BEFORE THE HEARING PANEL OF THE
FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A

SUPREME COURT NO. SC07-774

JUDGE, NO. 06-249, MICHAEL ALLEN
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FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF THE HEARING PANEL, JUDICIAL QUALIFICATIONS COMMISSION

Pursuant to Article V, §12(a)(1),(b) and (c) of the Florida Constitution and the FJQC Rules, the Hearing Panel, Judicial Qualifications Commission ("JQC") submits these Findings, Conclusions and Recommendations to the Florida Supreme Court.

THE COURSE OF PROCEEDINGS

On May 2, 2007, the Investigative Panel of the JQC filed a notice of formal charges against the Honorable Michael E. Allen, District Court Judge, First District Court of Appeal.[1] The Investigative Panel charged Judge Allen with violating Canons 1, 2A, 3B(2), 3B(4), 3B(5) and 3D(1), Code of Judicial Conduct, and Rule 4-8.2(a), Florida Bar Rules of Professional Conduct. These charges stem from Judge Allen's concurring opinion in the case of Childers v. State, 936 So. 2d 583, 619 (Fla. 1st DCA 2006) (*en banc*) (1st DCA Case No.: 1D03-2154).

The Investigative Panel filed an Amended Notice of Formal Charges in February 2008, adding the charge that Judge Allen knowingly made false statements during an Investigative Panel

[1] Pursuant to Fla. Const. Art. V, §12(b), the Investigative Panel receives or initiates complaints, investigates and submits formal charges to the Hearing Panel on a finding of probably cause, then files an Notice of formal charges. The Hearing Panel holds a hearing, issuing findings,

hearing, in violation of Canons 1, 2A, 3, 4A and 5, Code of Judicial Conduct and Rule 4-8.4, Florida Bar Rules of Professional Conduct.

Judge Allen timely moved to dismiss the initial charges. The Hearing Panel denied the motion on September 20, 2007. Judge Allen renewed this motion after he was served with the Amended Notice of Formal Charges. By order dated April 29, 2008, the Hearing Panel deferred ruling on the renewed motion until the conclusion of the evidentiary hearing.

Judge Allen answered, generally denying all charges. He asserted as affirmative defenses that: (1) the matters stated were true and therefore not subject to sanction; (2) he did not violate applicable codes of conduct; and (3) the publication of an opinion by an appellate court judge is not subject to discipline.

Judge Paul Backman chaired the Hearing Panel, which conducted the final hearing on June 9 through June 11, 2008. Six Commissioners were present throughout the hearing and deliberations. In addition to Chairman Backman, these included Judge Thomas Freeman, attorney Miles McGrane, III, attorney Michael Nachwalter (*ad hoc* replacement for recused member John Cardillo), lay member Ricardo Morales, III and lay member Nancy Mahon (*ad hoc* replacement for recused member Leonard Haber).

Special Counsel F. Wallace Pope and Jennifer Reh, and Interim General Counsel Marvin Barkin, represented the Investigative

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conclusions and recommendations.

Panel. Judge Allen was represented by attorneys Bruce Rogow, Cynthia Gunther, Richard McFarlain and Guy Burnette, Jr. Attorney Lauri Waldman Ross served as counsel to the Hearing Panel.

The pleadings are already on file with the Florida Supreme Court, S.Ct. Case No.: SC07-974. The parties assisted the hearing panel with a stipulated time line and exhibits.[2]

A transcript of the testimony (hereinafter T. __) and the parties' respective exhibits (hereinafter Ex. No. __) are being filed simultaneously with these Findings of Fact, Conclusions and Recommendations.

FINDINGS OF FACT

A. Background

Michael Allen served as the Public Defender for the Second Judicial Circuit, when he was appointed to the First District Court of Appeal, effective January 1990. (T. 71; 145; 598). Charles Kahn was an attorney in private practice with the Levin firm in Pensacola he was appointed to the First District in 1991. (T. 100). Both judges were screened by the judicial nominating process, prior to this appointment. The First District Judicial Nominating Commission (JNC) covers six judicial circuits, and is comprised of nine members. At that time, these included three gubernatorial appointees, three Florida Bar appointees, and three appointees selected by the other six. (T. 205-06). It was not weighted either way, thus, filtering the political process.

