IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A JUDGE, NO. 93-62 CASE NO.: 82,328

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RESPONSE TO ORDER TO SHOW CAUSE

Respondent, **Judge P. Kevin Davey**, by counsel, pursuant to this Court's Order to Show Cause issued January 14, 1994, responds to the Florida Judicial Qualifications Commission's Findings of Fact, Conclusions of Law and Recommendation of Removal, and says:

Introduction

The F.J.Q.C. has recommended that this Court remove Judge Davey as a circuit judge. This Court should reject the F.J.Q.C.'s recommendation for three reasons: First, this Court lacks jurisdiction over the subject matter of this case because the acts complained of transpired prior to Judge Davey assuming judicial office on January 8, 1985. Second, the F.J.Q.C. did not prove its allegations in the Notice of Formal Charges by clear and convincing evidence. Finally, the F.J.Q.C.'s recommendation of removal is not warranted under the facts of this case when compared to the facts of other F.J.Q.C. cases disposed of by this Court.

Preliminary Statement

The Florida Judicial Qualifications Commission shall be referred to as the Commission or the F.J.Q.C. throughout this Response. Respondent, Judge P. Kevin Davey, shall be referred to as Judge Davey or Mr. Davey for the times prior to his judgeship. References to the three volume transcript of the final hearing held on November 30 and December 1, 1993, are referred to by (T)

followed by a page reference. References to the F.J.Q.C.'s (1-18) exhibits are referred to by (J.Q.C.) followed by an exhibit number. References to exhibits (1-5) offered by Judge Davey are referred to by the symbols (P.K.D.) followed by an exhibit number. References to the F.J.Q.C.'s Findings of Fact, Conclusions of Law and Recommendation are referred to as (Findings) followed by a page number.

Statement of the Case

On June 14, 1993, the F.J.Q.C. served a copy of its Notice of Investigation on Judge Davey by U.S. Mail. On July 12, 1993, the F.J.Q.C. conducted a hearing pursuant to F.J.Q.C. Rule 6(b). On September 9, 1993, the F.J.Q.C. served formal charges against Judge Davey charging him with violations of Canons 1 and 2(A) of the Florida Judicial Code of Conduct.

On October 1, 1993, Judge Davey filed his Answer to the Notice of Formal Proceedings.

On November 30 and December 1, 1993, a final hearing was held before the F.J.Q.C. On January 7, 1994, the F.J.Q.C. issued its Findings and recommended to this Court that Judge Davey be removed.

On January 14, 1994, this Court issued an Order to Show Cause requiring Judge Davey to show cause why the recommended action should not be granted. This Response is timely filed.

Statement of the Facts

The facts giving rise to the Notice of Formal Proceedings occurred between June of 1984 and January 7, 1985, the day before Mr. Davey took the bench. None of the acts alleged in the Notice

of Formal Proceedings were alleged to have been committed by Judge Davey since he became a circuit judge on January 8, 1985. Judge Davey contends that the F.J.Q.C. did not prove, by clear and convincing evidence, that Judge Davey is presently unfit to continue to serve as a circuit judge.

Kevin Davey graduated from Manatee High School in Bradenton, Florida. He graduated from the University of Florida in 1971 and received a Bachelor of Science degree in Journalism and Communications. (T 283.) He graduated from the University of Florida School of Law in December of 1973 and became a member of The Florida Bar in May of 1974. (T 283-84.)

As a member of The Florida Bar, Mr. Davey was never notified of any Bar complaints filed against him (T 284), and there is no evidence in this record that any Bar complaints have ever been filed against him.

There is no evidence that any complaints have been filed with or by the F.J.Q.C. regarding Judge Davey other than the charges stemming from the case before this Court. (T 284.) On one occasion, however, Judge Davey reported to the F.J.Q.C.'s then General Counsel, John Rawls, that he had been the Chairman of the Tallahassee-Leon County Bicentennial Commission. As Chairman, Mr. Davey was appointed to speak about the Commission and a gala to raise funds for the Commission's Bicentennial activities. Judge Davey was concerned that his actions may have violated the Judicial Canons so he reported himself to the F.J.Q.C. through Rawls. Judge Davey never heard anything further on the issue. (T 284-86.)

After graduating from law school, Mr. Davey was employed as an associate with Tallahassee lawyer Dexter Douglass' law firm. (T 286.) The law firm primarily focused on personal injury cases at that time. After three or four years, Mr. Davey began handling workers' compensation cases, estate work, employment discrimination, and other matters in addition to personal injury matters. Over the last seven years of his employment with the Douglass firm, perhaps 5 to 10 percent of his legal time was spent doing personal injury cases. (T 286-87.)

Mr. Davey became a shareholder in the Douglass law firm in 1977. (T 289.)

On or about March 16, 1984, Emma J. Bryant became a client of the Douglass law firm. (J.Q.C. 4) (T 306-07.) Ms. Bryant executed a contract and authority to represent which was signed by Mr. Davey on behalf of the firm. Id. Mr. Davey handled the Bryant case and no one else worked on it. (T 307.)

In May of 1984, Mr. Davey decided to run for circuit judge. (T 19, 292, 296.) Mr. Douglass tried to dissuade him and said that Mr. Davey should run for the legislature. (T 200-01, 292.) Mr. Douglass told Mr. Davey that he could not stay with the firm if he ran, and would have to leave, win or lose. (T 20, 79, 200-01, 298.)

Shortly before or after Mr. Davey announced his intent to run for judicial office, Mr. Davey, Mr. Cooper, and Mr. Douglass found themselves discussing the merits of a sitting circuit judge. (T 124-25, 199, 297.) Mr. Davey commented that he believed the judge

was not handling the collection of child support appropriately. Mr. Douglass disagreed. Mr. Cooper agreed with Mr. Douglass. Mr. Davey believed this was contrary to Mr. Cooper's previously expressed opinion about the judge. (T 297-98.) Mr. Davey told Mr. Cooper that he had never had an original thought in his life and told him that was why everyone called him "Little Dex", referring to Mr. Douglass. (T 199-200.) According to Judge Davey, Mr. Cooper "went ballistic, because people did call him that." (T 298.) Mr. Cooper stormed out of the meeting. Others who witnessed the scene were "kind of chuckling about it at the time. But, apparently, that was the seed -- I mean, that was something that really was a big deal, . . ." (T 298.) Mr. Cooper recalls the meeting and says that after Mr. Davey referred to him as "Dexter's lackey," he walked out of the room. He later told Mr. Douglass, "Dexter, if you ever need my vote to fire Kevin, you've got it." (T 125.)

On or about June 6, 1984, the principles of the firm executed a handwritten separation agreement drafted by Mr. Coppins. (T 20-21, 147-48, 298-99) (J.Q.C. 1.) It provided, in part, "[b]y mutual agreement, Kevin's status as a shareholder in DDC&C will continue through and including June 30, 1984." (J.Q.C. 1.) As a result, effective July 1, 1984, Mr. Davey ceased to be "a partner" in the law firm. (T 298.) No name or stationary changes were contemplated until after the election and it was agreed that Mr. Davey would remain "physically present with full secretarial and logistic support for law practice until two weeks after the

election." (J.Q.C. 1, ¶1.) Paragraph 8 of this agreement provided in part that

> [a]ll attorneys will conference ASAP to inventory PKD's cases with the following objectives: (a) all hourly rate cases handled by PKD after July 1, 1984 will be billed out by PKD on DDC&C letterhead, with PKD retaining 100% of all fees collected (b) all PKD contingent fee cases will be evaluated for % of completion, and those worked on by PKD which produce a fee will result in compensation to PKD on a pro-rata basis (c) all cases which PKD does not handle after July 1, 1984 will be identified and reassigned within the firm or transferred to other qualified attorneys outside the firm. (J.Q.C. 1, ¶8.)[1]

Soon after Mr. Davey told his partners that he intended to run for judicial office, Mr. Douglass told him that "you've got some money coming from the building," which some of the principals had an interest in and that Mr. Davey would "be entitled to that, your ninth(sic)." Mr. Davey had paid $9,000 for his 15% share in the limited partnership that owned the building. (T 209, 214, 290, 292.) Mr. Douglass told Mr. Davey that they would be working out the respective ownership interests in the building. (T 292.) A few weeks later Mr. Douglass indicated that he would draw up an agreement concerning Mr. Davey's interest in the building. Mr. Davey stated that he thought there was a provision in the original agreement that Mr. Davey was entitled to a different payout if he became a judge. Mr. Douglass became upset. (T 209, 215-16, 293.) Mr. Douglass told Mr. Davey that he was going to draw up an agreement regarding the building and that Mr. Davey would sign it.

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[1] The September 20, 1984, agreement made no mention of requiring the lawyers to conference about Mr. Davey's cases (J.Q.C. 2). The September 20th agreement "took the place of [the] handwritten one." (T 385.)

(T 221, 293.)[2] Mr. Davey refused to sign the proffered "building" agreement because it would have allowed him a smaller amount for his interest in the building than as set forth in the existing contract. (T 291, 293.)

