

097

FILED

SID J. WHITE

JAN 11 1994

CLERK, SUPREME COURT

Chief Deputy Clerk

BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A

JUDGE, NO. 93-62

Supreme Court
Case No. 82,328

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDATION**

Pursuant to Article V, Section 12, of the Constitution of the State of Florida and the Rules of the Florida Judicial Qualifications Commission, the Florida Judicial Qualifications Commission ("the Commission") files these Findings of Fact, Conclusions of Law and Recommendation with the Supreme Court of Florida in the matter of the Honorable P. Kevin Davey, Circuit Judge for the Second Judicial Circuit of Florida.

Proceedings

On September 9, 1993, the Commission filed formal charges against the Honorable P. Kevin Davey, Circuit Judge, Second Judicial Circuit, charging him with violations of Canons 1 and 2 A. of the Florida Code of Judicial Conduct. The first charge against Judge Davey was that Judge Davey, at the time that he was in the process of terminating his relationship with the law firm of Douglass,

Davey, Cooper & Coppins, P.A. ("the Firm"), he misrepresented to the Firm that the case of Emma Bryant, a personal injury case involving a motor vehicle accident in which Judge Davey was representing the plaintiff, Emma Bryant, was not a good case and that the client had agreed that she would not pursue the case. Judge Davey told the Firm he was going to close the file when, in fact, he actually pursued the case and settled it for \$24,000. Judge Davey caused the settlement draft to be sent to his home, negotiated the draft, deposited it in his personal account and failed to inform the Firm of the settlement of the case. The second charge against Judge Davey was that at the time he was in the process of terminating his relationship with the Firm, he was representing Carol Breyer in a Firm personal injury case arising out of a motor vehicle accident, but the case did not appear on the Firm's case list. Judge Davey failed to bring the existence of the case to the attention of the Firm in meetings at which the list of the Firm's cases handled by Judge Davey was reviewed. After he admitted having lied about the handling of the Bryant case at one meeting, he was asked if there were any other contingent fee cases being handled by him of which the Firm should be apprised, and he untruthfully answered, "No, sir. There are not." He had previously removed from the Breyer file information pertinent to the settlement of the

uninsured motorist claim and forged his secretary's initials to the Closed File Check List to make it appear as if the file had been closed. He had the settlement draft sent to his home. He then attempted to negotiate the draft in the amount of \$127,500 which had been paid in full settlement of the Breyers' uninsured motorist claim. An answer was filed by the respondent on October 1, 1993. The matter was heard before the Commission in Tallahassee, Florida on November 30 and December 1, 1993.

Chairman Joseph J. Reiter presided over the hearing. Thirteen commissioners were present throughout the hearing and deliberations as follows: In addition to Chairman Reiter, Judge Richard H. Frank, Judge Gilbert S. Goshorn, Jr., Judge Frank N. Kaney, Judge Miette K. Burnstein, Judge Marvin H. Gillman, Judge Thomas B. Freeman, Rutledge R. Liles, Nancy N. Mahon, Seth Dennis, Garth C. Reeves, Kathleen T. Phillips, sitting as ad hoc replacement for recused member Stanley G. Tate, and Harry Lee Coe, Jr., sitting as replacement for the temporary vacancy on the Commission. The Commission was represented by Charles P. Pillans, III. The respondent was represented by Richard C. McFarlain and Christopher Barkas.

Findings of Fact

1. P. Kevin Davey is a Circuit Judge for the Second Judicial Circuit of Florida. He has served in that office since January 1985 (Tr.284).

2. In May or June 1984, Judge Davey announced to the members of the Firm that he had determined to run for a vacant seat on the Circuit Bench for the Second Judicial Circuit (Tr.19). As a result of that decision, a termination agreement was reached among the shareholders of the Firm that Judge Davey would remain a shareholder through and including June 30, 1984. Among the terms of the agreement was a provision that all attorneys would confer "ASAP" to inventory Judge Davey's cases with the objective with respect to contingent fee cases that they be evaluated for the percentage of completion and that those worked on by Judge Davey which produced a fee would result in compensation to Judge Davey on a pro-rata basis and that all cases which Judge Davey did not handle after July 1, 1984 would be identified and reassigned within the Firm or transferred to other qualified attorneys outside the Firm (Commission EX-1).

