OA 10-6.98

IN THE SUPREME COURT OF FLORIDA

AN INQUIRY CONCERNING
JUDGE DEBORAH FORD-KAUS,
NO. 97-74
_____/

CASE NO. 91,232

RESPONSE TO ORDER TO SHOW CAUSE

Respondent, **Judge Deborah Ford-Kaus**, by counsel, pursuant to this Court's Order to Show Cause issued June 3, 1998, responds to the Florida Judicial Qualifications Commission's Findings, Conclusions and Recommendations of Removal, and says:

Introduction

The JQC recommends this Court remove Judge Ford-Kaus as a circuit judge. This Court should reject that recommendation for three reasons. First, the charges admitted by Judge Ford-Kaus do not require removal to preserve public confidence in the integrity of the judiciary. Second, the JQC failed to prove the charges she did not admit by clear and convincing evidence but instead engaged in speculation and impermissible stacking of inferences. Finally, the Florida Constitution authorizes this Court to modify the findings, conclusions, and recommendations of the JQC and to determine more appropriate discipline.

Preliminary Statement

The Florida Judicial Qualifications Commission shall be referred to as the Commission or the JQC throughout this Response. Respondent, Judge Deborah Ford-Kaus, shall be referred to as Judge Ford-Kaus or, for the times prior to her judgeship, Attorney Ford-Kaus of Judge-elect Ford-Kaus. References to the six-volume

transcript of the Hearing Panel held March 2, 3, and 4, 1998, are referred to by (T) followed by page and line number references. References to the JQC's exhibits are referred to by (JQC) followed by an exhibit number. References to exhibits offered by Judge Ford-Kaus are referred to by (DFK) followed by an exhibit number. References to the JQC's Findings, Conclusions and Recommendations of Removal are referred to as (Findings) followed by a page number.

Statement of the Case

On June 18, 1997, the Investigative Panel of the JQC served a copy of its Notice of Investigation on Judge Ford-Kaus by U.S. Mail. On July 25, 1997, the panel conducted a hearing pursuant to JQC Rule 6(b). On August 19, 1997, the panel served its Notice of Formal Proceedings against Judge Ford-Kaus making allegations in eleven paragraphs and charging her with violating seventeen Rules of Professional Conduct and two judicial canons.

On October 30, 1997, the panel served an Amended Notice of Investigation on Judge Ford-Kaus. The panel conducted another 6(b) hearing on the Amended Notice on November 20, 1997.

On November 21, 1997, the panel served an Amended Notice of Formal Proceedings on Judge Ford-Kaus, adding four paragraphs of allegations and charging her with violating a previously unmentioned judicial canon. Judge Ford-Kaus served her Answer and Defenses to Amended Notice on December 10, 1997.

Also on December 10, 1997, the panel served a Second Amended Notice of Formal Proceedings on Judge Ford-Kaus, correcting a nonmaterial typographical error in the Amended Notice of Formal Proceedings. Judge Ford-Kaus Filed her Answer and Defenses to this Second Amended Notice on February 26, 1998.

At the beginning of the hearing before the Hearing Panel on March 2, 1998, the Special Counsel to the JQC withdrew the allegation contained in the second sentence of Paragraph 10 of the Second Amended Notice. (T 10:18 - 11:15).

The Hearing Panel of the JQC held a final hearing on March 2-4, 1998. On May 22, 1998, the JQC issued its Findings and recommended this Court remove Judge Ford-Kaus from office.

On June 3, 1998, this Court issued an Order to Show Cause requiring Judge Ford-Kaus to show cause why the recommended action should not be granted. This Response is timely filed.

Statement of the Facts

This Court admitted Deborah Ford-Kaus to The Florida Bar in 1986. (T 361:12-16). She was elected as a circuit judge of the Twelfth Judicial Circuit on November 5, 1996, garnering fifty-eight percent of the votes (approximately 140,000 votes) in a contested general election. (Findings at 12; T 358:18-22; 380:22 - 381:1). Judge Ford-Kaus assumed her judicial duties on January 6, 1997. (Findings at 12; T 358:18-22).

As a new judge, she was assigned a judicial mentor by the Judicial College. (T 565:23 - 566:1). Judge Stephen L. Dakan, a circuit judge in the Twelfth Judicial Circuit for 27 years, became her judicial mentor. (Id.; T 565:1-5). He testified Judge Ford-Kaus was both competent as a circuit judge and her performance on the bench gave him no reason to question her integrity or honesty as a sitting circuit court judge. (T 569:12-21).

Attorneys who practiced before Judge Ford-Kaus referred to her as "professional," "truthful," "courteous," "respectful," "fair," "conscientious," and "abundantly qualified to serve the public." (*See generally* DFK 9 - 12). These attorneys concluded that notwithstanding the matters that brought her before the JQC, Judge Ford-Kaus' continued service as a judge would maintain public confidence in and enhance the public's opinion of the judiciary. (*See generally* DFK 10 - 12).