Thereafter he received what he described as a "lock-out" letter at his home. (T 221-23, 294.) It was discovered by Mr. Davey's children on the doorstep of his house on the Saturday morning before the election. (T 293.) In part, the lock-out letter advised Mr. Davey that he had to leave the firm, that he would not have health or malpractice insurance, and that the locks would be changed. (T 87, 106, 151, 294.) The letter was delivered by Mr. Cooper, and was signed by Mr. Douglass, Mr. Cooper, and Mr. Coppins. (T 87, 106-07, 223, 293.) Mr. Cooper says the letter was written because they had difficulty getting Mr. Davey to negotiate. (T 87, 106, 223.) The firm did not carry through with its threats. (T 107, 111.)

After he received the lock-out letter and believing he would be physically locked-out of the Douglass law firm, Mr. Davey went to the office and picked up files on which he had been working. He cared about his clients and wanted to make sure they were protected. (T 305.) He believes the Breyer file was one of them

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[2] Legal issues regarding the building/partnership agreement were partially resolved pursuant to a civil suit filed by Judge Davey in which Judge Davey prevailed. (T 209, 214-16, 295.) This was not the only litigation that arose from Judge Davey's separation from the Douglass law firm. Judge Davey is still a limited partner in the partnership that owns the building. (T 217, 234, 289.)

but that the Bryant file was not. (T 305.)

Mr. Davey spent the next several days campaigning. (T 305.) After the election, on Wednesday, he came to the office and received a warm welcome as if the lock-out letter had never been written. (T 306.)

After July 1, 1984, Mr. Davey's financial position in relation to the firm changed. His monthly draw, at the time, without bonuses, was $4,535.00. (T 299-300.) The remaining shareholders in the firm agreed that he would still receive this amount as a way of purchasing Mr. Davey's interest in the firm. (T 300.) The law firm paid Mr. Davey one payment of $4,535.00. When he was not paid this amount the following month, he inquired and he was told that he would be paid differently thereafter, (T 300.); notwithstanding the express provisions in the June 6th agreement, pursuant to which Mr. Davey was to receive a monthly amount equal to his base salary to begin paying off his interest in the firm. (J.Q.C. 1, ¶5.)

On September 20, 1984, Mr. Davey and the shareholders of the firm entered an agreement for the firm to purchase Mr. Davey's stock. (J.Q.C. 2) (T 300.) The agreement provided for Mr. Davey to receive another check in the amount of $4,535.00 on or about September 20, 1984, and thereafter $1,650.00 a month until the principal amount was paid in full. (T 152, 301) (J.Q.C. 2, ¶(2).)

Judge Davey testified that he and Mr. Cooper met during July 1984 to discuss Mr. Davey's cases pursuant to the terms of the handwritten agreement. (T 302.) Mr. Cooper testified that he did not meet with Mr. Davey in July of 1984 and that the first meeting

between the two occurred sometime during the first part of November of 1984. (T 26-27.)

Judge Davey stated that he and Mr. Cooper reviewed the case list and discussed which cases he was to keep and which cases would be farmed out to other lawyers. (T 302.) "[T]here was no way our clients would be protected if we didn't make arrangements for somebody to be working on their cases or doing their work when [he] couldn't do it all." (T 303.) "[T]he whole reason that we met was to determine, okay, what cases do they want to keep, what cases do I think I can reasonably finish between now and when I had to leave, or what cases did they not want that we would have to send to somebody else because they didn't want to handle them." (T 303.) These were all firm clients. (T 303.)

Judge Davey testified that the two of them reviewed each case on the case list. (T 307.) When they got to the Bryant case, Mr. Davey told Mr. Cooper "exactly what the status of the case was. I told him the facts of the case, and the facts of the case have been recounted." Mr. Davey explained the facts of what happened to Ms. Bryant in the automobile accident and the problems with the case. (T 308.)

When the case first came into the office, Mr. Davey "thought it was an excellent case, because the lady was complaining. The lady had, obviously, had a miscarriage. That's what she told me in the first conference, and it was a couple of weeks after this collision with the bus, with the truck. So, I thought it was an excellent case." (T 308.); see also (J.Q.C. 8). However, during

his investigation of the case, Mr. Davey had difficulty obtaining the health records of Ms. Bryant from the Feminists Women's Health Center. Ms. Bryant eventually went to the Health Center and physically retrieved the records herself. (T 310.)

There were other, more serious problems with the case. Mr. Davey could not find medical experts who could testify that the miscarriage was causally related to the bus accident. (T 308-09.) Thus, what appeared initially to be a good case, turned out to be a poor case in Mr. Davey's estimate. Mr. Davey's former secretary, Janet Green Griggs, deceased, whose testimony was introduced by deposition, confirmed that when the case came to the firm, Mr. Davey felt that it was a good case. They continued to discuss the case as it progressed. "And sometime later he expressed that it wasn't as good a case as he had initially thought, because there were some problems with her previous medical condition." (J.Q.C. 17 at 9-10.) Mr. Davey told Ms. Griggs that the problems were "major." (J.Q.C. 17 at 10.)

Judge Davey testified that he discussed the merits of the Bryant case with Mr. Cooper during their July meeting. (T 310.)

> [Mr. Cooper] said, "This case is no good. It's a dog." And I said, "I agreed that it is not a good case." I said, "Well, maybe you can get settlement value or nuisance value out of it." And he said, "No. We don't have time to piddle with that. Why don't you send it to Joe Fixel? He's a friend of mine, he needs cases." And I said, "Okay, fine. I'll send it to Joe Fixel."

(T 310.) Joe Fixel was a friend of Mr. Cooper. (T 33.) As a result of this discussion with Mr. Cooper, Mr. Davey felt that the

Bryant case "was no longer the firm's case. I mean, they wouldn't even refer it to Joe." Instead, they asked Mr. Davey to do it. (T 310.) Judge Davey testified that he tried to contact Mr. Fixel but "never got in touch with him. I called him several times. He was out. I just never did get the case to him." (T 310.)

Later the Bryant case began to turn around. On August 20, 1984, Rhea Fletcher, a claims adjuster handling the Bryant case, recounted Mr. Davey telling her that he had attempted to obtain a medical report on Ms. Bryant from the Feminists Women's Health Center. She wanted to know whether Mr. Davey had been successful in obtaining the report, and whether he was now in a position to discuss settlement. However, Mr. Davey had advised Ms. Bryant by letter dated July 12, 1984, that he had not yet received the medical records. (J.Q.C. 8.) See also Mr. Davey's letter of July 12, 1984, to Ms. Risa Denenberg of the Feminists Women's Health Center of Tallahassee requesting Ms. Bryant's medical records. (J.Q.C. 8.) Mr. Davey responded to Ms. Fletcher by letter dated August 23rd and advised her that he had not yet received the records. Id. By letter dated September 20, 1984, Ms. Fletcher acknowledged Mr. Davey's letter of August 23rd and inquired whether Mr. Davey was in a position to submit the medicals and make a demand. Id.

Joe Cibulski, Claims Representative for Royal Insurance, later "inherited" the case and advised Mr. Davey by letter dated September 25, 1984, that he would be handling the matter. On October 2, 1984, Mr. Davey sent Mr. Cibulski a summary of treatment

provided by the Feminists Women's Health Center to Ms. Bryant. (J.Q.C. 8.)

Mr. Davey received a call back from Mr. Cibulski who said "Well, we've got your medical records. Make us an offer." (T 312.) Mr. Davey offered to settle for $50,00.00, not really expecting to get any real results. (T 338.) He received a $24,000.00 counter-offer, which he was very surprised to obtain. "There was nobody more shocked than me when [Mr. Cibulski] came back with a $ 24,000 offer to settle." (T 313, 338.)

The draft and the release were sent to Mr. Davey at his home. (T 312.) The check from the insurance company was made payable to Mr. Davey and Ms. Bryant. They both endorsed the check. (T 237-38.) Judge Davey recalls that he and Ms. Bryant went to the bank together. The check was cashed. Judge Davey stated that Ms. Bryant received her money and Mr. Davey his, but he admits that it could well have been that the check was put into his account and then Mr. Davey wrote Ms. Bryant a check. (T 238.) Ms. Bryant executed a release of all claims on October 31, 1984, and a closing statement dated the same date. (J.Q.C. 5-7.) The closing statement indicated that Mr. Davey received a fee of $8,000.00 and Ms. Bryant received $16,000.00. (J.Q.C. 7.)

Judge Davey testified that he did not advise the firm members of the settlement because the firm, through Mr. Cooper, had abandoned the case and responsibility for it to him. But, this was not the only reason he kept the fee. "The second reason, and I'm not very proud of it, but the reason I didn't tell them about it,

which I recognize now I should have, was because I knew if I did they would do exactly what happened. They would claim that they were entitled to part of the fee, when they weren't." (T 313.) "Not only did they not want the case, they wouldn't even agree -- I'm in the campaign, and they wouldn't even agree to call up Joe Fixel and refer it to him. John wouldn't. I don't say they. It was John." (T 313.)

