

IN THE SUPREME COURT OF FLORIDA

ROBERT A. BUTTERWORTH, )  
ATTORNEY GENERAL, )

Petitioner, )

v. )

Case No. SC01-1398

CHIEF JUDGE OF THE )  
THIRTEENTH JUDICIAL )  
CIRCUIT, )

Respondent. )

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**ANSWER BRIEF OF RESPONDENT**  
CHIEF JUDGE OF THE THIRTEENTH JUDICIAL CIRCUIT

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C. Steven Yerrid  
Richard C. Alvarez

THE YERRID LAW FIRM  
*Special Counsel to the*  
*Office of the Chief Judge*  
101 East Kennedy Boulevard  
Suite 3910  
Tampa, Florida 33602  
(813) 222-8222

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**STATEMENT OF THE CASE AND FACTS**

Respondent, CHIEF JUDGE OF THE THIRTEENTH JUDICIAL CIRCUIT, adopts and incorporates the Statement of the Case and Facts presented within his answer brief in *Media General Convergence, Inc., et al. v. Chief Judge of the Thirteenth Judicial Circuit*, Case No. SC01-1396.

**APPLICABLE STANDARD OF REVIEW**

The standard of review for a question of law is de novo. *Armstrong v. Harris*, 773 So.2d 7, 11 (Fla. 2000).

**SUMMARY OF THE ARGUMENT**

Article V, section 2(a) of the Florida Constitution provides this Court with the exclusive authority to adopt rules regarding the operation of all courts in Florida. The Court's establishment of Rule 2.051 of the Florida Rules of Judicial Administration in 1992, the Court's subsequent administrative orders and policies on sexual misconduct, and the Court's amendment of Rule 2.051 in 1995 were exercises of such exclusive authority.

Various media entities have sought access to materials pertaining to alleged sexual misconduct by a former judge in Florida's Thirteenth Judicial Circuit and materials concerning, much more generally, "fraternization, romantic relationships or sexual contact between any Hillsborough County judge and courthouse personnel." Respondent, as the Chief Judge of the Thirteenth Circuit at the time of the media's requests, denied access to the materials under Rule 2.051, as amended by this Court in 1995.

Petitioner, ROBERT A. BUTTERWORTH, ATTORNEY GENERAL, now contends that this Court's amendment of Rule 2.051 in 1995 and its administrative orders and policies on sexual misconduct are unconstitutional. Petitioner contends in his initial brief that only court rules and administrative orders in effect as of

November 3, 1992, are constitutionally valid under article I, section 24 of the Florida Constitution.

However, Petitioner's temporal distinction is of no effect in this case. This Court's amendment of Rule 2.051 did not materially alter the rule as originally established in 1992 and did not close any records previously subject to public disclosure. Each of the exceptions supporting the Respondent's prior denial of media access was in effect as of November 3, 1992. Therefore, this Court's amendment of Rule 2.051 was constitutional and in accordance with article I, section 24 and the Court's exclusive rulemaking authority under article V, section 2(a).

Petitioner, ROBERT A. BUTTERWORTH, ATTORNEY GENERAL, has even admitted that the Court's prior acts were constitutional. Petitioner has opined elsewhere that this Court's amendment to Rule 2.051 governs all questions of public access to judicial records.

Rule 2.051 applies to the materials sought by the various media entities in this case and excepted them from public disclosure at all material times.