Shortly before Thanksgiving Day 1997, Judge Ford-Kaus took a voluntary leave of absence with pay from the bench. (T 359:1-9). She has not served on the bench since that time. (T 358:23-25).

Deborah Ford-Kaus graduated law school in 1977. (Findings at 12). In addition to her membership in The Florida Bar, she is a member of state bar associations of Texas, Massachusetts, and New York. (Id.) Before joining The Florida Bar in 1986, Attorney Ford-Kaus worked as an administrator with the New York State Bar Association and as an investigative consumer legal reporter in

Corpus Christi, Texas. (T 363:7-18; 364:4-6).

In 1986, Attorney Ford-Kaus became an Assistant State Attorney in the Twelfth Judicial Circuit of Florida. (T 364:16-18). In 1987 she went into private practice, eventually opening her own firm in 1993. (T 364:25 - 366:10). Her original private practice involved general civil litigation, including family law, with some criminal and dependency cases. (T 365:14-17; 366:2-4). By the end of the second year of practice in her own firm, eighty percent of her cases involved family law. (T 366:22-25).

As a member of four bar associations, Attorney Ford-Kaus never had discipline actions taken against her. (T 474:11-17). The JQC produced no evidence to the contrary.

In August 1994, Attorney Linda Griffin joined Attorney Ford-Kaus' practice, forming a partnership of professional associations. (Findings at 12; T 70:22, 23). The law firm's name was "Griffin Ford-Kaus." (DFK 3).

Griffin supported and campaigned for Attorney Ford-Kaus. (T 108:20-24). She spoke at Judge Ford-Kaus' investiture and "canonized [Ford-Kaus] for sainthood in her speech." (T 108:25 - 109:2; 434:18, 19).

The fifteen Formal Charges against Judge Ford-Kaus involved the preparation and filing of an appellate brief shortly before she ascended to the bench; her bills and trust accounting for that brief; her communications and representations to that client; the timeliness of her withdrawal from that case and her withdrawals and

disclosures regarding other cases when she became a judge; and her testimony at her initial 6(b) hearing.

The McBee Appeal

Accepting the Case

In June 1996, Attorney Ford-Kaus signed a retainer agreement with Piche Patricia McBee to handle a family law appeal for her. (Findings at 12; JQC 12). McBee was a bartender who had lost custody of her son. (T 220:3-5, 13-17). Attorney Ford-Kaus had limited appellate experience having previously been involved in only one appellate brief and oral argument. (T 370:5-22). Nonetheless, she believed she could competently represent McBee on appeal because she was very familiar with the substantive family law issues in dispute. (T 409:25 - 410:8). Moreover, she expected to be able to consult with other attorneys and her partner about proper appellate procedures. (T 410:9-17). Judge Ford-Kaus said she advised McBee that if her campaign for circuit court judge were successful, she would be prohibited by law from continuing to represent McBee. (T 404:23 - 405:5). McBee, on the other hand, said she and Attorney Ford-Kaus never discussed a judicial campaign. (T 225:16-21). Judge Ford-Kaus found McBee's statement untrue, not only because her office was filled with judicial campaign materials at the time of the initial meeting with McBee, but also because McBee, in addition to being a client, was a potential voter whose support she would have sought. (T 386:2 - 387:5; 404:23 - 405:9).

By contrast, the JQC alleged Attorney Ford-Kaus took the McBee appeal when she knew or should have known she did not and would not have adequate time to devote to it. (Second Amended Notice, ¶ 1). The JQC also alleged Attorney Ford-Kaus knew she was not qualified by experience and knowledge to handle the appeal. (Id.). The JQC ultimately concluded its allegations were proven by clear and convincing evidence. (Findings at 24).[1] The JQC concluded Attorney Ford-Kaus did not inform McBee of these "obvious limitations." (Second Amended Notice, ¶ 1; Findings at 24).

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[1] The "Facts and Conclusions--Specific Charges" contained in the JQC's Findings were alternately specific and vague. At some points, the JQC expressly mentioned an alleged fact and concluded it was proven by clear and convincing evidence. At other points, facts charged were not discussed at all. In still others, facts not charged were discussed in great detail, contrary to In re Davey, 645 So.2d 398, 406 (Fla. 1994) (lack of candor cannot be basis for removal unless formally charged so judge has notice and opportunity to be heard).

After the recitations described above, the JQC concluded, "All of *the above* factual findings are based upon the clear and convincing evidence as further supported by the factual admissions contained in the Answer and Defenses." (Findings at 22, 23) (emphasis supplied). Later, the JQC concluded, "[T]he evidence establishing Judge Ford-Kaus' guilt of *all the specific charges* . . . meets and exceeds" the clear and convincing standard. (Findings at 24) (emphasis added). Based on the latter statement, Judge Ford-Kaus presumes the JQC concluded each and every charged factual statement was proven by clear and convincing evidence.

