IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A
JUDGE, NO. 93-62
IN RE: P. KEVIN DAVEY
_____/

Supreme Court
Case No. 82,328

REPLY OF
FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
TO RESPONSE TO ORDER TO SHOW CAUSE

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Statement of the Case

On September 9, 1993, the Judicial Qualifications Commission filed a formal notice setting forth two charges against Judge P. Kevin Davey, Circuit Judge for the Second Judicial Circuit of Florida.

The first charge was that Judge Davey, at the time he was in the process of terminating his relationship with the law firm of Douglass, Davey, Cooper & Coppins, P.A. ("the Firm"), misrepresented to the Firm that the case of Emma Bryant was not a good case and that the client had agreed that she would not pursue the case and he was going to close the file when, in fact, Judge Davey settled the case, 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 (Notice of Formal Proceedings, 9/9/93).

The second charge was that Judge Davey, at the time he was in the process of terminating his relationship with the Firm, was representing Carol Breyer in a personal injury case, but the case did not appear on the Firm's case list; he 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 was reviewed, and when asked if there were any

other contingent cases being handled by him [other than Bryant] of which the Firm should be apprised, he untruthfully answered, "No, sir. There is not"; removed from the Breyer file information pertinent to the settlement of the uninsured motorist claim, forged his secretary's initials to the closed file checklist to make it appear as if the file had been closed, had the settlement draft sent to his home and attempted to negotiate the draft (Notice of Formal Proceedings, 9/9/93).

Judge Davey filed an answer on October 1, 1993, admitting certain allegations and denying the remainder. He raised no affirmative defenses and did not challenge the jurisdiction of the Commission or this Court, or the sufficiency of the formal notice (Answer to Notice of Formal Proceedings, 10/1/93).

The Commission heard the case in Tallahassee, Florida on November 30 and December 1, 1993, and on January 11, 1994, filed with this Court its Findings of Fact, Conclusions of Law and Recommendations finding that the charges had been proven by clear and convincing evidence and recommending that this Court remove P. Kevin Davey from his position as Circuit Judge for the Second Judicial Circuit.

Statement of the Facts[1]

Background

In May or June of 1984, Kevin Davey announced to the members of the Firm that he had decided to run for a seat on the Circuit Bench for the Second Judicial Circuit (Tr.19).[2] As a result, the decision was made that Davey would terminate his relationship with the Firm effective July 1, 1984 whether or not he won the election, but that for all public purposes he would be with the Firm through the end of the year (Tr.20). A "hastily written" agreement dated June 6, 1984 was prepared by Michael Coppins, one of the members of the Firm (Tr.20-21), which contained a provision that all attorneys would confer "ASAP" to inventory Kevin 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 Davey which produced a fee would result in compensation to Davey on a pro rata basis and that all cases which Davey did not handle after July 1, 1984 would be identified and reassigned within the

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[1] The Commission submits this Statement of Facts because the respondent's Statement of the Facts, while not inaccurate, is based largely upon Judge Davey's version of the facts and omits discussion of significant evidence important to the Commission's decision.

[2] The reference "Tr." is to the transcript of the trial.

Firm or transferred to other qualified attorneys outside the Firm (CX-1).[3]

On September 4, 1984, Kevin Davey was elected to the Circuit Bench with his term to begin January 8, 1985 (Tr.25). Following the election, a more formal written agreement was entered into (CX-2). This agreement provided for the purchase of Davey's stock in the Firm and the 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 the 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 them reassigned to other attorneys" (CX-2).

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[3] The Commission's exhibits shall be referred to herein as "CX-__."

John Cooper, who was a member of the firm in 1984, was called as a witness for the Commission. Cooper testified that the first meeting with Davey to go over his case list was in the first two weeks of November 1984 (Tr.25-26). Cooper was able to document the approximate date of the meeting because he prepared a memorandum of a second meeting with Judge Davey, the first sentence of which reads: "Last Wednesday which was November 21, 1984, I met with Kevin to review all his cases" (CX-3).[4] As more fully developed in the discussion of the Bryant case, the meeting on November 21, 1984 was very significant because it was at this meeting that Davey was confronted with respect to his handling of the Bryant settlement. Coppins was also called as a witness for the Commission and testified that the first meeting was during the first week in November (Tr.153).

Judge Davey testified that the first meeting to go over the case list occurred in the middle or latter part of July 1984, but admitted that he had nothing to assist him in providing the exact date (Tr.302). On cross-examination, Judge Davey acknowledged that when asked in the civil suit which he brought against the Firm when the first meeting to go over the case list occurred, he testified, " 'It seems to

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

me it was after the election' " (Tr.346), but pointed out that after a break in the deposition he came back and changed his testimony (Tr.346).

The Bryant Case

The Emma Bryant case was a personal injury case arising out of a motor vehicle accident involving a bus on which Ms. Bryant was a passenger. On March 16, 1984, Ms. Bryant and Davey, on behalf of the Firm, entered into a contingent fee agreement by which the Firm agreed to represent her (CX-4). Judge Davey testified that he initially thought that Bryant was an excellent case but, because he was having difficulty obtaining records from the Feminist Women's Health Center which had treated Ms. Bryant and locating an expert witness, he determined that it was a difficult case. Thus, according to Davey, when he met with Cooper and Coppins in July 1984, he advised them of the merits of the case and Cooper said that it was not a good case and should be sent to Joe Fixel (Tr.308-10). Judge Davey testified that based on this conversation, he felt that Bryant "was no longer the firm's case" (Tr.310).

