BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

NO. 09-48 & 08-162

INQUIRY CONCERNING JUDGE
RE: JUDGE ANA I GARDINER

_____/

MOTION TO DISMISS

NOW COMES, ANA I. GARDINER (hereinafter "Gardiner), Circuit Court Judge, 17th Judicial Circuit, Broward County, Florida, and moves to dismiss the "Notice of Formal Charges filed herein on March 3,2010." The composition of the "investigative panel" substantially violated the clear constitutional intent of Article V, § 12 of the Constitution of the State of Florida. Therefore any action by the "investigative panel" is null and void *ab initio*.

Statement of Facts

1. On information and belief, the original investigative panel 09-48, which complied with Article V, § 12, Fl Const., consisted of Mr. McGrane, the Chair; Judge Silvebman, Judge Wolf, Dr. Haber, Ms. Bownè, Rev. Bracy, Judge Gehl, Judge Backman, and Mr. Russell.

2. Judge Gardiner did not seek to disqualify or remove any member of the investigative panel.

3. The Chair, who presides of the investigative panel, or some other member of the Commission, unilaterally and without apparent authority, disqualified Commission members Russell, Judge Backman and Judge Gehl. They did not seek disqualification or removal. Backman and Gehl are judges and Russell is a practicing lawyer. The disqualified or removed members are all members of the Florida Bar. Additionally, they are all Broward County residents, and the only Broward County residents on the JQC.

4. Thereafter, the investigative panel consisted of six members, instead of the constitutionally mandated nine members. The six members were:

- Mr. Cardillo, the Vice Chair – Florida Bar member;
- Judge Silberman – Florida Bar member;
- Judge Wolf – Florida Bar member;
- Ms. Bowné – non-lawyer;
- Dr. Haber – non-lawyer; and
- Rev. Bracy – non-lawyer.

The Chair, Mr. McGrane, did not preside over the investigative panel as required by law.

5. The six-member investigative panel consisted of three non-lawyers and three members of the Florida Bar (i.e., two judges and one lawyer). It voted to bring charges against Gardiner, as set forth in the Notice of Formal Charges;

6. Gardiner did not waive, or agree to proceed with less than the Constitutionally mandated nine-member investigative panel.

Legal Argument

A. The Constitutional Ratio Among the Classes of Commission Members.

Article V, § 12 (f)(2)(a) and (b) states that the Florida Judicial Qualifications Commission (Commission) shall be divided, by Chair, into an investigative panel and a hearing panel. The nine-member investigative panel must be comprised of: (1) four judges, (2) two members of The Florida Bar, and (3) three non-lawyers. The three non-lawyers cannot be former judges or former members of The Florida Bar. The Chair is a required member of the investigative panel.

The judicial members of the Commission are chosen by their respective judges' conferences. The Florida Bar's Board of Governors chooses the lawyer members of the Commission. The Governor appoints the non-lawyer members of the Commission. Thus, as a check and balance, the judiciary, the governing body over lawyers, and the executive branch, by and through the Governor, select the Commission members.

The clear constitutional intent is that six of the nine members of the investigative panel must be members of The Florida Bar. The clear constitutional intent is that sixty-six percent (66%) of the members of the investigative panel <u>must</u> be members of The Florida Bar (i.e. judges are members of the Florida Bar). While thirty-three percent (33%) of the members of the investigative panel must be lay persons that have <u>never</u> been members of The Florida Bar.

The ratio of Florida Bar members versus non-lawyers is clearly evinced elsewhere in Article V, § 12, relating to the Commission. The "hearing panel" hears the evidence relating to the charges enumerated in the Notice of Formal Charges and recommends punishment. It must be composed of: (1) two judges, (2) two members of

The Florida Bar, and (3) three non-lawyers. This, too, is a ratio of sixty-six percent (66%) Florida Bar members versus thirty-three (33%) percent non-lawyers.

In addition, there is a clear constitutional intent that forty-four percent (44%) of the investigative panel must be judges. Article V, § 12 clearly states that the four of the nine members of the investigative panel must be judges. This is forty-four percent (44%) ratio of judges versus non-lawyers.

The investigative panel receives or initiates complaints, conducts investigations and dismisses complaints. Most importantly, it brings formal charges to the hearing panel. This constitutionally mandated ratio means that Florida Bar members, learned in the law, ethics and evidence, are a "super majority" (66%) of the investigative panel that either brings or rejects charges.