This Court should require the JQC, however, to clearly and specifically state which facts were proven by clear and convincing evidence and, if all of them were proven in the JQC's opinion, not to include a variety of other facts that were not charged, are not legally relevant, and by their vagueness and irrelevance, do not enhance the public's confidence in the very judicial system the JQC is designed to protect.

Preparing the McBee Brief

Attorney Ford-Kaus began work on the appeal. Two weeks after being retained, she wrote McBee's trial counsel to try to secure a Final Judgment, because none had yet been entered. (JQC 3). She spoke to her client and prepared a Notice of Appeal. (JQC 4). As June turned to July, however, Attorney Ford-Kaus found herself increasingly caught up in her judicial campaign. (T 347:12-14). In retrospect, both Attorney Ford-Kaus and her husband, David, who served as her campaign manager, agreed they did not correctly anticipate the time, effort, and work that would be involved in her successful campaign. (T 376:15, 16; 377:7-21; 346:20-24).

She was involved in two contested races that summer and fall, a primary in September and a general election on November 5, 1996. (T 376:22 - 377:6). Trying to run a campaign and practice left her sleeping three or four hours a night for five months. (T 382:20-24). Her husband watched her become "increasingly more exhausted. Her sleeping habits were pretty bad. Her diet was terrible." (T 348:1, 2). Three days after the general election Attorney Ford-Kaus was diagnosed with pneumonia. (DFK 3; T 350:15, 16).

The stress of the campaign led Attorney Ford-Kaus to neglect the McBee appeal. (Answers and Defenses, ¶ 1). In August, she did some work, reviewing the file and the six-volume transcript from the three-day custody trial. (T 412:1-10). When she became aware she could not prepare the brief on time, she sought an extension of

time to file the initial brief from the Second District Court of Appeal. (JQC 4). She served the motion on September 23, 1997, and the court granted it on October 9, 1997, extending the due date to November 8, 1997. (Id.; T 413:11-15). Judge Ford-Kaus said McBee did not object to the extension of time. (T 413:4-10). McBee did not testify whether she did or did not, although she said she was in regular communication with John Hagerman, an employee at the Griffin Ford-Kaus law firm. (T 226:4,5, 25). Attorney Ford-Kaus mistakenly entered on her calendar that the brief was due on November 18, 1997, instead of November 8, 1997. (DFK 1 (cf. calendar entry for Nov. 18 with entry for Nov. 8)).

Realizing her time limitations, Attorney Ford-Kaus discussed her time management problem and the McBee brief with her partner, Linda Griffin. (T 427:19-25). Griffin suggested Ford-Kaus secure a law school friend, Wayne Olson, to help her. (T 427:23-25). In early October, Attorney Ford-Kaus hired Olson to research and draft the brief for her. (T 416:12-17). She sent him the file by Federal Express on October 4, 1996. (JQC 12).

Attorney Ford-Kaus' intent in securing Olson's services was disputed at the hearing. The JQC concluded Olson was hired "to write the brief." (Findings at 13). She testified, however, she intended for Olson only to draft the brief and for her to revise the draft before filing the brief. (T 416:12 - 417:2). She said, "My intention was that he was going to give me a lot to work with so that my time could be spent on adding substance and my style to

a brief . . . ." (T 427:12-14). She testified she "really liked the issue [McBee] had" and "wanted to write about it." (T 416:20, 21; 417:1, 2). Olson agreed with Judge Ford-Kaus, testifying he understood his task to be to "draft an appellate brief, with me doing the research necessary to draft that brief appropriately." (Olson deposition, 9:2-11).

Olson returned the draft, the file, and the brief on computer disc to Attorney Ford-Kaus on October 31, 1996, less than one week before the general election. (JQC 16).

After her successful election, Judge-elect Ford-Kaus, faced with pneumonia and exhaustion, attempted to work on the McBee appeal: "I did . . . surround myself beginning immediately after the election for approximately the next ten days with her materials, her briefs, her transcripts, the research. And I was struggling with trying to do something with this brief." (T 451:9-13). She struggled "with this case and my energy level" because she still planned to rewrite the Olson draft. (T 517:22, 25).

As Judge Ford-Kaus candidly and apologetically admitted, "Ultimately, I did not do anything productive." (T 451:14; 473:10-15). On November 18, 1997, she sent by Federal Express a copy of the signed brief to the Second District Court of Appeal for filing and a service copy to opposing counsel. (JQC 36; T 417:22 - 418:1). She had not changed the brief at all. (Answer and Defenses, ¶ 8).

Judge Ford-Kaus admitted she mishandled the McBee appeal. She admitted failing to represent McBee competently and diligently, and

failing to expedite litigation. (Answer and Defenses, ¶ 16). She acknowledged her responsibility, expressed her "sincere regrets," and apologized to McBee both in her public pleading and in her testimony at the hearing. (Id.; T 473:10-15; 474:18 - 475:16).

