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IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,595

FILED
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APR 16
CLERK, SUPREME COURT
By________
Chief Deputy Clerk

INQUIRY CONCERNING A JUDGE :

NO. 84-176 (HONORABLE :
J. ALLISON DEFOOR, II)
:

COMMISSION'S REPLY TO RESPONDENT'S RESPONSE TO ORDER TO SHOW CAUSE AND ANSWER BRIEF OF COMMISSION

JOHN S. RAWLS, ESQ.
General Counsel
Judicial Qualifications
Commission
Room 102, The Historic Capitol
Tallahassee, Florida 32301

ALBERT G. CARUANA, ESQ.
Wright and Caruana, P.A.
Special Counsel to the
Judicial Qualifications
Commission
Suite 1000 Roberts Building
28 West Flagler Street
Miami, Florida 33130
Telephone (305) 371-7972

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INTRODUCTION

The Florida Judicial Qualifications Commission hereby replies to the Respondent's "Response to Order to Show Cause" and replies to Respondent's Initial Brief.

The following designations will be used:

Commission App.:	Appendix of the Commission filed simultaneously herewith
Stipulation:	Evidentiary Stipulation as to all Facts executed by Respondent, Respondent's counsel and Special Counsel to the Commission on November 9, 1985. (See R. App. 3)
R. App.:	Respondent's Appendix

STATEMENT OF THE CASE AND OF THE FACTS

On July 2, 1985, the Florida Judicial Qualifications Commission ("Commission") issued its "Notice of Investigation" to the Honorable J. Allison DeFoor, II ("Respondent") advising that the Commission was conducting an investigation of the Respondent with regard to the following alleged conduct:

1. Respondent improperly actively participated in political activity inappropriate to his judicial office by openly supporting the candidacy of Richard J. Fowler for Circuit Judge of the Sixteenth Judicial Circuit in and for Monroe County and the candidacy of Randall Winter for Public Defender, Sixteenth Judicial Circuit in and for Monroe County in violation of Canon 7 of the Code of Judicial Conduct which requires that: "a judge should refrain from political activity inappropriate to his

judicial office".

2. Respondent utilized his judicial office and the prestige of his office to advance the private and financial interest of himself and others with respect to the use of the "electronic leash" probation monitoring device and the sales and marketing promotion thereof at a time when he owned stock in Controlled Activities Corp., a for-profit corporation ("CONTRAC"), which markets said device, and he failed to regulate his extra-judicial activities to minimize the risk of conflict with judicial duties and he failed to refrain from financial and business dealings that tend to reflect adversely on his impartiality and which exploit his judicial position, in violation of Canons 2, 3 and 5 of the Code of Judicial Conduct.

3. Respondent improperly required defendants, as a condition of probation, to make "restitution" monetary contributions to Pennekamp Coral Reef Institute, Inc., a non-profit corporation, of which he was a member of the Advisory Board and of which he was instrumental in originating, in the Case of State of Florida v. Jernigan, Monroe County Court Case Number 83-1932 and in State of Florida v. Severt, Monroe County Court Case Number 84-849, in violation of Canon 2B and Canon 25B of the Code of Judicial Conduct.

4. Respondent improperly established a uniform procedure pursuant to which traffic violators ("speeders") could, without appearing in court, pay directly to the clerk of court double the statutory fine and thereby obtain an automatic withhold of adjudication in violation of Canons 2 and 3 of the Code

of Judicial Conduct. (Commission App. 1).

On July 26, 1985, the Commission conducted a duly noticed Rule 6B hearing at the Tampa Airport Marriott, Tampa, Florida, at which time the Respondent took the oath and testified on his own behalf and at which time counsel for the Respondent made certain representations to the Commission. (R. App. 5).

On September 6, 1985, the Commission served its "Notice of Formal Proceedings" upon the Respondent, notifying the Respondent that the Commission, by a vote of at least a majority of its members, at the meeting of July 26, 1985 has determined that formal proceedings should be instituted against Respondent with respect to the following three charges:

COUNT I

> 1. You improperly actively participated in political activity inappropriate to your judicial office by openly supporting the candidacy of Richard J. Fowler for Circuit Judge of the 16th Judicial Circuit in and for Monroe County and the candidacy of Randall Winter for Public Defender, 16th Judicial Circuit in and for Monroe County in violation of Canon 7 of the Code of Judicial Conduct which requires that:
>
> > "A Judge should refrain from political activity inappropriate to his judicial office."

COUNT II

> 2. You improperly utilized your judicial office and the prestige of your office to advance the private and financial interests of yourself and others with respect to the use of the "electronic leash" probation monitoring device and the sales and marketing promotion thereof at a time when you owned stock in Controlled Activities Corp., a for-profit corporation (CONTRAC), which markets said device, and you failed to regulate your extra-judicial activities to minimize the risk of

conflict with judicial duties and you failed to refrain from financial and business dealings that tend to reflect adversely on your impartiality and which exploit your judicial position, all in violation of Canons 2, 3 and 5 of the Code of Judicial Conduct which require:

> Canon 2: "A Judge should avoid impropriety and the appearance of impropriety in all his activities."
>
> Canon 3: "A Judge should perform the duties of his office impartially and diligently."
>
> Canon 5: "A Judge should regulate his extrajudicial activities to minimize the risk of conflict with his judicial duties.

COUNT III

3. You improperly established a uniform procedure pursuant to which traffic violators ("speeders") could, without appearing in court, pay directly to the Clerk of Court double the statutory fine and thereby obtain an automatic withhold of adjudication in violation of Canons 2 and 3 of the Code of Judicial Conduct which require:

> Canon 2: "A Judge should avoid impropriety and the appearance of impropriety in all his activities."
>
> Canon 3: "A Judge should perform the duties of his office impartially and diligently." (R. App. 1)

On September 26, 1985, Respondent filed his "Answer" (R. App. 2). In the Answer, Respondent states:

> "That I supported the candidacy of Richard J. Fowler for Circuit Judge and the candidacy of Randall Winter for Public Defender...[M]y support of these candidates did become known to members of the public when I attended public functions in their company and when 'private' conversations were repeated to others. I now realize that a judge in a community as closely knit as Monroe County, can-

not become politically involved in any way without risk that his involvement will become known to the public. Accordingly, as long as I serve as a judge I will not become involved in any political campaign.

I admit that I am a stockholder (but not an officer or director) in Controlled Activities Corp., and that I was personally involved in the development of the 'electronic leash' monitoring device which is now sold by that company...Because the propriety of my interest in this Company has nonetheless been questioned, I have instructed the Company to place my shares for sale as soon as possible.

With respect to Count III, I did withhold adjudication of guilt in cases where minor traffic offenders (charged with speeding) entered a plea of guilty...

Except as admitted above, the charges are denied. I specifically deny that my conduct demonstrates present unfitness to hold the office of judge."

On September 26, 1985, Respondent filed a "Request to Hold Hearing in County of Residence". (Commission App. 2).

On October 30, 1985 the Commission entered its Order setting this matter for hearing before the Commission in the Monroe County Courthouse, Key West, Florida, beginning at 9:00 a.m. on Monday, December 2, 1985. (Commission App. 3)

On October 31, 1985 the Commission served its Notice of Taking Depositions of sixteen witnesses scheduled for deposition on November 11, 1985 and November 12, 1985.