Further, the Constitution guarantees an accused judge that the judge's peers comprise forty-four (44%) percent of the investigative panel. This ratio on the investigative panel makes it possible for the judge's peers (fellow judges), joined by one other panel member, to constitute the simple majority that can either bring or reject charges.

FJQCR 25, relating to the disqualification of *hearing panel* members, is pertinent. It provides that an accused judge can move to disqualify a member(s) of the *hearing panel*. If a *hearing panel* member(s) is disqualified, the Chair must request, from each of the appointing authorities, a list of four persons who may temporarily serve in the absence of disqualified members. The appointing authorities are the judges' conferences, the Board of Governors of The Florida Bar, and the Governor. The Chair

must choose a replacement from those listed by the appropriate appointing authority. A replacement must be from the same category as the disqualified or removed member(s). For instance, if a lawyer is disqualified or removed, the lawyer's replacement must be from The Florida Bar's Board of Governor's list. If a non-lawyer is disqualified, the non-lawyer's replacement must be from the Governors' list. Rule 25 guarantees that the composition of the hearing panel always maintains the proper constitutional ratio, because a member from one class always replaces a disqualified member from the same class. Therefore, Rule 25 makes certain the constitutionally mandated ratio among the classes of members on the hearing panel is maintained and is constant.

B. Disqualification

The disqualification Rule[1] was substantially amended. The earlier version of the Rule provided that a judge against whom formal proceedings have been instituted may file an affidavit with the "Commission" stating that he or she fears that he or she will not receive a fair hearing before the "Commission." In 1998, the Rule was amended to read that a judge against whom formal proceedings have been instituted may file with the "hearing panel" an affidavit that the judge fears the judge will not receive a fair hearing before the " hearing panel," because of the prejudice of one or more members of the "hearing panel" against the judge. In 1998, the disqualification rule was amended to make it clear that it only applied to the disqualification of "hearing panel" members. The Judicial Qualification Commission Rules of Procedure are silent regarding the

[1] Formerly Rule 26, now numbers Rule 25

disqualification of investigative panel members, either by the accused judge or by the Commission itself.

C. Judge Gardiner's Case

It was error for the Chair or anyone else, to disqualify or remove any member of the investigative panel or for the hearing to proceed with six (6) members from the constitutionally mandated nine (9). Consider, if Gardiner wants to disqualify a hearing panel member, she must (1) submit an affidavit setting forth facts she believes support her belief or prejudice, and (2) her affidavit must be supported by affidavits from at least two reputable citizens not related to her. Therefore, she must, under oath, allege facts setting forth her claim of prejudice supported by affidavit from at least two disinterested, reputable citizens.

Compare, on information and belief, Judge Gardiner's investigative panel members were *sua sponte* disqualified or removed without any affidavit alleging facts setting forth why they might be prejudiced. Neither the Rules not Article V § 12, contain any procedure for the Commission's disqualification of investigative panel members. Without an established procedure, the Commission's action was arbitrary and capricious.

Most importantly, the three disqualified or removed investigative panel members were members of The Florida Bar. The disqualifications resulted in an investigative panel consisting of three members of The Florida Bar and three non-lawyers. The disqualifications or removals resulted in The Florida Bar's representation on the investigative panel being reduced from the constitutionally mandated "super majority" of

sixty-six percent (66%) to a non-majority fifty-percent (50%). Conversely, the non-lawyers' representation on the investigative panel jumped from the constitutionally limited thirty -three percent (33%) to fifty percent (50%). This made the non-lawyers representation, with their concomitant lack of legal training, equal to the representation of the Florida Bar members, instead of the proportionately lesser representation mandated by the Constitution.

But the errors did not stop there. On information and belief, not only was the numerical count and ratio manipulated without apparent authority, but the Chair, Mr. McGrane, did not sit as mandated by Rule 2 (2). Gardiner was not consulted nor did she agree to his non-participation. The Chair was improperly absent from the investigative panel, and for that reason as well the panel was improperly and prejudicially constituted.

Gardiner was deprived of an investigative panel, contrary to the Rules, of her peers. Two of the three disqualified or removed investigative panel members were judges. With the disqualification or removal of Judges Backman and Gehl, Gardiner's peers (fellow judges) on the investigative panel were reduced from the constitutionally mandated forty-four (44%) percent to thirty-three percent (33%).