The Firm's Bryant file shows that on July 12, 1984, Davey wrote Ms. Bryant that he had not received the medical records from the Feminist Women's Health Center and that "[u]ntil we receive these records, it will be difficult to

evaluate your case for possible settlement or legal action" (CX-8). The file also shows that in August and September 1984, Davey corresponded with the insurance adjuster on Firm stationery regarding Ms. Bryant's medical records and a demand for settlement (CX-8). On October 2, 1984, Davey wrote the adjuster on Firm stationery, sending him a copy of the summary of treatment provided by the Feminist Women's Health Center and saying, "Please call me at your earliest convenience so we may discuss resolution of this claim" (CX-8). Shortly thereafter, the adjuster made an offer of $24,000, which was accepted. Judge Davey had the adjuster make the settlement draft out to Emma Bryant and P. Kevin Davey, her attorney, and mail it to his home address (CX-6). Upon receipt of the draft, Davey prepared a release and a handwritten closing statement which were executed on October 31, 1984 (CX-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).

As previously noted, both Cooper and Coppins testified that the first meeting occurred in November 1984. Cooper testified that at that meeting they went over the case list

and when they came to the Bryant case, Davey said that the Bryant 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. Davey also said that even Joe Fixel, a Tallahassee attorney, would not take the case (Tr.30-33). Coppins also testified that at the first meeting with Davey to go over the case list, Davey advised them that the 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).

Shortly after this meeting with Davey, Janet Green Griggs, who had been Davey's secretary at the Firm since 1975, told Cooper that she and her husband had had dinner the night before with the insurance adjuster, Joe Cibulski, who commented that " 'your boss must be pretty pleased with himself on the settlement of [the Bryant] case . . . [but] I thought it was kind of strange because [Davey] asked [Cibulski] to send the check and the release to his home address' " (Tr.187-88). At Cooper's request, Mrs. Griggs obtained copies of the Bryant release and draft from the adjuster (Tr.42). Cooper then discussed the matter with Coppins and "because something [was] wrong," it was decided that Cooper would again ask Davey to go over the case list and, specifically, the Bryant case to make sure they

understood exactly what the Bryant case was about and what had happened (Tr.155-56).

Cooper met with Davey on November 21, 1984. November 21 was the Wednesday before Thanksgiving and on the following Monday, November 26, 1984, Cooper prepared the memorandum (CX-3) of what was discussed at the meeting. Cooper testified that:

> I went back into his office, and I went through each of his cases again with him, down the same case list, probably in a much quicker fashion than we did the first time. But I went down through his cases, and when we came to the Bryant case, I asked him about that case, again. And he told me, again, that it was not good liability, not good damages, the case was not any good. That he and the client had decided not to pursue it. (Tr.44.)

Cooper then confronted Davey with the information he had that the case had been settled and a fee collected, and he testified that:

> [Davey] admitted that he had settled the case. He admitted that he had lied to me that day, and that he had lied to Mike, and I and Tom in the first meeting. And his only excuse for it 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. (Tr.45.)

Cooper reported his conversation with Davey to Coppins and, thereafter, on Monday, November 26, 1984, both Cooper and Coppins met with Davey and confronted him with his statement that Bryant was not a good case and that it was going to be closed and Davey again responded that he had lied to Cooper and Coppins in the first meeting and "that his purpose in doing this was to somehow provide some security or collateral in the event that the firm breached its agreement with him, its separation agreement" (Tr.47).

At the trial before the Commission, Judge Davey testified that he felt after the first meeting with Cooper and Coppins that the Bryant case was "no longer the firm's case" (Tr.310), but admitted that he had "hid" the fee from the Firm because he knew that if the Firm found out about the fee, they would want part of it (Tr.344-45). Ultimately, Davey agreed to pay part of the fee to the Firm and on December 20, 1984, he wrote a check on his personal account to the Firm for $1,440 in payment of the Firm's share of the fee (Tr.335-36; CX-16).

The Breyer Case

The Carol Ann Breyer case was a personal injury case involving severe injuries, but a tortfeasor with only a $10,000 insurance policy. The Firm's file was opened in June 1982 and a contingent fee contract entered into between

the Firm and Mrs. Breyer for the Firm to represent Mrs. Breyer and her husband "in any claim for damages against any person, firm or corporation liable therefor, resulting from an accident which occurred on March 8, 1982" (CX-13). From the beginning, 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, he did research with respect to that claim (Tr.287-88).

The claim against the tortfeasor was settled in June 1983 for $10,000 (CX-13). On August 6, 1984, Davey closed the Firm's Breyer file by filling out a "closed file checklist" to which he signed his secretary's initials (CX-12). The closing of a file results in the case being removed from the Firm's computer-generated case list (Tr.64-65) and was contrary to the Firm's procedure, which 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).

Beginning in September 1984, Davey began negotiating with the insurance adjuster for the insurance company with the uninsured motorist coverage. On September 18, 1984, the insurance company made an offer to Davey to settle the claim for $125,000 with a structured settlement (Tr.368; CX-14).