**ARGUMENT**

**THIS COURT'S ESTABLISHMENT OF RULE 2.051 IN 1992, ITS SUBSEQUENT ADMINISTRATIVE ORDERS AND POLICIES ON SEXUAL MISCONDUCT, AND ITS AMENDMENT OF RULE 2.051 IN 1995 WERE EXERCISES OF THE COURT'S EXCLUSIVE RULEMAKING AUTHORITY UNDER ARTICLE V, SECTION 2(a) OF THE FLORIDA CONSTITUTION.**

Article V, section 2(a) of the Florida Constitution provides the Florida Supreme Court with exclusive authority to adopt rules for the operation of the state's courts at all levels. *TGI Friday's, Inc. v. Dvorak*, 663 So.2d 606, 611 (Fla. 1995). The administration of the court system is the exclusive responsibility of the Florida Supreme Court, as the head of the state's judicial branch. *Johnson v. State*, 336 So.2d 93, 95 (Fla. 1976); *Chiles v. Children A, B, C, etc.*, 589 So.2d 260, 268 (Fla. 1991). It is the judiciary – and no other branch of government – that has exclusive power and responsibility over court records. *State v. D.H.W.*, 686 So.2d 1331, 1335 (Fla. 1996); *In re Amendments to Rule 2.090*, 681 So.2d 698, 699 (Fla. 1996).

This Court exercised its exclusive rulemaking authority when establishing Rule 2.051 of the Florida Rules of Judicial Administration in 1992 and later

amending the rule in 1995. Rule 2.051, as established and later amended, was expressly said to “govern public access to the records of the judicial branch of government and its agencies.” Fla. R. Jud. Admin. 2.051(a)(1992); Fla. R. Jud. Admin. 2.051(a)(1995). More importantly, both exercises began with this Court’s express declaration that the establishment and amendment of Rule 2.051 were “[s]ubject to the rulemaking power of the Florida Supreme Court provided by Article V, section 2, Florida Constitution[.]” Compare Fla. R. Jud. Admin. 2.051(a)(1992) with Fla. R. Jud. Admin. 2.051(a)(1995).

The Florida Supreme Court has exercised its rulemaking authority in related areas of administration as well. In 1993, this Court entered an administrative order incorporating a Policy Statement, the Supreme Court Civil Rights Complaint Procedure and a Personnel Regulations Manual as part of the rules governing the state’s court system. See Admin. Ord. of Sept. 23, 1993, Respondent’s App. at Tab A. The Court’s actions, like its actions when establishing and amending Rule 2.051, were expressly subject to the exclusive authority granted under article V, section 2(a) of the Florida Constitution. *Id.*

**RESPONDENT’S DENIAL OF ACCESS TO THE  
MATERIALS SOUGHT BY VARIOUS MEDIA  
ENTITIES WAS IN ACCORDANCE WITH RULE 2.051**

**AND THIS COURT'S OTHER ADMINISTRATIVE ACTS.**

Various media entities have sought access to materials pertaining to alleged sexual misconduct by a former judge in Florida's Thirteenth Judicial Circuit and materials concerning, much more generally, "fraternization, romantic relationships or sexual contact between any Hillsborough County judge and courthouse personnel." Respondent, as the Chief Judge of the Thirteenth Circuit at the time, denied access to the materials. Respondent's denial was in accordance with Rule 2.051 and this Court's other administrative acts in the area of sexual misconduct.

Rule 2.051 provides that "[t]he public shall have access to all records of the judicial branch of government and its agencies, except":

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(c)(3)(A) Complaints alleging misconduct against judges, until probable cause is established;

(c)(3)(B) Complaints alleging misconduct against other entities or individuals licensed or regulated by the courts, until a finding of probable cause or no probable cause is established, unless otherwise provided. Such finding should be made within the time limit set by law or rule. If no time limit is set, the finding should be made with a reasonable period of time;

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(c)(8) All court records presently deemed to be confidential by court rule, including the Rules for Admission to the Bar, by Florida Statutes, by prior case law of the State of Florida, and by the rules of the Judicial Qualifications Commission; [or]

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\*

(c)(9)(A) Any court record determined to be confidential in case decision or court rule on the grounds that confidentiality is required to . . . (v) avoid substantial injury to innocent third parties; [or] . . . (vii) comply with established public policy set forth in the Florida or United States Constitution or statutes or Florida rules or case law.

