IN THE SUPREME COURT
OF FLORIDA

CASE NO.: 91,232

INQUIRY CONCERNING A JUDGE NO.: 97-74
RE: DEBORAH FORD-KAUS

PETITIONER'S ANSWER BRIEF
IN RESPONSE TO ORDER TO SHOW CAUSE

On Review of
a Disciplinary Recommendation of Removal
by the Judicial Qualifications Commission

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PREFACE[11]

Judge Deborah Ford-Kaus seeks review of the "Findings, Conclusions and Recommendation of Removal" submitted by the Judicial Qualifications Commission ("JQC") on May 22, 1998. Because the facts were established by clear and convincing evidence, and removal is the entirely appropriate remedy for conduct involving a pattern of deceit, for personal and professional gain, it is respectfully submitted that the JQC recommendation of removal should be approved.

STATEMENT OF THE CASE

Special counsel generally accepts Judge Ford-Kaus' statement of the case with the following additions and clarifications. The original "Notice of Formal Charges" served August 19, 1997 contained eleven charges ("Notice"). The "Amended Notice of Formal Charges" served November 21, 1997, added four new charges, including the charge of lying under oath to the Investigative Panel about the following detailed, specific matters:

> 12. You did not tell the truth to the investigative panel in your testimony under oath about material matters pertaining to your handling of the McBee appeal. The specific matters at issue are contained in the referenced pages of the transcript of the 6(b) hearing held on July 25th:
>
> A. You testified that you spent time on the McBee appeal on November 6, 7, and 8th, 1996 "looking at the files", when in fact during those

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[11] All references are to the pleadings on file with the Court, the transcript of the for ring (T. __), the exhibits (JQC Ex. ___; Judge Ex. ___) and the deposition of Dwight Wayne Ol mitted by agreement below. (Olsen Depo. p. __).

days you did not work on the case at all. (T. 40);

B. You testified that a secretary prepared the bills containing those time entries, when in fact, you prepared them yourself and you did not have a secretary at the time. (T. 79).

C. You testified that Ms. Griffin refused to handle Ms. McBee's appeal because Ms. McBee was accusatory towards her, blaming her for the dismissal and threatening her with malpractice, when in fact Ms. Griffin refused to sign a letter you drafted which relayed these concerns of yours to Ms. McBee. (T. 27; 63).

The remaining new charges 13-15 included additional deceptive conduct by attorney Ford-Kaus in handling the McBee appeal, as well as Judge Ford-Kaus' conduct after she began sitting on the Circuit Bench. (Amended Notice).

Judge Ford-Kaus moved to continue the final hearing, originally set for November 17, 1997, without opposition. (Motion for Continuance). The hearing was thereafter rescheduled until March 2, 1998, giving the Judge an additional four months to prepare. (Order Granting Continuance and Resetting Hearing).

Special Counsel disclosed the retention of attorney Jane Kreusler-Walsh as an expert on the issue of appellate practice and procedure in interrogatory answers served October 21, 1997. (Interrogatory Answer #5). In the five months available to her, the Judge chose not to depose the witness, but to conduct an informal interview, during which time no questions about the expert's background or history were explored. (T. 150-51). Neither

side knew of any appellate services rendered in the past by the expert to panel member Dale Sanders. Indeed, the witness did not know who would be on the hearing panel. (T. 15). Special counsel learned about past services rendered by the expert the night before the hearing and immediately disclosed. (T. 7).[12] Special counsel voir dired the witness fully before the Commission; such *voir dire* revealed that the expert was hired on a "per job" basis, and was so hired by the panel member in the past. (T. 142-151). Only after such voir dire did the hearing panel overrule the Judge's objections, and permit the witness to testify. (T. 151).

On the morning of the final hearing, Judge Ford-Kaus amended her answer to admit many facts pertaining to her mishandling of the McBee appeal that she had previously denied. (Second Amended Answer).

Judge Ford-Kaus' new amendment admitted *inter alia* that she had "violated Rules 4-1.1 (providing competent representation); 4-1.3 (acting with reasonable diligence and promptness in representing a client); 4-1.4 (keeping client informed and explaining matters); 4-1.5(a)(1) (collecting clearly excessive fees),(e) (duty to communicate basis for fees) and (g) (division of fees without disclosure); 4-1.15 (safekeeping client's funds); 4-1.16(a) (termination of representation); 4-3.2 (expediting

[12] The Judge implies that the special prosecutor had knowledge of a relationship between ert and a hearing panel member, and failed to disclose. The Judge then attempts to equate t h her own conduct in presiding over a contested hearing in which her personal lawyer was involv hout disclosure to the other side. (Response p. 15 & n. 5). Her suggestion is completely belied record, and her analogy is ill-founded. (T. 7).

litigation)." Thus, the issue before the JQC was not whether the Judge would be disciplined, but what type of disciplinary action was required.[13]

The final hearing concluded on March 4, 1998. On March 11, 1998, the special counsel moved to submit additional evidence which only came to light after the final hearing. (Motion to Submit Additional Evidence).

Judge Ford-Kaus objected to re-opening the proceeding for submission of this new evidence. The Hearing Panel submitted its written "Findings, Conclusion and Recommendation of Removal" on May 22, 1998. (The Findings). In addition to the ethical violations Judge Ford-Kaus admitted, the hearing panel further concluded that her conduct violated Canons 1 and 2 of the Code of Judicial Conduct. (Findings p. 23). Special counsel's motion to re-open was accordingly moot and was denied on May 28, 1998, some six days later. The Hearing Panel's twenty-five pages of detailed findings conclude that the formal charges were proven by clear and convincing evidence. In it, the Hearing Panel concluded that "Judge Ford-Kaus' conduct as alleged and proved herein demonstrates a pattern of irresponsible and dishonest behavior and a lack of respect for the law and the Court." (Findings p. 25). Judge Ford-Kaus appeals.

