SUPREME COURT OF FLORIDA

ROBERT A. BUTTERWORTH, ETC.

Petitioner,

vs. CASE NO.: SC01-1398
L.T. No.: 2D00-1346

CHIEF JUDGE OF THE THIRTEENTH
JUDICIAL CIRCUIT

Respondent,

and

MEDIA GENERAL CONVERGENCE and
MEDIA GENERAL OPERATIONS, INC.

Petitioner,

vs. CASE NO. SC01-1396
L.T. No.: 2D00-1346

CHIEF JUDGE OF THE THIRTEENTH
JUDICIAL CIRCUIT

Respondent.
_____________________________________/

BRIEF OF AMICUS CURIAE
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INTRODUCTION AND SUMMARY 0F ARGUMENT

By order dated August 28, 2001, this Court granted The Florida Conference of Circuit Court Judges (the "Conference") leave to appear in this matter as amicus curiae. The Conference now respectfully submits this brief addressing the question the Second District Court of Appeal certified as one of great public importance:

> Under what circumstances are documents reflecting social, romantic, or sexual relationships of judges deemed to be judicial records subject to public disclosure under Florida Rule of Judicial Administration 2.051?

The Conference agrees that a clear answer to *this* question, as certified, is of great importance. The general topic may stimulate public interest, but it is of much practical importance to the Conference, whose members are charged with day-to-day responsibility of abiding by the Rules of Judicial Administration.

Petitioners' briefs gloss over the certified question in ways that are unhelpful at best, putting many proverbial carts before the horse. Despite the rhetoric, this case does not concern the "public's right to know" about the judicial process or "the official business of the court." Rather, this case concerns petitioners' efforts to circumvent a well-established and balanced system of record-keeping. If these efforts succeed, already overburdened Conference members will be saddled with an

unjustified web of additional administrative duties that severely infringe on personal privacy rights.

In response to the certified question, the Conference submits that documents reflecting social, romantic, or sexual relationships of judges are public records subject to disclosure when — and only when — the relationship is contrary to law or ethics. Under any set of facts even approaching this measure and under current standards, the records would be available through the Judicial Qualifications Commission. Otherwise, the relationship is perfectly permissible and a private matter. Conference members should not be charged with monitoring social relationships to insure that every related document is preserved and made available for possible disclosure and public consumption.

STANDARD OF REVIEW

The issue presented by this case is purely a question of law and therefore, the *de novo* standard of review applies. *Armstrong v. Harris* 773 So. 2d 7 (Fla. 2000).

ARGUMENT

Judges are human beings – the quintessentially social animal. As in any social endeavor, the people working in Florida's courthouses are engaged in a complex web of social relationships with others. As in any business setting, some of these relationships concern the business at hand, and some do not. Even a single relationship is not a binary phenomenon, either completely business-related or not. For example, at one moment a judge may ask an assistant, "Where is that brief?" and at another the question may be, "How was your vacation?" To categorize every event in a courthouse as business related — as part of the "judicial process" or "administration of the court" — is to ignore social reality and to reduce courthouse employees to single-dimensional automatons.

The question in this case is under what circumstances, if any, should media interests have access to records reflecting judges' "social, romantic, or sexual relationships." The media interests characterize such records as "judicial records" subject to disclosure under Florida Rule of Judicial Administration 2.051. The Conference respectfully submits that this broad view must be rejected as dehumanizing in theory and unworkable in practice. With no benefit other than perhaps increased sales of newspapers, the media interests' position would spawn two primary evils: (1) a gross intrusion on personal privacy and (2) an unworkable administrative burden on

the courts of Florida. No one denies the sanctity of the principle of open access to public records, but some level of reasoned judgment must guide application of the principle. In this case, reason demands that the Court reject petitioners' position.

I. ABSENT ILLEGAL OR UNETHICAL CONDUCT, THERE IS NO LEGITIMATE MEDIA INTEREST IN JUDGES' "SOCIAL, ROMANTIC, OR SEXUAL RELATIONSHIPS" AND PRIVACY RIGHTS SHOULD BE PROTECTED

At face value, the absurdity of the media interests' position is apparent. Petitioners cannot seriously believe that every record relating to a judge's "social, romantic, or sexual relationships" constitutes a judicial record. The adjective "social" covers much broader territory than either "romantic" or "sexual." As certified, the question is not even limited to documents created at the courthouse or related to courthouse activities. If a judge sits at home and writes a letter confirming reservations for a law school reunion dinner, is that letter a judicial record because it relates to a "social relationship" of the judge?