Filing and Serving the Brief

A crucial factual dispute involved the dating of the certificate of service on the brief. The following facts, however, were undisputed: (1) the brief was due November 8, 1997. (T 413:11-15); (2) the certificate of service had a typed month and year of "November" and "1997," but the date entry showed a "10" written over a handwritten "8." (T 515:4, 5); (3) the handwriting was Attorney Ford-Kaus'. (T 418:19-23; 419:13-18); (4) Attorney Ford-Kaus included with the brief a letter dated November 10, 1996, and addressed to the Clerk of Court for the Second District Court of Appeal. (JQC 18)[2]; (5) the brief was served by Federal Express on November 18, 1997. (JQC 36; T 417:22 - 418:1); (6) the brief was filed with the court November 19, 1997, having been sent by Federal Express the day before. (JQC 17); (7) Attorney Ford-Kaus did not serve the brief on the day she indicated on the certificate of

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[2] The JQC Findings concluded the letter "advised the clerk that the original brief was being forwarded *that date*." (Findings at 16) (emphasis supplied). The letter made no textual reference to any date. The entire body of the letter said, "Enclosed please find an original and three copies of the initial brief in the above encaptioned case, along with a computer disc containing the text of the brief." (JQC 18).

service. (T 420:4, 5); (8) Attorney Ford-Kaus was well aware Federal Express kept records regarding pick up and delivery of its packages. (T 420:18-24); and (9) Attorney Ford-Kaus was sufficiently proficient with computers to have printed out a new certificate of service page, had she wanted to. (T 421:3-7).

Judge Ford-Kaus did not specifically recall signing the brief. (T 515:12). She testified that, based on her practice in certifying service on pleadings for eleven years, she must have signed it on November 10 even though she did not serve the brief until November 18 because "I have never signed a document by a date that was not the date I'm signing it." (T 420:5, 6; 515:12-15). She could not explain the presence of the "8" under the "10." (T 543:20-25). She speculated, "I made a mistake about the date and went over it." (T 515:17, 18). An excerpt of the cross examination on this point by the JQC Special Prosecutor illustrates both the prosecutor's position--adopted by the JQC--and Judge Ford-Kaus' explanations:

> Q Judge, you're trying to convince us all of how you're ethical enough and you have integrity enough to stay on the bench.[3] So let's talk about the date you wrote on that brief, which was the 10th.
>
> A Yes, ma'am.

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[3] The Special Prosecutor, of course, misstated who had the burden of proof. Judge Ford-Kaus was not an applicant for admission to The Florida Bar with a burden of establishing character and fitness. See, e.g., Rule 1-16, Rules of the Supreme Court Relating to Admissions to The Bar. She was a constitutional officer, a circuit court judge accused of misbehavior by the JQC. The JQC had the burden of demonstrating her present unfitness by clear and convincing evidence. See, e.g., In re LaMotte, 341 So.2d 513, 516 (Fla. 1977).

Q Could you tell the panel what day of the week that was?

A I think a Sunday, isn't it?

Q It's a Sunday.

A Right.

Q And were you in your office on Sunday, November the 10th --

A No, but I was --

Q -- signing that brief?

A -- working at home. I was working at home.

Q And you certainly weren't in your office on November 10th typing that letter?

A No. I was at home typing that letter.

Q So the letter that went to the Court of Appeals, the brief that bears your signature with a date written over with a 10 on it, both dated the 10th, we agree those went out on the 18th. You're telling this Commission that's not backdating?

A That's correct.

Q And the reason why is because you would never personally formulate any intent to deceive anybody, even though you knew this brief was already eight days late?

A But why would I bother signing it on a date that it was also late? I signed it on the 10th.

Q Judge, did you think that the 10th was timely service because it was a weekend?

A No.[4]

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[4] The preceding question is not consistent with the Florida Rules of Civil Procedure. If November 10, 1997, was a Sunday, then November 8, 1997,--the due date of the brief--would have been a Friday. The brief would have been late by the close of business Friday afternoon. Weekends matter only if the due date falls on a

Q Well, you certainly didn't --

A I wouldn't have -- no, I wasn't -- I signed it the date I signed it. And at that time --

Q You signed it the date you signed it and you signed it the 10th?

A Yes.

Q Judge, you didn't even know the brief was due until the 18th.

A That's right.

Q Isn't that what --

A That's what I was trying to say in my direct testimony: that I was going through this mental process as I was struggling with this case and my energy level and how was I ever going to get it done because I still believed that I was going to try and rewrite that brief.

And at some point that day when I was working on the case, I said, "Heck with it. I'm not going to do this. Let's just send it the way it is."

Q So --

A And then I changed my mind. But by the time I sent the brief out, I neglected to change the certificate of service.

(T 515:24 - 518:8).