STATEMENT OF THE FACTS

[13] Contrary to suggestion, (Response p. 12, n.3), special counsel embraced the burden of pr met this burden by the introduction of all of the evidence of wrong-doing in question. It arly in the context of the appropriate disciplinary action that questions regarding the Judg egrity to remain on the bench were posed. (T. 515-18).

Special counsel incorporates the full JQC Findings included in the appendix to this brief. (App. "A"). The JQC Hearing Panel specifically found those facts had been established by clear and convincing evidence. If this Court reviews the findings and determines that this standard is met, "then [these findings] are of persuasive force and given great weight by this Court," because the JQC hearing panel, as trier of fact, which is in the first-hand position to evaluate the evidence and the demeanor of the witnesses. See In re LaMotte, 341 So. 2d 513, 516 (Fla. 1977); In re Crowell, 379 So. 2d 107 (Fla. 1979).

Accordingly, the judge's statement of facts is rejected in that: (1) it presents all of the evidence in the light most favorable to Judge Ford-Kaus; and (2) it relies heavily on testimony from the Judge, when the panel found her testimony to entirely lack credibility. Since this Court is the ultimate arbiter of both the facts and the law, however, special counsel will outline some of the contested testimony and documentary evidence that the hearing panel obviously found to be both credible and persuasive.

Despite her membership in several state bar associations, Debra Ford-Kaus did not actually practice law until 1986. (T. 476). Ms. Ford-Kaus then took a job with the state attorneys office in Sarasota, where she was fired after 8 months. (T. 477). Prior to the McBee case at issue here, Ms. Ford-Kaus had handled only one appeal. (T. 370, 476-77). However, Ms. Ford-Kaus told her client that she had handled many appeals, knew some of the judges, and that this was a good thing for the client. (T. 223).

McBee came to see Ms. Ford-Kaus in June 1996 to appeal a decision changing the custody of her four year old son to his father. (T. 219-20). Ms. Ford-Kaus did not disclose to McBee that she was running for judicial office at the time. (T. 225).[14] McBee signed a retainer agreement, (T. 223-24; JQC Ex. 1), and twice brought in cash deposits in payment of both fees and costs. (JQC Ex. 7).[15] Ms. Ford-Kaus deposited some of the $1000. cash received into her personal checking account and could not account for the remainder. (T. 521). On June 17, some $2400 in cash received from McBee went the same route, (T. 522) two thousand was deposited into her personal account and Ms. Ford-Kaus could not account for the remainder. She had no trust account records reflecting deposits. (T. 522-25, 542). Ultimately Ms. Ford-Kaus would receive some $9356. from her client as fees and costs for this appeal. (T. 228). Things went awry on the appeal almost immediately. Ms. Ford-Kaus pushed the trial lawyer to "expedite" entry of an appealable order, citing "the child's best interest to get the appeal underway." (JQC Ex. 3). She then waited to file the appeal and filed it in the wrong court. This required hiring a courier to rush a second notice to the right court, as well as a second filing fee. All of these costs were passed on to the client without disclosure. (T. 480). Ms. Ford-Kaus did not have experience to move to stay the

[14] McBee learned about the campaign some months later in September, from her child's father.).

[15] This was not the case of a client skimping on costs. Ms. McBee selected the highest-charg orney of those recommended to her, in the hopes of receiving the best possible services. (T. 2 .

custody change, to expedite the appeal, or move to transfer the appeal when she filed the notice in the wrong county. (T. 478-79). Moreover, while Ms. Ford-Kaus had the transcript in her possession, it was never filed of record. (T. 155). Thus, in an intense child custody battle, there was nothing for the appellate court's review.[16] (T. 155). These errors were merely a prelude to what happened next.

On October 4, 1996, Ms. Ford-Kaus engaged the services of another lawyer Wayne Olsen to ghostwrite the brief for a flat fee of $1000. (T. 230, Olsen Depo. p. 11; JQC Ex. 10). Neither the retention of a ghostwriter, nor this financial arrangement were disclosed to the client who was billed and continued to pay $175. per hour to Ms. Ford-Kaus. The Judge's brief is notably silent on the existence of this arrangement as well as her non-disclosure to the client. (T. 227, 230-31).

The Judge cites her testimony for the proposition that she "intended for Olson only to draft the brief and for her to revise the draft before filing the brief." (Response p. 9). The documentary and other evidence belies such suggestion. As Wayne Olson testified, when Ms. Ford-Kaus contacted him she did so to see if he could do the work for her. (Olson Depo. p. 14). She did not indicate he was only to draft, subject to her supervision or editorial work. (Id. at p. 15). Wayne Olson's letter, admittedly

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[16] This latter error was potentially serious enough to have cost Ms. McBee the loss of eal, and therefore the custody of her minor son. (T. 155). See Applegate v. Barnett Bank lahassee, 377 So. 2d 1150 (Fla. 1979).

received by Ford-Kaus, corroborates his testimony. He wrote:

> [I] would like to write an appellate brief for you .... Please call when you have had a chance to review this letter. I am ready to begin research and write this brief. <u>If you ask me to write the brief for you, I will have the complete brief ready for your signature by Tuesday afternoon at the latest.</u> Please give me the word to start. I look forward to hearing from you. (JQC Ex. 11, emphasis added).[17]

The client tried to reach Ms. Ford-Kaus by phone some six or more times in October, but was unable to do so. (T. 226). Wayne Olson also tried to reach Ms. Ford-Kaus, without response, to remind her when the brief was due. (Olson Depo. 31-32). Having faxed his draft brief to Ford-Kaus' attention on October 29, 1996, and receiving no changes, (Olson Depo. 18-20), Olson delivered his finished work product into her hands on October 31, 1996. (Olson Depo. 22, 25).