In practice, of course, no one would care about such a letter – it is purely academic whether it constitutes a judicial record. The media interests are really after records that make for good stories, *i.e.*, those relating to romance and sex (and, presumably, the courthouse). In evaluating this issue, it is important to understand the social context in which it arises.

Dr. Jan Yager, a sociologist and management consultant, has confirmed what many people know instinctively: “After the college years, the workplace, more than any other situation, is where single workers of all ages have the best opportunities to meet and get to know an eligible, potential mate." Allison Bloom, *Love Is in the Air*, at www.careerbuilder.com/ wl_work_0102_loveinair.html. According to one survey, about one third of all romantic relationships may begin in the workplace. Sheldon N. Sandler, *Discouraging Sexual Harassment and Favoritism in the Workplace*, Del. Empl. L. Ltr. (Nov. 1998). The most likely outcome of an office romance is marriage, according to 55% of the respondents to a survey conducted in 1998 by the Society for Human Resource Management (see www.shrm.org/press/releases/980128-3.htm).

This phenomenon is not new. “Men and women have been falling in love at the office for eons and many of these romances end up in marriage.” Cheri L. Swales, *Office Relationships*, at www.careerbuilder.com/wl_work_0012_relationships.html. Studies suggest, however, that office romances are likely to increase for several reasons: “One reason is that people are spending more time at work. Another reason is that people are staying single until later in life. Therefore, they are still single when they enter the workforce. With less time to meet people away from work, many people

are turning to the workplace to find romance." William M. Anderson, *The Cupid Problem*, Kan. Empl. L. Ltr. (Feb. 2000).

These sociological facts may have spawned a cottage industry for lawyers, but whatever one's personal views on the wisdom or morality of such relationships it must be stressed that they are not in themselves prohibited. To be sure, in some instances superiors may take unfair advantage of subordinates, and in others romantic attention may be so clearly unwelcome that continuing it amounts to sexual harassment. No one condones such conduct. But these potential negative results are isolated and, as a practical matter, do not justify policing office romances, much less outlawing them.

According to the recent survey conducted by the Society for Human Resource Management, 72% of the companies surveyed did not have a written policy addressing workplace relationships, and of those companies that did have either a written or unwritten policy, only 4% prohibited such relationships (see www.shrm.org/press/releases/980128-3.htm). To employers interested in adopting such a policy, one expert advises that any policy addressing workplace relationships should consider the following:

! There should be a legitimate need for a policy.

- Keep any inquiries into employees' personal matters as limited as possible.
- Show respect for employees' privacy.
- Strictly limit discussion of personal information to those members of management who really need to know.

Barbara M. Tapscott, *Workplace Romances: Should You Be Worried?*, Iowa Empl. L. Ltr. (Oct. 2000).

It is against this backdrop that the media interests in this case demand blanket access to "documents reflecting social, romantic, or sexual relationships of judges." If the vast majority of private employers do not police such relationships, why should the circuit courts in Florida?

There can be no doubt that the type of documents at issue directly implicate important privacy interests. The close linkage between sexual matters and strong privacy interests is well-recognized throughout the law. For example, in one case under the Federal Freedom of Information Act, 5 U.S.C. § 551 et seq. (2001) ("FOIA"), an accused requested copies of documents from a Navy investigation into accusations that he had harassed and threatened to rape another person. The Navy provided the requested documents, but redacted the names of the accuser and some witnesses. Evaluating the potential for an "unwarranted invasion of privacy" under the

FOIA section 7(C) exemption, the Ninth Circuit observed that disclosure of the names could constitute an invasion of privacy "because such a disclosure might result in great embarrassment to or stigmatization of those persons based . . . on the ***sexual, and therefore inherently private and potentially embarrassing***, nature of [the accused's] alleged actions." *Coulter v. Reno*, 163 F.3d 605 (9th Cir. 1998) (table, text at 1998 WL 658835, *1) (emphasis added).[1]

The inherently private nature of sexual matters is also apparent in the common law of torts, which recognizes a cause of action for invasion of privacy by public disclosure of private facts. "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public." *Restatement (Second) of Torts* § 652D (1977). As the comment to this section recognizes, "***Sexual relations . . . are normally entirely private matters***, as are . . . most intimate personal letters." *Id.* § 652D c mt. B (emphasis added).

