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Mr. Thomas D. Hall
Clerk of the Court
Florida Supreme Court
500 South Duval Street
Tallahassee, Florida 32399-1927

Re: Amendments to the Rules of Judicial Administration – 2 Year Cycle
Case Number: SC05-173

Dear Mr. Hall:

Holland & Knight LLP represents Media General Operations, Inc., d/b/a *The Tampa Tribune* and WFLA-TV ("Media General"). As a news organization, Media General routinely seeks access to judicial records throughout the state of Florida. As such, Media General has a strong interest in any proposed changes to Rule of Judicial Administration 2.051, which governs public access to judicial branch records.

Media General supports the change to Rule 2.051(d)(1) proposed by the Florida Rules of Judicial Administration Committee (the "Committee") requiring a judge who denies access to judicial records to file a sealed copy of the records with the appellate court. Media General further supports the proposed amendment to Rule 2.051(e)(2), requiring that when a request for access is denied, the records custodian must state in writing the reason for such denial. We believe, however, that two additional changes to Rule 2.051 are necessary.

First, Media General suggests that Rule 2.051(d)(1) should be amended to permit the parties in a judicial records case pending before a district court of appeal to utilize the discovery procedures provided in the Florida Rules of Civil Procedure

and to require that discovery occur on an expedited basis. The district courts should further be authorized to appoint a special master to oversee discovery and to resolve discovery disputes and other preliminary matters prior to a decision on the merits by the district court.

Second, Media General recommends that Rule 2.051(c)(3)(A) be amended to clarify when and how a party can obtain access to a complaint of misconduct against a judge. In particular, the Rule should be amended to require that all allegations of misconduct by a judge be forwarded to the Judicial Qualifications Commission.

Media General's proposed additional changes are discussed in greater detail below.

## 1. Rule 2.051(d)(1) Should Be Amended To Authorize Discovery And The Appointment Of A Special Master

### A. Discovery Will Allow The Parties To Develop A Factual Record And To Make Informed Arguments

When a person requests access to judicial records, the person often has only limited knowledge about the records. In response to the access request, the judge who is the records custodian may deny the request on one of several grounds. For example, the judge may state that the records do not exist. Or the judge may acknowledge that the records exist, but deny that they qualify as "judicial records" subject to disclosure under Rule 2.051. Or the judge may admit that the records are "judicial records," but may assert that they are exempt from disclosure under one of the various exemptions listed in Rule 2.051(c)(3).

In order to challenge such a denial of access, the requestor needs to be able to develop a factual record. For instance, the requestor will want to establish through interrogatories, requests for admission, or deposition testimony that the records in question actually do exist and are in the possession of the judge who has denied access. The requestor will want to develop facts showing that the records were made or created in connection with the court's official business. And the requestor will want to show that the records do not fit within any exemption listed in Rule 2.051(c)(3).

At present, developing such a factual record is enormously difficult because Rule 2.051(d)(1) requires the requestor to file suit in the court having appellate jurisdiction over the court that denied access. In most cases, this means the action will be brought in a district court of appeal. Unlike an action pending before a trial court, actions brought in the appellate courts typically do not involve discovery, and district courts have little experience overseeing such discovery. Moreover, as currently stated, Rule 2.051(d)(1) does not expressly authorize the use of discovery procedures in judicial records access cases pending in the district courts.

In addition, appellate courts, unlike trial courts, do not hold evidentiary hearings in judicial records access cases. Thus, a person seeking records not only is unable to take discovery about the records, but is also precluded from eliciting testimony and presenting evidence about the records at a hearing. The lack of a factual record severely hampers appellate review of a judge's denial of access to judicial records.

The use of discovery procedures in judicial access cases would permit the parties to create a factual record and thereby present more informed argument to the district court of appeal. It also would provide the district courts with a better basis for decision. To achieve these indisputably important goals, Rule 2.051(d)(1) should be amended to permit discovery on an expedited basis for judicial records cases pending before the district courts of appeal.[1]

### B. This Court Has Expressed Its Concern About The Inability To Develop A Factual Record In Judicial Records Cases

The Committee's proposed amendments to Rule 2.051 are the direct result of concerns expressed by this Court in *Media General Convergence, Inc. v. Chief Judge of the Thirteenth Judicial Circuit*, 840 So. 2d 1008 (Fla. 2003) (a copy of which is attached hereto). As the Supreme Court made plain in that case, Rule 2.051 provides limited guidance to district courts considering judicial records cases. Regrettably, the amendments proposed by the Committee fall short of remedying the faults in Rule 2.051.

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[1] To be clear, Media General is recommending that discovery be permitted to develop facts *about* the judicial records; Media General is *not* suggesting that the requestor should be able to obtain the judicial records themselves through a document request or subpoena. Rather, as the Committee has recommended, the records in question should be provided to the district court for an *in camera* review.