On Saturday, November 9, 1985, the Commission, acting through its Special Counsel, the Respondent and the Respondent's then counsel executed an "Evidentiary Stipulation as to

Facts".[1] (R. App. 2). In this Evidentiary Stipulation as to Facts ("Stipulation") the Respondent stipulated and agreed that at any hearing before the Commission with respect to the charges described in the Notice of Formal Proceedings, Special Counsel would offer evidence and establish the facts stipulated to. Stipulation at p. 2-3. (emphasis added). The Stipulation provides that Respondent "does not contest the statement[s]" stipulated to with the qualification of one specific stipulated fact which, although the Respondent does not contest, he had no independent recollection of the stated fact and/or no first hand knowledge of the stipulated fact. The singular fact which involves this qualification appears on page 15 of the Stipulation and deals with the stipulated fact that at the American Correctional Association Congress in San Antonio, Texas which occurred from August 19, 1984 through August 23, 1984 at the "CONTRAC" booth there was a table with a picture, approximately 20" by 20" in black and white of Judge Allison DeFoor. With the exception of this single qualification (the display of the photograph of the Respondent), all other facts stipulated and agreed to in the Stipulation are facts which the Respondent agreed would have been established, and which he does not contest. Stipulation at p. 2-3 (emphasis added).

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[1] Because the Evidentiary Stipulation consists of some twenty pages, and contains numerous admitted facts, supported by a voluminous appendix, each and every of the facts stipulated to are not repeated here. The Stipulation is part of this record and, where relevant to argument, the facts stipulated to are mentioned in the argument sections of this Brief.

The Stipulation further provided that the Respondent reserved "the right to offer argument in mitigation of the charges and to clarify, explain or attempt to place in context, any of the facts stipulated to," which was agreed to be done by a written submittal. Stipulation at p. 3. Finally, the Stipulation provides that the hearing proceedings originally scheduled for December 2, 1985 in Key West are waived, and that the matter "will be submitted to the Commission by the writings provided for herein, and that final oral argument as to an appropriate disposition only will be made in Miami...on Tuesday, December 3, 1985..." Stipulation at p. 3.

On November 26, 1985, the Respondent served his "Supplement to Evidentiary Stipulation". (R. App. 4).

There was no agreement that the factual matters set forth in the Respondent's Supplement to Evidentiary Stipulation were agreed to or stipulated to.

On December 3, 1985 the matter came on to be heard before the Commission in Dade County, Florida. Respondent was present and represented by counsel. Both Respondent and his counsel made statements during the proceedings, but because of the Stipulation there is no transcript of the proceedings. All thirteen members of the Commission were present throughout the hearing and deliberations. On February 5, 1986, the Commission issued its "Report and Recommendation" based upon the affirmative vote of not less than nine members of the Commission, in which Report the Commission found the Respondent guilty on all three Counts and the Commission recommended a public reprimand. The Report and

Recommendation of the Commission concludes with the following:

> The Commission, guided by the requisite standard of clear and convincing evidence, finds the Respondent guilty of Counts I, II and III of the Notice of Formal Proceedings of September 6, 1985. However, the Respondent's contrite demeanor, cooperation and acknowledgement of the seriousness of his admitted conduct, and his new understanding of the limits on the power and prerogatives of his office, demonstrates a present appreciation for the responsibilities of that office.
>
> In reaching these conclusions, the Commission has considered the principle that a judge should observe high standards of conduct so that the integrity and the independence of the judiciary may be preserved. A judge should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. To the extent that the Respondent may have failed to conform to these standards in the past, the Commission believes that, under the circumstances, such occurrences will not likely be repeated in the future.

On February 18, 1986, this Court entered its "Order to Show Cause" and set this matter for oral argument for Monday, May 5, 1986. (Commission App. 4).

On March 14, 1986, the Respondent filed his "Response to Order to Show Cause" and on March 18, 1986 the Respondent filed his Initial Brief and Appendix to Initial Brief.

STATEMENT OF THE ISSUES

I. WHETHER THE STIPULATED AND AGREED TO RECORD SUPPORTS THE REPORT AND RECOMMENDATION OF THE COMMISSION.

II. WHETHER THE PUBLIC REPRIMAND RECOMMENDED IS THE MINIMAL DISCIPLINE THAT THIS COURT SHOULD IMPOSE.

SUMMARY OF ARGUMENT

The stipulated and agreed record supports the Report and Recommendation of the Commission that the Respondent should receive a public reprimand for his violations of the Code of Judicial Conduct. There is substantial and competent evidence supporting the Report and Recommendations of the Commission that the Respondent violated Canon 7 by openly supporting the candidacy of friends in public elections; that the Respondent violated Canons 2, 3 and 5 by improperly utilizing his judicial office and the prestige of his office to advance the private and financial interests of himself and others with respect to the use of the "electronic leash" probation monitoring device and the sales and marketing promotion thereof at a time when he owned stock in a for-profit corporation which markets said device, and that he failed to regulate his extrajudicial activities to minimize the risk of conflict with judicial duties, and that he failed to refrain from financial and business dealings that tend to reflect adversely on his impartiality and which exploit his judicial position; and that the Respondent violated Canons 2 and 3 by improperly establishing a uniform procedure pursuant to which traffic violators (speeders) could, without appearing in Court, pay directly to the Clerk of Court double the statutory fine and thereby obtain an automatic withhold of adjudication.

Furthermore, the public reprimand recommended by the Commission in this cause is the minimal discipline that this Court should impose, because the record and applicable law fully

support the recommendation and would be sufficient to support even more substantial discipline.

ARGUMENT

I. THE STIPULATED AND AGREED RECORD SUPPORTS THE REPORT AND RECOMMENDATION OF THE COMMISSION

As set forth with specificity below, the stipulated and agreed record amply supports the findings of fact and recommendations of the Commission that Respondent receive a public reprimand for his violations of the cited Canons.

Although Respondent argues that the findings are not supported by "clear and convincing evidence free of substantial doubts and inconsistencies", the uncontradicted evidence belies the contention. The findings of the Commission "are of persuasive force and should be given great weight". In re Leon, 440 So.2d 1267, 1269 (Fla., 1983), citing In re Crowell, 379 So.2d 107 (Fla., 1979), and In re LaMotte, 341 So.2d 513 (Fla., 1977). See also In re Gridley, 417 So.2d 950, 951 (Fla. 1982). Whether the findings "are supported by competent and substantial evidence", In re Leon, supra, at 1296, is quickly answered in the affirmative upon review of the uncontradicted evidence set forth in the Evidentiary Stipulation as to all Facts, (R. App. A.3), which contains admissions as to Respondent's improper conduct violative of the Canons. Where, as here, the Commission bases its Report and Recommendation upon a stipulated record containing admissions of the Respondent, the argument that the weight of the evidence does not support the recommended discipline is particularly unavailing as the admissions render the findings "free of

substantial doubt and inconsistencies".[2] The simple issue, then, is "do the admissions warrant the recommended discipline?" It is submitted that the answer is a resounding "yes".