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[1]It is worth noting that Florida Rule of Judicial Administration 2.051(c)(7) provides that "all records made confidential under . . . federal law" are confidential under the rules and exempt from disclosure. Cases applying FOIA are thus persuasive in this matter. In addition, Rule 2.051(c)(8) adopts the statutory exemptions to the state Public Records Act, section 119.07(3) of the Florida Statutes. *Florida Publishing Co. v. State*, 706 So. 2d 54, 55 (Fla. 1st DCA 1998).

Though pundits did not coin the term "politics of personal destruction" until late in the twentieth century, it has long been known that the more personal a piece of information, the greater its political potential. The most glaring recent example is, of course, the scandal surrounding former-President Clinton. In determining whether to lift a confidentiality order imposed in the Paula Jones case, the trial court judge had this to say about the media's use of information:

> Much of the discovery in this case of alleged sexual harassment has delved deeply into the personal lives of individuals and elicited information that, regardless of its truth or falsity, could prove damaging to reputation and privacy. Many in the media have shown no restraint in their willingness to place such personal information in the public domain despite the pain it may cause. Driven by profit and intense competition, gossip, speculation, and innuendo have replaced legitimate sources and attribution as tools of the trade for many of these media representatives. Stories are no longer subjected to critical examination prior to being printed.

Jones v. Clinton, 12 F. Supp. 2d 931, 934 (E.D. Ark. 1998). The Conference is not imputing less than professional motives to the media interests pursuing this case. The point is, though, that the very nature of the records at issue gives rise to the real threat of damaging the legitimate privacy interests of those involved.

One might reply that the players in the Clinton drama ultimately got what they deserved. This reply is a variation of the argument, "If you've done nothing wrong, what do you have to worry about? If you oppose unfettered access, you must be hiding something." This position has some superficial appeal, but it should not be

blindly advanced, without regard for the personal interests at stake. "One who serves his state or nation as a career public servant is not thereby stripped of every vestige of personal privacy, even with respect to the discharge of his official duties." *New England Apple Council v. Donovan*, 725 F.2d 139, 142 (1st Cir. 1984) (citation omitted). The purpose of public records laws is to inform the citizenry of the workings of government, not to expose to the light of publicity every private factual detail concerning the individuals who work for the government. *Halloran v. Veterans Admin.*, 874 F.2d 315, 323 (5th Cir. 1989).

If a judge is not stripped of every vestige of personal privacy with respect to the discharge of official duties, the same must be true, to an even stronger degree, when it comes to matters having nothing to do with official duties, such as the judge's "social, romantic or sexual relationships." If efforts to protect against media intrusion into such matters are taken as evidence of having something to hide, so be it — the Conference respectfully submits that the vast majority of people would agree that it is appropriate to "hide" such matters from media intrusion, not in some furtive or otherwise morally loaded sense, but because they are intensely personal and sensitive matters that are no one else's business. A romantic relationship does not become grist for the media mill simply because a judge is involved. Likewise, a document relating

to a social relationship does not become a "judicial record" simply because a judge wrote it, or because someone else wrote it about a judge.[2]

If it were otherwise, imagine how easily powerful media interests could ride herd on judges they targeted for their opprobrium. As proven in the Clinton cases, a little "gossip, speculation, and innuendo" goes a long way to destroying people's lives, even innocent ones. A few newspaper reports of dinner dates or nights out with companions of an interesting nature, followed by a broad request for documents relating to the relationship, would be powerful means for any media interest to pressure a judge. Judges who had done nothing wrong would be forced to prove their innocence, and in the process make available for public inspection every document they wrote having to do with their "social, romantic or sexual relationships."