3. On September 4, 1984, Judge Davey was elected to the Circuit Bench with his term to begin in January 1985 (Tr.25).

4. On September 20, 1984, the members of the Firm entered into a second termination agreement providing for the purchase of the stock held by Judge Davey in the Firm and settlement of all claims between the parties except that relating to the partnership which owned the building in which the Firm was located. With respect to the distribution of fees, the agreement provided that "in non-hourly rate cases in which work is performed by Davey both before and after July 1, 1984, the parties will agree as to the percentage of work done by Davey prior to July 1, 1984 and a percentage of work done afterwards with a distribution of fee made accordingly." The agreement further provided that "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 reassigned them to other attorneys" (Commission EX-2).

5. John Cooper, who was a member of the Firm in 1984, testified that the first meeting with Judge Davey to go over his case list was in the first two weeks of November 1984 (Tr.25-26). Mr. Cooper's recollection of the date of the first meeting was supported by a memorandum dated November 26, 1984, the first sentence of which reads: "Last Wednesday, which was November 21, 1984, I met with Kevin to

review all his cases" (Commission EX-3).¹ Mr. Cooper testified that this memorandum was prepared as a result of the second meeting with Judge Davey to review his cases, but that based on the memorandum he was certain that the first meeting occurred within the two weeks prior to November 21, 1984 (Tr.26-27). Mr. Cooper testified that in the first meeting to go over the case list, at which Michael Coppins, another member of the Firm, and Tom Powell, an associate, were also present, when they came to the Bryant case, Judge Davey said that the case was not a good case, that he had discussed it with the client and the client had decided not to file suit and he was going to close the file (Tr.30-33). Judge Davey also said that even Joe Fixel, a Tallahassee attorney, would not take the case. Mr. Cooper's testimony was corroborated by the testimony of Mr. Coppins, who testified that the first meeting with Judge Davey to go over the case list was in November 1984, that Judge Davey advised them that the Emma Bryant case was not a good case and that with the agreement of his client, the file was going to be closed (Tr.153-55).

6. In August, September and October 1984, Judge Davey corresponded with the adjusters for the insurance company

¹ The remainder of the memorandum was objected to by counsel for the respondent and, by agreement of counsel, redacted.

insuring Spearman Distributors Co., the party against whom Mrs. Bryant had the claim, in which the adjusters were requesting Mrs. Bryant's medical records and for Judge Davey to make a demand to settle the claim (Commission EX-8). Ultimately, the insurance company offered \$24,000 to settle the claim and Judge Davey had the insurance adjuster make the settlement draft out to Emma Bryant and P. Kevin Davey, her attorney, and mail it to his home address (Commission EX-6). Upon receipt of the draft, Judge Davey prepared a release and a handwritten closing statement which were executed on October 31, 1984 (Commission EX-5, 7). The closing statement reflected a disbursement of an \$8,000 fee to P. Kevin Davey and made no provision for the payment of the costs the Firm had incurred in connection with the matter (Tr.121-22). Judge Davey admitted that the draft was negotiated through his personal account and that the \$8,000 fee was deposited into his personal account (Tr.238).

7. Thereafter, Janet Green Griggs, who had been Judge Davey's secretary at the Firm from 1975 until he left to become a judge (Tr.180-81), told John Cooper that she and her husband had had dinner the night before with the insurance adjuster, John Cibulski, who commented that " 'your boss must be pretty pleased with himself on the settlement of [the Bryant] case . . . [but] thought it was kind of strange, because [Judge Davey] asked [Cibulski] to

send the check and the release to his home address' " (Tr.187-88). At Mr. Cooper's request, Mrs. Griggs obtained from the adjuster copies of the Bryant release and draft (Tr.42). Mr. Cooper discussed the matter with Mr. Coppins and it was decided that Mr. Cooper would ask Judge Davey to go over the case list again, specifically, the Bryant case, to make sure they understood exactly what the Bryant case was about and what had happened (Tr.155-56).