While Respondent may attempt to attack certain isolated findings in the Stipulation as being insufficient to warrant discipline, it is clear that the uncontradicted facts in entire context warrant, indeed mandate, at least the recommended discipline. This Court has previously held:

> These findings are supported by clear and convincing evidence. Taken singly, some of these actions may appear innocuous, but taking them in their entire context, we conclude the Commission properly found that Judge Gridley . . .failed to conduct himself in a manner that promotes public confidence in the integrity and impartiality of the Judiciary. In re Gridley, 417 So.2d 950, 953 (Fla., 1982)

Respondent argues that "he has already been sufficiently punished" and the "punishment [should] fit the crime". Brief of Respondent, p. 18. However, this argument misses the mark, because "punishment" is not the goal of these proceedings:

> In short, the essence of the sanction imposed is not "punishment" but a reprimand based on grounds bearing a rational relationship to the interest of the State in the fitness of its judicial personnel. In Re: Inquiry Concerning a Judge, Kelly, 238 So.2d 565, 569 (Fla. 1970).

Indeed, it may be argued that, in light of the uncon-

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2 In another case submitted to this Court pursuant to Stipulation, the Commission recommended a public reprimand, and this Court agreed with and approved the Commission's recommendation. Inquiry Concerning a Judge Re: Susan M. Tyler, 480 So.2d 645 (Fla. 1985).

tradicted evidence, a public reprimand in this case is too lenient as being "inconsistent with prior recommendations of the Commission and with prior action of this Court in matters involving lesser judicial misconduct". In re Lantz, 402 So.2d 1144, 1145 (Fla., 1981). However, the Commission was impressed with Respondent's apparent "contrite demeanor, cooperation and acknowledgement of the seriousness of his admitted conduct", and concluded thereon, "such occurrences will not likely be repeated in the future". Respondent now takes these statements and urges them as the very basis to support the argument that a public reprimand (or any discipline) for the admitted conduct would be "excessive and unwarranted" and unsupported. Such an argument is built on a foundation of shifting sand, and cannot stand.

Moreover, the Report and Recommendation of the Commission that a Public Reprimand be ordered, was expressly predicated upon the Commission's finding of "contrite demeanor, cooperation and acknowledgment of the seriousness of his admitted conduct" and the conclusion of the Commission that "such occurrences will not likely be repeated in the future". In the absence of those findings and conclusions, the Commission might very well have recommended that Respondent's conduct warranted a recommendation of removal from office. It is, particularly, the Commission's view that the issue of the likeliness of such occurrences being repeated in the future is the issue which sometimes provides the demarcation between a recommendation of public reprimand and a recommendation of removal from office. For example, in Inquiry Concerning a Judge, Judge Leonard A. Damron, Case No. 67,151, the

Commission in its Brief, supported its recommendation of removal from office because:

> [the] Respondent was unable or unwilling to explain or justify his conduct, was often unconvincing and evasive, failed to acknowledge the seriousness and the gravity of even his admitted conduct and, with limited exceptions, demonstrated no contrition for his abuses. Brief of Commission, p. 2, Inquiry Concerning a Judge, Judge Leonard A. Damron, Case No. 67,151, Supreme Court of Florida.

The distinction, then, between the discipline recommended in the instant case and a case such as the Damron case, is found in the finding with respect to the acknowledgment of the seriousness of the activity and the likelihood that such activity will or will not occur in the future. If the Commission, in the instant case, is incorrect as to its finding with respect to the Respondent herein, a penalty more severe than public reprimand would be justified.

As set forth below, the uncontradicted record fully supports the Commission's Report and Recommendations and, at a minimum, a public reprimand is warranted.

A. AS TO COUNT I

It is significant that Respondent has failed to address the Commission's Findings of Fact as to Count I in his Response to Order to Show Cause or in his Initial Brief. Respondent's only comments upon the Commission's Report and Recommendation as to Count I is found in paragraph 1 and 2 of his said Response, which state in pertinent part:

> 1. "With respect to all counts of the Notice of Formal Proceedings. . .the discipline

recommended in the Report and Recommendation (public reprimand) is excessive and unwarranted."

2. "With respect to all counts of the Notice, the Commission has failed to consider or, if it did consider, failed to properly weight the evidence of mitigation in Respondent's favor."

The evidence as to Count I is based upon Respondent's admission that he actively participated in a political campaign seeking the defeat of a circuit judge and the election of his close personal friends. These uncontroverted facts are detailed in six and one half pages in the Evidentiary Stipulation as All Facts. Blatant examples of Respondent's highly improper conduct include the following:

1. Judge DeFoor and Randall Winter and Richard Fowler are close personal friends. Randall Winter managed Judge DeFoor's campaign for County Judge. <u>Stipulation</u> at p. 3, 4.

2. Randall Winter was to have managed Richard J. Fowler's campaign for Circuit Judge; however, Randall Winter became a candidate for Public Defender and thus could not serve as campaign manager for Richard J. Fowler. <u>Stipulation</u> at p. 4.

3. Judge DeFoor attended at least two private meetings to discuss and plan campaign strategy for Richard J. Fowler's campaign for Circuit Judge. Judge DeFoor researched the status of a number of criminal appeals pending in the incumbent Circuit Judges' Division (Judge Chappell), found that a number of appeals had been pending for considerable time and suggested to the campaign group that he contact Patty Shillington, a Miami Herald reporter, and disclose to the Miami Herald Judge Chappell's

failure to rule upon the appeals. Two members of the group suggested that such conduct would be inappropriate for a sitting judge. Judge DeFoor furnished to Mr. Fowler information derogatory to Judge Chappell that Judge DeFoor acquired in a meeting of judges. Stipulation at p. 4, 5.

4. Judge DeFoor told reporter Jim Rubino of Judge Chappell's delays in adjudicating appeals. Mr. Rubino mentioned said delays in an editorial. Stipulation at p. 6.

5. Judge DeFoor assisted, as a member of a "joint committee", in arranging a public political forum in the Plantation Key Courthouse that was held shortly before the election. The "joint committee" intended to ask pre-prepared questions. Judge DeFoor dictated questions on a tape and informed Randall Winter and Richard J. Fowler of the nature of the questions which would be put to them at the forum in advance of the forum. One of the questions asked Judge Chappell, which involved delay in adjudicating appeals, was prepared by Judge DeFoor. Stipulation at p. 6, 7.

6. Judge DeFoor assisted Randall Winter in putting up campaign signs. Stipulation at p. 7.

7. After the forum, Judge DeFoor went to "Harry's Place" with Richard J. Fowler and Randall Winter and their families for dinner. Stipulation at p. 7

8. During the campaign, Randall Winter and Richard J. Fowler, accompanied by Judge DeFoor, attended together the groundbreaking at the new Sheraton at Key Largo, and on the night of the Sheraton opening, Judge DeFoor invited Richard Fowler and

Randall Winter to a barbecue sponsored by Judge DeFoor's Episcopal Church. At this barbecue Judge DeFoor introduced Randall Winter as the "Public Defender" and introduced Richard J. Fowler as "running for Circuit Judge". Stipulation at p. 7.

