

## REPORTS OF SPECIAL COMMITTEES

### **SPECIAL COMMITTEE ON TECHNOLOGY AND THE PRACTICE OF LAW**

*Clyde R. Christofferson, chair*

This past year the Committee on Technology and the Practice of Law completed a report to bar leadership on electronic filing and remote access to court records. The report is intended as a contribution to an ongoing discussion of the difficult problem of reconciling legitimate privacy concerns of litigants with the presumption of open court records, when those records are available over the Internet.

The committee's approach accepts substantive law as that may develop with respect to the conflict between privacy and open judicial proceedings. The electronic-filing and remote-access issues are closely intertwined because of the practical effect of electronic record keeping upon access to the public record.

The practical effect of electronic record keeping is threefold. First, there is concern that the electronic record keeping process itself increases the risk to privacy interests. This may prompt litigants to avoid electronic filing altogether. Second, alternatively, the same perception of risk may prompt litigants to seek protective orders to cover the enhanced risk, placing an increased burden upon the courts in cases where electronic filing is employed. Third, in those circumstances where redaction of private information is appropriate, the burden of redacting the electronic record may be significant.

Three recommendations highlight the report's response to these issues: First, the report proposes placing the burden of identifying and redacting private or personal information on the parties, who have the interest and motivation to weigh whether the risk to privacy warrants the required effort. Second, the report contemplates appropriate court rules or statutes to identify specific information that would support a protective order, thereby reducing the need for a detailed hearing for redaction of such information. Third, the report recommends a balanced procedural mechanism for minimizing the potential burden upon the courts of hearings for protective orders. A party who desires to protect information in a document would be responsible for preparing a redacted version for the public file that includes a description of the redacted information so that another party is able to challenge the propriety of redaction. If a challenge is successful, the challenging party would be awarded its costs if the redaction was found to be in bad faith.

The Supreme Court of Virginia has provided by rule for electronic filing and is in the process of obtaining support from contractors for the technical aspects of implementation, pending availability of funding. The current rule has been used in pilot projects and requires consent of the parties and the judge. The report recommends that the rule be modified to allow law firms to develop regular procedures for filing electronically, even if the other party does not elect to do so. It should be noted that electronic filing will become mandatory in the Western District of Virginia in December 2004.