8. The meeting between Mr. Cooper and Judge Davey took place on Wednesday, November 21, 1984 (Commission EX-3). Mr. Cooper testified that at that meeting, they went over the case list and when they reached the Bryant case, Judge Davey told him the same thing he had told him previously, that the Bryant case was not a good case, that he had talked to the client and the client had decided to drop the case and that he was closing the file. Mr. Cooper then confronted Judge Davey, stating that he knew that Judge Davey had settled the case and presented to him copies of the draft and the release. Judge Davey then admitted that he had lied about the Bryant case and that he had done so because he was concerned that Dexter Douglass, the senior member of the Firm, would not honor the termination agreement and, therefore, he was holding the money as security (Tr.43-45).

9. November 21, 1984 was the Wednesday before Thanksgiving. On the following Monday, November 26, 1984, Messrs. Cooper and Coppins again met with Judge Davey. Mr. Coppins told Judge Davey that in his opinion what Judge Davey had done was stealing and Judge Davey again admitted that he had lied about the Bryant case and claimed that he had retained the Bryant fee as security because of his concern that Dexter Douglass would not honor the termination agreement (Tr.46-48, 158-59).

10. Judge Davey testified that the first meeting to go over the case list occurred in July 1984, although he could not testify as to the exact date and had no notes or memoranda to support his testimony as to the date (Tr.302). Judge Davey testified that at that meeting he told Cooper and Coppins that the Bryant case was a difficult case because of problems of causation between the accident and the injuries suffered by Mrs. Bryant and that he was going to refer the case to Joe Fixel. Judge Davey testified that Mr. Cooper agreed and said that the Firm did not want the case and recommended that Judge Davey send the case to Joe Fixel, a Tallahassee attorney (Tr.307, 310). Judge Davey testified that he tried several times to reach Joe Fixel, but never did and ultimately he received a call from the insurance adjuster offering \$24,000 (Tr.310, 312). Judge Davey testified that he believed the Firm had abandoned the

case and that he, therefore, was entitled to the entire fee (Tr.312-13). Judge Davey admitted that he "hid" the fee from the Firm because he knew that if the Firm found out about the fee they would want a part of it (Tr.344-45). Judge Davey also admitted that he had done work on the case prior to July 1, 1984 and that he ultimately agreed to pay part of the fee to the Firm and on December 20, 1984, wrote a check on his personal account to the Firm for \$1,440 in settlement of the claim for the fee (Tr.335; Commission EX-16).

11. Messrs. Cooper and Coppins testified that in the meetings to go over Judge Davey's list of cases, at no time was there any discussion of the Carol Breyer case and the case did not appear on the Firm's case list (Tr.33, 155).

12. The Carol Breyer case was a personal injury case involving severe injuries, but a tortfeasor with only a \$10,000 insurance policy. The Firm's Breyer file was opened in June 1982 and a contract was entered into between the Firm and Mrs. Breyer for the Firm to represent her "in any claim for damages against any person, firm or corporation liable therefor, resulting from an accident which occurred on March 8, 1982" (Commission EX-13). At the outset, Judge Davey recognized that because of the tortfeasor's limited insurance coverage, the major component of the claim would

be the uninsured motorist claim and when the file was opened Judge Davey did research with respect to that claim (Tr.287-88).

13. The claim against the tortfeasor was settled in June 1983 for \$10,000 (Commission EX-13). Beginning on September 18, 1984 and continuing through December 13, 1984, Judge Davey engaged in negotiations with the adjuster with the insurance company having the uninsured motorist coverage. On December 6, 1984, the adjuster wrote Judge Davey a letter, addressed to Judge Davey's home, making a lump sum settlement offer of \$127,500 and on December 13, 1984, Judge Davey accepted the \$127,500 offer (Tr.339-42; Commission EX-13, 14). Judge Davey instructed the adjuster to mail the \$127,500 draft to his home address (Tr.391; Commission EX-10).

14. John Cooper testified that he first learned of the Breyer case and its settlement on December 21, 1984 when Judge Davey approached him at the Killlearn Methodist Church children's Christmas program, which occurred between 11:00 a.m. and 12:00 Noon on that day. At that time, Judge Davey advised Mr. Cooper that he had settled the Breyer case for \$127,500 which would produce a fee of about \$40,000 (Tr.55-56).

