

**ORIGINAL**

D.A. 5-8-00

IN THE SUPREME COURT OF THE STATE OF FLORIDA

097

CASE NO. 99-162

IN RE:

AMENDMENTS TO THE FLORIDA RULES  
OF JUDICIAL ADMINISTRATION 2.050,  
2.075, and 2.160, and Form of  
Judicial Administration 2.901

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RESPONSE OF THE RULES OF JUDICIAL ADMINISTRATION COMMITTEE  
OF THE FLORIDA BAR TO AMENDMENTS TO THE FLORIDA RULES OF  
JUDICIAL ADMINISTRATION AS PROPOSED BY THE AD HOC COMMITTEE  
ON THE IMPLEMENTATION OF THE KAYLA MCKEAN ACT

**SCOTT J. SILVERMAN**

Chair, Rules of Judicial  
Administration Committee  
1351 NW 12 Street, Suite 513  
Miami, FL 33125-1629  
(305) 548-5613  
ssilverman@jud11.flcourts.org

**CHARLES J. KAHN, JR.**

Vice-Chair, Rules of Judicial  
Administration Committee  
301 Martin Luther King, Jr., Blvd.  
Tallahassee, FL 32399-1850  
(850) 487-2323  
kahn@mail.flcourts.org

**JOHN F. HARKNESS, JR.**

Executive Director, The Florida Bar  
650 Apalachee Parkway  
Tallahassee, FL 32399-2300  
(850) 561-5600

## I. Introduction

Pursuant to the request of this Court, the Rules of Judicial Administration Committee of the Florida Bar (the RJA Committee) files these comments in response to the proposed rule amendments suggested in the Interim Report of the Ad Hoc Committee on the Implementation of the Kayla McKean Act (Interim Report) dated December 30, 1999. The RJA Committee considered this matter in detail at a meeting called specifically for this purpose on February 25, 2000. Prior to this meeting, a subcommittee of the RJA Committee considered the Interim Report and presented its evaluation to the entire RJA Committee. The comments contained in this response represent the unanimous view of the RJA Committee.

## II. Whether This Court Should Adopt a Mandatory Reporting Requirement

The RJA Committee believes the most important issue facing this Court is whether the Court will adopt any rules mandating reporting requirements for judges. In this regard, the RJA Committee agrees with the conclusions of the Ad Hoc Committee on the Implementation of the Kayla McKean Act (Ad Hoc Committee), as well as those of the Family Law Rules Committee, concerning separation of powers. The RJA Committee fully concurs with the conclusion of the Ad Hoc Committee, stated at page 6 of the Interim Report, that the Florida Legislature does not have the power to require judges to report to an executive agency and then to subject judges to criminal sanctions for failure to do so.

## A. Separation of Powers

The responsibility to adopt rules for practice and procedure in all courts resides within this Court. See Art. V, § 2, Fla. Const. Although rules of procedure may be repealed by general law enacted by two-thirds vote of each house of the Legislature, this Court has not, in the past, enacted rules concerning child abuse reporting requirements. Therefore, because this Court has not previously adopted rules addressing this subject, the Legislature had no constitutional authority to act as it did. See Johnson v. State, 336 So. 2d 93, 95 (Fla. 1976) ("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.") .

The present enactment, Chapter 99-168, Laws of Florida, the Kayla McKean Child Protection Act (Act), goes far beyond adopting an ethical code for judicial officers as in In re The Florida Bar, 316 so. 2d 45 (Fla. 1975), or mandating expungement of certain court records, as in Johnson. The Act would impose a mandatory requirement upon judges to report suspected child abuse, abandonment, or neglect. See § 39.201(1)(g), Fla. Stat. (1999). This requirement would be triggered when a judge "knows, or has reasonable cause to suspect, that a child is abused, abandoned, or neglected . . ." Id. The Act then prescribes a manner of

reporting and purports to criminalize knowing and willful failure to report by a person "who is required to report known or suspected child abuse, abandonment, or neglect . . ." § 39.205(1), Fla. Stat. (1999).

