BEFORE THE JUDICIAL QUALIFICATIONS COMMISSION,
STATE OF FLORIDA

INQUIRY CONCERNING JUDGE
DALE C. COHEN, CASE NO.: 09-524 S. Ct. Case No.: 10-348
_____/

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF THE HEARING PANEL, FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

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

The Course of Proceedings

On February 25, 2010, the Investigative Panel of the JQC filed a notice of formal charges against the Honorable Dale C. Cohen, Circuit Judge for the Seventeenth Judicial Circuit. The Notice charged Judge Cohen with judicial misconduct in connection with: (1) proceedings in State v. Gibbs, 17th Judicial Circuit Case No. 09-1421 CA-10A; (Notice, ¶ 1-3; 8); (2) proceedings in State v. Butler, 17th Judicial Circuit Case No. 08-22681-CF-10A (Notice, ¶ 4-7); (3) a personal attack on the character of attorney Steven Melnick made to the Investigative Panel, after describing him as a friend at the 6 (b) hearing (Notice, ¶ 9); (4) the submission of photos taken by Mardi Ann Levey Cohen

(the Judge's wife) to the Investigative Panel (Notice, ¶ 10); (5) failure to mention the **Butler** case to the Investigative Panel, when questioned about **Gibbs** (Notice, ¶ 11); and (6) a continuing pattern of judicial misconduct reflected by the foregoing. (Notice, ¶ 12).

Judge Cohen answered, denying misconduct and offering various explanations. As an affirmative defense, he claimed that Judicial Canon 3(d)(2) requires a judge to take appropriate action when there is a substantial likelihood that an attorney violates Rules Regulating The Florida Bar.

Henry M. Coxe, III, Esq. chaired the Hearing Panel, which conducted a final hearing on January 18 and January 19, 2011. Six Commissioners were present during the hearing and deliberations. In addition to Chairman Coxe, these included Judge Manuel Menendez (ad hoc), Judge Stasia Warren (ad hoc), Evett Simmons, Esq. (ad hoc), Shirlee Bowne (lay member) and Harry Duncanson (lay member).

Special Counsel F. Wallace Pope represented the Investigative Panel. Judge Cohen was represented by Michael A. Catalano, Esq. Lauri Waldman Ross, Esq. served as counsel to the Hearing Panel.

The pleadings are on file with the Florida Supreme Court. The parties submitted a Stipulation of Facts and Documents for Final Hearing, incorporating exhibits, which were admitted at the outset of the hearing, and

streamlined the proceedings. (T. 8). A transcript of the final hearing, all trial exhibits, and exhibits marked for identification are being filed simultaneously with the Court.1

The Hearing Panel summarizes: (1) the charges and their disposition; (2) findings of fact; (3) conclusions of law; and (4) recommended discipline.

The Charges and Their Disposition

The charges alleged in the Notice of Formal Charges and their disposition are as follows:

1. On August 6, 2009, in State of Florida v. Steven Gibbs, Broward County Case No. 09-1421-CF-10A, you were the presiding judge. Attorney Stephen Melnick, who was representing Defendant, Steven Gibbs, filed a sworn motion to recuse you. The motion was sworn to by both Steven Gibbs and attorney Melnick. Among other things, the sworn recusal motion alleged that Attorney Melnick had conferred with Attorney William Scherer about a lawsuit to be filed against your wife Mardi Levey, who was a candidate for judicial office. The lawsuit, in which Mr. Melnick was involved was ultimately filed against Marti(sic) Levey and the Broward County Supervisor of Elections to have Marti (sic) Levey disqualified from the ballot. The lawsuit against your wife also contained allegations about your involvement in the election recount on behalf of your wife.