In *Media General Convergence*, the petitioners (the Tampa Tribune and News Channel 8 WFLA-TV) sought access to records in the possession of the Chief Judge of the Thirteenth Judicial Circuit. After the Chief Judge denied the access request, the petitioners filed a mandamus action in the Second District Court of Appeal. Because of the lack of any discovery procedures identified in the Rules of Judicial Administration, the petitioners were unable to take discovery during the pendency of the case in the Second District and were unable to develop a sufficient factual record. More particularly:

- When the petitioners first requested the records, the Chief Judge denied that the records even existed. No discovery procedures were available to challenge this assertion, an assertion that turned out to be inaccurate.

- After they filed suit in the Second DCA, the petitioners requested that the Chief Judge provide copies of the records to the Court for review *in camera*. The Chief Judge refused to do so.

- The petitioners attempted to take the deposition of the Chief Judge, but the Second DCA granted a protective order precluding the deposition.

- And, because no discovery was permitted, the Second DCA never received records from the Chief Judge and thus never knew the content of the records.

Discovery about how and why the records were created would have been extremely helpful in *Media General Convergence*, but it was completely unavailable. The inability to conduct discovery meant that the case was argued to the Second DCA without the benefit of any sworn testimony, any answers to interrogatories or requests for admission, or even an *in camera* review of the documents that the Chief Judge initially said did not exist and, later, refused to disclose.[2]

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[2] Certain records were obtained from the Judicial Qualifications Commission and were presented to the Second DCA for review. There was, however, no record evidence to establish that the records obtained from the JQC were precisely the same records as the Chief Judge had in his possession.

When the *Media General Convergence* case reached the Florida Supreme Court, the petitioners argued that the lack of discovery procedures in the district court created significant problems. This Court agreed. "The requests for the records in this case demonstrate a deficiency in the present procedure for public records requests that are overly broad or that seek records claimed to be exempt." *Media General Convergence*, 840 So. 2d at 1020. "The rules currently do not set forth specific procedure for the appellate courts, who are responsible for review of records requests made of the circuit court, to engage in an in-camera inspection. Therefore, in this case, the requested records were never subject to an in-camera inspection." *Id.*

As a result, this Court specifically requested that Committee make recommendations to address these deficiencies.

> [T]he petitioners maintain that the district courts are not capable of overseeing the use of interrogatories, requests for admission, requests for production, or depositions. . . .
>
> We agree with petitioners that the current rule does not provide sufficient guidance both to members of the judiciary and to members of the public for resolving disputes concerning access to judicial records. . . . Therefore, we refer this issue to the Rules of Judicial Administration Committee to study this issue and provide a recommendation to this Court.

*Id.* at 1020 (footnotes omitted).

In response to the Supreme Court's request that the Committee study the problem, the Committee has proposed amending Rule 2.051(d)(1) to permit for *in camera* review of records. In particular, the Committee has recommended adding the following sentence to Rule 2.051(d)(1): "Upon order issued by the appellate court, the judge denying access to records shall file a sealed copy of the requested records with the appellate court." The Committee has further recommended amending Rule 2.051(e)(2) by adding the following sentence: "If the request is denied, the custodian shall state in writing the basis for the denial." Media General supports these proposed changes to Rule 2.051.

But the Committee's recommendations do not go far enough and do not address the critical issue of discovery. As noted above, under both the current rule and the proposed rule, the appellate court will be at a significant disadvantage when attempting to assess a denial of access because it will have limited information about the records in question. For example, the party seeking access to the records cannot propound interrogatories asking when the records were received or made, why they were received or made, or who made or received them. These questions address the primary issue in any access case – the issue of whether the records in question even qualify as judicial records subject to disclosure in the first instance.[3] In fact, because this information was not available in the *Media General Convergence* case, the Second DCA reached the wrong result and concluded that the records in question were *not* judicial records. Interrogatory answers, admissions, or deposition testimony would have demonstrated conclusively that the records in that case were made or received in connection with official business. Thus, they were indisputably judicial records.

The Committee has recommended against amending Rule 2.051(d)(1) to permit the appointment of a special master or to provide for the use of discovery procedures because, according to the Committee, "[r]eviewing courts already have procedures in place to assist them when there is a need to gather additional information to assist in ruling on a petition for an extraordinary writ." *See Biennial Report of the Florida Rules of Judicial Administration Committee* ("*Committee Report*") at 2. This rationale makes little sense. If the district courts already have inherent authority to appoint special masters and to permit parties to utilize discovery procedures, the codification of this authority in Rule 2.051(d)(1) can only benefit litigants and the district courts themselves by making such authority clear and unambiguous.[4]

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[3] In many instances, a mere *in camera* review of the records by the district court will not resolve these fundamental disputes.

[4] Indeed, the codification of inherent authority is precisely the approach the Committee has taken with respect to *in camera* review of judicial records. At present, the district courts certainly have the inherent authority to review judicial records *in camera.* Despite this inherent authority, the Committee has recommended amending Rule 2.051(d)(1) to state explicitly that the district courts can conduct an *in camera* review of records. If such an approach makes sense with respect to authority to conduct an *in camera* review, it also makes sense with respect to the authority to appoint a special master or permit discovery to occur.