The RJA Committee recognizes the benevolent intentions of the Legislature. Nevertheless, the RJA Committee struggles to envision an argument by which the legislation as enacted could withstand a challenge under Article V, section 2 of the Florida Constitution. This Court has control of the procedural means by which a judge accomplishes official administrative duties. Indeed, the Rules of Judicial Administration are intended to govern administrative matters in all courts to which the rules are applicable by their terms. The Legislature may no more properly enact a child abuse reporting requirement applicable to judges in the performance of their official duties, than it could "adopt an ethical code of conduct which would govern the judiciary, whether it concerns financial disclosure or otherwise." In re The Florida Bar, 316 So. 2d at 47.

#### B. Judicial Independence and Impartiality

Apart from constitutional considerations, the RJA Committee would voice its concern that mandatory reporting requirements enacted by rule of this Court would nonetheless adversely impact traditional notions of judicial independence. Although the Ad Hoc

Committee recognized the separation of powers problem attendant to a mandatory reporting requirement imposed by the Legislature, that committee has nevertheless requested this Court to adopt such a reporting requirement by an amendment to Rule 2.050, Florida Rules of Judicial Administration. The RJA Committee believes that a requirement by which judges would report *ex parte* to an executive agency undermines to the notion of an independent judiciary as embodied in Florida's Code of Judicial Conduct (Code).

Pursuant to the Code, a judge must at all times act "in a manner that promotes public confidence the integrity and impartiality of the judiciary." Fla. Code Jud. Conduct, Canon 2A. Moreover, "[a] judge shall uphold the integrity and independence of the judiciary." Fla. Code Jud. Conduct, Canon 1. As this Court has stated in the Preamble to the Code, "Our legal system is based on the principle that an independent, fair, and competent judiciary will interpret and apply the laws that govern us." Public confidence in the judicial system hinges upon the perception that judges are fair and objective. A fair and objective judge will decide an issue only after considering the evidence. Such is the essence of a deliberative adjudicatory process.

Judges serve first and foremost as neutral and objective decision-makers. Every litigant deserves a fair decision from a judge who has not become an advocate in the case. The proposed changes would unavoidably require judges to become involved in

essentially an investigative function. Although such involvement may characterize inquisitorial courts in other societies, and other times, it frustrates Florida's commitment to a neutral, independent, and objective judiciary. See Wike v. State, 648 So. 2d 683, 688 (Fla. 1994) (Anstead, J., specially concurring) ("Our system contrasts with the inquisitorial system used in many countries, and its reliance upon the court to investigate, produce, and assess evidence.").

Again, the RJA Committee understands the good intentions of the Florida Legislature. The RJA Committee further understands the desire of the Ad Hoc Committee to impose some sort of reporting requirement upon Florida's judiciary so the Legislature might be inclined in the future to exclude judges from the statutory reporting requirement. Nevertheless, it remains the considered view of the RJA Committee that an institutionalized, preadjudicatory reporting function contravenes any fundamental concept of an independent and objective judiciary. The RJA Committee, therefore, opposes in concept the adoption of mandatory reporting rules to the extent such rules would apply to matters pending before a judge.

Notwithstanding the concerns expressed in Part II of this response, the RJA Committee submits the remaining comments in the event this Court considers it advisable to adopt rule proposals similar to those set forth in the Interim Report.

### III. Prososed Rule 2.050(i)

#### A. Limitation to Trial Judges

As presently worded, the proposal would impose reporting requirements on all judges. In the RJA Committee's view, any reporting requirement should be limited to trial judges. Although an appellate tribunal, such as the Florida Supreme Court, may have before it, in court records or appendices, indications of child abuse, the imposition of a reporting requirement on an appellate tribunal would be neither efficient nor particularly useful.