By its own conclusion, the JQC found the handwritten dates in the certificate of service to be "extremely confusing." (Findings at 15). The JQC concluded the certificate of service "shows the number '8th' to have been written over and the number '10th' or possibly '18th' superimposed. The numeral '10' is the most prominent and it is most likely that the '8th' was initially

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Saturday or Sunday, which it did not in this case. See Fla. R. Civ. P. 1.090(a).

written and then changed to the '10th.'" (Id.).

Over objection, the JQC heard testimony from a prosecution witness that the brief was backdated. (T 165:14 - 169:5). The witness, Jane Kreusler-Walsh, a board-certified appellate lawyer, reached her opinion based on her review of the certificate of service, the accompanying letter to the clerk, and transcripts of Judge Ford-Kaus' deposition and 6(b) testimony. (T 143:13; 166:6 - 167:24). The Special Prosecutor produced no evidence that Kreusler-Walsh was an expert in anything other than appellate advocacy. No evidence was presented that Kreusler-Walsh was a handwriting expert or possessed of some ability to reconstruct events beyond the ability of the members of the Hearing Panel.

Moreover, the chair of the Hearing Panel permitted Kreusler-Walsh to testify about other matters, despite the objection that the night before the formal hearing, the Special Prosecutor disclosed for the first time to Ford-Kaus' attorney that Kreusler-Walsh had actually represented Dale R. Sanders, a member sitting on the Hearing Panel. (T 7:7 - 9:8; 144:16 - 151:7).[5]

Based on the foregoing evidence, the JQC inferred that Attorney Ford-Kaus did not write the date of the certificate of service and the clerk's letter on November 10, 1996. (See Findings

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[5] Compare Findings at 22 (finding Judge Ford-Kaus' failed to disclose that an attorney who appeared before her at a hearing had represented her in a legal matter and concluding the conduct "would directly destroy public confidence in the integrity and impartiality of Judge Ford-Kaus.").

at 16). From that inference, the JQC concluded Attorney Ford-Kaus intentionally backdated the brief by "intentionally inserting a false certificate date . . . ." (See id.). From this second inference of intentional backdating, the JQC inferred that Attorney Ford-Kaus attempted "to mislead the Court and counsel." (Id.).

Judge Ford-Kaus denied writing either the certificate of service or the clerk's letter on any day other than November 10, 1996, denied backdating the brief, and denied intending to mislead anyone. (T 516:1-18; 517:13-15; 519:7-10; 419:24 - 420:1).

The McBee Bills and Trust Accounting

Having admittedly failed to represent McBee competently and diligently, it followed that Attorney Ford-Kaus charged McBee a clearly excessive fee. (See Answer and Defenses, ¶ 2). Moreover, Judge Ford-Kaus admitted over billing McBee by sending her statements listing work not actually performed and accepting payments from those statements. (JQC 9, 25, 53; T 451:21, 22; 452:1-21). According to McBee, she paid a total of $9,376.00, of which $2,200.00 or $2,300.00 was for costs of transcripts. (JQC 24). Attorney Ford-Kaus also paid Olson $1,028.00 for his work, meaning the fees to her for the McBee appeal were slightly more than $6,000.00. (JQC 16). After McBee sued Judge Ford-Kaus in March 1997 for breach of the retainer contract, Ford-Kaus paid her $20,000 as a settlement, which McBee accepted in August 1997. (JQC 56; T 454:15 - 455:6).

McBee's retainer to Attorney Ford-Kaus was $6,000 and nonrefundable pursuant to the retainer agreement. (Second Amended Notice, ¶ 2; Answer and Defenses, ¶ 2; JQC 1). Attorney Ford-Kaus considered those fees already earned by virtue of the nonrefundable retainer agreement, and deposited them directly into her personal account. (T 406:18 - 407:9). As the billing on the McBee account progressed, however, McBee paid additional sums and these sums were improperly not placed into trust, but put into Attorney Ford-Kaus' operating account. (Second Amended Notice, ¶ 3; Answer and Defenses, ¶ 3; Findings at 20).

While admitting responsibility for over billing, Judge Ford-Kaus denied the JQC charge of conversion because she never intended to deprive McBee of her money without providing services. (Second Amended Notice, ¶ 3; Answer and Defenses, ¶ 3). The JQC did not make a specific finding of conversion, and it did not produce evidence to establish the required elements of conversion.

Communications and Representations to McBee

As an attorney and as a judge-elect, Judge Ford-Kaus was untruthful to McBee, not to the degree the JQC would have this Court believe, but she was untruthful nonetheless.

The crucial time came during a meeting in Linda Griffin's office on January 3, 1997. (T 76:1-12). McBee and Judge-elect Ford-Kaus were present, as were two witnesses McBee brought and Ford-Kaus' partner, Linda Griffin. (T 235:3-6). McBee had learned from

John Hagerman, the employee at Griffin Ford-Kaus, that her brief might have been filed late. (T 233:23-25). McBee did not know that two motions had been filed against her appeal. (T 238:1, 2).