2. The **Gibbs** recusal motion was legally sufficient on its face, but instead of making that determination and

[1] References are to the parties' stipulation (Stip., ¶ ___), the hearing transcript (T. ____) and the trial exhibits. (Ex. ____).

recusing yourself immediately, contrary to the provisions of Rule 2.330 (f), Fla. R. Jud. Admin., you held an evidentiary hearing in which you were the chief interrogator. Furthermore, before the hearing you had an **ex parte** conversation with your wife, the witness you intended to call, and when you interrogated her at the hearing, over Mr. Melnick's objection, your wife testified in a way that contradicted Mr. Melnick which put Mr. Melnick in the position of attacking the credibility of your wife in a proceeding before you. At the 6 (b) hearing on November 6, 2009, you admitted that the motion was legally sufficient and that in conducting the evidentiary hearing you violated the judicial canons.

3. Your purpose in holding the hearing was to intimidate Mr. Melnick, and in doing so you used the courtroom and the power of your office to advance the interests of you and your wife. Your conduct was an abuse of your judicial power, an abuse of your office and was an improper use of your office for personal gain.

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8. In State v. Gibbs, although you had earlier recused yourself, Mr. Gibbs ultimately came before you for sentencing because Mr. Melnick was no longer representing Mr. Gibbs and at that hearing you questioned Mr. Gibbs about Mr. Gibbs' motion to disqualify. The purpose of this questioning was to develop information you could use to embarrass and intimidate Mr. Melnick.

Disposition: Guilty as charged of violating Judicial Canons 1, 2A, 2B, 3B(1), 3B(2), 3B (7) and 3E(1)(d). The Preamble is merely explanatory of the canons, and was not violated. The sufficiency of the recusal motion is immaterial to this disposition.

4. On August 28, 2009, twenty two days after the foregoing events in the **Gibbs** case, and in response to a sworn motion to recuse that attorney Melnick filed in the matter

of **State v. Leon Butler**, Broward County Case No. 08-22681-CF-10A, you required Mr. Melnick and his client, Leon Butler to appear before you, and again, contrary to Rule 2.330(c), you held an evidentiary hearing.

5. In the **Butler** case, Mr. Melnick filed a motion to recuse you, and both Mr. Melnick and Mr. Butler swore to the truth of the allegations in the motion to recuse. In the **Butler** motion to recuse, the motion contained the same allegations as in the **Gibbs** motion to recuse, but included the additional allegations about the recusal hearing you conducted on August 6, 2009, in the **Gibbs** case. These additional allegations were that you questioned the truthfulness and veracity of earlier recusal motions of Mr. Melnick; that you conducted the hearing in which you called your wife as a witness to challenge the credibility of Mr. Melnick; and that the hearing was conducted in an effort to embarrass and intimidate Mr. Melnick.

6. The **Butler** recusal motion is legally sufficient on its face and you should have immediately granted it. Instead, you swore in Mr. Butler and began to question him about conversations he had with his attorney Mr. Melnick. Mr. Melnick objected asserting attorney/client privilege, but you overruled Mr. Melnick's continuous objections that your questions invaded the attorney/client privilege, and you ordered Leon Butler to answer your questions. During the hearing, you threatened Mr. Melnick that you would file a Florida Bar complaint against him for forum shopping.

7. The purpose of your interrogation of Leon Butler on August 28, 2009, and your threat to report Mr. Melnick to the Florida Bar was to embarrass and intimidate Mr. Melnick.

Disposition: Guilty as charged of violating Judicial Canons 1, 2A, 2B, 3B(1), 3B(2), 3B(7), and 3E(1)(d). The Preamble is merely

explanatory of the canons and was not violated. The sufficiency of the recusal motion is immaterial to this disposition.

9. In your personal appearance before the Investigative Panel on November 6, 2009, you repeatedly described Mr. Melnick as a friend for whom you had no animosity, yet in your written response to the Commission in lieu of personal appearance dated December 10, 2009, which you submitted for your hearing before this Commission on January 15, 2010, you sought to discredit Mr. Melnick by personally attacking him as follows:

- "I was seriously in doubt of [Mr. Melnick's] ethics..."
- "I knew that he had a reputation for being less than ethical at times, in the handling of his cases."
- "Stephen Melnick is the lawyer in the courthouse who regularly appears in court dressed in jeans, and a casual blazer, no tie and untied sneakers."
- "He is very lax in his approach to the court, shows a general disdain for the authority of the court, and does not respect the decorum of the courtroom."
- "Many of Melnick's clients appear in court without him and indicated that he has told them to appear for him and to request a reset or a continuance of their case."