9. Judge DeFoor and Attorney William DeVane (who shared a friendly relationship) had a discussion about the judicial campaign in which Judge DeFoor told DeVane that he was supporting Richard J. Fowler, and encouraged DeVane's support of Fowler. A campaign contribution was mentioned. Stipulation at p. 6.

10. It is apparent that Judge DeFoor's political activities in support of Winter and Fowler were well-known in the community. "A Few Voters Called the Shots", an article in the November 1984 edition of the Florida Keys Magazine, succinctly describes these activities:

> On the judicial side of the ballot, two other lawyers who had worked for State Attorney Zuelch, County Judge Allison DeFoor and Attorney Richard J. Fowler, were embroiled in the contest against incumbent Circuit Judge Bill Chappell. Fowler was Chappell's opponent and he had Judge DeFoor openly plugging his campaign in various meetings in the Keys.
>
> As the campaign came down to the wire in late August, it was apparent to a great number of the voters that a powerful alliance of legal talent was at work for Winter and Fowler. Observers viewed it as a concerted effort by a small group to gain critical positions inside the Monroe County Court System. Stipulation at p. 8.

11. Judge DeFoor's assistance to Randall Winter and Richard Fowler included many discussions about tactical things which Judge DeFoor had learned from his own campaign, running the

gamut from how to put up signs and raise money, to the identification of campaign issues. Stipulation at p. 8.

In entering into a stipulation of facts (page nine, item 31, Stipulation as to All Facts), Judge DeFoor now acknowledges that "...his presence in a political campaign and his endorsement of a particular candidate are difficult, if not impossible, to distinguish and that 'there is not public and private distinction in the political activity of a Judge.'" This learned Respondent, who had authored many legal articles and lectured on legal matters, apparently failed to review the Code of Judicial Conduct, especially Canon 7.

Apparently Respondent's allegation that the Commission failed to properly weigh the evidence of mitigation is based primarily upon the fact that Respondent and Fowler are "closer than friends" and that Respondent "...believed strongly that Chappell's re-election would be a major setback to the criminal justice system...". (Respondent's Supplement to Evidentiary Stipulation R. App. 4). These "mitigating" factors are not considered valid. If they were, any judge could defend a clear violation of the Canons based upon the argument that friends were involved or the motive pure. Even assuming "pure motive", it is no defense to conduct violative of the Code of Judicial Conduct. Inquiry Concerning a Judge, J.Q.C. #77-16, 357 So.2d 172 (Fla. 1978).

It is submitted that the foregoing conduct of Respondent, a sitting Judge, in actively seeking the defeat of a Circuit Judge and publicly supporting the election of "closer than

friends" candidates, constitutes a flagrant violation of Canon 7 of the Code of Judicial Conduct.

B. AS TO COUNT II

Respondent admitted that he utilized his judicial office and the prestige of his office to advance the private and financial interests of others with respect to the use of the "electronic leash".

Beginning on page eight of said Stipulation as to Facts, Respondent detailed his lengthy involvement in this private project for financial gain, including his wife's endorsing a line of credit to the Barnett Bank of the Keys, Tavernier Branch, in the sum of $12,500.00. On the 28th day of March, 1984, Respondent and his wife executed a continuing and unconditional guarantee for the payment in full when due all indebtedness of Controlled Activities Corporation to said Bank. (Commission App. 5) CONTRAC's initial line of credit was in the sum of $50,000. Stipulation ¶10, p. 11. Clearly on the 28th day of March, 1984, Respondent was personally liable to said bank in said sum.

It is submitted that Respondent has been less than candid in testifying before the Commission as to his financial interest in the electronic leash promotion. In his Appendix, Item 11, Respondent itemizes his extensive legal background; however, he apparently did not comprehend the individual legal liability to the said bank in the sum of $50,000 when he executed the above instrument. On July 26, 1985, Respondent testified under oath before the Commission, viz:

> Q: Have you signed any notes?
> A: There's a note, and I originally thought

when I shared with Mr. Caruana that I was personally liable on it. I had the accountant check that, and he sent me a letter indicating that I was not, which relieved me very much.

Q: Your wife was?

A: No, sir. I had him check on that, as well, and he indicated that she had signed in capacity as the treasurer of the corporation, and that neither she nor I apparently--none of us are apparently liable. We pledged the stock to the bank, but of course the stock is only worth--

Q: So the divestiture, then, could be affected without any loss except from a capital gains standpoint?

A: Yes, sir.

BY MR. RAWLS:

Q: Did you say that the bank accepted a closely-held corporation's note without personal liability?

A: Shocked me.

Q: I would like to know the name of that bank.

A: Barnett.

Q: Well, how about the personal liability of the major stockholders?

A: I had the accountant--again, I've got a letter, and I'll be happy to supply it to Mr. Caruana, indicating that the only thing that was pledged was the value of the stock. I rather suspect Mr. Moody, Sr.'s position with that bank may have influenced the construction of that note, in the sense that he's a very good customer. I'm not one of their customers, other than having some loans with them; personal loans." (R. App. 5)

Respondent has defended the foregoing false statement to the Commission upon the grounds that his accountant advised him he was not personally liable upon said note. Surely one learned in the law would not forget executing a "continuing and unconditional guarantee of the payment in full when due all indebtedness of Borrower to Bank". (Commission App. 5). The finding of the Commission that "Respondent knew or should have known" was founded

upon the Respondent's extensive litany of education, honors, activities and past employment responsibilities (R. App. 11). Any active professional with an extensive real estate and legal background should know of such an extensive personal liability.

That Respondent invested in the electronic leash promotion for financial gain is undisputed. On July 26, 1985, Respondent testified that he had a 17.5 percent interest in the CONTRAC corporation (R. App. 5). Counsel for Respondent stated: "Well, when your only asset is a $90,000 debt at this point, it's not--- but it has great potential, commercial potential. We shouldn't deny that. Judge <u>DeFoor got involved in this company to make a dollar</u>, as well as to serve the obvious helping of the criminal justice system." (R. App. 5) (emphasis added). Respondent reaffirmed his hope for financial gain in paragraph 11 of the Stipulation as to Facts, viz:

> 11. Judge DeFoor, recognizing the interest which had been generated by the publicity associated with the use of the electronic leash, intended to participate in the profits, if any, which the devise might generate, if appropriate. <u>Stipulation</u> p. 11.

That Respondent improperly utilized his judicial office and the prestige of his office to advance private and financial interests of himself and others was clearly admitted by Respondent by paragraph 17 and 18 of the Stipulated Facts, viz:

> 17. Exhibit "W"*, used in the promotional materials for CONTRAC states:

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* All references to exhibits in the material quoted from the Stipulation are references to the Exhibits filed with the Stipulation.

Pride, Inc., along with Judge DeFoor in Plantation Key and Mr. Moody would like to extend an invitation to you to visit the Pride, Inc. office in Plantation Key for an on-site inspection.

We have agreed with Judge DeFoor in Plantation Key to run a pilot program using the CONTRAC supervisor system for monitoring defendants. Several defendants have been placed on probation with the special condition of house arrest and are in the process of being monitored, using CONTRAC's system. We anticipate that some time in September we will be implementing the same program on a pilot basis in Palm Beach County, Florida.