Fla. R. Jud. Admin. 2.051(a)-(c)(9)(1995). Each of these exceptions support Respondent’s prior denial of access to materials pertaining to allegations against the former judge and concerning “fraternization, romantic relationships and sexual contact.”

**THE EXCEPTION FOUND AT RULE 2.051(c)(8)  
SUPPORTED RESPONDENT’S PRIOR DENIAL  
OF ACCESS TO MATERIALS PERTAINING TO  
ALLEGATIONS OF A FORMER JUDGE’S  
SEXUAL MISCONDUCT.**

The exception at Rule 2.051(c)(8) for records deemed confidential by Florida Statute and the rules of the Judicial Qualifications Commission, (“JQC”), supported Respondent’s prior denial of access to materials pertaining to allegations of sexual misconduct against the former judge. Such allegations of sexual

misconduct were within the sole province of Florida's JQC. See Fla. Const. Art. V, § 12(a)(1). It was within the JQC's jurisdiction to investigate these allegations against the judge through any source and with "access to all information from all executive, legislative and judicial agencies[.]" See Fla. Const. Art. V, § 12(a)(5); see also *Forbes v. Earle*, 298 So.2d 1, 7 (Fla. 1974). Thus, once the JQC commenced its investigation, any relevant materials made and received by Respondent were properly forwarded to the JQC. These materials and any independent knowledge possessed by Respondent were to remain confidential under the constitution until a finding of probable cause was made by the JQC's investigative panel. See Fla. Const. Art. V, § 12(a)(4). Confidentiality during investigative proceedings "protect[s] both the complainant from possible recriminations and the judicial officer from unsubstantiated charges." *Forbes*, 298 So.2d at 7; see also *Inquiry Concerning a Judge, No. 96-141, re: Graziano*, 696 So.2d 744, 751 (Fla. 1997). "Eliminating the confidentiality of these proceedings would also eliminate many sources of information and complaints received by the Commission not only from lay citizens and litigants but also from lawyers and judges within the system." *Forbes*, 298 So.2d at 7-8; see also *Inquiry Concerning a Judge, No. 96-30, re: Frank*, 753 So.2d 1228 (Fla. 2000)(rules relating to

confidentiality give confidence to all involved).

Under the exception found at Rule 2.051(c)(8), Respondent's denials of access to the materials pertaining to the judge's alleged misconduct were appropriate until the JQC determined probable cause existed. The denials that followed the JQC's determination of probable cause were technically inappropriate, however, at no time did the various media entities inform Respondent of the finding of probable cause in their subsequent requests. The various media entities also failed to simply request the desired materials directly from the JQC itself. Instead, the media entities circumvented this obvious source and, perhaps to harass Respondent, pursued a writ of mandamus against his office. The media entities continued this course even after the JQC made the matter moot by releasing all materials pertaining to the judge's sexual misconduct to the public. One of the media entities, *The Tampa Tribune*, actually went so far as to publish an article entitled, "Court Makes Emails Public in Judge Case." See *The Tampa Tribune*, "Court Makes Emails Public in Judge Case," Respondent's App. at Tab B.

**B. THE EXCEPTIONS FOUND AT SUBSECTIONS (c)(3) and (c)(9)(A) OF RULE 2.051 SUPPORT RESPONDENT'S DENIAL OF ACCESS TO MATERIALS GENERALLY CONCERNING "FRATERNIZATION, ROMANTIC**

**RELATIONSHIPS OR SEXUAL CONTACT.”**

Any materials generally concerning “fraternization, romantic relationships or sexual contact between any Hillsborough County judge and courthouse personnel” are excepted from access under subsections (c)(3) and (c)(9)(A). Various media entities sought access to such materials in Respondent’s possession and in the possession of the Court Administrator’s Office. Because the possibility of romance or sex between judges and courthouse personnel begets the possibilities of harassment, discrimination and intimidation, any such materials must be received and processed cautiously by their recipient. The rights and interests of the purported victim, accused and all witnesses are effectively recognized through these exceptions to access.