Judge Davey testified that he did not misrepresent the strength of the case to Mr. Cooper in order to keep it for himself. (T 313.) He believed there were grave problems with the case, which he truthfully shared. (T 308-10.) No evidence was presented to establish that Mr. Davey's assessment of the case was inaccurate, nor that the settlement was not simply a windfall. When given a hypothetical set of facts similar to the Bryant case, Mr. Cooper agreed that it would be a "difficult case." (T 91-92.)

Mr. Cooper tells a different story with respect to when he first learned about the Bryant case. Mr. Cooper recalls that "[they] reviewed all of [Mr. Davey's] cases at one time." (T 25.) He recalls meeting in Mr. Davey's office at the firm with Mike Coppins and Tom Powell present. (T 25-26.) "It was in November of 1984. And the closest time frame that I can give you is that it would have been within the first two weeks of November of 1984." (T 26.) He believes that the first meeting took place at this time because he recalled that he and Mr. Davey had a second meeting on November 21, 1984, at which time he confronted Mr. Davey about his [Mr. Cooper's] knowledge that the Bryant case had been settled. He

also believes the first meeting occurred at this time because of his discovery that the Bryant case had been settled and also because he saw the settlement release dated October 31st and he recognized that the meeting he had with Mr. Coppins and Mr. Davey was after that date. (T 27.) Mr. Cooper testified that he prepared a memo dated November 26, 1984, which in its redacted form states "Last Wednesday, which was November 21, 1984, I met with Kevin to review all his cases." (J.Q.C. 3) (T 29-30.)

Mr. Cooper testified that the first meeting in early November called for Mr. Coppins, Mr. Powell, and Mr. Cooper to go over Mr. Davey's case list. (T 25-26, 30, 153-55.) They "went over a case list in the firm. Each lawyer had a case list, with his or her cases that they worked on separately. And [his] recollection was that we went over Kevin's case list at that time and went down each case. He gave us a brief synopsis of each case, and we decided that if it was not something that could be finished by him before the end of the year, or if it was something that should be referred to someone else, we then made a decision among Mike, Tom and [him] as to which one of us would take over the case and finish it." (T 30-31.)

Mr. Cooper recalls that during this meeting, Mr. Davey discussed the Bryant case and advised them of the facts of the case and that "liability was extremely weak, if nonexistent, and that damages were very slight." (T 31.) Mr. Cooper further recalled that Mr. Davey said "that he had tried to refer it to Joe, and Joe didn't want it." (T 32.) According to Mr. Cooper, Mr. Davey told

them at this meeting "that he and the client had consulted, and they had decided not to file suit, and close the file and take no further action." They then discussed the rest of the cases. (T 33.)

Mr. Cooper's testimony is that notwithstanding Mr. Coppins' hastily drafted agreement of June 6, 1984, stating in part that the "attorneys will conference ASAP to inventory PKD's cases," the first meeting did not take place until November of 1984, five months later. (T 85.) While Mr. Cooper prepared a memorandum for the second meeting, he did not prepare a memorandum about what he terms "the first meeting." (T 85.)

Between the first meeting and the November 21, 1984 meeting, Mr. Cooper had a conversation with Janet Green Griggs, Mr. Davey's secretary. (T 35-36.) Ms. Griggs told Mr. Cooper that she and her husband had dinner with Mr. Cibulski, and learned that Mr. Davey had settled the Bryant case. (T 36-37.)

Mr. Cooper asked Ms. Griggs to obtain a copy of the release and draft from Mr. Cibulski in order to ascertain what the situation was in light of Mr. Davey's representation that the case was closed and that it was not going to be pursued. (T 37.) Mr. Cooper says that he reviewed the release and the draft (T 40.) and discussed this issue with Mr. Coppins before Mr. Cooper's second meeting with Mr. Davey on November 21st. (T 42-43, 156.)

Mr. Cooper testified that after discussing the matter with Mr. Coppins, he went back to Mr. Davey's office and met with him on November 21, 1984. Mr. Cooper says that he went through each of

Mr. Davey's cases with him again, and that when they came to the Bryant case, he asked him about it. According to Mr. Cooper, Mr. Davey told him, in part, that the case was not any good and that the client had decided not to pursue it. Mr. Cooper recalls that he then confronted Mr. Davey with his knowledge of the settlement. (T 44.) Mr. Cooper claims that Mr. Davey admitted that he had settled the case and that he had lied during their first meeting and, according to Mr. Cooper, Mr. Davey's excuse was that "he was going to hold this fee as security, in the event, in his words, Dexter decided not to honor our September 20th written separation agreement." (T 45.) Mr. Cooper said that he suggested that they "needed to get the fee back" and "needed to divide the fee up in accordance with the agreement." (T 45.)

According to Mr. Cooper, there was no discussion of the Breyer case during their meeting on November 21st. (T 46.) Also, Mr. Cooper says he had a third meeting with Mr. Davey and Mr. Coppins on November 26th to discuss the Bryant case. (T 46.) He and Mr. Coppins were disturbed about Mr. Davey's handling of the settlement. (T 46.) Mr. Cooper and Mr. Coppins claim Mr. Davey admitted he lied to them. (T 47, 160.)

Judge Davey does not "recall telling them [he] lied." (T 314.) It "was a very rancorous meeting." Judge Davey did not testify that he did not say he had lied about the Bryant case. He recalls telling them: "Now, listen, you guys just came in here and accused me of stealing. I didn't steal anything. This is my case." (T 313-14.) Judge Davey testified that they claimed that

they were entitled to the fee. Mr. Davey disagreed at that time as he believed that it was not their case. (T 315.) F.J.Q.C. witnesses said that another meeting took place during late November or early December, 1984. (T 53.) The purpose of the meeting was to have Mr. Douglass confront Mr. Davey and ask whether there were any cases like Bryant, to which Mr. Davey said no. (T 53-55, 161, 206.)

Almost one month after the November 26, 1984 confrontation and after Mr. Douglass threatened to sue him, Mr. Davey, on December 20, 1984, settled the dispute by paying the firm $1,440.00. The settlement was based on Mr. Davey's review of the file and recapitulation of the hours performed before and after July 1, 1984. According to Judge Davey, Mr. Douglass said: "Okay, that looks good," and Mr. Davey wrote the firm a check in full settlement. (T 173-74, 240-41, 315-16) (J.Q.C. 16.)

The other case that was considered in the F.J.Q.C. proceeding was Mr. Davey's representation of Carol A. Breyer and her husband. Ms. Breyer was a personal friend of Mr. Davey's and was involved in a serious automobile accident in Leesburg, Florida. She was hit by a hit-and-run driver, Mr. Menchan, on or about March 8, 1982. (T 319.)

Judge Davey does not recall handling a UM claim before the Breyer case. (T 287.) The underlying tort action against the driver was settled for $10,000.00 on or about April 18, 1983. (T 81) (J.Q.C. 13.) Mr. Davey was aware that when Mrs. Breyer reached maximum medical improvement, he would need to file an underinsured

motorist claim against the Breyer's insurance carrier, GEICO. The underlying third party file remained open long enough for Mr. Davey to continue to collect medical information on Mrs. Breyer for the UM claim. In the summer of 1984, Mrs. Breyer reached maximum medical improvement. Mr. Davey was then ready to pursue the underinsured motorist claim against GEICO. (T 321, 355-56.)

Mr. Davey segregated all of the documents that he would need in order to negotiate or pursue a law suit, if settlement was not achieved, in the UM case. He took from the third party file all of the medical expenses, bills, and medical reports. (T 321, 355, 394.) He put these documents in a separate file and then he closed the file against the third party tortfeasor, styled Breyer v. Menchan. (J.Q.C. 13.)

Mr. Davey had followed a similar procedure, i.e., maintaining more than one file on a client, before Breyer. For example, if Mr. Davey had a client with both a personal injury and workers' compensation claim, sometimes Mr. Davey would treat each claim as a separate case. (T 332.)

With respect to the Breyer case, Mr. Davey took out the paper clips per office procedure and signed his secretary's initials, JG. (T 321.) This occurred on August 6, 1984. (J.Q.C. 12.) He does not recall why he signed her initials, although he did say that sometimes he signed hers and sometimes he signed his. (T 321.)

Judge Davey explained this was not the first time he had ever put JG on a closing form. His secretary would get behind sometimes in closing files and he would do that for her. He would go through

the file, take out the paper clips, take out the deeds, and send them back to the clients. Judge Davey testified he had done this before and signed JG before. In some cases he would sign JG and in others he would sign PKD. He had probably signed JG a dozen times over the past eight years. (T 322, 394.)