Disposition: Not guilty of misleading the Investigative panel. Guilty of a misplaced personal attack on Mr. Melnick.

10. On January 12, 2010, your wife, who is now running for judicial office under the name Mardi Ann Levey Cohen, was observed by a court deputy and the court clerk in Judge Jeffrey Levenson's courtroom clandestinely photographing Mr. Melnick, and when confronted about it, your wife left the courtroom. You submitted those photographs of Mr. Melnick to the Investigative Panel of the Commission. This was a continuation of your efforts

to embarrass and intimidate Mr. Melnick and to advance your personal interests and those of your wife, and constituted an abuse of your office, an abuse of judicial power and an improper use of your office for personal gain.

Disposition: Not guilty**.**

11. On November 6, 2009, when the Investigative Panel was expressing its concern that your behavior in the **Gibbs** matter suggested that you had allowed a marital relationship to influence your conduct or judgment, you failed to disclose to the Panel that you held an evidentiary hearing on an additional disqualification motion involving Mr. Melnick and your wife in the **Butler** case. Although not directly related to the merits of the **Gibbs** motion, the failure to mention the **Butler** hearing was relevant to the Panel's attempt to ascertain the purpose of your conducting the **Gibbs** hearing.

Disposition: Not guilty**.** In the absence of an inquiry sufficient to place Judge Cohen on notice that the Investigative Panel was looking into other facts or cases, Judge Cohen had no duty to disclose the **Butler** hearing.

12. The Preamble to the Code of Judicial Conduct provides that the Code is "intended to govern the conduct of judges and to be binding upon them" and also provides that the Commission should determine "whether there is a pattern of improper activity..." Your continuing pattern of judicial misconduct constitutes a pattern and practice unbecoming a judicial officer and lacking the dignity appropriate to judicial office, with the effect of bringing the judiciary into disrepute. The foregoing acts violates the Preamble to and Canons 1, 2A, 2B, 3B(1), 3B(2), 3B(7) and 3E(1)(d) of the Code of Judicial Conduct.

Disposition: Not guilty of a "pattern and practice" of wrongdoing.

FINDINGS OF FACT

A. Background

Dale Cohen and Mardi Levey Cohen met in law school. They graduated in 1986, and married on August 17, 1986 (Stip, ¶ 1). Dale Cohen joined the State Attorney's office, and left four years later to open his own law firm. (Stip, ¶ 1). He became board certified in criminal law in 2003, and was appointed to the circuit court bench by Governor Bush in 2006. Judge Cohen began to serve his term of office on May 1, 2006. (Stip, ¶ 2).

Mardi Levey Cohen likewise spent stints in government (the Attorney General and State Attorneys offices) and her own private practice. In June, 2006, shortly after Dale's appointment to the bench, Mardi took over her husband's law practice, and unsuccessfully ran for judicial office for the first time. (Stip, ¶ 5). Attorney Stephen Melnick actively supported Mardi's candidacy. (Stip, ¶ 6).

In May, 2008, Mardi qualified to run for judge under the name Mardi Ann Levey for the Group 3 circuit court seat then held by Judge Pedro Dijols. Attorney Melnick supported Judge Dijols, who was a personal friend, in what became a three way race. (Stip, ¶ 7-11). The primary election ended with Bernard Bober, first, gaining 38% of the vote, and Dijols and Levey separated

by a small number of votes for second place. This triggered an automatic recount (T. 119-20). After the canvassing board certified that Mardi Ann Levey came in second, Dijols sued to disqualify and remove Levey from the runoff ballot (T. 114; Ex. 1A). Dijols asserted that Levey willfully violated election law by running under her maiden name, rather than the married name in which she transacted private and official business. (Ex 1, pp. 4-6).

Melnick was heavily involved in the Dijols campaign, and Dijols used Melnick's office for campaign headquarters. (T. 116; 139; 247-48; 291-93; 328-29). Melnick held at least three fundraisers for Judge Dijols.(T. 293). An advertisement for one fundraiser posted on a local blog used the term "Re-elect Judge Dijols" rather than "Retain Judge Dijols." (T.161; 249). This was impermissible because Judge Dijols was initially appointed, not elected (T. 161).