Rule 2.051(c)(3) excepts complaints alleging misconduct against judges and other court personnel until probable cause is established. This exception serves the same purposes as the assurance of confidentiality to participants in proceedings before the JQC. Materials alleging sex between courthouse personnel or courthouse personnel and judges must be given full consideration and scrutiny by the primary administrator, namely the chief judge in each circuit. The chief judge must determine whether probable cause exists, like the investigative panel of the

JQC, through all sources available to him or her. If the possibility of harassment, discrimination or intimidation cannot be corroborated, probable cause cannot be determined to exist and the materials are not subject to disclosure. The integrity, rights, interests and identity of the purported victim, accused and all witnesses must be preserved in this instance.

Similarly, Rule 2.051(c)(9)(A) excepts from disclosure any court record determined to be confidential under court rule so to avoid substantial injury to innocent third parties or to comply with established public policy. See Fla. R. Jud. Admin. 2.051(c)(9)(A)(v) and (vii)(1995). Confidentiality is assured to purported victims of sexual misconduct under many court rules, including this Court's administrative order of September 23, 1993, the procedures incorporated therein, and the authorized procedures developed for specific use in the Thirteenth Judicial Circuit. See Admin. Ord. of Sept. 23, 1993, Respondent's App. at Tab A; see also Section III, Thirteenth Jud. Cir. Employee Handbook, Respondent's App. at Tab C.

"It is the policy of the State Courts System to make the workplace free of sexual harassment." See Admin. Ord. of Sept. 23, 1993, "Policy Statement" at p. 2. Furthermore, "[I]t is the policy of the State Court System that all complaints of

discrimination shall be treated seriously and acted upon promptly in accordance with procedures approved and adopted by the Supreme Court, or by local procedures approved and adopted by the Chief Judge of the district or circuit court.” Id. (emphasis added). “No individuals shall be discriminated against, harassed, threatened or intimidated for filing a complaint under these policies.” Id. Accordingly, the Florida Supreme Court has adopted a civil rights complaint procedure as part of the uniform system governing the state’s courts. “Written materials developed through the use of this procedure are confidential[.]” See Admin. Ord. of Sept. 23, 1993, “S.Ct. Civil Rights Complaint Procedure” at ¶ C.

The Thirteenth Judicial Circuit, in accordance with the authority delegated to it by this Court, adopted its own procedure for complaints of sexual harassment in 1998. See Section III, Thirteenth Jud. Cir. Employee Handbook, Respondent’s App. at Tab C. Under this procedure, all complaints are to be investigated thoroughly and in a confidential manner. Id. “The chief judge can attempt to resolve the complaint informally through mutual conciliation, appoint an investigative officer, or refer the complaint to the appropriate investigatory body.” See Handbook on Sexual Harassment of Office of the State Courts Administrator, Respondent’s App. at Tab D, ¶ 10. Confidentiality is again assured in all

investigations. *Id.* at ¶ 13.

The media entities' requests for materials generally concerning "fraternization, romantic relationships and sexual contact" were properly denied in that the requests infringe upon the privacy rights of any persons involved in or witnessing such activity. These materials, if any exist, are not subject to public disclosure unless probable cause has been determined by the primary administrator, namely the chief judge. Otherwise, the Office of the Chief Judge and the hundreds of individuals who work within the Court Administrator's Office would be mired in the constant receipt, retention and disclosure of every greeting card, "post-it" note, telephone message and invitation to lunch in their possession and reflecting, at the least, "fraternization." The exceptions to public disclosure found at subsections (c)(3) and (c)(9)(A) eliminate this administrative burden and protect any person involved in such "fraternization" unless probable cause exists for disciplinary action.