[2] Proposed Exhibits 16 and 17 were withdrawn. All of the remaining

The JNC vetted all prospective candidates, and sent a slate of 3 qualified candidates to the Governor, who selected his appointees. Both judges had good qualifications, when they received gubernatorial appointments. (T. 206).

Judge Allen evinced a strong, intense dislike for Judge Kahn which predated the Childers case. (T. 38; 42; 220-22; 372-73; 378). Judge Allen had nothing nice to say about Judge Kahn, and when he discussed Judge Kahn with colleagues, it was in a derogatory manner, not infrequently accompanied by profanity, and reflected by a physical change in his appearance. (T. 43; 221-22; 260; 373; 378). Judge Allen disavowed such dislike, describing it more as a lack of respect. (T. 130-31; 135; 214-16; 220).

By custom, the position of Chief Judge at Florida appellate courts is determined by seniority. (T. 36; 216). Some judges disagreed with the system, based on Fla. R. Jud. Admin. 2.210(a)(2) ("The selection of a chief judge should be based on managerial, administrative and leadership abilities."). (T. 452). However, the seniority system remained in place at the First District until Judge Kahn was next in line. Judge Allen then actively solicited other judges to contest Judge Kahn's election, voicing objections to his fitness. (T. 37-38; 215; 225). Two judges declined to run for the chief judgeship, believing a contested election would prove divisive, inevitably breed bad feelings, and threaten the Court's collegiality. (T. 39; 215-16).

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numbered exhibits went into evidence by agreement.

A third, encouraged and supported by Judge Allen, ran against Judge Kahn, but was defeated in the election. (T. 39-41).

B. The Childers Case

W.D. Childers is a former state legislator, convicted of bribery and unlawful compensation or reward for official behavior. At the time of his unlawful activity, Childers and Willie Junior served as Escambia County Commissioners. Junior agreed to testify against Childers as part of a plea agreement with the State. (Ex. 1). Junior died after Childers' conviction, but prior to resolution of Childers' appeal.

Childers' appeal was taken to the First District Court of Appeal, where it was blindly assigned to a three judge panel, comprised of Chief Judge Kahn, Richard W. Ervin, and William Van Nortwick, Jr. (Stipulation, ¶1, T. 590). Judge Kahn departed the Levin firm for the bench in 1991. (T. 118). This was several years before the "tobacco litigation." (T. 100-01; 588). Judge Kahn routinely recused himself on all appeals handled by Fred Levin's law firm. (T. 134; 151; 527). Fred Levin's law firm did **not** handle Childers' appeal, and the lawyers representing Childers (the law offices of Richard G. Lubin, P.A., West Palm Beach) were not connected with the Levin firm. (Exs. 1, 2, 13; T. 193-94; 527; 586-87). No party to the appeal sought Judge Kahn's recusal. (T. 114; 281).

Oral argument in Childers was twice postponed, and finally occurred on November 9th, 2004. (T. 443). The three judge panel

voted unanimously (3-0) to reverse Childers' conviction. (Stipulation, ¶1). Judge Kahn was the "primary" judge assigned to author the opinion. (Stipulation, ¶1).

After opinions are written, but prior to their public dissemination, they are circulated to all judges on the First District during a "pre-release" screening process. This process, among other things, is designed to ensure accuracy. (T. 54).

In January, 2005, a proposed unanimous (3-0) opinion authored by Judge Kahn, was "pre-released," and circulated to the entire court. (Stipulation, ¶1; T. 54; 141). This unanimous opinion would have reversed Childers' conviction. (Stipulation, ¶1).

Under Florida law, each appellate judge decides for him or herself whether the circumstances warrant that judge's recusal. That appellate judge's decision is not subject to review by other appellate judges on the same court, who are generally required to respect their colleagues' decision. (T. 41; 113-14; 130; 430).