15. The release releasing the insurance company under the uninsured motorist coverage was signed by Mrs. Breyer and her husband on December 21, 1984. It was witnessed by P. Kevin Davey, "attorney at law," using his home address (Commission EX-9). Judge Davey testified that Mr. Cooper accompanied him to the Breyers' home on that day to sign the release (Tr.324). Mr. Cooper testified that he did not go to the Breyers' home that day to sign the release and confirmed his recollection in this regard by referring to his December 1984 calendar, which showed that he had a deposition in the morning prior to the Killearn Methodist Church program and had to return to the office immediately after the program because he had another client appointment regarding a lease option to purchase a house (Tr.56-58, 111-12). Mr. Cooper testified that he recalls seeing the Breyer draft which was made payable to the Firm (Tr.126). Judge Davey testified that the draft was made payable to himself (Tr.327-28).

16. On December 21, 1984, Judge Davey took the Breyer draft to the Barnett Bank of Tallahassee. Received in evidence was a receipt acknowledging that on December 21, 1984, the Bank "received of P. Kevin Davey" \$127,500 (Commission EX-11). Dexter Douglass testified that the first he became aware of the Breyer draft was a call from the Bank regarding the draft (Tr.207-08). The draft was

collected and credited to the Firm's trust account on December 31, 1984 (Respondent EX-5) and disbursed pursuant to a closing statement between Mr. and Mrs. Breyer and the Firm on January 7, 1985 (Respondent EX-1).

17. Sometime between November 26, 1984 and December 21, 1984, there was a meeting in the office of Dexter Douglass between Judge Davey, Douglass, Cooper, Coppins and Tom Powell to discuss the Bryant case. In this meeting, according to the testimony of Messrs. Douglass, Cooper and Coppins, Judge Davey admitted lying about the Bryant case and claimed that Cooper had "tricked him" into lying about it and that he had retained the Bryant fee as security in case Douglass did not honor the termination agreement (Tr.53-55, 159-61, 203-06). In the meeting, Mr. Douglass asked Judge Davey directly on several occasions, "Are there any other cases like the Bryant case that we should know about?" and Judge Davey specifically answered, "No, sir. There are not" (Tr.55, 161, 206). Judge Davey testified that he did not recall being asked if there were any other cases, but admitted that if he was asked that question at the meeting, he would have said that there were none (Tr.362-63).

18. Upon learning of the Breyer case, the Firm's case file was examined and it was determined that only a small

portion of the original file remained in the office (Tr.65-66) and that Judge Davey had closed the file on August 6, 1984 by filling out a "Closed File Check List," to which he signed his secretary's initials (Commission EX-12). Mr. Cooper testified that he had examined all of the Firm's closed files for the year 1984 and of the approximately 60 closed files, Judge Davey had closed two files by signing his own initials to the Closed File Check List, but that the Breyer case was the only Closed File Check List on which Judge Davey had signed his secretary's initials (Tr.103; Commission EX-15).

19. Judge Davey admitted that he had signed his secretary's initials to the Breyer Closed File Check List and testified that he closed that portion of the file relating to the tortfeasor claim and removed from the file the documents necessary to pursue the uninsured motorist claim (Tr.320-21). Judge Davey could not explain why he closed the file on August 6, 1984, fourteen months after settlement of the tortfeasor claim, admitted that the Firm was entitled to part of the Breyer fee and when asked why he had had the Breyer draft sent to his home, he said, to "keep my options open" (Tr.356, 374, 391-92). The Firm's procedure was to treat the tort claim and the uninsured motorist claim as one file which would remain open until all claims were settled (Tr.72-73). The closing of a file

results in the case being removed from the Firm's computer-generated case list (Tr.64-65).

20. The Commission, having had the opportunity to hear the witnesses and observe their demeanor, finds the testimony of Messrs. Cooper, Coppins and Douglass to be creditable and the testimony of Judge Davey, where it was in conflict with the testimony of Messrs. Cooper, Coppins and Douglass, not to be worthy of belief.