Deborah Ford-Kaus was elected to the bench on November 5, 1996. (T. 88). On each of the next successive days November 6, 7, and 8th, <u>in her own hand-writing</u>, she billed 8 hours at $175. per hour (for a total of 24) to her client for the appeal. (JQC Ex 22, App. "B"). Ms. Ford-Kaus admittedly had to input these time slips into the computer herself in order to bill her client.[18] Her November 15, 1996 bill reflected 8 hours for "Research modification of custody case law," 8 hours to "Prepare draft of initial brief,"

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[17] The Judge attempts to fault the JQC's conclusion that Olson "was hired to write the brie sponse p. 9). This conclusion came directly from this document, as the Judge's subsequent actio

[18] Her secretary officially resigned on October 31 or November 1. (T. 390).

and 8 hours to "Prepare review and revise initial brief." (JQC Ex. 25). Without this additional billing, Ford-Kaus actually owed her client a substantial credit. (T. 228-30). The result of adding these hours to the bill was to wipe out the credit and leave the client indebted to Ms. Ford-Kaus (in the amount of $2389.02). (JQC Ex. 25). Ms. Ford-Kaus then signed the Olson brief as is and sent it out under her own signature without changing even a comma. (Olson Depo. 28; T. 520).

The brief was due in the Second District Court of Appeal on November 8, 1997. Ms. Ford-Kaus federal-expressed the Olson brief to the Court and her opposing counsel on November 18, 1997, or ten days later. The brief, which was served on the 18th, not only bore a service date of the 10th, but the zero was superimposed over an eight. Accompanying the brief was a letter dated November 10, 1997. (JQC Ex. 18). No explanation was provided to opposing counsel or the court for the discrepancy.

Matters were brought to a head when opposing counsel Cliff Curry noticed the difference in the dates. On December 2, 1996, he served a motion to dismiss the appeal as untimely, as well as a motion to strike the brief for lack of record references. The motion to dismiss was denied, but the motion to strike was granted, with leave to amend. (T. 42-46). After she received the motions, now-Judge Ford-Kaus telephoned Mr. Curry and said, "I've been elected to be a circuit court judge and why are you filing these kind of motions against me." Mr. Curry rejected the defense suggestion at trial that this phone call was one of complaint

because the Judge felt overworked. (T. 57-58). He deemed the phone call inappropriate and described its tone as a "veiled threat." (T. 46, 57-58; 68). Curry also kept the Federal Express envelope, bill of lading, and receipt because of the discrepancy between the certificate of service and these records. (T. 63-67).

When the client received a copy of the brief, she once again tried unsuccessfully to reach Ford-Kaus. (T. 231-32). Finally, on December 12, 1996, the client received a letter from Ford-Kaus advising her of the election's result. Judge Ford-Kaus invited the client to set up a meeting and consider having Linda Griffin assume the representation. (T. 232). Learning from an office manager that the brief was sent in late, the client phoned the clerk of the Second DCA and confirmed the brief's tardiness. (T. 233). A meeting was scheduled between the parties on January 3 – the last day of Debra Ford-Kaus' practice as an attorney. (T. 76).

The client arrived at the January 3, 1997 meeting with witnesses, and a host of questions written down to ask Ms. Ford-Kaus. (T. 75, 234-35). Linda Griffin, who was only present for an introduction to the client, described her as poised, articulate and organized. (T. 75-78). Since Judge Ford-Kaus disputes the extent of her lies to the client (Response p. 17), the following are the precise questions the client asked and the answers she gave at the meeting:

> Q. Did you ask Deborah Ford-Kaus on January 3rd, 1997 whether the brief was filed on time?
>
> A. Yes, I did.

Q. What did she say?

A. Yes, it was.

Q. What was your response?

A. I asked her again, "Are you sure?" And she said, yes, everything was fine. "The Brief is fine. It was sent in on time. Everything looks great."
So then I went to ask her one more time, and she asked why am I asking. And I said, "Because I called the appellate court myself to find out if in fact it was sent on time, and they had said no, it was not."

Q. And what was her response?

A. She wanted to know who I talked to. And I said, "I guess the clerk of the court, the girl who does that stuff, that's her job."

She said, Well, she doesn't know what she's talking about, because it was sent on time.

Q. Did you ask Deborah Ford-Kaus about the name Wayne Olson that appeared on one of your bills?

A. Yes, I did.

* * *

She wanted to know why I wanted to know. And I said, "Well, because you're billing me for talking with him."[19]

And she said, "well, he's just an assistant of mine."

Q. Did you ask Deborah Ford-Kaus who wrote the brief?

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[19] The November 15 bill contained a minimal time entry of .3 for a telephone conference betw Ford-Kaus and Wayne Olson. (JQC Ex. 25). It did not identify Olson, disclose the amount of ho had worked, or what he was paid. Instead, it billed time Ms. Ford-Kaus had purportedly worked a h higher rate.

A. Then I went to say, "Isn't it a fact he wrote the brief?" And she said, "Oh, no, no. I wrote the brief. (T. 235-37, emphasis added).

With respect to the 24 hour block of time billed by Ms. Ford-Kaus in her own hand on the three days immediately following the election, the questions and answers at that meeting were as follows:

Q. Did you specifically ask Deborah Ford-Kaus at the meeting what she was billing you for on November 6th, 7th and 8th, 1996?

A. Yes, I did. She said the dates were wrong. (T. 244, emphasis added).

Linda Griffin's account of the meeting was similar. (T. 77-79). After the client left, Ms. Ford-Kaus turned to Linda Griffin and asked how she thought the meeting went. Griffin, a close friend as well as a colleague, and the godmother of Ford-Kaus' child, told her that it was horrible and that she had "sounded like a liar." (T. 80, 115).