Judge Allen learned that Judge Kahn was assigned to the Childers panel on approximately November 5th, 2004, the day after oral argument in Childers. He took no action until January 2005, when he saw the proposed panel opinion. Judge Allen did not contact Judge Kahn directly; instead, he sought out another judge to solicit Judge Kahn's recusal.[3] (T. 141; 424; 434-35). Judge Allen was the only judge to raise Judge Kahn's potential recusal

[3] The intermediary judge was originally from Pensacola, had a long-standing friendship with Childers, and recused himself from participating in any of the ensuing *en banc* proceedings. (T. 424, 436).

to the intermediary. (T. 424; 433-36).

It is unclear what communications actually passed between the intermediary judge and Judge Kahn. The intermediary had only a general recollection of the conversation, but indicated that he told Judge Kahn it would be inappropriate for him to sit on the case, and solicited his feelings. Judge Kahn then responded that he saw no reason to recuse himself, and hadn't had any contact with Childers for two years. (T. 430).

Judge Kahn indicated, in contrast, that he was asked two specific questions: (1) are you comfortable on this case?; and (2) would you rather it go out *per curiam*? (T. 444).[4] Judge Kahn responded that he was comfortable sitting on the case, and routinely issued opinions he authored in his own name. (T. 444, 446). Following this conversation, the intermediary reported back to Judge Allen that he "spoke to Chuck" but "don't think it did any good." (Ex. 20; T. 425).

Judge Bradford L. Thomas was appointed to the First District in early 2005, and when he saw the proposed opinion, thought it was erroneously decided on the merits. (T. 254-55; 290). Court protocol dictated that Judge Thomas discuss this with Judge Kahn, who was "primary." During their discussion, Judge Thomas told Judge Kahn that he wanted the **entire** court to hear the case (a procedure known as *"en banc"*.) (T. 255; 440; Ex. 21). It is rare

[4] A *per curiam* opinion is handed down by an appellate court without identifying the individual judge who wrote the opinion. (Black's Law Dictionary, 8th Edition).

that a unanimous panel opinion is challenged by other members of the Court. (T. 291). Using profanity, Judge Kahn ordered Judge Thomas out of his office. (T. 255; 439-40).

Judge Thomas saw Judge Allen as a friend, mentor and confidant. (T. 265, 287-88). After he was summarily ordered out of Judge Kahn's office, Judge Thomas sought out Judge Allen. (T. 265-55; Ex. 19). Days after the proposed unanimous opinion was circulated, Judges Allen and Thomas convinced one of the original panel members to change his vote. (T. 242, 245, 256).[5] Judge Allen indicated that he became concerned about the "appearance of impropriety" when the panel divided two to one. (T. 118, 141). In fact, Judge Allen was instrumental in changing the panel's original unanimous decision to a two to one decision.

In June 2005, the Childers panel circulated its proposed revised opinion to the entire court on "pre-release," with Judges Kahn and Ervin voting for reversal, and Judge Van Nortwick dissenting. (Stipulation, ¶3).

A district court of appeal may order *en banc* hearing of a case on its own motion before or after an opinion issues, or on motion of a party, after an opinion is released. Rule 9.331(c),(d)(1), Fla. R. App. Proc. If the district court chooses to decide a case *en banc* before its opinion issues, by law, this is done internally without knowledge of or participation by the

[5] Appellate judges discuss changes to each other's opinions. Thus, the Hearing Panel suggests no impropriety by this conduct. However, it is pertinent to explain the sequence of events, and the testimony.

parties. (T. 441). There are only two authorized bases for *en banc* review: (1) when the case "is of exceptional importance;" or (2) when "necessary to maintain uniformity on the court's decisions." Rule 9.331(a), Fla. R. App. Proc. (T. 334; 481-82).

On June 21, 2005, before the Childers panel opinion was released to the public, Judge Thomas prepared an extensive "motion for *en banc* review," which was circulated to the entire court. (T. 458-59, Ex. 22).

On February 2, 2006, the Court issued an *en banc* decision. It consisted of 9 opinions (with varying judges aligning on different issues). Essentially, ten judges voted to affirm Childers' conviction (Judges Davis, Van Nortwick, Padovano, Lewis, Hawkes, Thomas, Allen, Wolf, Webster and Benton). Four Judges dissented, and voted to reverse (Chief Judge Kahn and Judges Ervin, Browning and Polston). (Ex. 1).