Levey Cohen phoned Melnick to discuss this election law violation (T. 162; 294; 375; Ex. D, pp. 8-9). She and Melnick disputed the tenor and nature of their conversation. (T. 162; 375; Ex. D, pp. 10-11). Levey Cohen indicated that she phoned Melnick "because he was a friend" to give him a "heads up" about something he had done incorrectly. (T. 208). She described a friendly, polite exchange (T. 162; 208). In contrast, Melnick described a

phone call which was threatening in tone and content. Levey Cohen told him "You'll be sorry. You're making a big mistake," and then hung up. (T. 249; 295-96; 367; 375).

A trial judge struck Levey's name from the ballot, in a ruling reversed on appeal. Levey v. Dijols, 990 So.2d 668 (Fla. 4th DCA 2008) (T. 135-38; 162). Mardi Levey Cohen then lost to Bernard Bober in the general election held November 6, 2008 (T. 162).

On November 18, 2008, two weeks after the election, Melnick sought to recuse Judge Cohen in a criminal case based on the adversarial relationship which developed between Melnick and the Judge's wife during her 2008 campaign (T. 251; Ex. P). Judge Cohen granted the motion, without a hearing, as he did some 16 additional motions filed by Melnick which contained the same underlying basis. (T. 80; 252; 575; 590).

On January 5, 2009, Levey Cohen filed to run for election for a third time (T. 163-64; Ex. B). She put her name in for an open seat "to let everybody know" she intended to run. (T. 164).

Melnick arrived early the morning of Thursday, August 6, 2009, and served the prosecutor with a sworn motion to recuse Judge Cohen in **State v. Gibbs,** which was to be addressed at the end of the docket. (T. 463; 484). He

then left**.** The **Gibbs** motion had the same underlying basis as Melnick's prior recusal motions. (Ex. C - D). The prosecutor called Melnick to return to the courtroom when it was time for his case. (T.465).

Levey Cohen arrived at Judge Cohen's courtroom at approximately 11:30 a.m. to meet her husband for their regular lunch appointment on Thursday. (T. 166; 409). A prosecutor in Judge Cohen's division testified that Melnick was in the courtroom before lunch, his client was in custody, and they knew they were to come back after lunch for a case involving Melnick, his client, and Mardi Levey Cohen (T. 411; 483).

Prior to August 6, 2009, the Cohens had discussed the contents of Melnick's recusal motions, which detailed Levey Cohen's phone call to Melnick. (Ex. H, pp. 50-62). Over lunch on August 6, 2009, Judge Cohen told his wife that Melnick had just filed another such motion, and asked her to appear in his courtroom at 1:30 p.m. for an evidentiary hearing. (Ex. H, pp. 59-62). Levey Cohen appeared at the hearing as requested, without need for subpoena. (T. 202).

Ten to fifteen minutes before the 1:30 hearing, word went out that Mardi Levey Cohen was going to be a witness in a hearing before her husband, as one assistant state attorney texted another to "come watch." (T.

415-16; 418; 420). Justin Griffis, recipient of the text message, had no business in the courtroom, and "went because of the text." (T. 425).

Judge Cohen called the **Gibbs** case, announcing that he had "a sworn motion to recuse." (Ex. E, p. 3). He asked his wife whether she "had an opportunity to read the motion?" When she said, "No," Judge Cohen swore in his wife as a witness, and questioned her about the contents of **Gibbs**' recusal motion. (Ex. E, pp. 3-5). Melnick objected on the basis that the proceedings placed him in the "no win" position of disputing the credibility of the judge's wife. (Ex. E, pp. 4-5; T. 426-427). Judge Cohen chose to proceed, stating he'd "approach that bridge when we come to it." (Ex. E, p. 5).