At a loss on what to do next, McBee continued to phone the law office after Ms. Ford-Kaus became a judge. McBee left messages with Linda Griffin which were duly passed on. (T. 80-81, 239). Griffin was caught in the middle and didn't want either McBee or Ford-Kaus to misunderstand the messages with which she was entrusted. Accordingly, a memorandum was "[T]he only way I could be assured and assure [McBee] that I was really relaying the information [was] ... she could come in and I would write it down and I could make sure that Ford-Kaus got it...." (T. 82).[20] On

[20] Judge Ford-Kaus claims that McBee & Griffin "apparently collaborated on their version

January 17, 1997, McBee came to the office and told Linda Griffin what she wanted. Linda organized it, and typed up a document. McBee signed the document as her own and Linda witnessed her signature. (T. 82-83). That document made the following points. First, the bills were wrong. McBee had paid $9376.00 for the stricken brief, and she wanted all the fees – not costs – returned. Second, McBee wanted the brief corrected per the Second DCA's order "at no charge to the client." Third, McBee wanted a written apology from Ford-Kaus for "not being truthful when asked directly" about the points detailed in addition to her failure to respond to client communications. (JQC Ex. 27; T. 240, 243).

In accordance with her promise to McBee, Linda Griffin both read Judge Ford-Kaus the memo on the telephone, and hand-delivered it to her personally. (T. 82-83). She advised the Judge to apologize and give the woman her money. (T. 84). The telling response of Deborah Ford-Kaus, now sitting as a circuit judge for the Twelfth Judicial Circuit, was that "I'm not going to give that fucking whore a dime." (T. 84). The request for a written apology met with a similar response, "No. She [doesn't] deserve it." (T. 137).[21]

Judge Ford-Kaus then urged Griffin to send a letter to McBee. The so-called "pink letter," dated January 20, 1997 was both

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nts and produced a document alleging Ford-Kaus was not truthful..." (Response p. 19, n.6). ge thus suggests, once again with no record support, that the witnesses conspired to set her u s claim is entirely belied by the record. (T. 82-83).

[21] A telephone message played in court confirmed the type of language the Judge used to con anger with Griffin. (JQC Ex. 32, T. 96).

written and typed by Judge Ford-Kaus, but bore Linda Griffin's initials as the purported author and typist. (JQC Ex. 28; App. "C").

It purported to give a host of reasons why Linda Griffin could not be involved any further, in pertinent part as follows:

> Dear Ms. McBee:
>
> I have informed Judge Ford-Kaus of your ultimatum regarding your demands as to future representation on your case.
>
> First of all, since you have taken a confrontational and adversarial approach in our consultations and since you expect to be represented for free, I will not be able to represent you in connection with your appeal. I cannot in good faith continue to assist you when all discussions with you center on your threats to sue and file grievances against Judge Ford-Kaus and myself ....
>
> This is [Ford-Kaus] position.... [N]o refund is appropriate. A competent brief has been filed and costs expended on your behalf....
>
> * * *
>
> Very truly yours,
> Linda E. Griffin
>
> LEG/leg

(JQC Ex. 28, App. "A").

Upon review of this letter drafted by the Judge for her signature, Linda Griffin told the judge its contents were untrue. McBee had neither been confrontational and adversarial, nor had she made any threats against either of the two. (T. 86-87).

She told the Judge that since the letter was "completely wrong," and nothing in it was accurate, she "would not sign it."

(T. 86). The Judge then "asked me for my letterhead so she could put it on my letterhead." (T. 86). Griffin again refused. (T. 86). Judge Ford-Kaus became upset – she still wanted Linda Griffin to sign the letter. (T. 87-88).

Relations between these former friends broke down completely when Griffin remained steadfast in her refusal. (T. 90, 101). The Judge makes much of the fact that this "pink letter" was never sent. (Response p. 32-33). However, the Judge's insistence that Linda Griffin send the letter even after she was told it was untrue spoke volumes as to her intent to deceive her client. (T. 128).

With nowhere else to turn, the client went to the Sarasota Herald Tribune with her story. An article on the case appeared in the newspaper on January 31, only three weeks after Judge Ford-Kaus assumed the bench. (T. 506). Judge Ford-Kaus refused to backdown. According to her own account, she still refused to even examine her bills because "[I] focused on what I thought was wrong with the column ... display[ing] stupidity and arrogance, and ... denial." (T. 507).

On February 21, 1997, McBee's new counsel, serving pro-bono, again tried to achieve an informal resolution of the problem. (T. 241, 508, JQC 54). This time the client specifically requested documentary support for the Ford-Kaus bills. (T. 508, JQC Ex. 54). The Judge's account of events was that she refused to look at her bills, when she received the letter, because it came from a lawyer she did not like. She "blew off" this request as well from her "arrogance and stupidity." (T. 509-11). Her written response, to

the client on March 3, was that McBee had "no good faith viable claim for any such refund."[22] (T. 512).

McBee was thus forced to file suit on March 21, 1997. (T. 512). According to the Judge, even after suit was filed, she still did not examine her bills, this time because she "wanted to settle." (T. 513). As to all of these opportunities to examine her conduct and to exhibit some remorse, Judge Ford-Kaus "blew them off because I did not see what I needed to do." (T. 513).

In sum, faced with four separate opportunities to face up to the consequences of her actions prior to the 6(b) hearing before the JQC Investigative Panel in July of 1997, Judge Ford-Kaus simply refused to do so. The reason was:

> I'm not viewing this as something that's going to dramatically change my life the way this has. It's not until my face is shoved into it and I'm – Hey, stupid, look at this. Look at what you did' that I pay any attention. That's right. (T. 513, emphasis added).

The hearing panel obviously concluded, as it was entitled to conclude, that Judge Ford-Kaus' newly found "contrition" at trial was contrived for purposes of self-preservation.