The enforcement of these exceptions should also preclude the dissemination or publication of false allegations of sexual misconduct. While the integrity of the media might be expected to prevent such harm and unsubstantiated damage, it is not guaranteed. For example, *The Tampa Tribune*, which sought access to

materials concerning “fraternization” from Respondent, recently published a news article about an unmarried judge’s supposed relationship with a unnamed employee of the court. See *The Tampa Tribune*, “Unsigned Letter Accuses Judge of Affair,” Respondent’s App. at Tab E. The entire news article was based on an unsigned letter submitted by an anonymous writer. *Id.* *The Tampa Tribune* disseminated these allegations of sexual misconduct without any substantiation, discretion or regard for the possible victim and accused.

The exceptions found at subsections (c)(3) and (c)(9)(A) control an overzealous media by reasonably restricting disclosure to allegations of sexual misconduct that are substantiated by fact and probable cause.

**THE COURT’S AMENDMENT OF RULE 2.051 IN 1995 WAS  
CONSTITUTIONAL AND IN CONFORMITY WITH  
ARTICLE I, SECTION 24.**

Petitioner, ROBERT A. BUTTERWORTH, ATTORNEY GENERAL, contends that this Court’s amendment of Rule 2.051 in 1995 was unconstitutional. It is Petitioner contention in his initial brief that only court rules in effect before the adoption of article I, section 24 of the Florida Constitution are constitutionally valid.

Petitioner’s temporal distinction is of no effect in this case. This Court’s

amendment of Rule 2.051 did not materially alter Rule 2.051 as originally established in 1992 and did not close any records previously subject to public disclosure. Moreover, each of the exceptions supporting the Respondent's prior denial of media access was in effect as of November 3, 1992, the date of adoption of article I, section 24.

**A. THE COURT'S AMENDMENT OF RULE 2.051 IN 1995 DID NOT CLOSE ANY RECORDS PREVIOUSLY OPENED TO THE PUBLIC, BUT INSTEAD CLARIFIED THE EXISTING EXCEPTIONS SO TO ASSURE PROPER ACCESS.**

Article I, section 24 generally provides all persons the right to inspect public records made or received in connection with the official business of any public body unless the records are exempted elsewhere. See Fla. Const. Art. 1, § 24(a). Records may be exempted under the constitution, by legislative acts or by rules of court that are in effect on November 3, 1992, the date of adoption of article 1, section 24. See Fla. Const. Art. 1, § 24(c)-(d). "Rules of court that are in effect on the date of adoption . . . shall remain in effect until they are repealed." See Fla. Const. Art. I, § 24(d).

The Florida Supreme Court has remained aware of this restriction when exercising its exclusive rulemaking authority in the area. As this Court explained in

October of 1992, the establishment of Rule 2.051 was “to clarify the rules on public access to the records of the judicial branch of government and its agencies.” See In re Amendments to Fla. Rules of Jud. Admin., 608 So.2d 472, 472 (Fla. 1992). Rule 2.051, as established in 1992, did not close any judicial records not then closed and, in some instances, opened certain records which were previously closed. *Id.*, at 473. Nonetheless, this Court was aware when establishing Rule 2.051 that article I, section 24 of the constitution, if later adopted, would prohibit the Court “from later enacting a rule which would close any other records.” *Id.*

There was and is no constitutional restriction on the Court to keep it from amending Rule 2.051 or creating any other rule to provide further clarity and to make public access “self-executing.” E.g. Fla. Const. Art. I, § 24(c)(“This section shall be self-executing.”). The Court’s amendment of Rule 2.051 in 1995 did exactly that. The Court did not close any other records from public disclosure nor was the rule altered in a material way. Instead, the Court provided amendment and further clarity “to assure proper access to judicial branch records.” See In re Amendments to Rule of Jud. Admin. 2.051, 651 So.2d 1185, 1185 (Fla. 1995).