While Media General strongly suggests that Rule 2.051(d)(1) be formally amended to permit the use of discovery procedures, if this Court disagrees, Media General requests that, at the very

Rule 2.051(d) should be amended to permit discovery in judicial access cases. Such discovery should be on an expedited basis. To avoid burdening the district courts with discovery disputes, however, the Rule should also be amended to authorize the appointment of a special master to oversee discovery matters. In particular, Media General recommends that Rule 2.051(d)(1) should read as follows:[5]

> (d) **Review of Denial of Access Request.** Expedited review of denials of access to records of the judicial branch shall be provided through an action for mandamus, or other appropriate appellate remedy, in the following manner:
>
> (1) Where a judge who has denied a request for access to records is the custodian, the action shall be filed in the court having appellate jurisdiction to review the decisions of the judge denying access. Upon order issued by the appellate court, the judge denying access to records shall file a sealed copy of the requested records with the appellate court. ***Upon motion by a party, the appellate court may permit the parties to engage in expedited discovery to develop the factual record for appellate purposes and may, in such cases, appoint a special master to oversee any discovery disputes. The discovery provisions of the Florida Rules of Civil Procedure shall apply.***
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> (2) All other actions under this rule shall be filed in the circuit court of the circuit in which such denial of access occurs.

Because there may be access cases in which discovery would not truly be beneficial, the proposed amendment would give the district courts discretion to permit discovery where appropriate, but to deny discovery where it is not necessary. Likewise, the district courts would have discretion to appoint a special master in appropriate cases.

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least, the Court Commentary accompanying Rule 2.051 expressly refer to the inherent authority of the district courts to permit the use of discovery procedures and to appoint special masters in access cases.

[5] The amendment recommended by the Committee and supported by Media General is underlined. The additional amendment recommended by Media General is underlined, bolded, and italicized.

Media General believes that the amendment it proposes is simple to understand and easy to implement. By permitting expedited discovery, it solves the very real problem of developing a factual record in access cases while also serving the goal of expedited review. And, most importantly, it addresses the concerns expressed by this Court about the need for guidance for appellate courts handling access cases.

## II. Complaints Of Misconduct Should Be Forwarded To The Judicial Qualifications Commission

Media General also recommends that Rule 2.051(c)(3)(A) be amended. Rule 2.051(c)(3)(A) provides that certain judicial records are exempt from disclosure, including "Complaints alleging misconduct against judges, until probable cause is established."

The Rule does not identify who will make the probable cause determination, or when or how it will be made. In *Media General Convergence*, the Florida Supreme Court held that the probable cause finding is to be made by the Judicial Qualifications Commission ("JQC"). 840 So. 2d at 1018. But the Court did not address the question of whether a judge must forward a complaint of misconduct to the JQC. When a judge does not forward such a complaint, the JQC obviously never has the opportunity to make a probable cause finding. As explained by then-Justice Pariente in a concurring opinion, this scenario "could occur under several possible circumstances." *Id.* at 1021 (Pariente, J., concurring).

Thus, Rule 2.051(c)(3)(A) contains an enormous loophole that can, in effect, hide from public scrutiny judicial records relating to the misconduct of a judge when those records are never forwarded to the JQC. Despite this fact, the Committee has not made any recommendations for amending Rule 2.051(c)(3)(A). *See Committee Report*, Appendix D(2) (Report Regarding Amendments to Rule 2.051(d)(1) and (e)(2)), at 2.

In order to close the loophole, Rule 2.051(c)(3)(A) should be amended to require that all judicial records constituting complaints of misconduct against a judge be provided promptly to the JQC. Such a rule would eliminate the possibility of a complaint falling outside the ambit of the Rules of Judicial Administration – and becoming, in a sense, "invisible" – simply because no one ever acts upon the complaint. It would also serve the laudable goal of ensuring

that the JQC is aware of all complaints against judges and has the opportunity to make a timely probable cause determination.

This Court may be concerned that the JQC will be inundated with frivolous complaints of misconduct against judges. To avoid this possibility – while simultaneously closing the loophole described above – Rule 2.051(c)(3)(A) could be amended to require that a judge receiving a complaint of misconduct about another judge must first make a determination, within a set period of time, as to whether the complaint is frivolous. The Rule would require the judge to forward all non-frivolous complaints to the JQC for a probable cause determination.

For all of the foregoing reasons, Media General requests that the amendments proposed by the Committee be adopted, but that the additional amendments proposed by Media General also be adopted.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was furnished by U.S. Mail on the ___ day of March, 2005, to Honorable Claudia R. Isom, 13th Judicial Circuit, 800 East Twiggs Street, Suite 513, Tampa, FL 33602-3556; John F. Harkness, Jr., Executive Director, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300; J. Craig Shaw, Bar Staff Liaison, Rules of Judicial Administration Committee, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300; Steven Patrick Combs, Duval County Courthouse, 330 East Bay Street, Room 222, Jacksonville, FL 32202.

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Attorney

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