Thereafter, there were continuous negotiations between Davey and the adjuster (CX-14). Davey admitted that he did not advise Douglass, Cooper or Coppins of the ongoing settlement negotiations (Tr.369-70), and both Cooper and Coppins testified that in the meetings to go over Davey's list of cases, the Breyer case did not appear on the Firm's case list and there was no discussion of it (Tr.33, 155). On December 6, 1984, the adjuster wrote Davey a letter addressed to Davey's home making a lump sum settlement offer of $127,500 with several alternative offers based on a structured settlement (CX-13). On December 13, 1984, Davey accepted the $127,500 lump sum offer (CX-14) and instructed the adjuster to mail the $127,500 draft to his home address (Tr.391; CX-10). Judge Davey testified at the trial before the Commission that he had the draft sent to his home to "keep [his] options open" (Tr.392).

Sometime after November 26, 1984 and before December 21, 1984, there was a meeting between Davey, Douglass, Cooper, Coppins and Tom Powell in the office of Dexter Douglass to discuss the Bryant case. Douglass, Cooper and Coppins testified that at this meeting, Davey admitted lying about the Bryant case, 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, Douglass asked Davey directly on several occasions, Are there any more cases like the Bryant case that we should know about? and Judge Davey categorically answered, "No, sir. There is not" (Tr.55, 161, 206).

Cooper testified that he first learned of the Breyer case and the fact that it had been settled on December 21, 1984, when Davey approached him at the Killearn Methodist Church children's Christmas program, which occurred around 12:00 Noon on that day (Tr.56). At that time, Davey advised Cooper that he had settled the Breyer case for $127,500, which would produce a fee of about $40,000 (Tr.55-56). The release was signed by Mr. and Mrs. Breyer on December 21, 1984. It was witnessed by P. Kevin Davey, "Attorney at Law," using his home address (CX-9). Judge Davey testified that Cooper accompanied him to the Breyers' home on that day to sign the release (Tr.324). Cooper testified that he did not go to the Breyers' home on that day to sign the release and confirmed his recollection 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 home (Tr.56-58, 111-12).

Cooper, in response to an inquiry by Judge Gillman, a member of the Commission, testified that he had seen a copy of the draft and that it was his recollection that it was made payable to the client and to the law firm (Tr.126). Mr. Douglass testified that he became aware of the Breyer case as the result of a call from Barnett Bank, with which the Firm did business, and he learned "that a draft made payable to the firm was being presented by Davey involving this case, which I knew nothing about" (Tr.207-08).

The draft was delivered to the Barnett Bank of Tallahassee on December 21, 1984 for collection. The bank issued a receipt in the name of "P. Kevin Davey" (CX-11). The draft cleared on December 31, 1984 and the proceeds disbursed to the Breyers and the Firm on January 7, 1985 (CX-13).

SUMMARY OF THE ARGUMENT

I. The Commission and this Court have subject matter jurisdiction under Article 5, Section 12 of the Florida Constitution, as amended in 1974, over the conduct of Judge Davey, even though it occurred before Judge Davey assumed judicial office, because the 1974 Amendment was specifically adopted to confer such jurisdiction upon the Commission and the Court to investigate and discipline a judge for conduct

whenever it occurs, as long as that conduct demonstrated a present unfitness to hold office.

II. The Commission's findings, considering the totality of the evidence offered in support of the charge relating to the Bryant case and the totality of the evidence offered in support of the charge relating to the Breyer case, are supported by clear and convincing evidence. The case involved critical conflicts in the testimony between Judge Davey and the witnesses called by the Commission. The Commission having heard the testimony and observed the demeanor of the witnesses specifically found that the testimony of the Commission's witnesses, Messrs. Cooper, Coppins and Douglass, to be creditable and the testimony of Judge Davey, where it was in conflict with that testimony, not to be worthy of belief (Commission Findings, ¶ 20). This Court has previously said that the Commission's Findings are to be given great weight and this should be particularly true where the decision is based in large part upon the credibility of the witnesses.

III. The Commission's recommendation of removal is warranted. If the Court finds that the evidence supports the Commission's conclusion that Judge Davey converted the Bryant fee or that he attempted to convert the Breyer fee, then the recommendation of the Commission that Judge Davey

be removed from office should be approved. This Court has previously held that conversion or theft by a judge is a ground for removal because it is impossible for the public to impose its confidence in a judge who has knowingly stolen property from another.

ARGUMENT

I.

The Commission and This Court Have Subject Matter Jurisdiction Over the Conduct of Judge Davey

Judge Davey contends that the Commission and this Court do not have subject matter jurisdiction over the conduct of Judge Davey that was the subject of the formal charges because the conduct occurred before Davey assumed judicial office on January 8, 1985. Judge Davey points out that the acts giving rise to the notice of the formal charges occurred prior to January 8, 1985, the date Davey assumed his judicial office, but overlooks the fact that the acts occurred after Judge Davey had been elected to the Circuit Bench and were all done in connection with his winding up his private practice so as to assume the Bench.