Levey Cohen testified that she saw an advertisement for her opponent Pedro Dijols which was missing a disclaimer indicating it was a paid political announcement by the candidate. She phoned Melnick to advise this could violate the rules, and said "Pedro Dijols needs to follow the rules just like everyone else." (Ex. D, p. 7). In response to Judge Cohen's questions, his wife testified that the conversation was friendly and she "absolutely made no threats to Melnick." (Ex. D, pp. 7-8).

Melnick was forced to dispute Levey Cohen's testimony before her husband. (Ex. D, pp. 10-14). Melnick indicated that, within 3 to 5 minutes of

posting the advertisement on a local blog using the term "re-elect not retain," he received a threatening telephone call from Levey Cohen about this language. (Ex. D, p. 11). Melnick stated that he was directly and heavily involved in the Dijols campaign and research in the Dijols/Levey litigation. Judge Cohen questioned how his wife would know Melnick was "behind the scenes... working with Dijols?" He continued to question Melnick's factual statements, but thereafter granted **Gibbs**' recusal motion. (Ex. D, pp. 12-14). Melnick was uncomfortable when forced to cross-examine the judge's wife. (T. 255-56; 468; 480-81; Ex. D, p. 9). He thought that the Judge conducted the hearing to intimidate and embarrass him by questioning his credibility in a courtroom at the time that the judge's wife was running for judicial office. (T. 360).

The parties subsequently agreed that Levey Cohen phoned Melnick about use of the term "re-elect," **not** a missing disclaimer (T. 222; 250; 658). Levey Cohen indicated she "ma[d]e a mistake" in her testimony before her husband (T. 222).

On August 28, 2009, Melnick served a sworn motion to recuse Judge Cohen in State v. Butler. (Ex. E). This motion was the same as prior motions, except it added paragraphs 16-18, which stated:

16. The undersigned was also on August 6, 2009, called before the Honorable Cohen who questioned the truthfulness and veracity of earlier recusal motions.

17. Judge Cohen conducted a hearing in which he called his wife as a witness to challenge the credibility of the undersigned counsel.

18. This hearing was conducted in an effort to embarrass or intimidate the undersigned attorney who Judge Cohen's wife is aware is working for the election of a candidate being challenged by her. (Ex. E)(T. 82; 85; 266).

On August 28, 2009, Judge Cohen held an evidentiary hearing on **Butler**'s recusal motion. (Stip ¶ 18) There is no transcript available of the **Butler** recusal hearing because the court reporter's equipment failed. The JQC investigated, and concluded Judge Cohen had nothing to do with the unavailability of this transcript. (Stip., ¶ 18). Florence Taylor Barnes, a former prosecutor present at the hearing, provided an affidavit which the parties agreed was generally accurate and relied on in lieu of the transcript. (T. 21; 69-70; 263; Ex. N).

Judge Cohen called **Butler** as a witness and personally interrogated him about the allegations in the motion. (Stip., ¶ 18; Ex. N). Judge Cohen

asked **Butler** whether he knew anything about an election. **Butler** denied knowing anything about it, but indicated he had spoken to his attorney Melnick about "going to a different judge" because of some issue between the judge and Melnick. (Ex. N). Melnick objected to the court's inquiry citing attorney client privilege. Judge Cohen overruled such objections, informing Melnick that the information was not privileged since it pertained to facts in the motion to which the client swore. (Stip., ¶ 18; Ex. N). Judge Cohen warned Melnick that he was proceeding on perilous grounds, could be perceived as forum shopping, and the Florida Bar might be concerned. Melnick denied the claim and urged recusal based on the motion's allegations. Judge Cohen did not respond when Melnick asked if the court was threatening him with a bar complaint. (Ex. N).

Butler was neither educated nor sophisticated, appeared to be "clueless," and to lack any understanding of what transpired at the hearing. (T. 90-91; 264-65; 476-79).

After the **Butler** recusal hearing, Judge Cohen phoned Melnick to apologize, and gave Melnick a permanent order of recusal. (T. 269-70; 608). Judge Cohen did not criticize Melnick during this phone call, or claim he was guilty of forum shopping or had engaged in unethical behavior. (T. 270).