Mr. Cooper testified that in 1991, in preparation for the civil suit by Judge Davey, he reviewed 60 cases that were assigned to Mr. Davey that were closed in 1984. He claimed that Breyer was the only one that had the initials JG, and that two cases had the initials PKD. (T 101-03) (J.Q.C. 15., #s 123 and 129) Mr. Cooper admitted that he only reviewed cases closed in 1984; he did not review any of Mr. Davey's cases closed within the three previous years (1981-83). (T 118-19.)

Although the UM file was maintained separately from the third party file, it remained at the office until just before the election in September. Mr. Davey did not take the UM portion of the file home with him until the Saturday night he received the lock-out letter. (T 87, 322-23.) Because the firm never actually followed through on the lock-out threat, from time to time thereafter Mr. Davey returned the file to his office during the course of his handling of the case. (T 323.)

Mr. Davey reached a settlement with GEICO. (T 323.) In a letter dated December 13, 1984, the claims examiner for GEICO sent Mr. Davey a draft in the amount of $127,500, along with a release. These documents were mailed to Mr. Davey's home. (J.Q.C. 10) (T 323.) Judge Davey does not recall the specific date, but thinks he

received the documents on December 20, 1984. (T 324, 372.)

Judge Davey testified that on December 21, 1984, he brought the Breyer draft into the firm's office and told Mr. Cooper he had settled the Breyer UM case for $127,500. (T 324.) Mr. Cooper agreed that Mr. Davey notified him of the settlement on December 21, 1984, but recalls the discussion taking place at Killearn Methodist Church where both had children participating in a Christmas pageant. (T 56.) Mr. Davey was very excited. Judge Davey says that Mr. Cooper accompanied him to Mrs. Breyer's house where Mrs. Breyer signed the release and the draft. (T 324.) Mr. Cooper denies this. (T 99, 111-12.)

According to Judge Davey, after he had told Mr. Cooper about the settlement and Mrs. Breyer had signed the draft, Mr. Davey called Willis Sims, the firm's contact at Barnett Bank, advised him of the draft and told him that they wanted to get it expedited. Judge Davey says that he took the draft to the bank to be deposited in the firm's trust account. The Barnett Bank receipt is dated December 21, 1984, but does not have a time stamp. (J.Q.C. 11.) Judge Davey unequivocally testified that he did not try to do anything with the draft at the bank prior to discussing the matter with John Cooper. (T 325-26.)

Judge Davey stated that the draft was made out to him and Mr. and Mrs. Breyer. (T 325, 327.) Mr. Cooper recalls that he "may have seen a copy or what" of the Breyer draft but that he has no independent recollection of actually seeing the draft himself. (T 98.) But see (T 126). A copy of the draft was not entered into

evidence.

At the hearing, Mr. Douglass was asked whether there came a time, in December, when he received communications regarding the Breyer case. (T 207.) Mr. Douglass responded: "Yes. My recollection, and I don't have a clear recollection of this, but the way I recall it is, I had a communication of some sort from the bank, from Barnett Bank, where we do business." Judge Davey's counsel objected as follows: "I am going to make a [an] objection. I don't believe that Mr. Douglass is the person that received the phone call from the bank. I think someone in his firm did. And if that's going to be hearsay from those people and his own firm, and then the people from the bank calling over to his firm is going to be hearsay, also, I am going to object to any of that." The Chairman overruled the objection as to Mr. Douglass testifying as to his recollection of a call from the bank to which Mr. Douglass stated: "Well, in all fairness, I don't have a clear recollection of the call coming to me and saying this is so and so at the bank." The F.J.Q.C. Special Counsel then withdrew the question. (T 208.)

Mr. Douglass was also asked: "But at some point in time, did you thereafter learn that there was a Breyer case and that the case had, in fact, been settled?" While not responsive to the question, Mr. Douglass responded: "Yes, I learned from the events that a draft made payable to the firm was being presented by Davey involving this case, which I knew nothing about." (T 208.) There is no evidence as to when he heard this or from whom. Mr. Douglass admitted that he has no specific recollection of seeing the draft

himself. (T 220.)

Mr. Davey was the only person in the firm to have contact with the adjustors in the Breyer case. He was the person who told the adjustor how to make out the draft so he could have advised the carrier to issue a different draft if the original draft came in with the name of the firm. Judge Davey is sure that the draft was in his name and Mr. & Mrs. Breyer. (T 327-28.)

The settlement proceeds were deposited into the firm trust account on December 31, 1984, after the draft cleared. (T 329.) On January 7, 1985, a closing statement was issued in the name of the firm signed by Mr. & Mrs. Breyer and by Mr. Davey and Mr. Cooper. (T 82) (J.Q.C. 13.)

Judge Davey testified that when the Breyer case settled and the draft came to him, he did nothing to try and hide the settlement from Mr. Cooper or the firm. (T 329.) Judge Davey testified that the firm was entitled to part of the Breyer settlement pursuant to the termination agreement. (T 330, 374.)

The strained relationship between Mr. Davey and the firm did not end when Judge Davey was invested in January 1985. First, the former partners were unable to agree on Mr. Davey's share in the building owned by the professional corporation. The "partnership agreement" between the shareholder's and the professional corporation provided that if any partner/shareholder left the firm, he would be entitled to the return of his initial investment, plus interest. However, if the partner/shareholder left the firm to become a judge, he was entitled to receive an amount equal to the

net value of the building times his percentage of ownership. (T 290.) Mr. Davey felt he was entitled to receive his net percentage because he had left the firm to become a circuit judge. Mr. Douglass, and consequently the firm, disagreed. Mr. Douglass' position was that, under the particular words of the employment agreement, there was a difference between "leaving to become a judge" and leaving to run for, and ultimately be elected, judge.[3] Judge Davey filed suit against the firm to establish his entitlement to the greater interest. Judge Davey prevailed. The firm appealed to the First District Court of Appeal, where the case was per curiam affirmed. This Court denied the firm's petition for certiorari. (T 176, 209, 214-16, 291, 295.)

Judge Davey also filed another law suit against the firm, based on his contention that the firm had breached the contract with respect to the DuPont and Breyer fees. (T 210.) One of the issues in the law suit was whether Mr. Davey had been paid the correct amount of the Breyer fee. (T 336, 374.) The firm unilaterally determined Mr. Davey's portion of the fee and sent him a cashier's check in that amount. (T 76-7.) Mr. Davey believed he was entitled to a larger fee, and refused to cash the check. He filed the law suit in the late 1980's. (T 76.) In its defense, the firm filed a counterclaim against Judge Davey. (T 76.) The firm prevailed at this bench trial. Id.

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[3] This was what led to the lock out letter Judge Davey received at his home just before the election. Mr. Douglass wanted Judge Davey to sign a new agreement with the firm that would have waived his entitlement to the greater amount as provided in the existing agreement.

Several witnesses testified as to Judge Davey's present fitness as a circuit judge. Former Chief Justice of the Supreme Court, Stephen C. O'Connell, having read the F.J.Q.C.'s Complaint and Judge Davey's Answer, and having known Judge Davey, testified that Judge Davey's "reputation is an excellent one, he is an honest, capable, hard-working judge, highly ethical. He is well respected by lawyers, other judges, and by those in the community who know him." (T 251-54.)

Lawyer C. Dubose Ausley, former Chair of the Florida Ethics Commission, testified that he has had trials before Judge Davey and found him "to be a very competent judge, who is fair, honest. He ruled promptly. He was very impartial in his rulings. He worked hard. My experience is that he is well prepared, and treats all parties and all lawyers with respect and impartiality." (T 256.) Having read the F.J.Q.C.'s Complaint and Judge Davey's Answer, and having known Judge Davey, Mr. Ausley expressed his opinion that Judge Davey's reputation for truth and veracity "is good." (T 257-58.) Mr. Ausley also believed Judge Davey was presently fit to serve as a circuit judge. (T 259.)

Circuit Judge J. Lewis Hall, Jr. has worked closely with Judge Davey as a fellow circuit judge. He has discussed legal issues with Judge Davey and used him as a "sounding board" on judicial, legal, and ethical matters. (T 263.) Judge Hall believes Judge Davey's reputation in the community is excellent. He testified that Judge Davey has "a reputation for being a truthful man of integrity." He further believes that Judge Davey is well qualified

to continue to serve as a circuit judge. (T 264-65.)

Chief Circuit Judge Philip J. Padovano has "total confidence in Judge Davey. He's probably the hardest working judge we have in the whole circuit. I have a great deal of trust in him. I think he's a pleasure to work with. I mean, if that's your question, we really couldn't ask for a better judge, I don't think." (T 272.) He said that Judge Davey's reputation in the community "is excellent." Judge Padovano read the F.J.Q.C.'s Complaint and Judge Davey's Answer. Judge Padovano believes that Judge Davey is presently fit to serve as a circuit judge. (T 272-73.)

Three affidavits also were submitted in Judge Davey's behalf: Lawyer Roosevelt Randolph, Executive Director of The Florida Bar, John Harkness, and Public Defender Nancy Daniels. (T 282) (P.K.D. 2-4.) In particular, Mr. Harkness opined "that nothing in the J.Q.C. charges, even if true, affects Judge Davey's present fitness to sit as a judge." (P.K.D. 3.)