The jurisdiction of the Commission is set forth in Article 5, Section 12(a), of the Florida Constitution, as amended in 1974. The 1974 Amendment to Article 5, Section 12, came in response to the decision in State ex

rel. Turner v. Earle, 295 So.2d 609 (Fla.1974). In Earle, this Court considered the question of whether the Judicial Qualifications Commission had jurisdiction to investigate and recommend discipline of a circuit judge for misconduct committed prior to the time he became a circuit judge. In that case, the Commission brought formal charges against Judge Turner, charging him with having conspired to commit the felony of bribery in 1972 as a Criminal Court of Record Judge, for which Judge Turner had been tried and acquitted. The Court noted that by the great weight of authority which had been specifically adopted in Florida, that when statutory and constitutional provisions authorizing the removal of public officers do not refer to the term of office in which the misconduct occurred, a public officer may not be removed from office for misconduct which he committed in another public office or in a prior term of office. Article 5, Section 12, of the Constitution, as it existed at the time of the Earle decision, made no reference to the term of office in which the misconduct occurred and, therefore, the Court held that the rule adopted in the majority of jurisdictions, including Florida, was applicable. In so holding, this Court noted that this rule does not apply if the statute or constitution specifically provided otherwise (295 So.2d at 617 n.7).

The Court also noted that its holding created "an hiatus in the law" (295 So.2d at 619) because under the Court's ruling in In re Proposed Disciplinary Action by The Florida Bar Against a Circuit Judge, 103 So.2d 632 (Fla.1958), The Florida Bar lost jurisdiction to investigate an attorney's conduct upon that attorney becoming a circuit judge and the Judicial Qualifications Commission lacked jurisdiction to investigate because he was not a judge at the time of the alleged offense. Having pointed out this hiatus, this Court said:

> We, therefore, respectfully call to the attention of the Legislature this deficiency with the thought that it might want to provide some corrective remedy by submitting a resolution for constitutional amendment. (295 So.2d at 619.)

The amicus brief argues that in the years following Turner v. Earle, neither the Legislature nor any public initiative sought to amend Article 5, Section 12, to reach back to conduct of a person who later became a judge (Amicus Brief, p.16). This argument ignores the history of Article 5, Section 12. State ex rel. Turner v. Earle was finally decided on May 31, 1974. The Florida Legislature convened in regular session on April 2, 1974 and on June 11, 1974 filed with the Secretary of State House Joint Resolution 3911, a proposed constitutional amendment to

Section 12 amending Section 12(a) to provide that the Judicial Qualifications Commission had jurisdiction

> [T]o 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 . . . . (Emphasis added.)

The only reasonable construction that can be placed upon this amendment, which was approved at the General Election in November 1974, is that it was proposed and adopted to address the deficiency created by the holding in Earle and that it granted jurisdiction to the Commission to investigate and make recommendations with respect to any conduct occurring during a judge's term of office or otherwise, so long as that conduct took place on or after November 1, 1966.[5] The only restraint upon the power of the Commission to investigate and make recommendations was that the conduct, whenever it might occur, must demonstrate "a present unfitness to hold office." For the Court to conclude otherwise would mean that there still existed the hiatus or deficiency recognized in Earle and that no matter how egregious the conduct, if it occurred prior to a lawyer

[5] The additional parenthetical phrase (without regard to the effective date of this section) also suggests that the amendment was intended to be retroactive.

assuming the Bench, neither The Florida Bar nor the Judicial Qualifications Commission can conduct an investigation or recommend that any action be taken with respect to such conduct.

Judge Davey relies upon a memorandum to Allen Morris, Clerk of the House of Representatives, from Joe Boyd, Staff Director of the Judiciary Committee, dated December 2, 1974, to support his construction of the 1974 Amendment to Article 5, Section 12. It is doubtful that this memorandum is acceptable evidence of legislative intent. See McLellan v. State Farm Mutual Automobile Insurance Co., 366 So.2d 811 (Fla.4th DCA 1979). Nevertheless, Judge Davey, in quoting the first two paragraphs of Mr. Boyd's memo, omits the third paragraph, which reads: "The overall effect, then, is to broaden the scope of investigation in both time and area" (Appendix 1 to Response to Order to Show Cause). Rather than an ambiguous memorandum from a legislative staff member, the Court, if it needs aid in construing Article 5, Section 12, should look to its legislative history and, in particular, to the deficiency which this Court, in State ex rel. Turner v. Earle, called to the Legislature's attention. See City of St. Petersburg v. Siebold, 48 So.2d 291, 293-94 (Fla.1950). Section 12 of Article 5, as amended in 1974, is not, however, ambiguous. Presumably, the Legislature understood the common meaning of words. The word

"otherwise" means in another manner, in a different manner, in different circumstances [Webster's Seventh New Collegiate Dictionary (1972 ed.)], leading to the only logical conclusion that the Commission has jurisdiction to investigate conduct occurring during a judge's term of office or in other circumstances and recommend removal provided that that conduct, whenever it occurs, demonstrates a present unfitness to hold office. It appears, therefore, that in adopting the 1974 Amendment to Article 5, Section 12(a), the Legislature intended to adopt the approach of Justice Richard Ervin in his dissent in Turner v. Earle, in which he said:

> Insofar as any alleged misconduct of a judge may reasonably be considered to have a pertinent bearing or impact upon the question of his present fitness as a judge, it lies within the jurisdiction of the Commission to make an investigation of it unrestrained by time limitations applying to suspensions or impeachments. (295 So.2d at 621.) (Emphasis added.)