Melnick did not report Judge Cohen to any authorities. (T. 245-46; 270). He wanted these issues over, and not to have to appear before Judge Cohen. (T. 360; 371).

On September 29, 2009, the JQC Investigative Panel served Judge Cohen with a "Notice of Investigation" seeking an explanation from Judge Cohen regarding his actions in calling his wife as a witness at the **Gibbs** recusal hearing. (Ex. G).

The **Gibbs** case was reassigned to Judge Gillespie (T. 542). Melnick and attorney Andrew Coffey both appeared for defendant **Gibbs**, at a bond hearing, unaware of the other's existence. (T. 271; 542-44). Melnick told the judge that he had a conflict with Judge Cohen (which led to Judge Cohen's recusal) and if he was no longer the attorney on the case, it should go back to Judge Cohen. (T. 544). Judge Gillespie agreed (T. 271; 545). No one appears to have been aware that this practice was prohibited. (T. 545).

On October 22, 2009, defendant **Gibbs** appeared at a hearing before Judge Cohen represented by attorney Coffey (Stip, ¶ 17; Ex. F). Judge Cohen placed **Gibbs** under oath and interrogated him about the prior motion to recuse filed by attorney Melnick (Ex. F). He asked the defendant "What did Mr. Melnick tell you?" (Ex. F). Attorney Coffey "was surprised by that

line of questioning," and didn't know where the judge was heading. He did not object to the judge's questions or caution **Gibbs** on attorney client privilege as a result. (T. 551).

Judge Cohen appeared before the JQC Investigative Panel on November 6, 2009, as scheduled. (Ex. H). He testified that he thought the **Gibbs** recusal motion was legally sufficient at the evidentiary hearing on August 6, 2009, that he discussed the motion at lunch with his wife in advance of the hearing, and that there was no legally justifiable purpose for his inappropriate conduct. (Ex. H, pp. 33-53; 59-62; 67).

Judge Cohen described Melnick as a friend and indicated that he held the hearing on the **Gibbs** recusal motion because:

> [These motions] weren't accurate or they were exaggerated. And I thought, well, if he heard my wife, he would realize what he was writing wasn't true and we would get past it, he wouldn't file these anymore and this would clear it up. I thought whatever disagreement he had, I thought if he heard from my wife and he got to speak, that would be it....(Ex. H; pp. 9-10).

By his own account, Judge Cohen sought to dissuade Melnick from continuing to file similar motions. (Ex. H, pp. 24-25; 26-27).

The Investigative Panel asked Judge Cohen no open-ended questions which could be construed to invite a response about other cases. (Ex. H).

Sometime thereafter, it learned about the **Butler** hearing. On December 1, 2009, the Investigative Panel served Judge Cohen with a Notice of Investigation seeking an explanation of **Butler**. (Ex. I).

Judge Cohen incorrectly assumed that Melnick had made accusations leading to the new notice of investigation. (T. 611-12). This time, he submitted a "Written Response in Lieu of Personal Appearance" to the Investigative Panel, asserting that he held the **Butler** hearing because:

- "I was seriously in doubt of [Mr. Melnick's] ethics and whether Mr. Melnick had properly explained the motion to recuse and affidavit to the defendant;" (Ex. I, p. 1).

- "I have known Mr. Melnick as an attorney in Broward County prior to these incidents, and although we were friendly, I knew he had a reputation for being " less than ethical" at time in handling of his cases..." (Ex. I., p.1);

- "At this point it is important that this commission become familiar with Mr. Melnick's reputation among the courthouse and his credibility. Stephen Melnick is the lawyer in the courthouse who regularly appears in court dressed in jeans and a casual blazer, no tie and untied sneakers. He is very lax in his approach to the court, shows a general disdain for the authority of the court and does not respect the decisions of the courtroom. Many of Melnick's clients appear in court without him and indicate that he was

> late then appear for him and request a reset or continuance on their own." (Ex. I, p. 8).

Judge Cohen did not mislead the Investigative Panel. However, he made a misplaced personal attack on the character of attorney Melnick thinking that Melnick was the source of the charges, and that a good offense was better than simply responding. (T. 611; 634-35; 694).