A comparison of Rule 2.051, as established in 1992 and as amended in 1995, makes this apparent. The simple differences between the original rule and the

amended rule are:

definition of “judicial records” provided at subsection (b);

examples of compelling interests for the withholding of court memoranda and advisory opinions provided at subsection (c)(2);

explanation of the duration and manner of confidentiality of court memoranda and advisory opinions provided at subsection (c)(2);

original exception for complaints for misconduct divided into two subsections regarding judges and other court personnel at subsection (c)(3)(a) and (c)(3)(b);

information regarding unpaid volunteer personnel opened to allow access to volunteers’ names and qualifications at subsection (c)(5); and

requirement of reasonable public notice included at subsection (c)(9)(D).

Compare Fla. R. Jud. Admin. 2.051(1992) with Fla. R. Jud. Admin. 2.051(1995).

None of these differences closed additional records from public access.

This Court’s definition of “judicial records” closed no records in that the definition coincides with the “public records” defined under article I, section 24 of the constitution. See Fla. Const. Art. I, § 24(a)(“public record[s] made or received in connection with the official business”). This Court’s definition of “judicial

records” is also consistent with the legislature’s definition of “public records” contained in Chapter 119 of the Florida Statutes. See Fla. R. Jud. Admin. 2.051 (1995) committee commentary. The difference between subsection (c)(2), in its original and amended version, is purely explanatory. The difference between the original and amended subsection (c)(3) primarily regards form in that the complaints of judicial conduct were basically separated from complaints of employee misconduct. Finally, the remaining differences at subsections (c)(5) and (c)(9)(D) actually opened records to public access.

This Court’s amendment of Rule 2.051 in 1995 was a constitutional exercise of its exclusive rulemaking authority.

**B. IF THE COURT’S AMENDMENT OF RULE 2.051 WAS SOMEHOW UNCONSTITUTIONAL, RESPONDENT’S DENIAL OF MEDIA ACCESS REMAINS SUPPORTED BY RULE 2.051, AS ORIGINALLY ESTABLISHED IN 1992.**

Even if Petitioner’s contention was correct and this Court’s amendment of Rule 2.051 was somehow unconstitutional, Respondent’s denial of access to various media entities is supported by the original Rule 2.051. Each of the exceptions applicable to the materials pertaining to the former judge’s alleged

misconduct and the materials generally concerning “fraternization, romantic relationships or sexual contact” was in effect as of November 3, 1992.

Access to the materials pertaining to the former judge’s misconduct was excepted, at all material times, under the original subsection (c)(8) of Rule 2.051. As noted previously, subsection (c)(8) excepts court records deemed confidential by law and by the rules of the JQC. The Florida Constitution deemed the materials regarding the former judge and the related knowledge independently possessed by Respondent to be confidential. See Fla. Const. Art V, § 12(a)(4). More importantly, the exception to access found originally at subsection (c)(8) was incorporated without change by this Court when Rule 2.051 was amended in 1995.

Access to the materials generally concerning “fraternization, romantic relationships or sexual contact” is excepted under subsections (c)(3) and (c)(9)(A) of the original Rule 2.051.

Subsection (c)(3) excepts complaints alleging misconduct by judges and court personnel until a determination of probable cause is made. This allows the primary administrator or chief judge time to investigate the merit of the allegations through all available sources. The exception also protects the rights, interests and identity of the purported victim, accused and all witnesses. The Court’s

amendment of Rule 2.051 in 1995 merely divided the original subsection (c)(3) into two parts addressing judicial misconduct and employee misconduct separately.

The amendment did not close these records from access in any way.

Lastly, the original subsection (c)(9)(A) excepts any court record determined to be confidential under court rule in order to avoid substantial injury to innocent third parties or to comply with established public policy set forth in Florida's laws or rules. The original subsection (c)(9)(A) experienced only syntactical change by this Court when amended in 1995.

Nevertheless, Petitioner contends in his initial brief that this Court's administrative orders and statement of policy regarding sexual misconduct in 1993 were unconstitutional and cannot serve as any basis for Respondent's denial of access to the "fraternization" materials. Petitioner essentially contends that the administrative orders and statement of policy were made after November 3, 1992, the date on which article I, section 24 was adopted.