The motions--a Motion to Dismiss Appeal and Motion to Strike Initial Brief of Appellant--were filed December 2, 1996, by opposing appellate counsel, Clifton Curry. (JQC 20, 21). Although the certificate of service on each motion indicates service on December 2, 1996, by U.S. Mail to Judge-elect Ford-Kaus, she testified she did not receive them. (T 422:20 - 423:2). So on December 12, 1997, she called Curry's office to determine whether he was filing an Answer brief. (T 421:16 - 422:10; 423:3-6). She was told he had filed a Motion to Dismiss--but she was not told he filed a Motion to Strike the brief. (T 422:2-17). Judge-elect Ford-Kaus asked for a copy of the Motion to Dismiss, and it was faxed to her. (T 423:5-10). The Motion to Strike was not sent. (T 423:7-9). Thus, when Judge-elect Ford-Kaus met with McBee on January 3, 1997, she had no idea a Motion to Strike had been filed. (T 493:16, 17). Moreover, she did not think there was any likelihood the Motion to Dismiss would be granted. (T 424:16 425:4). The JQC even acknowledged, "Generally, the District Courts do not dismiss cases for such minor infractions[]" as being ten days late with an initial brief. (Findings at 14). Accordingly, at the January 3, 1997, meeting Judge-elect Ford-Kaus thought the brief was safe from collateral attack and not in jeopardy. (T 431:2, 3).

Quite wrongly, Judge-elect Ford-Kaus chose not to tell McBee about the pending Motion to Dismiss. (T 430:18-25). She was concerned McBee would overreact to the late-filed brief that Ford-Kaus believed would not be a problem. (T 431:6-11). So, when McBee asked if there were any problem with the brief, Judge-elect Ford-Kaus--not being aware of the Motion to Strike--told her "the brief was fine." (T 430:20; 235:22; 77:5, 6).

Judge Ford-Kaus admitted she erred by trying to reassure McBee without informing her of the pending Motion to Dismiss. (T 430:18-25). She testified the representation was not honest, "was wrong," and "it was unforgivable to lie to a client." (T 430:23-25).

She also admitted misrepresenting to McBee at that same meeting the role of Wayne Olson. (T 494:10-21). Although she did not recall the specifics, she agreed she "said the wrong thing" and did not fully disclose that Olson wrote the brief. (T 495:1-3).

Judge Ford-Kaus disagreed with McBee and Griffin about two other alleged misrepresentations at that meeting. McBee and Griffin said Ford-Kaus said the brief was timely filed and a clerk at the court who said it was late was simply wrong. (T 235:14 - 236:9; T 77:7-13).[6] Judge Ford-Kaus testified McBee did not ask her

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[6] McBee and Griffin met on January 17, 1997, apparently collaborated on their version of events, and produced a document alleging Ford-Kaus was not truthful when asked directly whether the brief was filed on time. (JQC 27). There was no mention of the alleged conversation about the court clerk in that document. (See id.). The document appeared to have been drafted by Griffin, based on references to "the client." (See id.). Griffin was motivated in part by her fear of "being caught in the middle" and eventually

who wrote the brief. (T 494:22-24).

No matter whose memory is accurate, Judge Ford-Kaus admitted making false statements to her former client. (Answer and Responses, ¶ 10).

Ultimately, the brief was ordered stricken by the Second District Court of Appeal with leave to amend in twenty days. (JQC 37). Through various extensions filed by both parties to the McBee appeal[7], the matter has been fully briefed and remained pending before the Second District Court of Appeal as of the March 1998 hearing. (T 252:11 - 254:2; Findings at 14).

Timely Withdrawal from the McBee Case

Judge-elect Ford-Kaus notified McBee by letter of December 12, 1996, that she had been elected to the circuit court. (JQC 26). In that letter, she indicated she would take office January 2, 1997, and "state law prohibits me from continuing with the practice of law after I take office."[8] (Id.). She said "we will have to find

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consulted her malpractice insurance carrier about a proper handling of the matter. (T 81:22, 23; 118:14-24). She and Judge Ford-Kaus had a dispute about the breaking up of their partnership, and Griffin ultimately changed the locks at the office, refused to return Judge Ford-Kaus' telephone calls to finalize partnership issues, and became a co-defendant with Judge Ford-Kaus in a lawsuit by their former landlord. (T 89:21 - 90:2; JQC 32; T 97:20 - 100:14; 113:1-5).

[7] McBee secured new appellate counsel in February 1997. (T 252:14-19).

[8] Judge Ford-Kaus ultimately took office January 6, 1997. (Findings at 12; T 358:18-22).

new counsel for you" and "I would like you to consider having my partner, Linda Griffin, assume your representation . . . ." (Id.).