One reason for nine separate opinions was a legal dispute over the court's jurisdiction to proceed *en banc*. (T. 33-34; 57-60; 349-50; 404; 481-82). There was a spirited, heated, and at times, contentious dispute over the court's authority, rationale, and decision to bypass the three judge panel. (Ex. 1).

Judge Allen took umbrage at separate opinions authored by Judges Kahn and Wolf on the issue of *en banc* jurisdiction. He termed statements in these opinions "unfair," "false" "malicious" "harmful," "offensive", "taunting" and "an attack on the integrity of the court." (T. 75-79; 88; 143-44; 146; 150; 156; 158).

Following release of the *en banc* decision, Childers' attorney timely moved to certify certain questions to the Florida Supreme Court. Certification would have afforded the Florida Supreme Court a basis to review the First District's decision.[6] The same ten judges who voted to affirm, voted to deny Childers' motion for certification; the same four judges who voted to reverse, voted to grant the motion. (Exs 1 & 2). A dissent from Judge Kahn generated further majority opinions. (Ex. 29).

On June 9, 2006, Judge Allen circulated his proposed concurrence on the certification question to the entire court with a note that "[T]his language added to Judge Kahn's opinion is the final assault on the integrity of the Court I intend to endure in silence." (T. 91-92; Ex. 4). Another judge appealed to his colleagues for "a return to maturity, civility and sanity," requesting a stop to "further wallowing in the mud." (Ex. 3). Judge Allen took this as an added insult. (Ex. 3; T. 93).

Judge Allen's concurrence suggested that Fred Levin was intimately involved in Childers' appeal, that Judge Kahn procured his judicial appointment as a result of tobacco litigation benefiting Levin, that Judge Kahn was indebted to Levin, and that Judge Kahn paid back his indebtedness to Levin through his vote in Childers. (Ex. 2, at p. 9).

It did not explain that Judge Kahn joined the court in 1991,

[6] The Florida Supreme Court has discretionary jurisdiction to review decisions of district courts of appeal that "pass upon a question certified to be of great public importance." Fla. Const. Art v, §3(b)(4).

long before the tobacco litigation; and Childers' appeal was not handled by Fred Levin's firm. (Ex. 2; T. 589). Judge Allen quoted extensively from newspaper articles, but there was nothing in those articles connecting Judge Kahn to the tobacco litigation or to Childers. (T. 501-02). Judge Allen had no evidence that Childers was a client when Kahn worked for the Levin firm. (T. 115). Judge Allen supplied these links by supposition. (Ex. 2).

The suggestion that a judge has sold his vote as "payback" is a serious charge of corruption. (T. 142; 245-46). **Judge Allen admitted that he did not know if the facts detailed were true, and had no reason to believe that Judge Kahn was casting a vote for return of a favor.** (T. 107; 122; 189-90).

None of Judge Allen's colleagues joined this concurrence, or warned him of a potential violation of judicial canons. However, most of the judges were seriously concerned about its proposed release, and the impression conveyed of corruption. (Exs. 1, 3; T. 44; 93-94; 172; 196-97; 239; 252-53; 258; 339-40; 367; 376; 493-94; 573; 577-79). A few described it as a fair and reasonable explanation of reasonable views, but even some of these deemed its release "unwise" and "problematic." (T. 470-73; 492-93; 499; 518; 573; 584-85).

One of the members of the Court tried to mediate a solution. (T. 61; 484-86). Judge Kahn offered to withdraw his proposed dissent to the denial of certification. (T. 178, Ex. 33). That was not enough for Judge Allen (among others) who insisted on the

withdrawal of all prior opinions contesting the propriety of *en banc* review, before he would withdraw his concurrence. (T. 63; 180-82; 489-90; Ex. 33). On June 26, 2006, the "mediator" judge e-mailed Judge Kahn indicating:

> [**I] think that [Mike] would really like for his opinion to go out. He was upset with me this morning for continuing to look for a solution. He thinks you are stalling for time and I am playing into your hand.** Several other judges who are in the majority have told me that they want a complete withdrawal of all opinions *en banc*. Of course, that would mean that those who wrote in favor of going *en banc*, Thomas and Allen would have to withdraw their opinions. (Ex. 33, emphasis added).