Petitioner's contention overlooks the fact that this Court's policy on sexual misconduct was probably not new in 1993. But more convenient to his contention, Petitioner overlooks the public policy set forth in Florida law before November 3, 1992, on the issues of sexual harassment and the protection of innocent third

parties.

It has long been the public policy of Florida to protect and provide confidentiality to the purported victims, accused and witnesses of sexual misconduct until probable cause is determined. This Court's administrative orders and statement in 1993 were not the first announcements of this policy by a governmental branch. The legislature had announced this policy through laws enacted before November 3, 1992, including Chapter 119 of the Florida Statutes. The public records laws of Chapter 119 recognized the importance of protecting purported victims, accused and witnesses by excepting from disclosure records relating to complaints of sexual discrimination and documents revealing the identity of victims of crime. See Fla. Stat., § 119.07(3)(t) and (3)(z)(1992). The legislature even amended Chapter 119 after the adoption of article I, section 24 to maintain these exceptions and add another exception for all records relating to victims of discrimination who choose not to proceed with a complaint and request confidentiality. See Fla. Stat., § 119.07(3)(p), (3)(s) and (3)(u)(2000) (records "are exempt from the provisions of subsection (1) and section 24(a), Article I of the State Constitution").

Access to the materials generally concerning "fraternization, romantic

relationships or sexual contact” is, therefore, excepted under subsections (c)(3) and (c)(9)(A) of the original Rule 2.051. Confidentiality in complaints and the investigation of sexual misconduct has been the policy in Florida well before this Court’s administrative order and formal statement on the subject in 1993. Innocent third parties are to be protected. For the same reason, the original subsection (c)(8) excepted materials pertaining to the former judge’s alleged misconduct at all times before the determination of probable cause.

Petitioner’s temporal distinction between Rule 2.051, as originally established and then amended, is of no effect in this case. Respondent’s denial of access is supported by the original Rule 2.051, if this Court’s amendment of the rule in 1995 was indeed unconstitutional.

**IV. PETITIONER HAS ADMITTED ELSEWHERE THAT THE COURT'S AMENDMENT OF RULE 2.051 IN 1995 WAS CONSTITUTIONAL AND GOVERNS QUESTIONS OF PUBLIC ACCESS TO JUDICIAL RECORDS.**

Petitioner, ROBERT A. BUTTERWORTH, has on several occasions since the adoption of article I, section 24 rendered legal opinions on how questions of public access to judicial records should be answered. Petitioner has consistently agreed that such questions are governed by the rules promulgated by the Florida Supreme Court, including this Court's amendment of Rule 2.051 in 1995.

Petitioner at no time took issue with the supposed unconstitutionality of this Court's exercise of its exclusive rulemaking authority.

For example, in 1998, the Clerk of Courts for Florida's Eleventh Judicial Circuit posed the question of whether "section 119.19, Florida Statutes, particularly the obligations for retrieval, copying and production, apply to judicial records[.]"

See Fla. Att'y Gen. Op. 98-77, Respondent's App. at Tab F. Petitioner,

ROBERT A. BUTTERWORTH, answered:

Although the judiciary is not an "agency" for purposes of the Public Records Law, there is a constitutional right of access to public records. Article I, section 24, Florida Constitution, provides that the public has a right of access to records in the judicial branch of government, except for records exempted as provided therein. The Florida Supreme Court has adopted Rule 2.051, Florida Rules of Judicial

Administration, entitled “Public Access to Judicial Records.” Thus, public access to judicial records is regulated by the judicial administration rule.

See Id. at p. 2. Petitioner thereby admitted that Rule 2.051, as it existed at the time of his opinion in 1998, comported with the constitutional requirements of article I, section 24. Petitioner also admitted that Rule 2.051 governs issues of public access to judicial records.