Judge Cohen exercised poor judgment and acted inappropriately in calling his wife as a witness at a recusal hearing in which he acted as an inquisitor. He did so to embarrass and intimidate Melnick, and to prevent him from filing more recusal motions reflecting poorly on Levey Cohen, when she was engaged in another election campaign. (Ex. D, pp. 10; 24-26; 34-39; 42).

Assertions that the Cohens had no discussions of Melnick's recusal motions before the August 6, 2009 **Gibbs** recusal hearing (T. 167-68) strain credulity particularly in light of the detailed questions and answers on this subject before the JQC Investigative Committee. (Ex. H, pp. 49-50; 59-62; 66-67; T. 657-63).

Judge Cohen continued to exercise poor judgment when he placed **Gibbs** and **Butler** under oath, and interrogated them about the recusal motions filed by attorney Melnick. Judge Cohen may not have intended to retaliate against attorney Melnick, but these proceedings had the appearance

of impropriety and were used by the judge to convey the public impression that his wife was right, and Melnick, wrong.

CONCLUSIONS OF LAW

Canon 1 of the Florida Code of Judicial Conduct provides:

> **A JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY**
>
> 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 2 of the Florida Code of Judicial Conduct provides:

> **A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES**
>
> (A) 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.
>
> (B) A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of political office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

Canon 3 of the Code of Judicial Conduct states, in pertinent part:

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

*** * ***

B. ADJUDICATIVE RESPONSIBILITIES

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

*** * ***

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits are authorized, provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte

> communication and allows an opportunity to respond.
>
> * * *

E. DISQUALIFICATION

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> * * *
>
> (d) the judge or the judge's spouse, or a person within the third degree relationship to either of them or the spouse of such person:
>
> * * *
>
> (iii) is known to the judge to have a more than de minimus interest that could be substantially affected by the proceeding;
>
> (iv) is to the judge's knowledge likely to be a material witness in the proceeding;
>
> * * *

The bedrock of our judicial system is that "every litigant is entitled to nothing less than the cold neutrality of an impartial judge." State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613 (Fla. 1939). Nothing is more dangerous and destructive to the impartiality of the judiciary than a one sided communication between a judge and a single litigant. Rose v. State, 601

So.2d 1181, 1183 (Fla. 1992). Judicial Canon 3B(7) excludes all ex parte communications by a judge with limited and specific exception. See Inquiry Concerning a Judge: Clayton, 504 So.2d 394 (Fla. 1987)(interpreting the predecessor rule). The reason is that "Even the most vigilant and conscientious of judges may be subtly influenced by such contacts." Rose v. State, 601 So.2d at 1183. Levey Cohen may not have been a litigant but she certainly had an interest in discrediting Melnick.

Judges must necessarily have a great deal of independence in exercising the power entrusted to them, which is awesome. However, "such authority must never be autocratic or abusive." In re Inquiry Concerning a Judge: Turner, 421 So.2d 1077, 1081 (Fla. 1982). "Litigants and attorneys should not be made to feel that the disparity of power between themselves and the judge jeopardizes their right to justice." See In re Inquiry Concerning a Judge: Graham, 620 So.2d 1273, 1277 (Fla. 1993).

Attorney Melnick filed recusal motions against Judge Cohen based upon a dispute with the judge's wife. The matters detailed in the motions, if believed, reflected negatively on Levey Cohen, who was seeking election in a third judicial campaign. It is only natural for a husband to rise to the defense of his wife. Here, however, Judge Cohen was not merely a husband, but a

judge. Judge Cohen abandoned a role of neutrality, and used the judicial proceedings in **Gibbs** and **Butler** as a forum to vindicate his wife's personal interests.

Judge Cohen violated Judicial Canons 1, 2A, 2B, 3B(1), 3B(2), 3B(7) and 3E(1). He had ex parte communications with his wife about the Melnick motions and held an evidentiary hearing in which he called his wife as a material witness. This was a proceeding in which his impartiality could certainly be questioned. Courtrooms are not forums for judges to work out personal issues or friendships with the lawyers appearing before them. Nor should they be used to vindicate a judge's personal or professional interest.