18. The manner in which others utilized Judge DeFoor's involvement to promote the electronic leash device is best understood by the following relationships and events:

(a) Historically the Salvation Army had been utilized in Monroe County to monitor misdemeanor probationers.

(b) Soon after Judge DeFoor's election (either November or December of 1982) Betty L. Strike of the Salvation Army and the Captain of the Salvation Army had lunch with Judge DeFoor. Judge DeFoor informed them that he would continue to use the Salvation Army to monitor misdemeanor probationers in the Upper Keys.

(c) However, by letter dated February 1, 1984 (Exhibit "X"), Judge DeFoor informed Captain Lane of the Salvation Army that, effective April 1, 1984, it was his intention to utilize Pride, Inc. as the agency for the adminstration of misdemeanor probation services in the Upper Keys Division of the Monroe County Courts.

(d) Pride, Inc. had been utilized in Palm Beach County to supervise misdemeanor probationers since 1977. Judge James Carlisle was once on the Board of Directors

of Pride, Inc,, but later resigned on the basis of conflict of interest. Glenn Rothbart, in January or February of 1984, was in Judge Carlisle's office at a time when Judge Carlisle was speaking on the telephone to Judge DeFoor. Judge Carlisle introduced Judge DeFoor to Glenn Rothbart and, consequently, Judge DeFoor became interested in the possibility of Pride, Inc. substituting for the Salvation Army as the misdemeanor supervisor in the Upper Keys.

(f) As a consequence of Judge DeFoor's discussions with Glenn Rothbart and Fred Rasmussen concerning Pride, Inc. (which is non-profit corporation) Rothbart and Rasmussen became aware of the electronic leash device and its potential availability through CONTRAC.

(g) In September of 1984 Rothbart and Rasmussen created Correction Services, Inc. ("CSI"), a for-profit Florida corporation, and at the same time retained their positions with Pride, Inc., a non-profit corporation. CONTRAC and CSI entered into a written agreement pursuant to which CSI was to serve as a sales representative for CONTRAC with respect to this marketing of the electronic leash device. (Exhibit "Y") CSI, under the written agreement, received commissions on orders CSI placed with CONTRAC for the electronic leash devices. CSI promoted the device nationwide and used Judge DeFoor's use of the device in the promotional materials, as described above. CSI received commissions for the purchases of the device by Pride, Inc. in West Palm Beach and the Sheriffs Office in West Palm Beach. (Exhibits "Z", "AA", "BB")

(h) CSI, Pride, Inc., CONTRAC, Rothbart and Rasmussen used Judge DeFoor's use of the electronic leash device in Monroe County in the promotional and marketing efforts which CSI undertook pursuant to its relationship with CONTRAC. Promotional materials contain numerous references to Judge DeFoor and contain newspaper articles showing pictures of Judge DeFoor and explaining the electronic leash device. (When Judge DeFoor utilized the electronic leash device on defendant Barton in December of 1983, he called the

Press and the Press covered the event, taking a picture of Thomas Moody installing the device on the defendant and using a "file" picture of Judge DeFoor in the article. (See Exhibit "CC") This material was utilized by CSI and CONTRAC to promote the electronic leash device.

(i) On February 7, 1984 Judge DeFoor, State Attorney Kirk Zuelch and Fred Rasmussen signed a memorandum of understanding providing for a local advisory board (Monroe County Advisory Board) for Pride, Inc. and Judge DeFoor and Kirk Zuelch, pursuant to this memorandum of understanding, served on the Advisory Board. (Exhibit "DD")

(j) In February of 1984 Betty L. Strike of the Salvation Army attended the Southern Annual Corrections Conference in Tallahassee. The theme of the Conference was "The Private Vendor in Corrections". Ms. Strike saw Judge Allison DeFoor at the Conference with Thomas Q. Moody, the Vice President of CONTRAC. At this Conference Ms. Strike learned that Judge DeFoor and Mr. Moody were speaking about the electronic leash device.

(m) The program scheduled for the Conference of County Court Judges, January 30, February 2, 1985 shows that Glenn Rothbart of Pride, Inc. and Thomas Moody discussed the electronic leash device and that Judge DeFoor discussed telephone conferencing. No public disclosure of Judge DeFoor's financial interest in CONTRAC was made at that Conference.

The facts which were voluntarily agreed to by Respondent are what the Commission relied upon in finding that: "Judge DeFoor improperly utilized his judicial office and the prestige of his office to advance the private and financial interests of himself and others with respect to the use of the electronic leash probation monitoring device and the sales and marketing promotion thereof at a time when he owned stock in

Controlled Activities Corp., a for-profit corporation (CONTRAC)."

Respondent's Initial Brief appears to reject those facts recited above and other facts in said Stipulation covering this subject. The conclusory statements in Respondent's Brief, viz: "That finding is unsupported. . ." is without foundation. Again, taking into consideration Respondent's extensive legal education, author of books and law review journals (R. App. 11), it is submitted that "he knew or should have known" of the impropriety of his using his judicial office and permitting others to do so, to advance the private financial interest of himself and others. The finding that he knew or should have known is supported by competent and substantial evidence and should be approved.

Respondent, in his Brief, argues that the Commission's findings with respect to Count II should not be adopted by this Court because:

> The central flaw in the Commission's findings with respect to Count II is that it gives no weight to Respondent's before-the-fact inquiry to this Court's Committee on Standards of Conduct Governing Judges. Before he acquired <u>any</u> financial interest in the corporation that developed the electronic leash, Respondent set out in detail by letter to the Committee on Standards his involvement in the development of the electronic leash device and his desire to participate in the fruits of his labor if he could do so within ethical bounds. <u>Brief of Respondent</u>, p. 12.

The foregoing argument is an insufficient basis to disregard the Report and Recommendation of the Commission for a variety of reasons. To begin with, any such opinions are advisory

in nature only, and no such opinion binds the Judicial Qualifications Commission, and any determination of the propriety or impropriety of particular conduct by the Commission supercedes any conflicting opinion of the Committee (assuming such advisory opinion does in fact conflict with a determination of the Commission):

> The Committee shall render advisory opinions to inquiring judges relating to the propriety of contemplated judicial and non-judicial conduct, but all opinions shall be advisory in nature only. No opinion shall bind the Judicial Qualifications Commission in any proceeding properly before that body. An opinion of the Committee may, however, in the discretion of the Commission, be considered as evidence of a good faith effort to comply with the Code of Judicial Conduct;...Any determination of the propriety or impropriety of particular conduct by the Judicial Qualifications Commission shall supercede any conflicting opinion of the Committee. Petition of the Committee on Standards of Conduct for Judges, 327 So.2d 5,6 (Fla. 1976).