In 1996, Petitioner again acknowledged the exclusive authority of this Court and further applied the 1995 amendments to Rule 2.051 in his own analysis. The Sarasota County Property Appraiser had posed the question of whether e-mail messages between his office and other governmental agencies are public records. See Fla. Att’y Gen. Op. 96-34, Respondent’s App. at Tab G. Petitioner based his answer, in part, on this Court’s amendment and commentary to Rule 2.051. See Id. at p. 2. Petitioner never suggested that this Court’s actions in 1995 might be constitutionally infirm or that his reliance on the Court’s actions was not appropriate.

Most telling is Petitioner’s decision not to answer a question by the Public Defender of Florida’s Thirteenth Judicial Circuit in late 1995. See Fla. Att’y Gen. Op. of Nov. 27, 1995, Respondent’s App. at Tab H. The public defender asked

whether an audio tape may be a judicial record within the meaning of Rule 2.051.

See Id. at p. 1. Petitioner deferentially stated that this was not “a matter upon

which [his] office may issue an opinion.” Id. Petitioner explained:

This office is authorized to provide legal opinions to governmental officials on questions of state law. Your inquiry, however, concerns a rule promulgated by the Supreme Court of Florida rather than a statute and, thus, construction of the rule falls outside this office’s scope of authority.

See Id. Petitioner did not attempt to wield the rulemaking authority which is exclusive to this Court, and should not be allowed to do so in this case.

## **CONCLUSION**

Petitioner’s contention of unconstitutionality must be rejected. This Court’s amendment of Rule 2.051 in 1995 was a constitutional exercise of the exclusive authority granted under article V, section 2(a) of the Florida Constitution. The rule’s amendment did not close any additional records from public access, but opened some records which were closed previously, provided clarity to the original rule, and made the rule and its exceptions “self-executing.”

Respondent’s denial of media access is supported by these exceptions as found in both the amended and original rule. Access to the materials pertaining to the former judge’s alleged sexual misconduct was excepted, at all material times, under subsection (c)(8) of Rule 2.051 and the constitutional provision of

confidentiality to JQC proceedings. Access to the materials generally concerning “fraternization, romantic relationships or sexual contact” is excepted under subsections (c)(3) and (c)(9)(A) and the long-standing public policy protecting the interests of purported victims, witnesses and persons accused of sexual misconduct.

Accordingly, if the ruling of the lower court is to be altered, it should be modified to further reflect the propriety of Rule 2.051, the Court’s exercise of its rulemaking authority in the area of sexual misconduct and Respondent’s decision to deny access to related materials.

Respectfully submitted,

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C. Steven Yerrid, Esquire  
Florida Bar No. 207594

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Richard C. Alvarez, Esquire  
Florida Bar No. 031615

THE YERRID LAW FIRM  
*Special Counsel to the  
Office of the Chief Judge*

101 East Kennedy Boulevard

Suite 3910  
Tampa, Florida 33602  
(813) 222-8222

**CERTIFICATE OF SERVICE**

RESPONDENT'S COUNSEL HEREBY CERTIFIES that on the 19<sup>th</sup> day of September, 2001, a true and correct copy of the foregoing was provided by regular mail to: Thomas E. Warner, *Solicitor General*, The Capitol – Suite PL-01, Tallahassee, Florida 32399; and Gregg Thomas, Carol Jean LoCicero, and James McGuire, *Counsel to Media General*, Holland & Knight, L.L.P., P.O. Box 1288, Tampa, Florida 33601.

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Richard C. Alvarez, Esquire  
Florida Bar No. 031615

**CERTIFICATE OF COMPLIANCE**

RESPONDENT'S COUNSEL HEREBY CERTIFIES that this answer brief was prepared in Times New Roman 14-point font in compliance with Rule

9.210(a)(2) of the Florida Rules of Appellate Procedure.

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Richard C. Alvarez, Esquire  
Florida Bar No. 031615