#### B. Threshold for Reporting

The next issue addressed by the RJA Committee is the threshold or standard of reporting. Under the proposal of the Ad Hoc Committee, a judge would be required to report when that judge, in the course of official duties, "has reasonable cause to suspect that a child is the victim of abuse, abandonment or neglect . . . ." The RJA Committee believes that inclusion of the phrase "reasonable cause to suspect" suggests that a judge would perform more than a reporting role and would actually have to engage in a preliminary factual determination concerning whether reasonable cause exists. Moreover, the standard of suspicion is vague, at best, and subject to varying, and perhaps, conflicting interpretations. Accordingly, the RJA Committee suggests that, if the Court imposes a reporting requirement, such requirement be mandated in only those incidences

where a judge, in the course of official duties, has been made aware of allegations that a child has been abused, abandoned, or neglected. The RJA Committee also felt it best to delete references to the term "victim" in the proposed rule change, due to the subjective nature of the term.

C. Other Matters Under Proposed Rule 2.050(i)

The proposals of the Ad Hoc Committee provide that the failure of any judge to comply with the reporting requirement may be "grounds for disciplinary action." The RJA Committee does not believe this Rule of Judicial Administration, if adopted, should contain a predetermined conclusion of judicial misconduct. Although failure to report may ultimately constitute a neglect of judicial duty, that determination should be made on a case-by-case basis, after a proper complaint.

The RJA Committee very strongly agrees with the suggestion of the Ad Hoc Committee that a reporting duty imposed by rule of this Court should be in lieu of any statutory duty to report. The RJA Committee further agrees that copies of any Notice provided by a judge should be given to all parties. The RJA Committee is concerned about the problem of multiple reporting. Evidence of the same incident of abuse, neglect, or abandonment may manifest itself or be made known repeatedly to a judge or to several judges.

Nevertheless, the RJA Committee sees no good way to address this issue.

Because of the changes suggested, the RJA Committee sees no need for the proposed committee comment to the rule suggested by the Ad Hoc Committee. Proposed Rule 2.050(i), as modified by the RJA Committee, would read as follows:

[RJA Committee additions to the Ad Hoc Committee's proposal in *italics*. RJA Committee deletions in ~~strikeout~~.]

#### 2.050 TRIAL COURT ADMINISTRATION

(i) Duty to Provide Notice. When a *trial* iudse, in the course of official duties, ~~has reasonable cause to suspect~~ *has been made aware of allegations that a child has been abused, abandoned, or neqlected* ~~is a victim of abuse, abandonment or neglect that would by law require a person to make a report to the Department of Children and Families,~~ the judge shall issue a sewarate Notice in substantial compliance with Form of Judicial Administration 2.901. The Notice shall be wrovided to the Dewartment of Children and Families and all parties. ~~The failure of any judge to comply with this requirement shall be considered neglect of duty pursuant to subdivision (g) and may be grounds for disciplinary action pursuant Article V, section 12, Florida Constitution.~~ The duty to

enter a Notice established by this rule is in lieu of any statutory duty to report when the information arises from the judge's official duties.

Comment to rule:

A hearing is not required in order to determine whether there is reasonable cause to suspect that a child is a victim of abuse, abandonment or neglect. The threshold for determining reasonable cause to suspect child abuse, abandonment or neglect is low and, unlike a search warrant, a sworn statement is not required.

#### IV. Proposed Rule 2.075(k)

The RJA Committee recommends that this Court not adopt the Ad Hoc Committee's proposed Rule 2.075(k) concerning record retention. The rule, as proposed by the Ad Hoc Committee, implies that a court will receive a written summary of the outcome of an investigation conducted by the Department of Children and Family Services. The RJA Committee does not believe that judges would, or should, routinely receive such reports. In the RJA Committee's view, a judge should not receive reports from the Department unless receipt or review of such reports is otherwise allowed or required by law. Accordingly, the RJA Committee sees no need for adoption of a new rule concerning sealing of these reports.

#### V. Proposed Rule 2.160(d)

The Ad Hoc Committee's proposed amendment to Rule 2.160(d) would add a subsection (2) stating "a judge who issues a notice pursuant to Rule 2.050(i) should not be disqualified solely on the basis of entering such a notice." The RJA Committee unanimously recommends that no such change be made to Rule 2.160(d). The general rules regarding disqualification would continue to apply.