This Court need not find that the Findings of the Commission conflict with the advisory opinion of the Committee, because the advisory opinion of the Committee certainly does not address all of the conduct which the Respondent has admitted and for the further reason that the activities of the Respondent with respect to the electronic leash device did not all predate the sought opinion from the Committee.[3] It is particularly noteworthy that

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[3] Respondent requested the opinion by letter to Judge James R. Carlisle dated January 17, 1984 (Commission's App. 2). The Committee's response is dated February 16, 1984. (R. App. 8). Respondent first used the device in Monroe County on December 16, 1983. Stipulation at p. 14.

the Respondent admitted having contacted the media[4] on the first occasion that he utilized the electronic leash device in Monroe County in December of 1983 (one month before he sought an opinion from the Committee):

> Promotional materials contained numerous references to Judge DeFoor and contained newspaper articles showing pictures of Judge DeFoor in explaining the electronic leash device. (When Judge DeFoor utilized the electronic leash device on Defendant Barton in December of 1983, he called the Press and the Press covered the event, taking a picture of Thomas Moody installing the device on the Defendant and using a "file" picture of Judge DeFoor in the article....this material was utilized by CSI and CONTRAC to promote the electronic leash device). Stipulation at p. 14.

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[4] It is also noteworthy that Respondent apparently often contacts the media to suggest newsworthy stories which either involve him or promote his views on political issues. See e.g. Stipulation ¶11, p. 4 (suggested contacting Patty Shillington of the Miami Herald to disclose Judge Chappell's failure to rule upon appeals from County Court); Stipulation, ¶13, p. 5. (Respondent contacted attorney William N. Devane, counsel for a defendant with an appeal pending for some time before Judge Chappell, mentions the Miami Herald and says he "intended to let someone else know about it"). Stipulation, ¶14, p. 6. (Respondent called Reporter Rubino and editor Martin of local newspaper and informed them of the long delays in Judge Chappell's court). Stipulation ¶24, p. 8 (Respondent told Kalt, editor of local newspaper that her newspaper's expected endorsement of candidate Keane was "incredible".) Although Respondent may argue that his constitutional right to freedom of speech was being exercised, it has been held by this Court that imposition of sanctions for conduct unbecoming a Judge does not abridge freedom of speech:

> In these proceedings we are not faced with the question of petitioner's right of freedom of speech or with the contents of his pronouncements. The question is whether the motive of, and the methods used by, the petitioner together with the resulting turmoil created by his actions should be considered as conduct unbecoming a member of the judiciary and contrary to the Canons of Judicial Ethics. In Re: Inquiry Concerning a Judge, Kelly, 238 So.2d 565, 569 (Fla. 1970).

Moreover, the Respondent admitted:

> "both prior to and subsequent to Ethics Opinion 84-3 being received by Judge DeFoor, the electronic leash was utilized in Monroe County approximately a dozen times on an experimental basis. Stipulation at p. 12.

The advisory opinion of the Committee (R. App. 8) does not condone all of the admitted conduct of the Respondent set forth in the Stipulation. The "advisory opinion" consists of two pages, letter form, and is replete with reservations:

> Of the eight members of the Committee on Standards of Conduct Governing Judges who responded to your inquiry, all were generally of the opinion that you could enjoy the financial fruits of your endeavors, but not without problems.
>
> By the provisions of Canon 5C, however, the judge must refrain from financial and business dealings which tend to reflect adversely on his inpartiality. Will his Rulings in Criminal Division cases affect whether such a device is purchased by his County of the State and the number of units that are purchased? It appears to me that the answer is "yes" and that such appearance would also occur to the public at large.
>
> [S]uch marketing should not be untaken within the confines of your jurisdiction.
>
> I can see immediate problems, perhaps insurmountable ones, to his both serving as a judge and participating in profits from any type of business entity which was benefitting from the sales of these devices in (that) county.
>
> One other member simply suggested you invest in the device but avoid actively advancing sales within the judicial sphere. (R. App. 8) (emphasis added)

Thus, the Respondent's utilization of the electronic leash device

in Monroe County both before and after the issuance of the Committee's opinion, and the admitted utilization of his involvement with the device to promote the sales and marketing of the device within Monroe County, within Florida and throughout the United States supports the conclusion that the Respondent failed to regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties (Canon 5) and failed to avoid impropriety and the appearance of impropriety in all his activities (Canon 2).

The Respondent has admitted that:

> Newspaper articles mentioning Judge DeFoor and showing his picture were assembled by CONTRAC and used by CONTRAC and others involved with CONTRAC to promote the device. Stipulation at p. 12. The promotional materials for the device specifically state that "Judge DeFoor...would like to extend an invitation to you to visit the Pride, Inc. office in Plantation Key for an on-site inspection [of the electronic leash device]." and that "we will be implementing the same program on a pilot basis in Palm Beach County, Florida." Stipulation at p. 12, 13.

The Stipulation goes on to admit that the entity which Judge DeFoor introduced into Monroe County to substitute for the Salvation Army to supervise misdemeanor probationers, Pride, Inc., promoted the sale of the device to officials in Palm Beach County resulting in profits to both the entrepreneurs at Pride, Inc. [which was a non-profit entity] and CONTRAC, of which Judge DeFoor was a shareholder. The Stipulation admits that:

> CSI promoted the devise nationwide and used Judge DeFoor's use of the device in the promotional materials...Stipulation at p. 14.
>
> Promotional materials contain numerous references to Judge DeFoor and contain newspaper

> articles showing pictures of Judge DeFoor and explaining the electronic leash device. Stipulation at p. 14.
>
> At one booth [at the American Correctional Association Congress in San Antonion, Texas] there was the usual backdrop and in front of that was a table with a picture, approximately 20" by 20" in black and white of Judge Allison DeFoor. Stipulation at p. 15. (See p. 6, supra)

Indeed, Judge DeFoor's decision to divest himself of his interest in CONTRAC after the Notice of Formal Charges were filed is an implicit acknowledgment that his involvement with the device, and the promotional materials utilization of his likeness in the sales promotion of the device created the appearance of impropriety:

> Judge DeFoor has divested himself of his interest in CONTRAC by selling his stock back to the corporation at his original cost ($70.00). Counsel to Judge DeFoor, in a letter to Special Counsel to the Commission dated November 1, 1985 states:
>
> > After such deliberation Judge DeFoor decided to sell his stock in Controlled Activities Corp...
> >
> > The Judge realized that, even if his interest in the company were eventually found by the JQC not to be improper, the continuing controversy may impair his effectiveness as a judge and diminish the public's respect for the judiciary. Stipulation at p. 16.

Nowhere in the Committee's advisory opinion does it sanction the use of promotional materials containing photographs of the Respondent in his judicial robes and printed materials in which Respondent invites purchasers to come to Monroe County to inspect the device, where it was admittedly utilized by the Res-

pondent both before and after the advisory opinion.

For the foregoing reasons, then, the Respondent's reliance upon the Advisory Committee Report as a basis to avoid any and all discipline with respect to Count II is misplaced reliance. Certainly, it cannot fairly be argued that all of the circumstances and actions admitted to by the Respondent were contemplated in his request to the Committee (Commission App. 6) and therefore the advisory opinion, itself, cannot serve to justify the admitted conduct of the Respondent with respect to the promotion of the device. Indeed, it may be argued that the Respondent has taken unanticipated and unfair advantage of the contents of the Committee's Report in his efforts to avoid any discipline for the admitted conduct. The Committee on Standards Governing Judges is not intended to supply a basis for carte blanche conduct which the Commission ultimately determines is in violation of the Canons of Judicial Conduct. If such were the case, there would be no need for a Judicial Qualifications Commission at all. All a judge would need do is frame a narrow issue, submit it to the Committee, obtain an advisory opinion, and then justify all subsequent activity of a questionable nature upon the issuance of the narrow advisory opinion.