As Judge-elect Ford-Kaus phased out her law practice, Griffin took over at least half a dozen of Ford-Kaus' cases. (T 434:2-8). Griffin claimed she told Ford-Kaus immediately after the January 3, 1997, meeting she would not represent McBee. (T 116:25 - 117:2, 12-14). Griffin did not, however, make that statement on January 3 to McBee, and Judge Ford-Kaus said Griffin never said that statement to her. (T 117:8, 9; 433:24 - 434:1). Indeed, McBee left that meeting thinking "if Deborah wasn't [my attorney], then, yes, Linda would probably be my attorney." (T 256:8-10). McBee understood within a day or two after that January 3, 1997, meeting that Judge Ford-Kaus no longer represented her:

> Q [by Commissioner Heffner] At what point did you finally realize that Judge Deborah Ford-Kaus was not going to be your attorney?
>
> THE WITNESS: Probably the next day or two, when I called back or Linda called me. And that's when I was probably saying, "Well, what about Deborah?"
>
> And she says, "She's out of the office. She can no longer help you. So you either have to hire me or hire another attorney."
>
> So it was probably a couple of days after that.
>
> . . . .
>
> MS. HEFFNER: At what point did you realize that Ms. Griffin was not going to represent you?
>
> THE WITNESS: I think it was a meeting that I had with her -- the second and only meeting that I had with her when I went back to the office.
>
> MS. HEFFNER: Is this the meeting where you prepared the memo to Judge Ford-Kaus?

THE WITNESS: Yes.

MS. HEFFNER: So it was at that point then that you realized that Ms. Griffin was not going to represent you?

THE WITNESS: Right.

(T 256:17 - 257:1).

Judge Ford-Kaus was aware that between January 3 and January 17 Griffin "was working with the client." (T 433:15-24). During this time, Judge Ford-Kaus did not file a Motion to Withdraw from the McBee representation because she presumed Griffin would either file an appearance or substitute in as counsel. (T 435:11-14). By January 28, 1997, realizing Griffin was "going to leave me out on a limb without the ability now to find substitute counsel and do anything on my own[,]" Judge Ford-Kaus, through counsel, filed a Motion for Leave to Withdraw and for Extension of Time in the McBee appeal. (JQC 34). She filed that motion as soon as she realized Griffin was not going to represent McBee. (T 436:4-12). The Second District Court of Appeal granted the withdrawal on January 30, 1997. (See Second Amended Notice, ¶ 11, and Findings at 24).

Based on the foregoing evidence, the JQC concluded by clear and convincing evidence that Judge Ford-Kaus violated Rule 4-1.16(d), Rules Regulating The Florida Bar, regarding protecting a client's interests upon termination of representation. (See Second Amended Notice at 7 and Findings at 24).

Timely Recusals: Debra Salisbury

The JQC accused Judge Ford-Kaus of failing to timely recuse herself from certain cases. (Second Amended Notice, ¶¶ 14, 15). Both charges involved the litigation in which Judge Ford-Kaus and Griffin were sued by their former landlord. (T 264:21 - 265:1). Judge Ford-Kaus was represented briefly in the lawsuit by Debra Salisbury, and later by Kate Busch-Halverson. (T 264:19, 20; 307:8-17).

In December 1996, after Attorney Ford-Kaus had won the election, she and Salisbury talked about Ford-Kaus recusing herself from Salisbury's cases. (T 297:18 - 298:3). Salisbury had family law cases being assigned to Judge-elect Ford-Kaus for hearing in January, even though Ford-Kaus had not yet been sworn in. (T 298:17 - 299:1). In December, of course, Judge-elect Ford-Kaus had no authority to sign any orders of recusal, because she had not yet ascended to the bench. (T 299:2-4). Salisbury was aware of that limitation. (Id.).

On December 12, 1996, Salisbury sent a letter to Chief Judge Andrew Owens by facsimile. (JQC 63). She asked his advice on how to proceed "in avoiding any unnecessary delays and numerous motions to disqualify the judge [Ford-Kaus]" and how to "re-route" her cases to other judges. (Id.). Judge Owens did not respond to the letter and, Salisbury said, "I didn't really know what to think of that . . ." (T 267 16-18).

On December 20, 1996, Salisbury left a telephone message for Judge-elect Ford-Kaus saying she was going to withdraw as the Judge-elect's attorney. (T 268:22 - 269:3). Judge Ford-Kaus explained the message this way: "She left a very agitated . . . a very snitty [message] about how this is causing her a lot of problems and she just can't deal with it anymore and she was out of here." (T 456:21 - 457:1). Judge-elect Ford-Kaus "was just astounded" because "I would never fire a client, let alone a friend, in that kind of manner . . . ." (T 457:5-7). Accordingly, Judge-elect Ford-Kaus left what she considered to be both a private and privileged message on her attorney's answering machine angrily telling Salisbury she was disappointed and hurt. (T 458:1-25; JQC 58; 271:10-21).