21. Judge Davey called as character witnesses Stephen C. O'Connell, former Chief Justice of the Florida Supreme Court and former President of the University of Florida; C. Dubose Ausley, a Tallahassee attorney, former member of the Florida Ethics Commission and a member of the Board of Regents; Judge J. Lewis Hall, Jr., Circuit Judge, Second Judicial Circuit; Judge Phil Padovano, Chief Judge, Second Judicial Circuit; and offered the affidavits of Roosevelt Randolph, a member of The Florida Bar (Respondent EX-2); John F. Harkness, Jr., Executive Director of The Florida Bar (Respondent EX-3); and Nancy Daniels, Public Defender for the Second Judicial Circuit (Respondent EX-4). Each of the four character witnesses appearing before the Commission testified that Judge Davey's reputation for truth and veracity was good (Tr.253-54, 258, 264-72). Mr. Ausley and Judge Padovano also testified that, in their opinion,

Judge Davey was presently fit to serve (Tr.258-59, 272-73) and Judge Hall testified that, in his opinion, Judge Davey was well qualified to serve (Tr.264-65). Messrs. Randolph and Harkness, in their affidavits, stated that, in their opinion, even if the charges were true, they do not affect Judge Davey's present fitness to serve as a judge. Ms. Daniels, in her affidavit, stated that, in her opinion, the charges were too remote and that she knew of nothing that affected Judge Davey's present fitness to sit as a judge. None of these witnesses, however, had the opportunity to hear all of the testimony, consider the demeanor of the witnesses, examine the exhibits and determine the truthfulness of Judge Davey's testimony at trial. While their evidence is helpful to the Commission, the Commission cannot substitute the opinions of these witnesses for the conclusions the Commission must reach based upon a thorough analysis of all of the evidence.

22. With respect to the Emma Bryant case, the Commission finds that the evidence is clear and convincing that Judge Davey intended to convert the entire Bryant fee to himself, that Judge Davey misrepresented the merits and value of the Bryant case to Messrs. Cooper and Coppins, and that, even if the first meeting to discuss Judge Davey's cases occurred in July 1984, Judge Davey nevertheless misrepresented the case to Cooper in November 1984 after he

had settled the case and negotiated the draft through his personal account. The Commission rejects Judge Davey's claim that the Firm had "abandoned" the Bryant case because any abandonment was based upon a misrepresentation of the merits and value of the case. In any event, after it was apparent to Judge Davey that the insurance carrier was seeking to settle the case and, in fact, had offered to settle the case for \$24,000, Judge Davey had an affirmative responsibility under the termination agreement with the Firm to share that information and the fee with the Firm.

23. With respect to the Carol Breyer case, the evidence is also clear and convincing that the actions of Judge Davey, by closing the Breyer file on August 6, 1984; by forging his secretary's initials to the Closed File Check List; by failing to advise the Firm with respect to the existence of the Breyer case or his ongoing negotiations between September and December 1984 to settle the case; by his untruthful response to Mr. Douglass' question, "Are there any other cases like the Bryant case?" at a time when he was engaged in negotiations for settlement of the case for a substantial sum, to which the Firm was unquestionably entitled to share in the fee; by his failure, after receiving a firm written offer of settlement on December 6, 1984 and settling the case on December 13, 1984, to advise the Firm of the settlement until December 21, 1984; by his

signing as witness to the Breyer release using his home address; and by directing the adjuster to send the draft to his home address in order to keep his options open, all constitute clear and convincing evidence that Judge Davey intended to convert the Breyer fee and was thwarted in that effort only because the draft was payable to the Firm and the Bank contacted Mr. Douglass regarding receipt of the draft.

24. 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 and untrue statements to the members of his Firm and lied under oath to the Commission at the trial of this cause in an attempt to justify his conduct. The record, therefore, shows and the Commission finds by clear and convincing evidence that Judge Davey's conduct with respect to the Emma Bryant case demonstrates his present unfitness to hold judicial office in this State. The record further shows and the Commission also finds by clear and convincing evidence that Judge Davey's conduct with respect to the Carol Breyer case demonstrates his present unfitness to hold judicial office in this State.

Conclusions of Law

Canon 1 provides:

A JUDGE SHOULD UPHOLD THE INTEGRITY AND
INDEPENDENCE OF THE JUDICIARY.