Respondent correctly argues in his brief that "the Committee's opinion may be considered as evidence of a good faith effort to comply with the Code of Judicial Conduct". Brief of Respondent, p. 13. It is respectfully submitted that the Commission gave due consideration to the advisory opinion and the Respondent's conduct relating thereto in recommending only a public

reprimand in this case. Therefore, the Commission's recommendation as to Count II should be approved by this Court, as the minimum discipline ordered.

C. AS TO COUNT III

Respondent's contentions that the Commission's Report and Recommendation as to Count III is contrary to the weight of the evidence, constitute a misapprehension and misapplication of the facts and law, and do not establish a basis to impose discipline are devoid of merit.

The record abundantly establishes the existence of competent and substantial uncontradicted evidence supporting the findings and conclusions of the Commission. Accordingly, Respondent's argument that the recommendation of public reprimand "is excessive and unwarranted" fails.

Review of the uncontradicted evidence establishes:

(a) the Respondent, without prior legislative or other appropriate sanction did in 1984 instruct the court clerk to routinely accept fines double of that provided for by statute for speeders Stipulation ¶2(a), p. 16.

(b) that in direct violation of Rule 6.340(b) of the Florida Rules of Traffic and Procedure (FRTP), Respondent, in such cases, instructed the clerk to accept "Waiver Information" forms from such traffic offenders and to accept double the statutory fines, with the clerk then entering into the computer the disposition of "withhold of adjudication", all prior to any court appearances of any kind. Stipulation ¶2(c), (d) and (e), and ¶3, p. 17.

(c) That Respondent at the July 26, 1985 Rule 6B hearing affirmatively misrepresented that the form he had instructed the clerk to accept (Waiver Information Form, R. App 6) complied in all respects with the form entitled "Affidavit of Defense" permitted and required by Rule 6.340(c) of the FRTP, when such form did not comply at all with such requirements.

The Transcript of July 26, 1985 6B Hearing (R. App. 5) includes the following comments of Respondent's counsel and Respondent:

> And he made the adjudication withholding uniformly available to all defendants. He didn't think it was fair that only those who knew about the procedure because they lived in Dade or Broward should be availed of this procedure. It should be available to tourists from Michigan as well as people from Dade and Broward, so he made it uniformly available, and the highway patrol made these people who were cited aware of this procedure.
>
> Now, he noted that the traffic court rules specifically provide for appearance by mail by affidavit, and he followed that procedure to the letter. He did not depart from the rule, the traffic court rule, procedure. If you are a resident of Monroe County, and you're going to be in the county, you cannot avail yourself of this procedure. He followed the traffic court rules as he understood them to provide, and he developed standard criteria, which were that the speed not exceed 70 miles an hour, because U.S. 1, in addition to being a main interstate highway, is also our main road through the Keys. It would not apply under aggravating circumstances such as through a traffic zone or a school zone or other aggravating circumstances noted by the officer, and that the person could not be a frequent offender. (R. App. 5, p. 12) (emphasis added).
>
> He did not violate, as I read them, any rules -- any of the traffic court rules -- as soon as the procedure was questioned, he submitted

himself to review and the procedure to review by the appropriate agency...Since the traffic court rules did provide specifically for an appearance by affidavit, by mail, without court appearance, Judge DeFoor felt that what he was doing was within the rules of the traffic court rules, so--

BY MR. CARUANA:

Q: The question that I had, Judge, was whether or not you had instructed the clerk that in a certain category of case the clerk was to accept a double fine and issue an automatic withhold as a matter of routine practice.

A: No. That's not the intent of the memo at all, because the clerk in my county has no authority to do that, anyway. They, as a matter of routine practice -- and you can communicate with Ms. Hartley -- they accepted the guilty plea waivers or the forms admitting or denying the infraction with the bond posted in an accident case and forwarded those to my office for consideration and execution.

Q: Had the fine --

A: There must be an order executed either on the back of the ticket or at the bottom of the form in every instance by the judge, not by the clerk.

Q: But in those events the defendants did not appear before you? You received the documentation from the clerk. Is that correct?

A: Yes, sir.

Q: After the party had gone to the clerk?

A: Yes, sir.

Q: And you either accepted it or did not accept it?

A: Correct.

Q: Had the fine already been paid at that point when it came to you?

A: Usually they would staple the check and

the form onto the ticket and send it up to my office.

Q: <u>And would this procedure be applicable to all defendants or just those who do not reside in Monroe County?</u>

A: <u>I believe the rule provides -- and what we tried to do was -- if you're in Monroe County, you've got to come to court. If you're going to be out of the county, or if your residence is out of the county, then the rule provides that you can appear by affidavit, either admitting or denying the charge</u>.

Q: <u>We, my question is, the procedure that you had instituted -- was it applied uniformly to all persons who had received a citation, or were distinctions made between those who reside in the county or outside the county?</u>

A: <u>The distinction that we tried to make and, to the best of my knowledge did make, was, if you're in Monroe County, you should come to court, unless you're going to be out of town on the date of the hearing, which is what the rule provides for. If you're from out of county, you should be able to avail yourself of that procedure routinely</u>.

Q: Was there any discretion posed with the clerk? Mr. Hendrick said the clerk would not rubber-stamp these applications. Did the clerk have any discretion as to whether or not to accept the documentation and the check and forward it to you or simply reject it and instruct the defendant to --

A: No.

Q: --make a court appearance?

A: The clerk had no discretion. The officers in our jurisdiction generally have the discretion to make just about anything a mandatory appearance, if in their opinion the circumstances were egregious. (R. App. 5, p. 16-21. (emphasis added).

The Respondent's statements at the 6B Hearing were false - admittedly false - because in the Stipulation Respondent

admits the form he utilized directly violates the requirements of Rule 6.340 F.R.T.P. Stipulation ¶2(d), p. 16. The waiver information form[5] utilized makes no distinction between residents and non-residents, and was uniformly utilized (in lieu of an appearance) in all such cases. Making false statements to the Commission could itself be grounds for removal from office. In Re: Inquiry Concerning a Judge, Leon, 440 So.2d 1267 (Fla. 1983).[6]

The Respondent's admitted conduct in creating his own special procedure violative of the applicable rule violates the accepted rule of law that a judge must follow the law and is not permitted to substitute his concept of what the law ought to be

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[5] Respondent's argument that "every county judge in Monroe County has been using [the waiver information form] since no one apparently realized that it was outdated and prohibited by Rule 6.340" (Brief of Respondent, p. 10) is, it is submitted, a red herring. There is no evidence that other judges in Monroe County were utilizing this form in the manner and for the purposes which Respondent did. The Stipulation states only that the form "had been in existence prior to the time [Respondent] was elected to the County Court". Stipulation ¶2(d), p. 17. References to this form is made in Respondent's Supplement to Evidentiary Stipulation (R. App. 4), but the representation appearing on page 4 was not conclusively established. That is, it was not established that other judges used the form in the same manner and for the same purpose which Respondent did.