When Judges Kahn and Wolf refused to withdraw their prior opinions, Judge Allen issued his concurrence, telling a trusted colleague that "It's time for them to get theirs." (T. 259).

CONCLUSIONS OF LAW

Judge Allen defended his concurrence on the basis that he did not personally attack Judge Kahn, or suggest corruption. (T. 104; 106; 123; 125-26; 213). Instead, he simply raised "concerns" that might be entertained by suspicious members of the public, and bring the court into disrepute. (T. 103-04; 106). To the contrary, Judge Allen's concurrence clearly suggested that Judge Kahn cast a corrupt vote as a payback to friends. (T. 224; 245; 300-01; 318-19; 364; 495).

The Hearing Panel agrees with the assessment that "Judge Allen's opinion ... could not have helped but create the impression in the minds of many that Judge Kahn was on the take

and that ... someone had attempted to purchase his vote on the panel," and "it's hard to draw any other impression" from the opinion. (T. 224; 245; 252-53; 300-01; 319; 363-64).

Judge Allen's opinion was not only counter-productive, it was unnecessary. By the time of its release, the entire court had already affirmed Childers' conviction by a vote of 10-4. (T. 388; 516). This raised the spectre that Judge Allen was abusing his opinion writing power to settle a personal score. (T. 378; 388). Judge Allen's concurrence was no less a personal attack on a colleague because he phrased it in the third person, invoking "suspicious readers," as a substitute for the more direct and straightforward "J'accuse." See Milkovich v. Lorain Journal Co., 497 U.S. 1, 18-19, 110 S.Ct. 2695, 111 L.Ed. 2d 1 (1990) ("If a speaker says 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are incorrect or incomplete, or if his assessment of them is 'erroneous', the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications....").

Judge Allen also urged that his opinion was warranted by the decisions of Judges Kahn and Wolf, which argued the "illegality" of the *en banc* procedure. (T. 110; 124). There is a clear distinction between criticizing the state of the law (i.e.,

application of the *en banc* rule)[7] and attacks upon the integrity of an individual judge. See ex rel. Florida Bar v. Calhoon, 102 So. 2d 604, 608 (Fla. 1958):

> It would be contrary to every democratic theory to hold that a judge or a court is beyond *bona fide* comments and criticisms which do not exceed the bounds of decency and truth or which are not aimed at destruction of public confidence in the judicial system as such. However, where the likely impairment of the administration of justice is the direct product of false and scandalous accusations then the rule is otherwise. (Citation omitted).

See generally In re Sawyer, 360 U.S. 622, 631, 645, 79 S.Ct. 1376, 3 L.Ed. 2d 1473 (1958) (Criticism on the state of the law "cannot be equated with an attack on the motivation or the integrity or the competence of the judges," and is not the same as indicating that a judge is corrupt, venal or incompetent); In re Palmisano, 70 F. 3d 483 (7th Cir. 1993) (affirming discipline against a lawyer for false accusations of corruption based *inter alia* on the rationale that all of the Supreme Court justices in Sawyer "assumed or stated that a lawyer's false accusations of criminal conduct directed against named judges may be the basis of discipline.").

Judge Allen also contends that his opinion is protected by

[7] State ex rel. Shea v. Judicial Standards Commission, 198 Mont. 15, 643 P.2d 210 (Mont. 1982), on which Judge Allen relies, falls into this category. The Montana Supreme Court ruled that one of its justices could not be disciplined for "willful misconduct in office" for a dissent which accused the majority of unfairness, being "slippery with the facts" and "intellectually dishonest." This was criticism of the majority **decision**, not a personal attack on a particular judge.

the First Amendment, and may not form the basis for disciplinary proceedings. Special Counsel relies heavily on In re Kelly, 238 So. 2d 565 (Fla. 1970) in response. Judge Kelly, a newly elected judge, created turmoil and chaos in his circuit by newly instituted procedural changes. When other judges voted to remove him, Judge Kelly responded by filing a "petition" with the clerk of the court, misrepresenting the facts regarding his removal. Judge Kelly then called a press conference to generate favorable publicity for himself, to the detriment of his fellow judges, who were not even furnished a copy of his petition.