This Court in a series of cases following the adoption of the 1974 Amendment has without question sanctioned investigations and imposed discipline upon judges for conduct occurring before they assumed the Bench. Thus, in In re Inquiry Concerning a Judge, Mark A. Speiser, 445 So.2d 343 (Fla.1984), the Court adopted the Commission's recommendation of a public reprimand of a circuit judge "for

his conduct as an attorney which occurred prior to his becoming a circuit judge" (445 So.2d at 344). Significantly, Justice Ehrlich, who dissented on the ground that he considered the judge's conduct far too serious for a simple reprimand on the basis of stipulated facts, said:

> Although not specifically discussed in the majority opinion, I concur that the Judicial Qualifications Commission (JQC) has jurisdiction to proceed against a circuit judge for conduct which occurred prior to his assuming judicial office, and that this Court has authority to discipline the circuit judge under these circumstances. (445 So.2d at 344.)

In In re Inquiry Concerning a Judge re: James S. Byrd, 511 So.2d 958 (Fla.1987), the Court approved the findings, conclusions and recommendations of the Commission that a circuit judge be reprimanded for conduct as an attorney in the handling of property which he held as a trustee and property of an estate for which he was the attorney and personal representative. In Inquiry Concerning a Judge re: Irwin A. Berkowitz, 522 So.2d 843 (Fla.1988), the Court approved and adopted the Commission's findings and recommendations that Berkowitz be removed from his office as circuit judge for election campaign improprieties and misuse of trust accounts while a practicing attorney. In In re Inquiry Concerning a Judge re: Wallace E. Sturgis, Jr., 529 So.2d 281 (Fla.1988), the Court approved the findings

and recommendations of the Commission and ordered a public reprimand of a circuit judge for charges which included conduct prior to becoming a circuit judge relating to his handling of probate and guardianship estates and his trust account. In In re Inquiry Concerning a Judge re: S. Peter Capua, 561 So.2d 574 (Fla.1990), the Court approved a stipulation and recommendation of the Commission reprimanding a circuit judge for conduct which included the commingling of client and lawyer funds and the failure to properly prepare and give closing statements to clients, which conduct occurred before the judge took the Bench. In Inquiry Concerning a Judge re Ana-Maria Carnesoltas, 563 So.2d 83 (Fla.1990), the Court approved a stipulation and recommendation of the Commission that a county court judge be reprimanded for conduct while appearing as counsel in cases in federal and state court prior to becoming a judge. In In re Inquiry Concerning a Judge re: Murray Meyerson, 581 So.2d 581 (Fla.1991), the Court approved findings and recommendations of the Commission and imposed a reprimand on a county judge for conduct which included mishandling of trust funds and the charging of excessive fees while closing his private practice of law. While it is true, as pointed out by Judge Davey, that none of these cases, with the exception of Speiser, addressed the jurisdictional issue, that is so because the 1974 Amendment to Article 5 is so

clear and the consequence of the Commission and this Court being powerless to consider conduct prior to becoming a judge so untenable that the argument has not been previously made.

For the foregoing reasons, the Court should reject Judge Davey's jurisdictional argument and consider the merits of the Commission's findings, conclusions and recommendations.

II.

The Commission's Findings Are Supported by Clear and Convincing Evidence

This Court has consistently said that the findings of the Judicial Qualifications Commission are of persuasive force and are to be given great weight. In re Inquiry Concerning a Judge, Joseph M. Crowell, 379 So.2d 107 (Fla.1979); In re Inquiry Concerning a Judge, Stewart F. LaMotte, 341 So.2d 513 (Fla.1977); In re Inquiry Concerning a Judge, Richard A. Kelly, 238 So.2d 565 (Fla.1970), cert.denied, 401 U.S.962, 91 S.Ct.970, 28 L.Ed.2d 246 (1971). And, this should be particularly true in a case such as the present one in which there were substantial conflicts in the testimony and the findings and conclusions of the Commission are based in large part upon credibility determinations. In re Inquiry Concerning a Judge, Joseph M.

Crowell, supra; In re Inquiry Concerning a Judge, Stewart F. LaMotte, supra (concurring opinion by Justice England at 518).

The Bryant Case

Judge Davey devotes relatively little argument to a challenge to the sufficiency of the evidence relating to the Bryant case,[6] the key evidence with respect to which is as follows: (1) Emma Bryant was a client of the Firm pursuant to a contingent fee agreement (CX-4); (2) in October 1984, the adjuster on the case offered $24,000 in settlement, which Davey accepted, and Davey instructed the adjuster to send the draft to his home address (CX-6); (3) on October 31, 1984, Ms. Bryant signed a release and a handwritten closing statement which reflected a payment of an $8,000 fee to P. Kevin Davey and no provision for costs (CX-5, 7); (4) the $8,000 was deposited into Davey's personal account (Tr.238); (5) when Cooper and Coppins met with Davey in November 1984 to go over his case list, Davey advised them that Bryant 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); (6) Cooper, after learning of the settlement, again met with

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[6] The amicus brief makes almost no argument as to sufficiency of evidence relating to Bryant.

Davey and was told the same thing he had been told previously, that the Bryant case was not a good case, that he had talked to the client and that the client had decided to drop the case, and he was closing the file (Tr.43-45).