Judge Ford-Kaus appeared before the Investigative Panel of the JQC in July 1997. She knew her testimony was important. She had a month to meet with her lawyer, or "plenty of time" to prepare. (T. 495-96). She was admittedly attempting to avoid any discipline at the time, deeming that "the universal goal of any judge who is

[22] One might well question how the Judge could make such a statement if she had never e mined her bills.

asked to appear at such a hearing." (T. 498).

As to who prepared her bills, the exact questions posed by Commissioner Tate and the Judge's answers are reprinted here:

Q. When you billed the 28 hours or the 16 hours when you billed the client, you already had the brief, didn't you?

A. Are you talking about the October bill?

Q. I'm talking about the bill on November the 15th.

A. I had Mr. Olson's brief.

Q. But that's the brief you filed, so you had the -

A. That's the brief I filed. That's an inaccurate billing. There's no question about that.

Q. Who prepared your bills?

A. A secretary. (T. 500-01, emphasis added).

As the Investigative Panel subsequently came to learn, Judge Ford-Kaus had no secretary during all of November, 1996. (T. 520). She not only personally hand-wrote her own time entries, she input the November 6-8 entries into the computer herself before generating her November 15, 1997 bill. (T. 503, 520).

Judge Ford-Kaus' explanation for her testimony before the investigative panel at trial was that she heard "Who prepared your bills" generally, not "Who prepared this bill," even though this was the very bill on which she was being questioned. (T. 502). She didn't distinguish between the bills because "I wasn't asked to." (T. 514).

As to exactly what work she had performed on November 6, 7,

and 8th when she had the completed brief already in her hands, Judge Ford-Kaus' testimony before the Investigative Committee was that she spent time on those three days "looking at the files." (T. 532). At her deposition just two months later, however, Judge Ford-Kaus admitted that she had performed none of the work itemized on those dates:

> Q. You didn't perform any of the work that you've got on this bill on November 6th, 7th and 8th?
>
> A. That's right.
>
> Q. And you billed the client $4200. for the work that you ostensibly performed on those days?
>
> A. That's what this bill says.
>
> Q. You didn't do anything those three days, did you Judge?
>
> A. No, ma'am.... (T. 532-33, emphasis added).

Judge Ford-Kaus' entirely new story at trial was that she surrounded herself immediately after the (November 5th) election with all of McBee's materials, briefs, transcripts, and research. She struggled to do something productive, but ultimately sent the brief in "as is." (T. 451).[23]

She conceded that "if I were sitting in my own judgment and if I were sitting in your place, I would have a lot of difficulty with my explanation ... to you about why I did not intend to overbill Ms. McBee." (T. 451). The panel clearly found this testimony to be implausible, noting that the brief she signed was "very simple,"

[23] All of the differing versions were also clearly inconsistent with the Judge's earlier Janu xplanation to McBee that "the dates were wrong." (T. 244).

containing a 17 line long factual statement and an argument section only six pages in length (Findings p. 19). It concluded that "Judge Ford-Kaus' attempted explanations given on several occasions have been inconsistent and untruthful." (Id.).

Judge Ford-Kaus complains that her underlying statements to the JQC investigative panel about the "pink letter" were not adduced in evidence. (Response p. 28). She forgets that her second amended answer admitted the substance of such testimony, in which she told the investigative panel that Ms. Griffin refused to handle the appeal "because Ms. McBee was accusatory towards her, blaming her for her dismissal and threatening her with malpractice." Not only did both Griffin and McBee testify to the contrary, (T. 84-88; 242-43) but Ford-Kaus ultimately agreed that this letter was the product of her own "venting" which Linda Griffin "rightfully" refused to send. (T. 491).

With regard to backdating the brief, Formal Charge 13 charged Ford-Kaus with the following conduct:

> When you learned, on or about November 18, 1996, that you missed the due date for filing your initial brief, you backdated the brief, and falsely certified that you mailed it on November 10. You also sent the brief under cover of a November 10, 1996 letter to the Second District to make it appear as though your brief was timely filed with the Second District when it was late.

As the Hearing Panel highlighted, the only issue in dispute on this charge was whether the Judge's conduct was intentional. The Judge's version of events, was that she signed both the brief and the letter on November 10th, then had second thoughts and wished to

make changes, then realized on the November 18th that the brief was late, and sent it in without change. (T. 543). The problem with this version was certain of the Judge's other testimony. Judge Ford-Kaus agreed that she could not have initially written an "8" and crossed it over with a "10" because she did not know the brief was due until the 18th of November.[24] (T. 514). Moreover, her testimony could not account for the superimposition of one number over another in the Certificate of Service, as Commission Sanders highlighted in his questioning as follows:

> Q. [T]hat would explain to me why it would [have] a date of the 10th.
>
> A. Yes.
>
> Q. I don't understand nor have I – I don't think I've heard an explanation as to why there is –
>
> A. There's something under –
>
> Q. – an 8 crossed out.
>
> A. And I don't have one. I don't have one. I have no idea. (T. 543, emphasis added).[25]

In sum, the only answer there could have been on these facts was, as the hearing panel concluded, that the "certificate of service on the brief constituted intentional back-dating and this plus the letter were false and an attempt to mislead the Court and counsel." (Findings p. 16).

On these and other facts, the JQC hearing panel concluded that the evidence adduced both met and exceeded the clear and convincing burden of truth. (Findings p. 24). The panel "reject[ed] the

[24] Indeed, this ignorance was how she explained late service of the brief.

[25] The original brief containing Judge Ford-Kaus' original certificate of service is before rt as JQC Ex. .

assertion that the stress of an election and the closing of a practice justify or mitigate the violations...." (Findings p. 22).