The RJA Committee is concerned that a one-size-fits-all rule concerning judicial disqualification in this context is not possible or desirable. Specifically, the RJA Committee believes that certain types of reporting would involve simply the transmission of written documents to the Department. Other types of reporting, however, would involve the observation powers of the judge and might, in fact, implicate the judge as a witness to an incident of suspected abuse, abandonment, or neglect. A single rule purporting to exempt a judge from disqualification will not fit all foreseeable circumstances.

#### VI. Proposed Reportins Form

The final comments of the RJA Committee concern the form of the Notice that would be used to make reports. The RJA Committee sees no need for a **case** style on the Notice because the Notice is not a pleading in any particular case. The RJA Committee suggests a document simply entitled "NOTICE TO DEPARTMENT." The preamble of

the Notice would conform to the RJA Committee's suggestions concerning the proposed reporting threshold language of Rule 2.050(i). The RJA Committee further suggests that the document not contain the "Done and Ordered" clause as suggested by the Ad Hoc Committee, because the document would not have the force of an order. The Notice would allow the judge to report that the judge has received information either from a document filed in court or "from 'other information,'" which would include testimonial matters or other matters observed by the judge in the judge's official capacity. The RJA Committee's proposed Notice is as follows:

**NOTICE TO DEPARTMENT**

I have been made aware of allegations that the listed child(ren) is/are abused, abandoned, or neglected.

Child's Name	Date of Birth	Location of Child

This Notice is based on information provided in:

A document filed with this court, a copy of which is attached hereto.

Other information received on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_. A brief summary is as follows: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

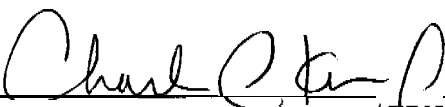
Dated: \_\_\_\_\_

\_\_\_\_\_  
CIRCUIT/COUNTY JUDGE


cc: All parties

VII. Conclusion

The RJA Committee respectfully suggests that this Court not impose mandatory reporting rules upon judges acting in the course of their official duties. Should the Court decide to adopt such rules, the RJA Committee requests the Court to consider the suggestions contained in this response.

  
\_\_\_\_\_  
SCOTT J. SILVERMAN (FBN 015700)  
Chair, Rules of Judicial  
Administration Committee  
1351 NW 12 Street, Suite 513  
Miami, FL 33125-1629  
(305) 548-5613  
ssilverman@jud11.flcourts.org

CHARLES J. KAHN, JR. (FBN 243051)  
Vice-Chair, Rules of Judicial  
Administration Committee  
301 Martin Luther King, Jr., Blvd.  
Tallahassee, FL 32399-1850  
(850) 487-2323  
kahn@mail.flcourts.org

  
\_\_\_\_\_  
JOHN F. HARKNESS, JR. (FBN 123390)  
Executive Director, The Florida Bar  
650 Apalachee Parkway  
Tallahassee, FL 32399-2300  
(850) 561-5600

Certificate of Service

WE HEREBY CERTIFY that a true **copy** of the **foregoing** was furnished by mail upon this 8th day of March 2000 to:

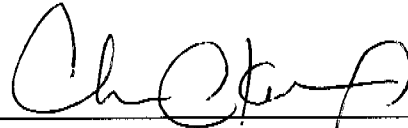
Honorable Daniel P. Dawson  
2000 E. Michigan Avenue  
Juvenile Justice Center  
Orlando, FL 32806

Larry K. Coleman, Esquire  
1111 Third Avenue West  
Suite 100  
Bradenton, FL 34205

Honorable Robert L. Doyel  
Polk County Courthouse  
Post Office Box 9000  
Bartow, FL 33831

Sarah H. Bohr, Esquire  
2337 Seminole Road  
Atlantic Beach, FL 32233

Jennifer C. Newsom, Esquire  
420 Bayshore Blvd., Unit 201  
Clearwater, FL 33759



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CHARLES J. KAHN, JR.  
Vice-Chair, Rules of Judicial  
Administration Committee