 5-3, with Haynie chosen as chair. For vice chair, Irby nominated Shore, Jett seconded. Baldwin nominated Mr. Straus who declined. Shore was elected vice chair without opposition.

A lunch break was held from 12:25 p.m. to 1:30 p.m.

Haynie, chair, called the meeting back to order at 1:30 p.m. She asked members to look at their calendars to consider a date for the next meeting. She discussed moving the meeting to Orlando. DOS members expressed

concern over their agency travel freeze. Ms. Hayne then entertained the idea that perhaps there could be one more meeting face to face then the committee could meet by conference call or at another location. Irby moved that the next meeting be held in Tallahassee and indicated that Mondays and Tuesdays were bad for Clerks. There was general discussion of potential dates, as well as the fact that the Special Session could cause a scheduling problem.

Haynie asked Baldwin to chair a subcommittee and bring back to the full committee a recommended workplan, with goals and objectives, for the committee to review at the next meeting. Others named to the subcommittee are: Rumsey, Shore, and Straus. It was noted that the subcommittee is considered to a meeting of the committee under the Florida Sunshine Statute and as such must be noticed, keep minutes, make an agenda available and meet in a venue where the public can come if they so choose.

Haynie asked if anyone in the audience wished to speak. She recognized Mr. Steve Jordan, Fidelity National Financial, who asked if the committee could help push e-recording forward and get feedback from the title community.

Irby commented that he would like to get the rules together, add anything else needed for Florida, and get this done. Paul Clifford, Simplifile, told the committee that e-recording in Florida had come to a halt with the passage of URPERA and would not resume unless underwriters got positive reassurance that it could continue. Baldwin asked that this discussion appear in the minutes. Jett asked that it be put in writing from the Secretary of State's Office that it is ok to electronically record. Judith Ring, DOS, told the group she would take it up with their General Counsel's Office. Haynie clarified that the DOS had no objection to it to recorders continuing with e-recording.

Straus made a motion to ask the Secretary of State to confirm or deny that electronic recording as it exists in Florida can continue. Shore seconded the motion for discussion. Mr. Baggett clarified that the duty of the recorder is not under the jurisdiction of the Department of State and that they have no authority to tell recorders to e-record or to stop. Irby amended the motion to clarify that the question should be asked of the Attorney General. Straus withdrew his motion. Chips seconded the withdrawal. Straus mentioned that the underwriters still have an issue. Clifford, Simplifile, explained that his company has a cease and desist order. Jett asked if Baggett could do a memo to the group. The procedure for requesting a legal opinion was discussed and the group decided to let the issue alone for now. Rushing reminded the group that this is an industry issue, not a clerk/comptroller's issue. Rumsey noted that this issue should not be considered by this committee. Chair Haynie agreed that the committee should not overstep its bounds. Rumsey suggested that the committee look at the Kansas Electronic Recording Commission's draft plan as to maximize the use of the committee's time. The members agreed. Jordan, Fidelity National Financial urged the committee to move quickly.

Haynie suggested that the next meeting be scheduled sooner rather than later, sometime with the next eight weeks, and that all would be notified.

Ms. Haynie adjourned the meeting at 2:45 p.m.

Respectfully submitted,

Beth Allman as Recording Secretary