In the strongest possible terms the panel wrote:

> [J]udge Ford-Kaus has been dishonest with her client and in her public statements and ... the Code of Judicial Conduct mandates removal. If this Panel failed to recommend removal of Judge Ford-Kaus, it would impair the confidence of the citizens of the State of Florida in the integrity of the judicial system and in her as a judge. Her conduct is clearly conduct unbecoming a member of the judiciary. Her public admissions and attempted excuses for lying to a client impair her functions as a judge.
>
> * * *
>
> Judge Ford-Kaus' conduct as alleged and proven herein demonstrates a patters on irresponsible and dishonest behavior and a lack of respect for the law and the Courts. (Findings p. 25).

This appeal follows.

I. THE EVIDENCE PRESENTED BOTH MET AND EXCEEDED THE "CLEAR AND CONVINCING" BURDEN OF PROOF (ISSUE I, REPHRASED)

The parties agree that the degree of proof required to discipline a judge is "clear and convincing" and that this burden is more than a mere preponderance and less than beyond a reasonable doubt. (Response p. 33). Fla. Const. art V, §12(f). Inquiry concerning a Judge (Graziano), 696 So. 2d 744 (Fla. 1997). The parties diverge on whether that standard was met here.

"Clear and convincing evidence" "differs from the greater weight of the evidence in that it is more compelling and persuasive. It calls for evidence that is precise, explicit, lacking in confusion and of such weight that it produces a firm

belief or conviction, without hesitation, about the matter in issue. See Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983); see generally In re Standard Jury Instruction (Civil Cases 89-1), 575 So. 2d 194 (Fla. 1991) (M.I. 4.1). This standard of proof may be met even though the evidence is in conflict. See Fraser v. Security and Inv. Corp., 615 So. 2d 841 (Fla. 4th DCA 1993) (judgment for civil theft affirmed even though evidence of intent was disputed and proven circumstantially). Additionally, where, as here, the JQC Hearing Panel sat as the trier of fact, its function:

> [I]s to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor and credibility of the witnesses appearing in the cause. It is not the function of the appellate court to substitute its judgement for that of the trial court through re-evaluation of the testimony and evidence from the record on appeal before it.

See Shaw v. Shaw, 334 So. 2d 13 (Fla. 1976); Westerman v. Shell's City, Inc., 265 So. 2d 43 (Fla. 1972).

In the instant case, the Judge studiously ignores all of the documentary and other evidence negating her testimony. This evidence included her billing records (including her time sheet entries written in her own hand), her deposit slips and trust account records (and their absence), correspondence and memoranda, and the "pink letter" she wrote herself, but falsely attributed to Linda Griffin.

Contrary to suggestion, the case against this Judge did not depend upon either stacked inferences or lack of candor by her mere maintenance of a denial of the charges. (Response p. 35).

The lies that this attorney told her client were documented by the testimony of two separate witnesses. The lies that this Judge told to the JQC Investigative Panel were pled with specificity, with reference to the specific pages of transcript. That Judge Ford-Kaus knew that the billing entries were her own (not her secretary's) is reflected by her own testimony and time sheets. That this Judge knew she had performed no work on November 6, 7, & 8 is reflected by the deposition with which she was impeached. That no work was even contemplated was reflected by the testimony

and corroborating documents of Wayne Olson.

Thus, all of the Davey requisites were met. Inquiry Concerning a Judge (Davey), 645 So. 2d 398, 406 (Fla. 1994). This Judge's lies were specifically charged, the Commission made particularized findings, and the record, corroborated by witnesses and documents, reflects that the tying was both knowing and wilful.

On the issue of back-dating, the Commission had before it the original brief filed by Ms. Ford-Kaus. The certificate of service in that brief contained a "1" followed by a "0" superimposed over an "8" (JQC Ex. 17). The cover letter addressed to the clerk was dated November 10, 1996 (JQC Ex. 18). Both were admittedly sent by Federal Express on November 18, and received by the Second DCA on November 19, 1996. All of these are documented facts. Distilled to its essence, the Judge argues that her testimony about her "intent" must be accepted, no matter how inconsistent or how improbable it is. This is not the case.

In a civil case, a fact may be established by circumstantial evidence as effectively and conclusively as it may be proven by direct evidence. Nielsen v. City of Sarasota, 117 So. 2d 731 (Fla. 1960). A party's mental intent "is hardly ever subject to direct proof." Thus, intent must be gleaned from all of the surrounding circumstances. See Busch v. State, 466 So. 2d 1075 (Fla. 3d DCA 1984); Brewer v. State, 413 So. 2d 1217, 1219-20 (Fla. 5th DCA 1982), rev. den., 416 So. 2d 25 (Fla. 1983). State v. Hurley, 676 So. 2d 1010, 1011 (Fla. 3d DCA 1996); State v. Jones, 642 So. 2d 804, 806 (Fla. 5th DCA 1994) (intent is question of fact for the jury).

Here, the Judge's "hypothesis of innocence" was that she had the completed brief in her hands on October 31, and signed it and the cover letter on November 10, intending to send it in. She then changed her mind and, intending to do work, but essentially dithered for eight days.[26] Having accomplished nothing, she then sent the unchanged brief and cover letter in "as is". (Response pp. 37-39). This hypothesis had to be discounted because of the Judge's own prior testimony that she could not have initially written an 8 and crossed over it with a 10, because she did not even know the brief was due until November 18. Moreover, as one commissioner highlighted, this hypothesis would explain the dating of the certificate on November 10. It could not explain why a "zero" was written over an "eight." The Judge could give no other explanation than backdating (T. 543) because there was no other explanation than backdating. In the words of Sherlock Holmes, "When you have eliminated the impossible, whatever remains, however improbable, must be the truth." Arthur Conan Doyle, "The Sign of Four," Chapter 6 (1890). (emphasis in original).