A strong commitment to the principle of open access to public records does not dictate such an absurd result. Despite their strong rhetoric, even the media interests in this case would concede as much and, indeed, already have. For example, this Court can note that on August 23, 2001, the editors of *The Tampa Tribune* spoke out against a proposal coming before the Judicial Conference of the United States,

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[2]The Conference is not suggesting that a balancing test should be employed when determining whether a document that indisputably is a "public record" should be disclosed. *Cf. Wallace v. Guzman*, 687 So. 2d 1351 (Fla. 3rd DCA 1997). But it is appropriate to consider the competing interests of personal privacy and the public's right to know where, as here, the issue is whether a document *is* a public record.

whereby employees of the federal judiciary would have no right of privacy in anything they did on their computers at work. The editors noted, "How discomforting to think that every . . . word written would be judged and reported. . . . Monitor for cause, not curiosity. To go further would be to place an uncomfortable level of intrusiveness into the hands of busybody bureaucrats." *Limit Bureaucratic Monitoring of Judiciary's Computer Use*, THE TAMPA TRIB., Aug. 23, 2001, at 14. It is no more comfortable when media interests with an agenda, instead of a busybody bureaucrat, possesses a level of intrusiveness that allows them to monitor every word written by or about a judge.

II. THE MEDIA INTERESTS' POSITION WOULD IMPOSE AN OVERWHELMING BURDEN ON COURTHOUSE ADMINISTRATION

Petitioners' position would not only trample on personal privacy rights, but also bog down the courts with unnecessary and intrusive administrative burdens. Returning to the letter-writing judge example from above, suppose now the letter is written in chambers. Suppose the letter, instead of confirming reservations, is addressed to an old law school acquaintance. What if the judge and the acquaintance once were romantically involved? What if either the judge or the acquaintance harbors unconscious desires to become romantically involved? Of course, no one could know for sure. Should Conference members be charged with reviewing, retaining, and

indexing every document like this, so that if anything should develop in the future, the court would be able to retrieve the document in response to a demand from the media?

Perhaps more to the point, what if the judge transmits an e-mail message instead of mailing a letter? Should the judge be required to generate a hard copy of the message, which can then be submitted for review to determine whether it reflects a social, romantic, or sexual relationship? To save the judge the trouble of generating a hard copy, or to guard against willful circumvention of the requirement, should Conference members simply install an electronic snooping system to monitor all e-mail messages? If that is justified, why stop there? Why not monitor all telephone calls, too, because one never knows when a judge might be using the telephone to further some kind of personal relationship — which is by definition of interest to the public, according to the media interests.

These questions are rhetorical at present, but they are neither far-fetched nor exhaustive. Variations are limitless, but the foregoing examples suffice to illustrate the defects in the position advanced by Petitioners. And to what end? To enable court administrators to assist media searches for information, no matter how remotely removed from the actual business of the court, and no matter the end to which the media intends to put the information.

Petitioners' view is at odds with the current system implemented by the Florida Rules of Judicial Administration, whose drafters expressly recognized that not every e-mail message is available for public consumption simply because it originated at a courthouse. The drafters comment that e-mail constitutes a "judicial record" only if it concerns "official business information." Fla. R. Jud. Admin. 2.051 Committee Commentary.[3] The rule commentary is unambiguous: "E-mail may also include transmissions that are clearly not official business and are, consequently, not required to be recorded as a public record." *Id.* The media interests pursuing this case would destroy this existing clarity by expanding the category of "official business" to include any record relating to a judge's "social, romantic or sexual relationships."

At page 18 of their initial brief, the media interests make light of the suggestion that they advocate an intrusive and burdensome definition of judicial record. They suggest that *their* request was limited to documents reflecting "social, romantic or sexual relationships" communications that were provided to the Chief Judge. First, their request was not so limited. They sought records made or received by the Chief

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[3]The drafters further note that most "official business" messages, while constituting judicial records, would nonetheless be exempt from public disclosure under Rule 2.051(c). In particular, about a universe of documents including "direct communications between judges and staff and other judges" the drafters expressly state, "All of this type of information is exempt from public disclosure under Rule 2.051(c)(1) and (2)."

Judge *or* the Court Administrator's office. Thus, the need to designate a repository, collection, preservation and review process exists even under the "limited" request in this case.

Second, and more importantly, as the media interests have so vehemently argued throughout this case, the public status of a document is not determined by where it is located. It is determined by its nature, content and circumstances in which the document is created. The certified question seeks guidance on determining whether documents reflecting the social, romantic or sexual relationships of judges are judicial records. The question is not limited to documents created or received by the Chief Judge or the Court Administrator. And this Court's inquiry should not be so limited, because next week's media request for records likewise may not be.