Argument

I

THE F.J.Q.C. AND THIS COURT DO NOT HAVE SUBJECT MATTER JURISDICTION OVER THE ACTS COMPLAINED OF BECAUSE THEY OCCURRED BEFORE MR. DAVEY ASSUMED JUDICIAL OFFICE ON JANUARY 8, 1985.

It must be conceded by the F.J.Q.C. that the alleged acts which gave rise to the notice of formal charges arose prior to January 8, 1985, the date when Judge Davey assumed judicial office. Article V, Section 12(a) of the Florida Constitution grants the F.J.Q.C. jurisdiction over Florida's judiciary. This grant of

jurisdiction is limited to conduct occurring while a judge is in some judicial office. It does not authorize the F.J.Q.C. to investigate or recommend discipline for a judge based on conduct that allegedly occurred prior to his ascension to the judiciary.

Article V, Section 12(a) of the Florida Constitution provides:

> There shall be a Judicial Qualifications Commission vested with jurisdiction to investigate and recommend to the Supreme Court of Florida the removal from office of any justice or judge whose conduct, during term of office or otherwise occurring on or after November 1, 1966 (without regard to the effective date of this section), demonstrates a present unfitness to hold office, and to investigate and recommend the reprimand of a justice or judge whose conduct, during term of office or otherwise occurring on or after November 1, 1966 (without regard to the effective date of this section), warrants a reprimand. (emphasis added.)

The crucial language "during term of office or otherwise occurring on or after November 1, 1966," does not grant the F.J.Q.C. jurisdiction over any conduct occurring after that date, but rather, grants jurisdiction over conduct occurring in any term of office after November 1, 1966. Article V, Section 12 was amended in response to this Court's 1974 holding in State ex rel. Turner v. Earle, 295 So. 2d 609 (Fla. 1974).

In Earle, this Court held that the F.J.Q.C. did not have jurisdiction over a judge for conduct which occurred prior to his term of judicial office that was subject to the jurisdiction of the F.J.Q.C. 295 So. 2d at 619. In 1973, Judge Turner had been elected Circuit Judge of the Eleventh Circuit in Dade County. The F.J.Q.C. investigated him for alleged bribery that occurred in 1972

while he was a judge of the Criminal Court of Record of Dade County, to wit: a term of judicial office which was not previously under the F.J.Q.C.'s jurisdiction. Id. at 612. This Court refused to extend the F.J.Q.C.'s jurisdiction to conduct that occurred prior to the judge coming under the authority of the Commission, even though he was a judge when he allegedly took the bribe. The practical result of this holding was that judges who were not previously under the jurisdiction of the F.J.Q.C. were immune for acts committed while they sat on the bench, but before the constitution was amended to extend the Commission's jurisdiction over all judges.

In response to Earle, the 1974 Legislature proposed a constitutional amendment to Article V, Section 12, which was approved by the voters. In a December 2, 1974, Memorandum to Alan Morris, Clerk of the House of Representatives, Joe Boyd, Staff Director of the Judiciary Committee, wrote:

> 1. The Commission may investigate the conduct of any judge or justice during term of office or otherwise occurring on or after November 1, 1966.
>
> The old provision was silent in this area. However, the Supreme Court in the case of Turner v. Earl, No. 44-339, effectively limited the investigation to acts occurring after January 1, 1973 (except felonies). Nor was the Commission allowed to investigate alleged acts of misconduct by a judge occurring during a prior term or when he held a different office. (Appendix 1.)

The effect of the amendment was simple. After the amendment, the F.J.Q.C. had jurisdiction over judges such as Judge Turner who had violated the judicial canons while a judge, but before the F.J.Q.C.

was granted power over them. The amendment then limited the F.J.Q.C.'s jurisdiction across the board to acts that took place on or after November, 1966, when the F.J.Q.C. was created. The 1974 amendment allows the F.J.Q.C. to proceed against a judge for conduct occurring during any term of judicial office whether that office was subject to the F.J.Q.C.'s jurisdiction or not. There is no evidence that the amendment was ever intended to extend jurisdiction to conduct which occurred before any term of judicial office.

This Court has never squarely addressed whether the F.J.Q.C. has jurisdiction over pre-judicial conduct. Although several reported cases involve discipline for such conduct, with the exception of dicta from Justice Erhlich's concurring opinion in In re Speiser, 445 So. 2d 343 (Fla. 1984)[4], these cases do not address the jurisdiction issue. See, e.g., In re Speiser, 445 So. 2d 343 (Fla. 1984); In re Myerson, 581 So. 2d 581 (Fla. 1991); In re Sturgis, 529 So. 2d 281 (Fla. 1988); In re Berkowitz, 522 So. 2d 843 (Fla. 1988); In re Carnesoltas, 563 So. 2d 83 (Fla. 1990).

That the F.J.Q.C. does not have jurisdiction over pre-judicial conduct in this case is also supported by the plain text of the Judicial Canons Judge Davey has been charged with violating. Canon

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[4] The only mention of jurisdiction in these opinions is found in Justice Erhlich's concurrence in Speiser. He wrote "I concur that the Judicial Qualifications Commission (JQC) has jurisdiction against a circuit judge for conduct which occurred prior to his assuming judicial office . . ." 445 So. 2d at 344. However, the issue is not mentioned in the majority opinion and the concurrence has no force of law. 13 Fla. Jur. 2d Courts and Judges § 152 (1979).

1 of the Florida Code of Judicial Conduct provides that "A judge should uphold the integrity and independence of the judiciary." Canon 2 of the Florida Code of Judicial Conduct provides that "A judge should avoid impropriety and the appearance of impropriety in all his activities." Both of these Canons expressly mention that "a judge" should or should not do something. Neither one references non-judicial conduct. Although it is reasonable to extend these Canons to the activities of a judge while he is acting in an independent capacity, it is not reasonable to extend these Canons to extend to a judge's conduct that occurred before he ascended to the bench.

All of the alleged conduct occurred while Mr. Davey was an attorney, not while he was a judge. At the time of the conduct, The Florida Bar had jurisdiction and did not attempt to discipline him.[5] The F.J.Q.C. has no authority to reach back almost a decade and discipline Judge Davey for this alleged conduct prior to his taking the bench.

II

THE F.J.Q.C. ERRED IN FINDING JUDGE DAVEY GUILTY AS CHARGED AND IN RECOMMENDING REMOVAL BECAUSE ITS MATERIAL FINDINGS OF FACT WERE NOT PROVEN BY CLEAR AND CONVINCING EVIDENCE.

The F.J.Q.C. is required to prove its allegations by clear and

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[5] Indeed, The Florida Bar would still have jurisdiction over Judge Davey were he ever to resume his career as a lawyer. Any concerns that a judge who allegedly commits bad acts just prior to assuming judicial office is exempt from sanction are therefore unwarranted. Further, if a judge were guilty of a serious crime committed prior to taking office, he could be impeached. See Art. V, § 12(g), Fla. Const.; Art. III, § 17(a), Fla. Const.

convincing evidence. In re LaMotte, 341 So. 2d 513, 515 (Fla. 1977).

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Smith v. Department of Health and Rehabilitative Services, 522 So. 2d 956, 958 (Fla. 1st DCA 1988) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). See also The Florida Bar v. Rayman, 238 So. 2d 594, 597 (Fla. 1970) (quoting In re Martin, 67 N.M. 276, 354 P.2d 995, 998 (1960)).

While it is true that the "findings and recommendations of the Commission are of persuasive force and should be given great weight," "the ultimate power and responsibility of making a determination rests with this Court." LaMotte, 341 So. 2d at 515. See also In re Kelley, 238 So. 2d 565, 571 (Fla. 1970).

A

> The F.J.Q.C. erred by finding that Judge Davey had lied to them in the proceeding and compounded the error by relying on this finding in whole or in part to support its recommendation that he be removed.

The F.J.Q.C. did not charge Judge Davey with lying[6] to the

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[6] "The giving of false testimony or the making of a false statement is an essential element of perjury. The statement must be false and it must have been willfully given, with the intent by the defendant that it be taken as true, though he or she knows that it is false." 15A Fla. Jur 2d Criminal Law § 4167 (1993). Further, "[n]o one should be convicted of perjury simply because

F.J.Q.C. at any time. See Notice of Formal Proceedings. Judge Davey appeared and testified at the F.J.Q.C.'s investigative hearing. The F.J.Q.C. was aware of Judge Davey's testimony both at the investigative hearing and during the prior civil trial involving Judge Davey and his former law firm. See (T 14-15). Nevertheless, no charges were ever filed alleging that Judge Davey lied in any proceeding.