Judge Ford-Kaus' final complaint with regard to the evidence

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[26] Even in a criminal case, where the burden of proof is the higher one of "beyond a reasona bt," trial courts rarely, if ever, are authorized to grant a motion for judgment of acquittal ba the state's ostensible failure to prove mental intent. Brewer v. State, 413 So. 2d at 1220.

establishing her guilt is the testimony of Jane Kreusler-Walsh, a board-certified appellate lawyer. Contrary to suggestion (Response pp. 15, 40) the Commission was not required to designate the witness as an "expert" before admitting her testimony. See Chambliss v. White Motor Corp., 481 So. 2d 6, 8 (Fla. 1st DCA 1985), rev. den., 491 So. 2d 278 (Fla. 1986):

> While the court did not expressly declare that Demay was an expert prior to his answering of the questions, it is not necessary for the court to state that the witness is qualified as an expert. In fact, it is questionable whether it is proper procedure for the court to expressly declare the witness an 'expert' because the jury may infer from such declaration that the court is placing its approval on the opinion of the witness.

See Ehrhardt, Florida Evidence §701.1, p. 504 (1994 ed.) ("It is not necessary for counsel to formally proffer a witness as an expert to the court").

Here, Ms. Kreusler-Walsh was well-qualified by virtue of her background, training and experience to render opinions on appellate practice and procedure. (T. 142-43). Here, she explained the ordinary services performed by an appellate lawyer, the competency and diligence of the Ford-Kaus representation, (T. 151-164) and the obligations of contemporaneous service and filing of pleadings under Rule 9.420(b), Fla. R. App. Proc. The Expert reviewed the underlying documents and the Judge's testimony to conclude that "the date that was inscribed on the certificate of service was not the date that the certificate was signed." (T. 168). In this regard, Section 90.703 of the Florida Evidence Code expressly provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be determined by the trier of fact.

Even accepting the judge's premise that "on November 10th, [she] realized that the brief was late" and she signed the brief and dictated a letter, and both sat on her desk for eight days, the expert opined that the rules required that "the certificate of service should have been redone, as should the cover letter." (T. 168-69). In sum, the testimony was entirely within the purview of the expert, who was there to explain a specialized area to the Hearing Panel.

To the Judge's suggestion that hers is not "unforgivable conduct" warranting the ultimate remedy (Response pp. 48-50) we would now respond.

II. REMOVAL IS THE ONLY APPROPRIATE REMEDY FOR CONDUCT INVOLVING A PATTERN OF DECEIT, FOR PERSONAL AND PECUNIARY GAIN.

The parties agree that removal from judicial office is reserved for cases involving the most egregious misconduct, as this court will not lightly remove a sitting judge from office. See In re Berkowitz, 522 So. 2d 843 (Fla. 1988); In re Kelly, 238 So. 2d 565 (Fla. 1970), cert. den., 401 U.S. 962, 91 S.Ct. 970, 28 L.Ed.2d 246 (1971).

In determining whether a judge has conducted herself in a manner which erodes public confidence in the judiciary, "we must consider the act or wrong itself and not the resulting adverse publicity." In re LaMotte, 341 So. 2d 513, 518 (Fla. 1977). If a judge commits a "grievous wrong" which should erode public confidence in the judiciary, but it is not apparent that the public confidence has been eroded, the judge should nevertheless be removed. Id. The parties here disagree on whether Judge Ford-Kaus' conduct is of sufficient magnitude to warrant her removal. Simply stated, it must.

A judge's honesty and integrity lie at the very heart of the judicial system. See In re Shenberg, 632 So. 2d 42 (Fla. 1992). Thus, even one serious and flagrant dishonest act may warrant the ultimate remedy. See In re Garrett, 613 So. 2d 463 (Fla. 1993) (knowing and intentional act of petit theft); See also In re Inquiry Concerning a Judge (Leon), 440 So. 2d 1267 (Fla. 1983)

(removal warranted *inter alia* for making false statements to the JQC); In re Berkowitz, 522 So. 2d at 843 (removal warranted where judge's deception of JQC reflected that he was "basically dishonest"); In re Johnson, 692 So. 2d 168 (Fla. 1997) (committing fraud on department of motor vehicles). This is particularly true where dishonesty is accomplished for personal or professional gain. See In re LaMotte, 341 So. 2d at 513 (removal warranted for repeated use of state credit car for personal expenses, even in light of prior unblemished record).

Lawyers have been suspended or disbarred for the type of ethical violations at issue here. See The Florida Bar v. Williams, 604 So. 2d 447 (Fla. 1992); Florida Bar v. Vining, 1998 WL 544470 (Fla. 1998) (obtaining client's funds by deception and thereafter lying to court about it warranted disbarment, but three year suspension would be affirmed "due to significant mitigation"); Florida Bar v. Hmielewski, 702 So. 2d 218 (Fla. 1997) (deliberate misrepresentations regarding location of client's medical records). Judges are held to an even higher standard than lawyers because in the nature of things, "even more rectitude and uprightness is expected of them." In re LaMotte, 341 So. 2d at 517.

The charges at issue here are the most serious offenses a lawyer/judge can commit.[27] Distilled to their essence they are the following. Judge Ford-Kaus:

(1) mishandled the McBee appeal while a practicing lawyer;

(2) hired another attorney to write the brief without her client's consent or proper disclosure;

(3) billed her client a substantially higher rate than what she paid a ghost-writer, without disclosure;

(4) sent false bills for services never performed;

(5) mishandled and failed to account for funds that should have been placed into trust;

(6) served the brief late, but backdated the certificate of service, to cover up her errors and to mislead both her opponent and the appellate court;

(7) lied to her client about multiple material matters to cover up her ineptitude in handling the appeal; and

(8) then lied to the JQC investigative panel, after her investiture as a Judge, in order to escape discipline.