Judge Davey principally challenges Cooper's testimony that the first meeting at which the Bryant case was discussed was in November 1984, claiming that Cooper's testimony "does not make sense" (Response to Order to Show Cause, p.43). Judge Davey contends that this testimony is contrary to the wording of the first handwritten agreement that all attorneys were to confer "ASAP" and that it was not reasonable for the Commission to assume that the Firm would wait five months to discuss Davey's case list (Response to Order to Show Cause, p.43). Judge Davey's argument ignores the fact that Coppins, as well as Cooper, places the first meeting in November 1984 (Tr.153); overlooks Cooper's testimony that he was certain that the first meeting occurred in November 1984 because "when I discovered that the Bryant case had been settled and saw the settlement release, which I think was dated October 31st, I immediately recognized that the meeting that I had had with Kevin and Mike, the first meeting, was after that point" (Tr.27); and overlooks the fact that Cooper's recollection is aided by his memorandum of his second meeting with Davey on November 21, 1984 (Tr.27-30). Judge Davey's argument also

overlooks the testimony of Coppins that although the first agreement contained a provision that all attorneys would meet "ASAP," there was, in fact, no urgency about meeting because Davey was not physically leaving the Firm until January 1985 (Tr.20, 166-67).

Judge Davey contends that the language of the two agreements between Davey and the Firm suggests that the attorneys had, in fact, met and gone over the case list before the September 20, 1984 agreement. The language, however, in the September 20, 1984 agreement which Davey relies upon is 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" (CX-2; Response to Order to Show Cause, pp.44-45). The language that Davey will take responsibility for reassigning the cases suggests something that is to be done in the future, not that something had already occurred as a result of a prior meeting. The wording of the agreements, therefore, does not support Judge Davey's testimony that the meeting to go over the case list occurred in July or contradict Cooper's and Coppins' testimony that it occurred in November.

Next, Davey contends that the Commission's finding that Davey misrepresented the merits of the Bryant case was unwarranted (Response to Order to Show Cause, p.45). First, the Commission accepted the testimony of Cooper and Coppins that the meeting at which the Bryant case was discussed occurred in November, after Davey had already settled the case and deposited the fee in his personal account. Second, Judge Davey's argument overlooks the further finding of the Commission that after it became apparent to Judge Davey that the insurance carrier was seeking to settle the case, he had the affirmative responsibility under paragraph 7 of the September 20, 1984 agreement to share the fee with the Firm. It was for this reason that Davey "hid" the Bryant fee, because he knew the Firm would claim its share if it knew about it.

Judge Davey's representations regarding the merits of the Bryant case relate to his claim that the Firm abandoned the case. Judge Davey, however, on three occasions in 1984, first to Cooper on November 21, 1984, again to Cooper and Coppins on November 26, 1984, and again to Douglass, Cooper and Coppins sometime before December 21, 1984 (Tr.45, 47, 55, 161, 206), Davey attempted to justify his conduct with respect to the Bryant fee by claiming that he was holding the fee as security in case the Firm did not honor the termination agreement. Judge Davey, apparently aware that

secreting the fee to protect his interest in the termination agreement was not an acceptable explanation, changed his story to claim that the Firm had abandoned the Bryant case. The evidence, however, supports the Commission's rejection of this claim.

A consideration of all of the evidence before the Commission relating to the Bryant case should lead to the conclusion that the charges based on that case were proven by clear and convincing evidence.

The Breyer Case

The key evidence supporting the Commission's findings with respect to the Breyer case is as follows: (1) On June 11, 1982, Carol Ann Breyer and her husband, John P. Breyer, entered into a contingent fee contract with the Firm to represent them "in any claim for damages against any person, firm or corporation liable therefor, resulting from an accident that occurred on March 8, 1982" (CX-13); (2) at the outset, Davey recognized that because of the tortfeasor's $10,000 insurance coverage, the major component of the claim would be the uninsured motorist claim and when the file was opened, he began work on this claim (Tr.287-88); (3) on June 2, 1983, the case against the tortfeasor was settled for $10,000 and Davey thereafter continued to work on the uninsured motorist claim (CX-13);

(4) on August 6, 1984, Davey closed the Breyer file and signed his secretary's initials to the Firm's closed file checklist (CX-12) which, under the Firm's procedures, would remove the case from the Firm's case list (Tr.64-65); (5) on September 18, 1984, the insurance adjuster made an offer to Davey of $125,000 with a structured settlement and thereafter, in September, October, November and December 1984, Davey and the adjuster were in communications regarding a settlement (CX-14); (6) in November, in the meeting to go over Davey's cases, the Breyer case was not mentioned and it was not on the case list (Tr.33, 155); (7) on December 13, 1984, Davey accepted a $127,500 lump sum offer and requested that the draft be sent to his home address (CX-10); (8) sometime between November 26, 1984 and December 21, 1984, at a meeting Douglass specifically asked Davey if there were any more cases like the Bryant case which the Firm should know about and Davey responded, "No sir. There is not" (Tr.55, 161, 206); (9) Davey admitted that he always understood that the Firm was entitled to part of the Breyer fee (Tr.330, 374), but had the draft sent to his home to "keep [his] options open" (Tr.391-92); and (10) on December 21, 1984, Davey went to the Breyers' home and had them sign a release which Davey witnessed as "Attorney at Law," using his home address (CX-9).

The Commission found that this constituted clear and convincing evidence that Davey intended to convert the Breyer fee (Commission Findings, ¶ 23).