The JQC concluded that Judge Kelly violated judicial canons by his conduct. The Supreme Court affirmed, but emphasized that it was not faced with the question of free speech or the contents of the judge's pronouncements, and focused on "whether the motive of, and the methods used by" the judge should be considered conduct unbecoming a member of the judiciary. It deemed a public reprimand warranted by the judge's abuse of his official power to generate favorable publicity when he had alternative, authorized methods of protest.

Kelly is not on all fours because the content of Judge Allen's opinion is squarely at issue here, and he has invoked "freedom of speech" as a defense. Since there is no controlling case, the Hearing Panel has examined analogous law controlling attorney discipline.

Courts have split on whether to use the "actual malice" test

applicable to defamation suits[8] in attorney disciplinary proceedings, or a more objective test. See Fla. Bar v. Ray, 797 So. 2d 556 (Fla. 2001); see e.g. In re Cobb, 445 Mass. 452, 468-70, 838 N.E. 2d 1197 (Mass. 2005) (and cases collected).

Courts reason that defamation actions are brought to vindicate private wrongs to reputation with an award of money damages. Florida Bar v. Ray, 797 So. 2d at 558-59. In contrast, attorney disciplinary actions are designed to preserve public confidence in the judicial system. Id.; see also In re Terry, 271 Ind. 499, 394 N.E. 2nd 94, 95 (Ind. 1979) ("Professional misconduct, although it may directly affect an individual, is not punished for the benefit of the affected person; the wrong is against society as a whole, the preservation of a fair, impartial judicial system, and the system of justice as it has evolved for generations."); In re Graham, 453 N.W. 2d 313, 322 (Minn. 1990) ("[W]here an attorney criticizes the bench and bar, the issue is not simply whether the criticized individual has been harmed, but rather whether the criticism impugning the integrity of judge or legal officer adversely affects the administration of justice and adversely reflects on the accuser's capacity for sound judgment.").

Florida has joined the majority of jurisdictions in embracing the latter test, focusing on whether an attorney has an "objectively reasonable factual basis" for making derogatory

[8] New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11

statements about the judiciary. Florida Bar v. Clark, 528 So. 2d 369 (Fla. 1988) (accusing judge of a pattern of racketeering, warranted discipline). Under the objective standard, an attorney does not lose his right to free speech. He is simply required to have a reasonable factual basis for making such statements. Florida Bar v. Ray, 797 So. 2d at 558-59; In re Cobb, 838 N.E. 2nd at 1214.

Unfounded accusations of corruption have long been treated seriously. See State ex. rel. Kirk v. Maxwell, 19 Fla. 31, 1882 WL 3052 (Fla. 1882); State ex. rel. Florida Bar v. Calhoon, 102 So. 2d 604 (Fla. 1958); Cerf v. State, 458 So. 2d 1071 (Fla. 1984). This includes accusations made by lawyers in pleadings. In Cerf, *supra*, an attorney filed a petition for writ of mandamus with an appellate court seeking return of a child to his mother. In his pleadings, the attorney accused the trial judge, without record basis, of trading a guardianship *ad litem* to a "political crony" in exchange for a political contribution. The Florida Supreme Court **affirmed** a public reprimand reasoning that:

> The record clearly shows that appellant made false and unsubstantiated charges against Judge Gordon's integrity. Such conduct cannot be condoned. It is one thing to allow an attorney his truthful criticisms against our judicial system. However, it is quite another to allow an attorney a poetic license to falsely slander a circuit judge with untrue accusations of political corruption and bribery. Such accusations represent more than a personal attack upon that particular judge, but casts slurs and insults upon the judiciary

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L.Ed. 2d 686 (1964).

as a whole. Id. at 1074.