Notwithstanding the failure to charge Judge Davey with this conduct, the F.J.Q.C. found in part that Judge Davey "lied under oath to the F.J.Q.C. at the trial of this cause in an attempt to justify his conduct," Findings at 18, and that "Judge Davey has compounded his original misconduct by appearing before the F.J.Q.C. and attempting to explain his conduct through testimony that the F.J.Q.C. finds to be false in material respects." Findings at 21.

Disciplinary action may not be imposed on the basis of facts that have not been charged in a complaint. Basic notions of due process of law as guaranteed by the Florida and United States Constitutions, see Art. I, § 9, Fla. Const.; 5th and 14th Amend., U.S. Const., compel this result. In Bernal v. Department of Professional Regulation, 517 So. 2d 113 (Fla. 3d DCA 1987), affirmed sub nom Department of Professional Regulation v. Bernal, 531 So. 2d 967 (Fla. 1988) (Bernal II), Dr. Bernal was charged with several counts of assisting the practice of medicine by unlicensed persons. The hearing officer found the doctor guilty of three

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another person swears to a contradictory state of facts." Id. at § 4208.

counts of the complaint and recommended a penalty of 90 days suspension followed by one year probation. The Board adopted the hearing officer's finding as to guilt, but found that the recommended penalty was too lenient and ordered that Dr. Bernal's medical license be revoked. The Board rejected the hearing officer's recommended penalty based, in part, on the hearing officer's finding that "the respondent [Dr. Bernal] was less than candid in his testimony." Bernal, 517 So. 2d at 115.

The district court reversed the penalty imposed by the Board because the finding of the doctor's alleged lack of candor was an offense with which he was not charged. The court reasoned:

> . . . one's conduct in defending an action against him may not be the subject of an increased penalty if he is nevertheless found guilty of the substantive crime charged. On these points, we believe that the cases which hold that even perjury or other misconduct in the defense of a criminal charge may not provide a ground for an increased sentence or an upward deviation from the sentencing guidelines are analogous and most persuasive.

Bernal, 517 So. 2d at 115 (citations omitted). See also Klein v. Department of Business and Professional Regulation, 625 So. 2d 1237 (Fla. 2d DCA 1993); Celaya v. Department of Professional Regulation, Board of Medicine, 560 So. 2d 383 (Fla. 3d DCA 1990). This Court approved the district court's decision and rejected "DPR's contention that the matter should be remanded to the board to give it a second chance to modify the penalty." Bernal II, 531 So. 2d at 968 n.2.

It cannot be precisely determined on this record and upon a

review of the F.J.Q.C.'s recommendation what weight was given this finding. However, there is evidence that the F.J.Q.C. relied heavily on it. On page 18 of its Findings, the F.J.Q.C. states:

> Public confidence and perception of the judiciary would be substantially eroded if Judge Davey remains on the bench in the face of the findings of the Commission that he attempted to convert the Bryant fee and the Breyer fee and in the course thereof made numerous misrepresentations to the members of his firm and lied under oath to the Commission in an attempt to justify his conduct.

(emphasis added). And then, on page 21 of the F.J.Q.C. recommendation, the F.J.Q.C. state "Judge Davey has compounded his original misconduct by appearing before the Commission and attempting to explain his conduct through testimony that the Commission finds to be false in material respects." (emphasis added). There can be no doubt that this finding was material to the F.J.Q.C.'s conclusion that Judge Davey should be removed.

Given the serious nature of the finding that Judge Davey lied to the F.J.Q.C., this Court should reject the F.J.Q.C.'s findings with respect to this issue because he was not charged with lying to the Commission. This Court should reject the F.J.Q.C.'s recommendation of removal and make an independent review of the record without affording the F.J.Q.C.'s recommendation any special weight.

B

> The F.J.Q.C. failed to prove by clear and convincing evidence that Mr. Davey's actions with respect to the Bryant and Breyer cases render him presently unfit to hold judicial office.

The Breyer Case

The F.J.Q.C. made several findings of fact regarding Mr. Davey's handling of the Breyer case. See Findings 11-19, 23. The thrust of these findings appears to be that they support the conclusion that Mr. Davey intended to convert the Breyer fee, and that the only reason he did not do so was that he was prevented from tendering the draft himself. Finding 23. There is no record evidence to support this conclusion.

The F.J.Q.C.'s finding that Mr. Davey was prevented from tendering the draft and keeping the proceeds himself is purportedly based upon the testimony of Mr. Cooper (regarding the name on the draft) and Mr. Douglass[7] (regarding the name on the draft and "knowledge" that Mr. Davey had previously attempted to negotiate the draft). However, Mr. Cooper admitted that he does not have a specific recollection that he even saw the draft.

Q. Do you remember seeing the Breyer draft?

A. I can't tell you, Mr. Barkas, that I have an independent recollection that I saw it. But I think I can tell you that if I followed my ordinary routine and practice, I most likely did see it at some time.

Q. Before it would have been deposited?

A. I don't know. I may have seen a copy or what, I just

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[7] The three main F.J.Q.C. witnesses, Mr. Cooper, Mr. Coppins, and Mr. Douglass, are not neutral witnesses. They were personally involved in the separation battle and subsequent litigation with Judge Davey. Mr. Douglass is still a partner with Mr. Davey in the ownership of the building. (T 218.) Mr. Cooper testified at the F.J.Q.C. hearing that Mr. Cooper had once told Mr. Douglass "if you ever need my vote to fire Kevin, you've got it." (T 125.) They all had personal and/or financial motives to testify the way they did at the civil trial, and for obvious reasons could not change their testimony at the F.J.Q.C. hearing.

don't know. If it was a draft that came into the firm that was big one like that [sic], I would usually take a peek at it just to look at it.

Q. You are guessing? You don't know?

A. That's my routine. I can't tell you independently that I actually looked at this draft.

(T 98.) (emphasis added). However, in response to Judge Gillman's inquiry regarding the Breyer draft, Mr. Cooper then stated: "I do not have it in front of me[8], but I have seen a copy of it, and my recollection is that it was made payable to the client and to the law firm." (T 126.) See Findings at 12. Nor does Mr. Douglass.

Q. The bank draft in the Breyer case, you didn't see that, did you?

A. I don't know that I ever saw it. I could have. I could have even been the one that signed it.

Q. But you don't have any specific recollection of seeing it?

A. No. I think I did see a copy of it.

(T 220.) (emphasis added). The F.J.Q.C. did not introduce the bank draft to contradict Judge Davey's testimony that the draft was made payable to him and Mr. & Mrs. Breyer. The F.J.Q.C. did not prove by clear and convincing evidence, by witnesses Mr. Cooper and Mr. Douglass that they saw the draft, much less that they know to whom it was made payable. Therefore, the F.J.Q.C. finding that the draft was made payable to the firm, not Mr. Davey, is not only unsupported by clear and convincing evidence, see The Florida Bar

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[8] Of course not. The F.J.Q.C. did not produce the original or a copy of the bank draft at the hearing. Given that the burden of proof lay with the F.J.Q.C., and given that the name on the draft appears to be so important to their findings, they should have introduced the draft or at least explain why they did not.

v. Rayman, 238 So. 2d 594, 597 (Fla. 1970), it is unsupported by any evidence.

The second half of F.J.Q.C.'s "proof" that Mr. Davey was prevented from converting the Breyer fee is the finding that Mr. Davey tried, unsuccessfully, to present the draft before he told Mr. Cooper about the settlement. Again, the record is completely devoid of any evidence to support that claim. The F.J.Q.C. relied entirely on Mr. Douglass' testimony for this. Mr. Douglass was asked whether, in December, he received communications regarding the Breyer case. (T 207.) Mr. Douglass responded "Yes. My recollection, and I don't have a clear recollection of this, but the way I recall it is, I had a communication of some sort from the bank, from Barnett Bank, where we do business." Id. (emphasis added.) Judge Davey's counsel objected to the hearsay nature of what some unknown person at the bank had said. The Chairman overruled the objection and allowed Mr. Douglass to testify regarding his recollection of receiving a call from the bank. However, on that point, Mr. Douglass testified: "Well, in all fairness, I don't have a clear recollection of the call coming to me, and saying this is so and so at the bank." (T 207-08) (emphasis added.) With this answer, counsel for the F.J.Q.C. withdrew the question. (T 207-08.)

Mr. Douglass was then asked whether he "thereafter learned[ed] that there was a Breyer case and that case had, in fact, been settled?" Mr. Douglass responded, "I learned from the events that a draft made payable to the firm was being presented by Davey

involving this case, which I knew nothing about." (T 208.) (emphasis added)

Based upon this hearsay testimony, F.J.Q.C. concluded: "[Mr.] Douglass testified that the first he became aware of the Breyer draft was a call from the Bank regarding the draft (Tr. 207-08.)." Finding 16. Upon what is this finding based? Mr. Douglass unequivocally testified that he did not have a clear recollection of the call coming to him or the details of any such conversation if one even occurred. There is no evidence as to who called from the bank, when that person called or who that person may have spoken with at the law firm.[9] Mr. Douglass states that he "learned from the events...." What events? Mr. Douglass' knowledge had to have been based on what he heard from a third party or what that third party heard from another party. Hence, Mr. Douglass' testimony was based upon hearsay and not personal knowledge. Thus, it cannot form the basis for the F.J.Q.C.'s finding that Mr. Davey attempted to present the draft before notifying the firm of the settlement.