[6] Respondent's argument that "it is grossly unfair to accuse Respondent...of having misrepresented...the nature of the form..." because "it was not mentioned in the Notice...and the Respondent had given the form itself to the Commission's special counsel during his initial investigation" (Brief of Respondent, p. 10) is a non-sequitor. Although not in this Record, it is represented that the Waiver Information form was first obtained by special counsel to the Commission after a joint telephone request with Respondent's then counsel to deputy clerk Louise Hartley on November 4, 1985, shortly before the preparation of the Stipulation as to Evidentiary Facts.

for what the law actually is. In Re: Inquiry Concerning a Judge, J.Q.C. No. 77-16, 357 So.2d 172 (Fla. 1978).

Furthermore, while Respondent's motivation may be argued to have been "good and wholesome" and not "corrupt", this, even if true, would not be a basis to avoid discipline for failure to comply with the law. Id. at 180. In the instant case, Respondent claims to have acted "in good faith" and upon reliance of an advisory opinion dated June 27, 1985 of the Supreme Court Traffic Review Committee "before engaging in the acts set forth in the Report and Recommendation". (Response, para. 7). The latter assertion is totally false.

Respondent undertook the offending practice in 1984. Stipulation ¶1, p. 16. Sometime prior to March 22, 1985, the Monroe County Clerk's Office expressed "concern" about Respondent's traffic "procedure". Stipulation ¶2(i), p. 18 On March 22, 1985, Respondent, in writing, directed the clerk to continue to accept the Waiver Information forms and to continue the practice of accepting double fines in exchange for a withhold of adjudication. Stipulation ¶3, p. 18. On April 10, 1985, Attorney Joseph B. Allen, III, counsel to Danny Kolhage, Clerk of Court, Monroe County, advised Respondent in writing that the Respondent's traffic procedure was NOT authorized by law. (Exhibit "KK" to Stipulation, Commission's App. 7).

Only thereafter (and NOT "before engaging in the acts") did Respondent, in April of 1985, direct the court administrator "to contact Richard Cox, Director of the Supreme Court Traffic Court Review Committee to seek an opinion as to the propriety of

(Respondent's) practice." Stipulation ¶5,6, p. 19. The June 27, 1985 reply by Mr. Cox stating, among other things, that "the Committee declined to take a specific position" (Exhibit "OO" to Stipulation, R. App. 9), was only five days prior to the date of the July 2, 1985 Rule 6B Notice of Investigation.

Thus, Respondent's claim that he "had the right to rely, and did rely, on the advisory opinions of..this Court's Traffic Review Committee before engaging in the acts..." is in direct contradiction to the facts as stipulated by the Respondent, and is totally devoid of merit.

The recommended discipline as to Count III is, therefore, fully supported by the record and, if anything, is lenient as opposed to "excessive and unwarranted" as claimed by the Respondent.

II. THE PUBLIC REPRIMAND RECOMMENDED IS THE MINIMAL DISCIPLINE THAT THIS COURT SHOULD IMPOSE

The Commission agrees with Respondent's citation on page 17 of his Initial Brief, of the Commission's Conclusions of Law, in pertinent part, viz:

> "The Respondent's contrite demeanor, cooperation and acknowledgment of the seriousness of his admitted conduct, and his new understanding of the limited of the power and prerogatives of his office, demonstrates a present appreciation for the responsibilities of that office."
>
> "To the extent that the Respondent may have failed to conform to these standards in the past, the Commission believes, that, under the circumstances, such occurrences will not likely be repeated in the future. (emphasis added).

However, in reviewing Respondent's Response to Order to Show

Cause and Respondent's Initial Brief, it is apparent that the Commission has been overwhelmed by Respondent's chameleon conduct in his appearances before the Commission and its Special Counsel. It is apparent that as of today, Respondent is not contrite and is of the opinion that the occurrences recited in the 20-page Evidentiary Stipulation as to Facts do not constitute violations by him of the Code of Judicial Conduct. It is undisputed by Respondent's background and resume that he is highly intelligent, knowledgeable as to the provisions of the Code of Judicial Conduct; yet he appears before this Court and contends that he should not be publicly reprimanded for:

(1) Knowingly engaging himself and the powers of this judicial office in a political campaign to defeat a Circuit Judge who had been in office more than 10 years, and to elect a close personal friend.

(2) Stating falsely to the Commission as to his financial guarantee of $50,000 to a private corporation in which he had a 17.5% interest.

(3) Utilizing his office and the prestige of his office to advance his financial interests and the interests of others.

(4) Instituting, without prior sanction, a practice which violates Rule 6.340 F.R.T.P., and claiming, in defense that he had a right to rely upon a prior advisory opinion, when such "advisory opinion" was neither "prior" nor exculpatory, and affirmatively misrepresenting to the Commission that the form he utilized complied with Rule 6.340, F.R.T.P. when it did not

comply.

It is emphasized once again, that the facts upon which this Commission based its Recommendations are facts that Respondent admitted. In retrospect, it is the Commission's view that Respondent has falsely represented to it: That he is "contrite" and "has acknowledged the seriousness of his admitted conduct". The Commission now questions its findings that "...the Commission believes that under the circumstances, such occurrences will not likely be repeated in the future." Consequently, it is submitted that the record supports the Report and Recommendation of the Commission, and, at a minimal, the Respondent should receive a public reprimand as to all Counts, but if this Court deems a public reprimand is too lenient as being "inconsistent with prior recommendations of the Commission and with prior actions of this Court in matters involving lesser judicial misconduct", In Re: Lantz, supra, then such other, more severe, appropriate discipline as this Court may deem proper should be imposed.

CONCLUSION

For the foregoing reasons, the Commission submits its recommendation that the Respondent be publicly reprimanded be accepted, and that Respondent receive a public reprimand as to all Counts, or, in the alternative, should a public reprimand, under the circumstances, be considered inconsistent with prior recommendations of the Commission and with prior action of this Court in matters involving equal or lesser judicial misconduct, or that the Respondent's apparent contrition and prior acknowledgment of the seriousness of the conduct be subject to ques-

tion, or that the findings and conclusion that Respondent is not likely to repeat the conduct in the future be subject to question, that this Honorable Court order such other or more severe discipline as it may deem apprpriate.

Respectfully submitted,

ALBERT G.CARUANA, ESQUIRE
Special Counsel to the Judicial
Qualifications Commission
Suite 1000 Roberts Building
28 West Flagler Street
Miami, Florida 33130
Telephone: (305) 371-7972

By: ______________________
ALBERT G. CARUANA

JOHN S. RAWLS, ESQUIRE
General Counsel to the Judicial
Qualifications Commission
Room 102, The Historic Capitol
Tallahassee, Florida 32301

By: ______________________
JOHN S. RAWLS

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to BURTON YOUNG, ESQUIRE, Young, Stern & Tannenbaum, P.A., Attorneys for Respondent, 17071 West Dixie Highway, North Miami Beach, Florida 33160 and JAMES T. HENDRICK, ESQUIRE, Albury, Morgan & Hendrick, P.A., Post Office Box 1117, Key West, Florida 33041, this 16 day of April, 1986.

____
ALBERT G. CARUANA