To the extent the requested documents may be deemed to relate only to allegations of wrongful conduct on the part of judges, Judge Alvarez correctly recognized that there are procedures in place governing public disclosure. Rule 2.051 applies under those circumstances and it is sufficient to ensure disclosure of documents containing information about which the media and public have a legitimate interest. As such, the Judge Ward documents requested by the media here became available when the Judicial Qualification Commission found probable cause. Yet, the media interests seek to institute a new procedure where there is no need for it. In

short, with respect to those documents relating to the conduct of judges about which the media and public have a legitimate interest, there are mechanisms in place for their disclosure. There is no reason to further burden the already overburdened administration of justice by the circuit courts in order to provide a means of disclosure for documents already available.

III. THIS COURT SHOULD NOT ADDRESS THE MEDIA PETITIONERS' SUGGESTION FOR ENACTMENT OF A NEW PROCEDURE APPLICABLE TO RULE 2.051 REQUESTS.

The Media Petitioners suggest that this Court should adopt a new set of procedural regulations governing review under Rule 2.051(d) of circuit court denials of an access request. The Conference submits that the revamping of Rule 2.051(d) suggested by Petitioners is not appropriate.

Although it may be within the authority of this Court to change the rules of Judicial Administration on an *ad hoc* basis, the usual and orderly process of rule making should be followed before the Court considers adopting substantial changes as suggested here. If media representatives believe the existing review procedure is inadequate, they are free to petition this Court for a rule change. The Court would then invite public comment and have the benefit of full briefing by all interested entities.

Petitioners ignore entirely the practical implications of the procedures they suggest. For example, if judges are to be subjected to depositions and required to

answer interrogatories when a denial for access to records is challenged, they will be entitled to representation by counsel. Provisions must be made for the retention, payment and oversight of such counsel. Likewise, if the district courts are to appoint special masters who will, according to petitioners, act as the equivalent of a federal court magistrate, the special master will have to be paid. Petitioners offer no suggestion with respect to funding or otherwise administering the extensive process they seek to create. Nor do they recognize the disruption and burden to the circuit court while Chief Judges or other court personnel are taken from their routine and essential duties and cast in the role of party litigants. The Conference respectfully submits that these are concerns that would need to be considered and addressed in an appropriate rule making procedure before the Court would entertain the substantial rule changes Petitioners have suggested.

Putting aside the administrative and financial difficulty inherent in Petitioner's proposals, the Conference observes that the existing Rule 2.051 procedure has been in effect since 1992, and Petitioners have not demonstrated a need for change. Petitioners complain that the documents they sought were never reviewed *in camera* by the district court, but they fail to establish that the outcome would have been different if such a review had been granted. Indeed, it is clear from the district court opinion that the court assumed the documents at issue contained the type of

information Petitioners claimed they were seeking. Likewise, Petitioners have not shown that the outcome might have been different if they had been permitted to depose Judge Alvarez or other court personnel. In short, the Petitioners have not established a compelling need for the drastically intrusive process they seek.

CONCLUSION

Based on the foregoing, the Florida Conference of Circuit Court Judges respectfully submits that the opinion of the Second District Court of Appeal should be affirmed and the court should hold that documents reflecting the social, romantic or sexual relationships of judges are not judicial records subject to public disclosure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by United States Mail upon Gregg D. Thomas, Carol Jean Locicero and James J. McGuire, Holland & Knight LLP, P.O. Box 1288, Tampa, Florida 33601-1288, Counsel for Petitioners Media General etc.; Thomas E. Warner, Office of the Attorney General, The Capitol - PL01, Tallahassee, Florida 32399-1050, Solicitor General, counsel for Petitioner Robert A. Butterworth; and C. Steven Yerrid and Richard C. Alvarez, The Yerrid Law Firm, 101 E. Kennedy Boulevard, Suite 2160, Tampa, Florida 33602-5187, Special Counsel to Office of Chief Judge this ____ day of September 2001.

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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with appellate rules, The Florida Conference of Circuit Court Judges certifies that the size and style of type in this brief is fourteen (14) point Times New Roman.

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