Judge Davey, in his Response to the Order to Show Cause, primarily focuses upon the testimony of Cooper with respect to whether he actually recalled seeing the Breyer draft and the testimony of Douglass that although he did not have a clear recollection of the telephone call, he first learned about the case when a draft made payable to the Firm was being presented by Davey involving the Breyer case (Response to Order to Show Cause, pp.35-38). The Commission would concede that if the findings with respect to the Breyer case depended entirely upon the testimony of Cooper and Douglass on these two specific points, it would not have sufficient proof regarding the Breyer case. Judge Davey, in his response, however, cannot explain away the totality of the evidence regarding the Breyer case, including the fact that Davey's conduct beginning in August 1984 regarding his handling of the Breyer case, particularly his closing of the file, his failing to advise the Firm of the settlement negotiations, his denial to Douglass that there was another case like the Bryant case[7] and his failure to advise the

[7] Judge Davey attempts to justify his lies to the Firm by saying, "While it may have been better to advise them about the case, ultimately it matters not that he did not do so" (Response to Order to Show Cause, p.40).

Firm of anything about the Breyer case until the same day that the draft was submitted to the bank, is strikingly similar to his conduct in connection with the Bryant case and inconsistent with his position that he always intended to share the Breyer fee with the Firm.

Thus, the Commission has submitted to the Court its finding of clear and convincing evidence that Davey converted the Bryant fee and that he attempted to convert the Breyer fee. Significantly, the Commission found by clear and convincing evidence that Davey's conduct with respect to each of these cases, independent of the other, demonstrated his present unfitness to hold judicial office in this State (Commission Findings, ¶ 24). For this reason, even if the Court is not satisfied that the Commission proved the allegations relating to the Breyer case by clear and convincing evidence, it should nevertheless uphold the findings with respect to the Bryant case and adopt the Commission's recommendation that Davey be removed from office.

III.

The Commission's Recommendation of Removal Is Warranted

Clear and convincing evidence that a circuit judge is guilty of conversion or theft is unquestionably a ground for

removal from office. Thus, in In re Inquiry Concerning a Judge re: Eugene S. Garrett, 613 So.2d 463 (Fla.1993), the Commission found that District Court of Appeal Judge Garrett had attempted to steal a VCR Plus device from a store and this Court upheld the findings and, notwithstanding Judge Garrett's unblemished career of public service as a state attorney and judge, noted that:

> [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. (613 So.2d at 465.)

Similarly, in In re Inquiry Concerning a Judge, Stewart F. LaMotte, supra, the Commission recommended the removal of Judge LaMotte for charging personal air transportation on a state air travel card knowing that the cost of the personal trips would not be deducted from his judicial salary. This Court, based on the evidence, said that Judge LaMotte committed serious and grievous wrongs of a clearly unredeeming nature and, therefore, removed LaMotte from office.

The conduct of Judge Davey in this case, particularly with respect to the Bryant case, is equally as serious and egregious as the conduct of Garrett and LaMotte. Judge

Davey attempts to compare his conduct to the conduct involved in In re Inquiry Concerning a Judge, Richard J. Fowler, 602 So.2d 510 (Fla.1992), which resulted in this Court imposing a public reprimand on Judge Fowler. In that case, Judge Fowler accidently backed into a parked car at 3:00 a.m. on December 20, 1990, did not stop to determine the damage or the identity of the owner of the parked car and when shortly thereafter police officers proceeded to Judge Fowler's home, he untruthfully said that a woman was driving the vehicle and that he was a passenger. The Commission, in its findings, described Judge Fowler's conduct as an "isolated incident" (602 So.2d at 511). This Court adopted the findings and imposed a public reprimand, but in so doing suggested in a footnote that if the Court had the constitutional prerogative, it would have addressed the question of whether Judge Fowler's conduct warranted more severe discipline (602 So.2d at 511 n.). Whatever may be said about the conduct of Judge Fowler, it is clear from the evidence that Judge Davey's conduct was not an "isolated incident," but involved a series of deliberate acts, in the Bryant case over several months and in the Breyer case over five months, to put Judge Davey in the position of keeping the Bryant and Breyer fees for himself.

The amicus contends that because the matters for which Davey was charged occurred a number of years ago and before

Judge Davey assumed the Bench, the Commission has the additional burden of showing some connection so as to demonstrate a present unfitness to hold office.[8] This the Commission has done. Specifically, the Commission rejected Judge Davey's contention that the events which occurred in 1984 were too remote to affect his present fitness to serve as a judge and found that Judge Davey's conduct with respect to the Bryant and Breyer cases "evidence character flaws which the passage of time alone does not mitigate or justify" (Commission Findings, p.21). In this regard, the conduct of Judge Davey is not the "isolated incident" involved in Fowler, but more like the findings in Berkowitz, which this Court, based on the totality of the circumstances, said illustrated "a serious character flaw" (522 So.2d at 844).

The Commission, in addition to finding that Judge Davey's conduct with respect to the Bryant case and with respect to the Breyer case evidenced a character flaw, found that Davey had compounded his original misconduct by

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[8] The amicus also contends that the formal charge against Davey must allege a "carryover" of prior nonjudicial conduct that taints the judicial function and the proceedings should be dismissed for want of a proper pleading of the charges" (Amicus Brief, pp.23-24). This issue was not raised by the respondent before the Commission or this Court and the amicus has no standing to raise the issue. Acton v. Ft. Lauderdale Hospital, 418 So.2d 1099 (Fla.1st DCA 1982), approved, 440 So.2d 1282 (Fla.1983); Keating v. State ex rel. Ausebel, 157 So.2d 567 (Fla.1st DCA 1963).

attempting to explain it through testimony that the Commission found to be false in material respects (Commission's Conclusion, p.21).