This Court approves recommendations from the JQC that a judicial officer be removed when it concludes that the judge's conduct is "fundamentally inconsistent with the responsibilities of judicial office." Inquiry concerning a Judge (Graziano), 696 So. 2d 744, 746 (Fla. 1997). Recently in Inquiry concerning a Judge (Alley), 699 So. 2d 1369 (Fla. 1997), a candidate for judicial office made widespread public misrepresentations during her election campaign. This Court voiced its difficulty in "allow[ing] one guilty of such egregious conduct to retain the benefits of those violations and remain in office." Nevertheless, it felt constrained by a JQC recommendation of reprimand.

The facts at issue here are much more egregious. First, they

[27] This Court has consistently rules that pre-judicial conduct constitutes a basis for removal er discipline of a judge. See Inquiry concerning Davey, 645 So. 2d at 403 (and cases collected)

were committed for personal and pecuniary gain – the money Judge Ford-Kaus received from the client was very close to the amount she reported on her tax returns as her income for the entire year. (T. 526). Second, the Judge's last act as a practicing attorney was to lie to her client. Third, she not only lied herself, she pressured Linda Griffin to lie for her. Fourth, presented with multiple opportunities to examine her conduct, she refused. Fifth, she then lied to the JQC Investigative Panel investigating her conduct in order to avoid receiving discipline.

So too, neither In re Meyerson, 581 So. 2d 581 (Fla. 1991) nor In re Tyler, 480 So. 2d 645 (Fla. 1945) are on point. Both of those cases are simple neglect cases, without the additional elements of wilful deceit and intentional overbilling.

Judge Ford-Kaus has no basis to suggest that she "performed admirably on the bench." (Response p. 48). These events surfaced just three weeks after she was sworn in as a judge.[28] The Judge, moreover, persisted in her pattern of deceit by presiding over a case handled by her personal lawyer, without disclosure to the opposition. As to the impact of these acts, her character witness Judge Stephen Dakan testified on cross-examination as follows:

> Q. [I] think we can agree with the following propositions: First of all, it is never permissible for a lawyer to lie to a client, is it?
>
> A. I can't think of any situation where it would be, no, ma'am.
>
> Q. And it is never permissible to knowingly misstate or falsify a certificate of service?
>
> A. No, ma'am.
>
> Q. It is never permissible for a lawyer to charge a client for work that was not performed?
>
> A. No, ma'am.
>
> Q. It is also, as a sitting judge, improper to have a lawyer appearing in front of you who currently represents you without disclosing that fact to the other side, is it not?
>
> A. Is that improper? Yes, maa'm. (T. 570).

* * *

[28] The Davey case is therefore inapposite. Judge Davey was not charged until 9 years after evant events, and that lengthy rehabilitative period established his present fitness as a jud refore warranting less stringent discipline than removal.

Q. And all of these things, if committed – all of these acts, if committed diminish public confidence in the judiciary?

A. Yes, ma'am. (T. 572, emphasis added).

Since all of these facts were proven by clear and convincing evidence, and they are fundamentally inconsistent with the responsibilities of judicial office, it is respectfully submitted that the JQC recommendation of removal was entirely proper and should be approved.

III. IF MODIFICATION OF PENALTY IS CONSIDERED, THE CAUSE SHOULD FIRST BE REMANDED FOR THE JQC TO CONSIDER NEWLY DISCOVERED EVIDENCE.

JQC Rule 18 permits the Hearing Panel to order a hearing for the taking additional evidence at any time while a matter is pending before it. This disciplinary hearing concluded on March 4, 1998. Within one week after the hearing concluded, a material witness came forward for the very first time to reveal that Ms. Ford-Kaus handling of client McBee's case was anything <u>but</u> an isolated instance, as portrayed.

A former legal assistant of the judge, now residing in Colorado, came forward after the close of the hearing asserting her personal knowledge that <u>McBee</u> was <u>not</u> an isolated case and that:

> [I] was frequently asked by Ford-Kaus to misrepresent the status of material aspects of her client cases. For example, Ford-Kaus failed to complete specific tasks relating to these agreements within the agreed time frames, resulting in frequent client complaints. My task was to make excuses to cover for her failure to meet deadlines, return client phone calls, or otherwise inform clients of the status of their case.
>
> Beginning in the Spring of 1995 and continuing through my resignation I received many client complaints which included threats to file grievances with the Florida Bar due to her mishandling of cases. My duties increasingly included responding to pejorative letters and phone calls Ford-Kaus received from clients. In some cases, clients demanded a refund of their retainers and Ford-Kaus refused. In one particular case, Ford-Kaus received a retainer in which services were not provided and Ford-Kaus only returned a portion of the clients retainer. She also let it be known that only cases with large retainers received attention. (App. "D").

Special counsel moved to submit this additional newly-discovered evidence to the panel. The defense objected, observing that the "admission into evidence or the review of the affidavit by the Commission will require the reopening of this case for additional evidence and additional arguments by counsel." The recommendation of removal rendered the motion moot, and it was accordingly denied.

In the absence of legal or factual error or newly discovered evidence, the parties have a right to presume that the proceedings are concluded when they rest. See St. Petersburg Housing Authority v. J.R. Development, 1998 WL 80476 (Fla. 2d DCA 1998). Here, newly discovered evidence came to light almost immediately, and a motion to submit it to the Hearing Panel was filed promptly. The recommendation of removal mooted its consideration and thus it was not presented to the Commission.

In sum, should this Court conclude that any "modification" to the proposed disciplinary action should be considered, it is respectfully submitted that the cause should first be remanded to the Commission for the consideration of the newly discovered evidence.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the JQC Findings and Conclusions should be approved in their entirety. Alternatively, before any modification of the discipline recommended, it is respectfully submitted that the cause should

first be remanded for the submission of the proffered newly discovered evidence.

Respectfully submitted,

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