She was further deprived of an investigative panel of her peers by the disqualification or removal of all Broward County residents. While no judge is guaranteed that residents of his or her county will sit on the investigative panel, the Judicial Qualification Commission Rules of Procedure do not mandate the automatic disqualification or removal of same county residents. The disqualification or removal of Judges Backman and Gehl and Mr. Russell clearly, without a basis for the belief of

prejudice, indicates that the Chair or other Commission members felt they could not be fair. This manipulated “quorum” defies the clear intent of the constitutional mandate and offends fundamentally fairness.

The unilateral and unauthorized disqualification or removal of these three Commission members, eviscerates the clear intent of the Constitution, as well as the Rules by:

1. depriving The Florida Bar of its “super majority” on the investigative panel;
2. depriving the judiciary of its mandated forty percent (40%) representation on the investigative panel;
3. depriving The Florida Bar of a duly appointed Commission representative;
4. depriving the judiciary of two duly appointed Commission representatives;
5. depriving Gardiner of an investigative panel consisting of her peers (fellow judge);
5. depriving Gardiner of an investigative panel consisting of members of her own community (Broward County residents); and
6. Unfairly manipulating a “quorum” without notice or opportunity for the judge to be heard and in violation of the clear and unequivocal mandate of Article V § 12 of the Florida Constitution.

Besides, clearly ignoring the Constitution and its own Rules, the Commission’s actions offend the electorate of Broward County. Gardiner stood twice for election since her appointment. She was elected without opposition. The citizenry of Broward County

have an expectation that the Commission will strictly adhere to the Constitution, as well as its own Rules.

The constitutional make-up of an investigative panel mandated by Rule and Article V § 12 is plain. The unlawful manipulation of the make-up of Gardiner's investigative panel, without oversight by the Supreme Court of Florida, or other authorizing authority, tramples on the essence of the rationale for a multiple, diverse member investigative panel from specifically identified groups employing their joint and several common senses and practical experiences applicable to the facts to result in the decision to charge, or not to charge, a sitting judge. The unilateral, un-consented manipulation of the investigative panel's make-up and numerical count does violated due process of law, does constitutional violence to the process and also to the Rule and Article upon which its very existence is based.

Conclusion

The clear conclusion is: (1) that three investigative panel members were improperly disqualified; (2) that their disqualifications ultimately resulted in the composition of the investigative panel violating, directly or indirectly, the clear Constitutional mandate regarding the proportional class representation of Florida Bar members and judges; (3) that the illegal composition of the investigative panel renders its action against Gardiner null and void *ab initio*;[1] and (4) that the investigation must

[1] When an order is vacated, it is nullified, canceled, invalidated, or made void. When an order is vacated, it is considered void *ab initio*, meaning it is a nullity from the beginning. Acts that are void *ab initio* cannot be fixed and the parties are returned to their respective positions at the beginning of the event. See *Black's Law Dictionary* 1546 (7th ed. 1999).

begin anew with an investigative panel consisting of the Constitutionally mandated ratio of Florida Bar members, judges, and non-lawyers.

WHEREFORE, Judge Gardiner, respectfully moves to Dismiss the current Notice of Formal charges, and to re-submit the allegation herein to a constitutionally formulated investigative panel in keeping with Article V 12 of the Florida Constitution and the Rules of the Judicial Qualification Commission.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this _____ day of March, 2010, to Clerk of the Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida, 32399-1927, with true and correct copies being furnished to Michael L. Schneider, General Counsel, Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, Florida, 32303-6224, Judge Thomas B. Freeman, Hearing Panel Chair, Criminal Justice Center, 14250 49th Street, North Clearwater, Florida, 33762-2801; Laurie W. Ross, Counsel to Hearing Panel, 9130 S. Dadeland Boulevard, Ste. 1612, Miami, Florida, 33156, and to Wallace Pope, Jr. Special Counsel for Florida Judicial Qualifications Commission, JOHNSON, POPE, BOKOR, RUPPEL, & BURNS, L.L.P., 911 Chestnut Street, Clearwater, Florida 33757.

Respectfully submitted,

BOGENSCHUTZ, DUTKO & KROLL, P.A.
Attorneys for Defendant
600 South Andrews Avenue, Suite 500
Fort Lauderdale, Florida 33301
(954) 764-2500

BY:_____

J. DAVID BOGENSCHUTZ
Florida Bar No. 131174