Judge Davey and the amicus contend that Judge Davey was denied due process because the Commission did not formally charge him with lying. Clearly, the formal notice charged Judge Davey with having lied to his partners and gave Judge Davey notice that this would be an issue before the Commission. Judge Davey contends, however, that the Commission could not, in making its recommendation, take into consideration that he gave false testimony before the Commission. Judge Davey relies upon Bernal v. Department of Professional Regulation, 517 So.2d 113 (Fla.3d DCA 1987), aff'd, 531 So.2d 967 (Fla.1988). Bernal and the cases relied upon by the District Court in Bernal, e.g., City of Daytona Beach v. Del Percio, 476 So.2d 197 (Fla.1985), hold that punishment in a criminal or administrative proceeding cannot be increased because of the way in which a party conducts his defense. These cases are not in point, however, because the duty of the Commission and of this Court " 'is not to inflict punishment, but to determine whether one who exercises judicial power is unfit to hold a judgeship.' " In re Inquiry Concerning a Judge, Gary G. Graham, 620 So.2d 1273, 1275 (Fla.1993), cert.denied, 62 U.S.L.W.3350 (1994); In re Inquiry Concerning a Judge,

Richard A. Kelly, supra at 571. Thus, this Court, on a number of occasions, without any formal charge of lying, has taken into consideration the lack of candor of a judge in determining whether a judge should be reprimanded or removed from office. In In re Inquiry Concerning a Judge re: James S. Byrd, 511 So.2d 958 (Fla.1987), this Court noted that the Commission, in making its recommendation of a reprimand, "considered Judge Byrd's candor and cooperation during the investigation" (511 So.2d at 959). In In re Inquiry Concerning a Judge, Wallace E. Sturgis, supra, Justice Overton, in a concurring opinion in which he set forth the factors distinguishing why in an earlier case, In re Inquiry Concerning a Judge re: Irwin A. Berkowitz, supra, Berkowitz had been removed from office while Sturgis, for similar conduct, received a reprimand, said that "[i]n the Berkowitz case, there is no question that he intentionally attempted to mislead the Commission in his testimony concerning its charges against him" (529 So.2d at 286). See also The Florida Bar v. McKenzie, 581 So.2d 53 (Fla.1991), in which this Court held that disbarment was the appropriate sanction for a lawyer who charged an excessive fee. Although not part of a formal charge, the referee found that the attorney's testimony at the final hearing was less than truthful and this Court, in upholding the findings, but increasing the discipline from the recommendation of a

three-year suspension to disbarment, took into consideration the attorney's "total conduct in this incident, including the submission of false testimony before the referee . . ." (581 So.2d at 55). Similarly, in Florida Board of Bar Examiners re J.H.K., 581 So.2d 37 (Fla.1991), an applicant for admission to The Florida Bar was charged with having demonstrated a pattern or course of untruthfulness in the application proceedings for admission to the Bar. The Board found the applicant guilty of the formal charges and included in its findings the fact that the Board had had the opportunity to evaluate the applicant's demeanor during his formal hearing testimony and found his testimony "totally unreasonable and unworthy of belief" (581 So.2d at 38). In its conclusions of law, the Board said:

> As noted in the findings above, the Board observed additional untruthfulness and a continuing lack of candor during the applicant's formal hearing testimony. The applicant's misconduct as established by the proven Specifications and as observed by the Board during the formal hearing convinces the Board of the applicant's present inability to be truthful and candid in his dealings with others. (581 So.2d at 39.)

This Court accepted the recommendations of the Board and denied the applicant's petition for review.

Thus, in cases involving proceedings before the Judicial Qualifications Commission, The Florida Bar and The Florida Board of Bar Examiners, this Court has recognized that it is appropriate to comment upon and take into consideration the candor of the person appearing before it. Surely, any litigant who chooses to testify in his own behalf understands the risk that his testimony might not be believed and that if the finder of fact believes that he is not telling the truth, this will be taken into consideration in reaching a decision. Before the Commission, Judge Davey's defense was that the Commission's three principal witnesses, Messrs. Cooper, Coppins and Douglass, were not telling the truth (Response to Order to Show Cause, p.34 n.7). The Commission rejected this argument and instead found Judge Davey's version of the facts to be unworthy of belief. In these circumstances, in proceedings such as these where the Commission hears the testimony and observes the demeanor of the witnesses and reports its findings and recommendations to this Court for a final determination, it is entirely appropriate for the Commission to comment upon and provide the Court the benefit of its collective judgment as to the candor of the witnesses.

CONCLUSION

The proceedings before the Commission and before this Court are not a referendum on Judge Davey's fitness to serve as a circuit judge. Based upon the evidence that was before the Commission, Judge Davey is guilty on two separate charges, conversion of the Bryant fee and attempting to convert the Breyer fee, either of which, under the precedent established by this Court in similar cases, justifies Judge Davey's removal from the office of Circuit Judge of the Second Judicial Circuit.

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Certificate of Service

I DO HEREBY CERTIFY that a copy of the foregoing has been furnished to each of the following by United States Mail, this 11th day of March, 1994:

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