The burden of proof in an F.J.Q.C. proceeding lies with the F.J.Q.C. The burden is clear and convincing evidence. However, given these facts, there is no evidence in the record at all to support the finding that Mr. Davey attempted to negotiate the draft and thus attempted to convert the money to his own use. Thus, the

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[9] To the extent that Mr. Douglass could have testified about the conversation, any such testimony would have been hearsay and could not have provided support for the F.J.Q.C. findings. The "caller," if any, from the bank did not testify at trial for the F.J.Q.C.

F.J.Q.C.'s most important finding of fact against Mr. Davey with respect to the Breyer matter, that he intended to convert the fee, is not supported by any evidence.

Mr. Davey handled Carol Breyer's case from the outset. She hired the firm because she was a personal friend of Mr. Davey. There were two initial components of the Breyer case, to wit: resolution of the claim against the tortfeasor driver and the workers' compensation claim. These matters were resolved in or around 1983 with a settlement received against the tortfeasor for $10,000.00. This case was not closed because Mrs. Breyer had not achieved maximum medical improvement. It was not time to pursue a claim against Ms. Breyer's UM carrier. The matter became ripe during the summer of 1984 after Mr. Davey decided to run for judicial office and terminated his relationship with the law firm.

The Commission also relies on the finding that Mr. Davey negotiated the settlement on his own with the UM carrier and requested that the settlement draft be sent to his home. He admitted as much in his Answer to Notice of Formal Proceedings. This does not mean he attempted to convert the fee. Mr. Davey was under no legal obligation to the firm or the firm members to do otherwise. The September 20, 1984, Agreement between Mr. Davey and the law firm only required Mr. Davey to "take responsibility for completing or reassigning to other attorneys within the firm or other qualified attorneys outside the firm all cases he was handling as of June 6, 1984, and afterwards. As of January 8, 1985, he will have completed all such cases or have them reassigned

to other attorneys." (J.Q.C. 2 ¶ (10)) (emphasis added.) The September 20th agreement expressly provided for Mr. Davey to take sole control of cases that he had been handling as of June 6, 1984. Mr. Davey lived up to this Agreement by taking responsibility and completing the case on his own. This Agreement did not require him to seek their advice on how to handle the case, nor did it require him to keep them apprised of ongoing negotiations. Once Mr. Davey completed the case, he notified Mr. Cooper of the settlement and the draft was deposited into the firm trust account. Thus, the record evidence leads to only one conclusion: Judge Davey lived up to the terms of the September 20, 1984, agreement.

The F.J.Q.C. gives great weight to Mr. Davey's statement that he requested the adjuster to send the draft to his home "to keep [his] options open." (T 392.) Finding 19. But, in context the statement does not support the proposition upon which the F.J.Q.C. relies, i.e. that he intended to steal the money. Mr. Davey had been involved in a rancorous meeting with the members of the firm. They accused him of lying and hiding the Bryant fee, and demanded that they be paid part of it, a fee to which Mr. Davey (with justification) felt they were not entitled. In light of the events which occurred up to that time, including but not limited to the lock out letter he received; the problems he had with Mr. Douglass regarding the ownership interests in the building; the fact that he "didn't know what they were going to do" to him or how they would treat him; or how they would disburse the settlement proceeds. Even so, Mr. Davey never questioned that the firm was entitled to part

of the fee. The issue to Mr. Davey was how it should be presented to them. Part of Judge Davey's testimony regarding his "options" was left out of the F.J.Q.C. recommendation and is of particular relevance to whether he intended to steal the fee:

> I mean, but I never said to myself I'm going to take this. I'm going to try to steal this. I never in my mind said this is not their case, or they're not entitled to some portion of the fee.

(T 392). He had the settlement check sent to his home for no reason other than to have possession of the check so as to work out the apportionment of the fees. Mr. Davey's "option" was whether or not to maintain control of the distribution of the fee to protect his interests. There is no evidence he ever intended to conceal the settlement from the firm or to try to keep the entire fee himself. None.

Another basis for the F.J.Q.C.'s conclusion that Mr. Davey intended to convert the Breyer fee is testimony by his former partners[10] that Mr. Davey failed to tell them about the Breyer case when asked if there were any cases the firm needed to know about. Judge Davey said that he does not recall them asking that question, but candidly admitted that if he had been asked whether there were other cases like the Bryant case, he would have said that there were none. Again, and in context, Mr. Davey was genuinely concerned that the firm would not live up the their agreements. While it may have been better to advise them about the case, ultimately it matters not that he did not do so. Breyer was

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[10] See n. 7, supra.

Davey's case. The meeting took place in November. Two months before that, Mr. Davey and his law partners had executed the September 20, 1984, agreement providing that Mr. Davey had responsibility for completing or reassigning cases. (J.Q.C. 2, ¶ (10).) Mr. Davey was under no obligation to go over his cases with his former law partners. All he had to do was share the fee with the firm. He did share it.

The F.J.Q.C. did not prove by clear and convincing evidence that Mr. Davey's response to the inquiry was evidence that he intended to keep any settlement proceeds for himself and not share them with the Douglass law firm. Mr. Davey was the only lawyer involved with the case. If he wanted to keep the fee and the draft was made payable to the wrong party, Mr. Davey could have had the insurance company reissue it. (T 327-28.)

Finally, the Commission relies on its finding that Judge Davey placed his secretary's initials on the "closed file check list" dated August 6, 1984. (J.Q.C. 12.) Judge Davey did not deny that he did this. He also testified that he had done this before over the previous eight years of his service to the law firm. The F.J.Q.C. determined, based on the evidence presented at the hearing, that Mr. Davey forged his secretary's signature. Finding 23. This finding is not supported by the evidence. Forgery is a statutory and common law crime.[11] It consists of a specific

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[11] See § 831.01, Fla. Stat. (1993). At common law forgery was the false making or materially altering, with intent to defraud, of any writing, which, if genuine, might apparently be of legal efficacy for injury to another, or the foundation of a legal liability. See Hepburn v. Chapman, 109 Fla. 133, 149 So. 196, 200

criminal intent to deceive others as to the authenticity of a signature or document. The only way to make such a finding in this case is to bootstrap the intent requirement onto the finding that Mr. Davey intended to convert the fee. Which element is the predicate? According to the F.J.Q.C., Mr. Davey's intent to convert the fee is based on the fact that he forged his secretary's initials, while at the same time, the intent to forge is "supported" by the fact that Mr. Davey intended to convert the fee. This circular logic does not remotely resemble clear and convincing evidence.

Regarding the Breyer case, Mr. Davey notified Mr. Cooper of the settlement and the draft on September 21, 1984; the draft was deposited into the firm's trust account at Barnett Bank on December 21, 1984 (and cleared December 31, 1984); and Mr. Cooper and Mr. Davey signed the closing statement in the Breyer case on January 7, 1985. The record evidence does not support the finding that Mr. Davey intended to convert the Breyer settlement check to his own use.

The Bryant case.

Emma J. Bryant became a client of the firm on March 16, 1984. Mr. Davey was her lawyer. (T 307.)

As recounted by the F.J.Q.C., Judge Davey testified that he went over all of his cases with Mr. Cooper in July of 1984. (T 307.) When they got to the Bryant case, Judge Davey says he told Mr. Cooper of the facts and status of the case. (T 307-08.)

(1933).

Mr. Cooper says that meeting never took place and that the first time they discussed the Bryant case or any of Mr. Davey's cases was in November of 1984. What Mr. Cooper says does not make sense.

When Mr. Davey announced in June of 1984 that he was going to run for office and he was Mr. Douglass told him he would have to leave the firm whether he won the election or lost. Then the law firm hastily drafted a handwritten transition agreement dated and signed June 6, 1984. (J.Q.C. 1.) In part, the members of the firm agreed that "[a]ll attorneys will conference ASAP to inventory PKD's cases..." (J.Q.C. 1, ¶ 8) (emphasis added.)

The acronym "ASAP" generally stands for as soon as possible. It does not stand for some indefinite time in the future. It is not reasonable for the F.J.Q.C. to assume that a well known firm with many clients, knowing that Mr. Davey is representing firm clients, would wait five months to discuss Mr. Davey's case list with them, and only then to determine the nature of hourly and contingency fee cases handled by Mr. Davey. It cannot assume that an experienced firm with experienced litigators would wait five months to discuss these important issues, especially as they related to the generation of firm income and the protection of firm clients. On this issue, the F.J.Q.C. should have given Judge Davey the benefit of the doubt, especially given that the issue pitted one person's testimony against another.[12]

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[12] See, n. 7, supra; see also The Florida Bar v. Rayman, 238, So. 2d 594, 597 (Fla. 1970)(quoting In re Martin, 67 N.M. 276, 354 P.2d 995 (1960)).