The disparity of power between a judge and the lawyers and litigants appearing before him, in a proceeding where the judge is the inquisitor, renders the proceedings intimidating, whether or not the judge so intended.

The Hearing Panel rejects the defense that the Judge's interrogation of Melnick and his clients constituted "appropriate action" under Judicial Canon 3(d)(2). "Appropriate action" is to address minor misconduct directly with the perceived offender, or to inform the Florida Bar if the judge had knowledge that a lawyer violated a Bar Rule that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness. Commentary, Canon 3D; See

generally ABA Model Code, Rule 2.15, Comment 2. It does not include a personal investigation by the judge, during hearings set for other matters.

Recommended Discipline

The Florida Constitution vests jurisdiction in the JQC to recommend discipline for judges regarding misconduct during judicial service. Discipline includes "reprimand, fine, suspension with or without pay, or lawyer discipline." Fla. Const. Art. V, 12 (a)(1). In the instant case, the Hearing Panel recommends a public reprimand, together with the assessment of the cost of these proceedings against Judge Cohen.

All of Judge Cohen's violations stem from the same underlying facts: his use of office in efforts to vindicate his wife. This situation is akin to one where the judge uses the prestige of office to obtain favorable treatment for relatives or friends. In such instances, a public reprimand is generally deemed appropriate. See In re Inquiry Concerning a Judge: Maxwell, 994 So. 2d 974 (Fla. 2008) (approving public reprimand where judge intervened with sheriff's office to have sister of his former law partner released to a "Pretrial Release Program" without the benefit of personal appearance, where she was ineligible because of other charges for which she was currently serving a lengthy probation sentence); In re Inquiry Concerning a Judge: Brown, 748

So. 2d 960 (Fla. 1999) (approving public reprimand where judge executed arrest warrants for the arrest of judge's daughter in law on his son's affidavit, after the judge had recused himself, where the judge recognized the defendant's identity and signed as a convenience to the sheriff's office because he was the only county judge in his County); In re Inquiry Concerning a Judge: Maloney, 916 So.2d 786, 788 (Fla. 2005) (approving public reprimand where judge phoned police to have a close personal friend released into his father's custody in violation of §316.193, Fla. Stat. governing driving under the influence of alcohol). The Panel also recommends that Judge Cohen be ordered to pay the cost of these proceedings. In re Inquiry Concerning a Judge: Eriksson, 36 So.3d 580, 596 (Fla. 2010).

In recommending this discipline, the Hearing Panel has taken the following mitigating factors into consideration.

At the time of the **Gibbs** recusal hearing, Judge Cohen had been on the bench only three and ½ years. (T. 648-49). While Judge Cohen had substantial experience in the practice of criminal law, he had limited experience with recusal motions. (Ex. H, p. 24; T. 683).

Multiple witnesses described Judge Cohen as a smart, fair, conscientious judge, who is well liked and respected in Broward County. He is reputed to have high moral character, and to have excellent judicial

temperament. (T. 344; 397-98; 402; 450-51; 459-60; 507-08; 538). The witnesses included court personnel, attorneys, and other judges (including the Chief Judge) of the Circuit.

Judge Cohen has demonstrated remorse for his actions, and has suffered considerable embarrassment as a result. See In re Inquiry Concerning a Judge: Brown, 748 So.2d at 962; In re Inquiry Concerning a Judge: Maloney, 916 So.2d at 788-89. The Hearing Panel believes that the canon violations at issue here are fact specific, relate to one situation, and will not be repeated. Cf. Inquiry Concerning a Judge Albritton, 940 So. 2d 1083, 1089 (Fla. 2006) (approving combined punishment of public reprimand, $5,000 fine, unpaid 30 day suspension and costs where the judge committed fourteen substantial canon violations for a variety of canons, and it was "not a case in which the violations tended toward one variety")(emphasis added).

All of the Hearing Panel's findings are supported by clear and convincing evidence. 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, in compliance with Fla. Const. art V, § 12 (b); FJQC Rule 19.

Dated this____ day of_____,2011.

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