Accord In re Terry, 271 Ind. 499, 394 N.E. 2d 94, 96 (Ind. 1979) (accusations that judge conspired with attorneys to conceal and cover-up criminal activity); Office of Disciplinary Counsel v. Gardner, 99 Ohio St. 3d 416, 793 N.E. 2d 425 (Ohio 2003) (attorney's accusation that appellate court affirmed a conviction out of prosecutorial bias and corruption); In re Cobb, 445 Mass. 452, 838 N.E. 2d 1197 (Mass. 2005) (impugning the integrity of a judge); In re Graham, 453 N.W. 2d 313 (Minn 1990) (accusing judge of conspiring with attorney to fix the outcome of a case); In re Maloney, 949 S.W. 2d 385 (Tex. Ct. App. 1997) (attorney's motion for rehearing which attacked the integrity of appellate court judges).

Critical remarks from the Bar have impact on the judgment of citizens because attorneys are perceived to possess special knowledge of the judicial branch. Florida Bar v. Ray, 797 So. 2d at 560. Critical remarks from the bench are even more elevated. A judge is a consummate insider; his claim that corruption is afoot may well-nigh be considered by the average citizen to be unimpeachable and unassailable. See generally In re Graham, 620 So. 2d 1273, 1274 (Fla. 1993) (allegations of corruption against a colleague pose an even greater threat to public confidence in the fairness and impartiality of the judiciary).

The defense of "absolute immunity" fails for similar reasons. Attorneys have absolute immunity for damage suits for acts taken

in the course of judicial proceedings, related to the suit. See Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, 950 So. 2d 380 (Fla. 2007); Levin, Middlebrooks, Mabie, Thomas, Mayes, Mitchell, P.A. v. U.S. Fire Ins. Co., 639 So. 2d 606 (Fla. 1994). They are nonetheless subject to discipline when their pleadings step over the line. See Florida Bar v. Clark, 528 So. 2d at 371-72; Cerf v. State, 458 So. 2d at 1074-75.

The Hearing Panel does not, by this report, determine which of these legal standards apply (i.e., "motive and method," "actual malice," or the lack of an "objectively reasonable factual basis"). It concludes that Judge Allen violated all of these standards. He acted, at least in part, from a personal motive. He did not pursue proper methods by bringing claims to the appropriate authority (the JQC or law enforcement). Instead, he abused the power of his office by accusing Judge Kahn of trading his vote as payback for past favors when he admittedly had no evidence to support it. This conduct was reckless and had no objectively reasonable factual basis.

The Hearing Panel is convinced that Judge Allen acted from dual motives: (1) a perceived threat to the integrity of the Court by criticism; and (2) an extraordinary level of antipathy to Judge Kahn. The dissenting opinions were not, as suggested, an attack on the Court. Judge Allen nevertheless clearly took them personally. He succumbed to his dislike of Judge Kahn, which clouded his perspective and his judgment. Judge Allen knew that

his concurrence would be "devastating," would harm Judge Kahn, and would impede future endeavors, including judicial opportunities. (T. 340-41).

More importantly, Judge Allen's concurrence brought the court and the judiciary into disrepute. (T. 243-44; 246; 282; 301; 318-19; 363; 378). It did not promote public confidence in the integrity and impartiality of the judiciary. (T. 244-45; 300-01; 306; 318-19).

Judge Allen agreed that there are lines which should not be crossed in appellate opinions, (T. 203), and that appellate opinions should not make personal attacks on the character and integrity of other judges. (T. 110). Judge Allen, in the opinion of the Hearing Panel, crossed the line here. He caused the public to question the Court's integrity and impartiality. Such a taint, once created, is not soon dissipated.

For all of the foregoing reasons, Judge Allen's renewed motion to dismiss and motion for directed verdict are denied.

Canon 1 of Florida's Code of Judicial Conduct provides:

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2A of Florida's Code of Judicial Conduct provides:

> A judge shall respect and comply with the law

> and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 3B(5) of Florida's Code of Judicial Conduct provides:

> A Judge shall perform judicial duties without bias or prejudice....