The F.J.Q.C.'s finding that Mr. Davey did not meet with any members of his law firm to go over a case list until November of 1984 conflicts with the progression of the agreements entered into between Mr. Davey and the Douglass law firm. The June handwritten agreement provided:

> 8. All attorneys will conference ASAP to inventory PKD's cases with the following objectives:
>
> (a) All hourly rate cases handled by PKD after July 1, 1984 will be billed out by PKD on DDC&C letterhead, with PKD retaining 100% of all fees collected.
>
> (b) All PKD contingent fee cases will be evaluated for % of completion and those worked on by PKD which produce a fee will result in compensation to PKD on a pro-rata basis.
>
> (c) All cases which PKD does not handle after July 1, 1984 will be identified and reassigned within the firm or transferred to other qualified attorneys outside the firm.

(J.Q.C. 1, ¶ (8).) Three months later, Mr. Davey and his former law partners executed another agreement, this one typewritten. The September agreement provided in part:

> (10) Davey will take responsibility for completing or reassigning to other attorneys within the firm or other qualified attorneys outside the firm all cases he was handling as of June 6, 1984 and afterwards. As of January 8, 1985 he will have completed all such cases or have them reassigned to other attorneys.

(J.Q.C. 1, ¶ (10).) The striking difference between the June and September agreements is that the September agreement no longer contains language requiring the attorneys to conference to inventory Mr. Davey's cases. The most reasonable explanation for the omission of that language in the September agreement is that

the attorneys had already complied with paragraph 8 of the handwritten June agreement. Having done so, there was no longer any reason to set that requirement in writing. The difference in the two agreements supports Judge Davey's testimony that he met with Mr. Cooper to go over the case list in July, and contradicts Mr. Cooper's recollection.

The F.J.Q.C. also found that Mr. Davey misrepresented the merits of the Bryant case. Judge Davey testified while he initially thought the case was good, it became weak when he could not find experts to establish causation. Mr. Davey's secretary, Ms. Griggs, stated that Mr. Davey told her that it was not a good case and that there were major problems with the case. (J.Q.C. 17 at 9-10.) When posed a hypothetical set of facts similar to those testified to by Judge Davey, Mr. Cooper admitted that the hypothetical facts presented a difficult case. (T 91-2.) Notably absent from the hearing was any evidence to contradict Judge Davey's testimony regarding the facts of the Bryant case. The F.J.Q.C. assumes that it was not weak. This finding is unwarranted.

As a result of the initial problems with Bryant, Mr. Davey genuinely believed that Mr. Cooper, on behalf of the law firm, did not want to pursue the Bryant case. This explains Mr. Davey's conduct thereafter with respect to the Bryant case. If he genuinely believed the Bryant case was his, and not the law firm's, then, given the circumstances existing at the time, it is understandable why Mr. Davey would not have advised the law firm of

the Bryant case when asked in November of 1984.

The issue is not whether Mr. Davey was correct in his belief. The issue is whether he had any ill intentions or motives while he worked on the case. There is no evidence that he did.

III

THE RECOMMENDATION THAT JUDGE DAVEY BE REMOVED IS UNWARRANTED IN LIGHT OF THIS COURT'S PRIOR HOLDINGS.

This Court has addressed various scenarios regarding the conduct of judges. In so doing, this Court has developed a case-by-case strategy of determining the best way to handle each matter. Nonetheless, these cases do provide valuable guidance in determining what is appropriate in cases involving similar facts. A review of these cases indicates that the recommendation of removal, assuming discipline is even warranted, is extreme considering the facts of this case.

For example, in In re Fowler, 602 So. 2d 510 (Fla. 1992), Judge Fowler pled guilty to furnishing false information about an accident to a police officer, a crime. This occurred while Judge Fowler was the Chief Judge of the Sixteenth Judicial Circuit. "Judge Fowler stipulated that his actions in connection with the automobile accident constitute conduct unbecoming a member of the judiciary" and this Court agreed. Id. at 511. The evidence established that this was an isolated incident and that Judge Fowler had been a well-respected jurist. "Testimony from a variety

of lawyers, judges and citizens clearly attested to this fact."[13] Id. Notwithstanding Judge Fowler's admission that he lied to a law officer while a judge, Judge Fowler only received a public reprimand. The worst scenario proven by the F.J.Q.C. against Mr. Davey is that, as a lawyer, he may have failed to disclose information to his partners because he feared he would be cheated by them and he wanted to protect his interests.

The Commission cites to cases where this Court has removed judges, but the facts of those cases do not apply here. For example, in In re Lamotte, 341 So. 2d 513 (Fla. 1977), this Court removed a judge because he had intentionally used a State credit card for personal expenses while a sitting judge over a seven year period. This Court noted that "[t]he evidence is clear and convincing that the judge intentionally committed serious and grievous wrongs of a clearly unredeeming nature." 341 So.2d at 518. Judge LaMotte's dishonest conduct over a seven year period is distinguishable from Mr. Davey's alleged acts, which at worst were isolated in scope and time and arose in the context of a bitter law firm divorce.

More recently, this Court removed Judge Garrett based upon Judge Garrett's admitted conduct showing a conscious, deliberate and premeditated theft while he was a sitting judge. In re Garrett,

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[13] Judge Davey presented similar character evidence at his trial. Surely, if Judge Fowler's recent conduct while he was a sitting judge only warranted a public reprimand, then the F.J.Q.C.'s recommendation in this case is disproportionate to the alleged acts, which occurred almost a decade ago and are separated by that many years of faithful service as a judge.

613 So.2d 463, 465 (Fla. 1993). This Court concluded that there was no doubt that Judge Garrett knowingly committed petit theft, a crime of moral turpitude, while a member of the judiciary. Crucial to this Court's decision to remove him is the belief that it is impossible for the public to repose competence in a judge who has knowingly stolen property from another. Id. This fear does not apply in this case, as there is no evidence that Mr. Davey stole property of another or that he tried to do so.

Each of these public reprimand and removal cases involve allegations and proof that a judge knowingly and intentionally committed theft or deliberately lied while they were sitting as a judge. These cases involve independent, conscious, bad acts on the part of sitting judges. These cases do not involve personal and business issues facing a lawyer involved in a bitter extrication from a hostile law firm. While Judge Davey accepts that his judgment as a lawyer in the midst of this acrimony could have been better, he steadfastly denies stealing or lying under oath.

This is a case of law partners who parted ways in a less than amicable fashion. It "is an inappropriate one for disciplinary action, and should more properly be made the subject of a civil action in the circuit court, if any party feels the necessity for redress." The Florida Bar v. Quick, 279 So. 2d 4, 8 (Fla. 1973). Indeed, the termination of Mr. Davey' relationship with the Douglass law firm was the subject of two independent law suits: one won by Judge Davey, one won by his former partners. To the extent that the issues raised in the breakup needed to be addressed, they

have been so.

This is not a case involving proven theft. It is not a case involving proven perjury or forgery. It is a case involving a lawyer who was working under strained circumstances to extricate himself from an unfortunate situation 10 years ago. The F.J.Q.C. did not prove by clear and convincing evidence that the acts of Mr. Davey, while he was a lawyer, have made him an object of disrespect or that the public confidence in the judiciary or Judge Davey has been eroded or will be eroded if he remains a judge. Current sitting judges, a former Supreme Court of Florida Chief Justice and respected members of The Florida Bar, testified unequivocally that they believe Judge Davey to be a judge and person of the highest order. "[W]hile, of course, such attestations are not controlling . . . they are deserving of serious consideration as [this Court] perform[s] the delicate function of reconciling the conflicts of evidence as those found in this record." The Florida Bar v. Rayman, 238 So. 2d 594, 598 (Fla. 1970). There was no testimony that Judge Davey is presently unfit. His reputation and character as a judge is beyond repute. Judge Davey should be judged by what he is to the bench, Bar, and community -- a good, honest and hard working judge.

CONCLUSION

Based upon the foregoing Judge Davey requests this Court to reject the erroneous findings of fact referenced herein, to reject the F.J.Q.C.'s findings and conclusions that Judge Davey is presently unfit to serve as a Circuit Judge, to further reject the

F.J.Q.C.'s recommendation of removal, and to dismiss the F.J.Q.C.'s charges.

Respectfully submitted this 14th day of February, 1994.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing has been filed with the Honorable Sid White, Clerk of the Supreme Court of Florida, 500 S. Duval Street, Tallahassee, Florida 32399, with a copy by Hand Delivery to Ford L. Thompson, General Counsel, Florida Judicial Qualifications Commission, Room 102, The Historic Capitol, Tallahassee, Florida 32399-6000, and by U.S. Mail to Charles A. Pillans, III, Bedell, Dittmar, DeVault & Pillans, P.A., The Bedell Building, 101 East Adams Street, Jacksonville, Florida 32302, this 14th day of February, 1994.

Richard C. McFarlain