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

Canon 2 A. of the Florida Code of Judicial Conduct
provides:

A JUDGE SHOULD AVOID IMPROPRIETY AND
THE APPEARANCE OF IMPROPRIETY IN ALL
HIS ACTIVITIES.

A judge should respect and comply
with the law and should conduct himself
at all times in a manner that promotes
public confidence in the integrity and
impartiality of the judiciary.

Article V, Section 12(f) of the Florida Constitution
provides, in part:

Upon recommendation of two-thirds
of the members of the judicial
qualifications commission, the supreme
court may order that the justice or
judge be disciplined by appropriate
reprimand, or be removed from office
with termination of compensation . . .

for . . . conduct unbecoming a member of the judiciary demonstrating a present unfitness to hold office"

In determining whether a judge has conducted himself in a manner which erodes public confidence in the judiciary, the Commission must consider the nature of the act or wrong. Lawyers are disbarred in cases where they commit extreme violations involving moral turpitude, corruption, defalcation, theft, larceny or other serious or reprehensible offenses. In re Lamotte, 341 So.2d 513, 517 (Fla.1977) (emphasis added); In re Garrett, 613 So.2d 463 (Fla.1993). Judges are held to an even stricter ethical standard than lawyers because, in the nature of things, more rectitude and uprightness is expected of them. In re Lamotte, supra at 517. See also In re Boyd, 308 So.2d 13, 21 (Fla.1975).

The paramount concern of these proceedings must be the preservation of public trust and confidence in the judiciary. In re Shenberg, 17 F.L.W. S217, S218 (Fla.1992). As the Supreme Court said in In re Garrett, supra at 465:

[I]t is essential to our system of justice that the public have absolute confidence in the integrity of the judiciary. We believe it would be impossible for the public to repose this confidence in a judge who has knowingly stolen property from another.

Judge P. Kevin Davey, by conducting himself in the manner set out in the above Findings of Fact, intentionally committed serious and grievous wrongs of a clearly unredeeming nature. The Commission rejects Judge Davey's contention that the events which occurred in 1984 and which gave rise to the charges are too remote to affect Judge Davey's present fitness to serve as a judge. Judge Davey's conduct with respect to the Emma Bryant case and with respect to the Carol Breyer case evidence character flaws which the passage of time alone does not mitigate or justify. In addition, 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. Compare In re Inquiry Concerning Judge, 440 So.2d 1267 (Fla.1983), in which the Supreme Court said:

The integrity of the judicial system, the faith and confidence of the people in the judicial process, and the faith of the people in the particular judge are all affected by false statements of a judge. (Id. at 1269.)

Judge Davey has rendered himself an object of disrespect and public confidence in the judiciary will be eroded if he remains a member of it. Judge Davey is guilty of violating Canons 1 and 2 A. of the Code of Judicial Conduct. The Commission finds by clear and convincing evidence that Judge

Davey's violations of these Canons demonstrate a present
unfitness to hold office.

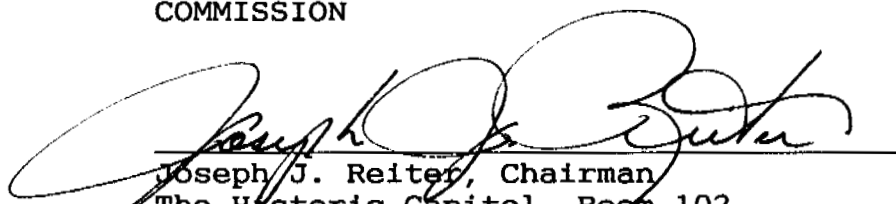
Recommendation of Removal

By an affirmative vote of not less than nine members,
the Florida Judicial Qualifications Commission recommends
that the Supreme Court of Florida remove P. Kevin Davey from
his position as Circuit Judge for the Second Judicial
Circuit, and render its Order and Judgment in accordance
with the foregoing recommendation, for his conduct as
hereinabove found to have occurred.

Dated this 7th day of January, 1994.

Respectfully submitted,

FLORIDA JUDICIAL QUALIFICATIONS
COMMISSION



Joseph J. Reiter, Chairman
The Historic Capitol, Room 102
Tallahassee, Florida 32399-6000