The Hearing Panel finds Judge Allen guilty of Count I by violating Canons 1, 2A & 3B(5), of the Code of Judicial Conduct. The panel finds no violation of Judicial Canons 3B(2) (faithfulness to the law and professional competence), or 3B(4) (patience, dignity and courteousness). The Hearing Panel deems the Rules Regulating the Florida Bar, including Rule 4-8.2(a) inapplicable to a sitting judge, whose conduct is governed by the Code of Judicial Conduct.

The Hearing Panel finds Judge Allen not guilty of Count II, concluding there is insufficient evidence to support this charge under In re Davey, 645 So. 2d 398, 406-07 (Fla. 1994).

Judge Kahn's Conduct

The Hearing Panel denied Special Counsel's motion *in limine*, and admitted evidence of Judge Kahn's conduct through and including June 28, 2006, the date of the concurrence, but excluded evidence thereafter. Some of that evidence was nevertheless adduced. The panel thus heard that Judge Kahn resigned the Chief Judgeship on the verge of removal for various reasons. (T. 46-52; 135-40; 224-25; 239; 343-44). The Hearing Panel does not condone or offer judgment on Judge Kahn's behavior, as it is not the subject of these formal charges.

However, these proceedings are a matter of public record, and the transcript of the final hearing is available to the Investigative Panel of the Judicial Qualification Commission for such action as it deems appropriate. See F. J. Q. C. Rule 6(a).

RECOMMENDATION OF PUNISHMENT

In Kelly, 238 So. 2d at 565, the Florida Supreme Court ordered a public reprimand. Special Counsel suggested this would be appropriate if Judge Allen was acquitted of the second count, which has in fact occurred. (T. 632).

By all accounts, Judge Allen is an excellent, hard-working judge, with an otherwise unblemished reputation, who has rendered extraordinary service to the State of Florida. (T. 599; 605; 609). There were no cases directly on point for Judge Allen to look for guidance, but he solicited the opinions of others before he published. (T. 92; 209; Ex. 18). Otherwise, a more severe sanction might be warranted. The Hearing Panel has confidence that Judge Allen has learned from this experience, and that nothing like it will ever occur again. Judge Allen has also been able to fulfill the duties of his office without incident, despite these proceedings, and is otherwise presently fit to hold office. Accordingly, the Hearing Panel recommends to the Supreme Court that it administer a public reprimand.

All of the Hearing Panel's findings are supported by clear and convincing evidence. In re Henson, 913 So. 2d 579 (Fla. 2005). The vote of the Hearing Panel on guilt as well as the

recommended discipline has been determined by an affirmative vote of at least two thirds of the six hearing panel members, meeting the Constitutional requirements. Fla. Const. Art V, §12(b); F.J.Q.C. Rule 19.

DATED this 18 day of July 2008.

FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

By:

JUDGE PAUL BACKMAN
Chairman, Hearing Panel,
Florida Judicial Qualifications Commission
1110 Thomasville Road
Tallahassee, FL 32303
(850) 488-1481 (telephone)
(850) 922-6781 (facsimile)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U.S. Mail this ___ day of July, 2008 to Richard C. McFarlain, Esq., Carr Allison, 305 South Gadsden Street, Tallahassee, FL 32301; Bruce S. Rogow, Esq., and Cynthia Gunther, 500 East Broward Boulevard, Suite 1930, Fort Lauderdale, FL 33394; Guy Burnette, Esq., 3020 N. Shannon Lakes Drive, Tallahassee, FL 32309; Brooke S. Kennerly, Executive Director, Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, FL 32303; F. Wallace Pope, Esq., Special Counsel to the Florida Judicial Qualifications Commission, P.O. Box 1368, Clearwater, FL 33757; Marvin E. Barkin, Esq., Interim General Counsel, Fla. Judicial Qualification Commission, 2700 Bank of America Plaza, 101 E. Kennedy Boulevard, Tampa, FL 33601-1102 and Lauri Waldman Ross, Esq., Ross & Girten, 9130 S. Dadeland Blvd., Suite 1612, Miami, FL 33156.

By: /s/
Judge Paul Backman