After still not hearing a response from Chief Judge Owens, Salisbury began filing individual motions to recuse Judge-elect Ford-Kaus. (T 274:16 - 275:2). She attached to each motion a copy of a transcription she prepared of Judge-elect Ford-Kaus' angry telephone message to her. (T 275:5-8). Judge Dakan signed the first few motions soon after submission, while Judge Ford-Kaus was attending classes for new judges. (T 276:2-4).

Salisbury filed more individual motions in January and February. (T 276:7-9). Then on February 3, 1997, she sent Judge Ford-Kaus a letter asking for an omnibus recusal order. (T 276:12-14). Salisbury was unaware, however, of a local administrative order prohibiting blanket recusals. (T 286:4-9). Between that time

and the time Judge Ford-Kaus eventually recused herself from Salisbury's cases, there was substantial confusion about the proper method of seeking recusal, with Salisbury wanting a blanket recusal and Judge Ford-Kaus insisting the motions be properly filed in accordance with the local rule. (See, e.g., T 277:4 - 281:8; 301:8-16; 302:17 - 303:25; 464:12 - 468:12). Judge Owens eventually responded to Salisbury in February 1997, but his letter was, by Salisbury's testimony, open to different interpretations regarding whether a motion should be filed or a form. (T 287:22 - 288:3). In early March, Salisbury contacted Judge Ford-Kaus' Judicial Assistant regarding pending recusal motions and was told the judge was simply waiting for them "to be done right." (JQC 65).

Although Salisbury's testimony was unclear, under questioning by Commissioner Nachwalter she admitted Judge Ford-Kaus promptly recused herself from properly filed motions. (T 300:25 - 301:16).

Judge Ford-Kaus denied delaying in recusing herself from Salisbury's cases and denied the JQC's charge that she impeded the prosecution of Salisbury's cases. (Answer and Defenses, ¶ 14).

Based on the foregoing, the JQC concluded clear and convincing evidence established Judge Ford-Kaus delayed from recusing herself from Salisbury's cases, thereby impeding their prosecution. (Second Amended Notice, ¶ 14; Findings at 24).

Conflict Disclosure: Kate Busch-Halverson

Salisbury's withdrawal left Judge Ford-Kaus without counsel in the civil litigation until late-July 1997, when another local

attorney, Kate Busch-Halverson, agreed to discuss settlement terms with opposing counsel. (T 459:6-10). The case settled in October 1997. (T 208:3-10; 209:20-24). Even though she was involved in passing settlement offers back and forth, Halverson did not consider herself to be Judge Ford-Kaus' attorney. (T 321:14-18). Halverson was, however, providing legal services to Judge Ford-Kaus, albeit informally. (T 460:3-8).

On September 10, 1997, Halverson appeared before Judge Ford-Kaus at a ten-minute status conference in a family law matter. (T 309:21-23). Neither Judge Ford-Kaus nor Halverson disclosed the representation to opposing counsel. (T 459:22 - 460:2; 310:8-11). Judge Ford-Kaus testified, candidly, she "didn't think of it." (T 460:14). She explained the history of the case involved very complicated and delicate issues involving domestic violence, and she monitored the case monthly. (T 460:15 - 461:17). She testified, "So I was very focused on how are we doing on this case. I hadn't spoken to Kate probably for six weeks. And it just -- you know, it was one of 30 cases I heard that day, and I just simply didn't think about it." (T 461:18-22).

Judge Ford-Kaus admitted she was wrong not to disclose the relationship with Halverson to the other attorney, Emma Joels. (T 462:7). She was "very apologetic" to Joels for the oversight. (T 461:25). She maintained, however, there was no prejudice either to Joels or her client by virtue of the nondisclosure, because there was no controversy pending and the brief status conference was

merely for monitoring the case. (T 462:7-25). Joels, however, who had become Linda Griffin's new law partner, testified she thought Judge Ford-Kaus was "particularly harsh to my client[,]" although she provided no explanation or examples to support her impression. (T 211:10-12; 215:17, 18).

That ten-minute status conference was the only time Halverson appeared before Judge Ford-Kaus during the time Halverson was providing legal services to the judge. (T 463:1-6).

Based on the foregoing evidence, the JQC concluded Judge Ford-Kaus "continued to preside over Ms. Halversen's *cases*, without disclosing the fact of such representation to her opposition." (Second Amended Notice, ¶ 15; Findings at 24) (emphasis added).

Truthfulness at the 6(b) Hearing

The JQC accused Judge Ford-Kaus of three specific instances of being untruthful before the Investigative Panel during her testimony on July 25, 1997:

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

B. You testified that a secretary prepared the bills containing these 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 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. (P. 27; 63)[.]

(Second Amended Notice, ¶ 12) (emphasis in original).[9]

Judge Ford-Kaus admitted making the statements as alleged, but denied she was untruthful. (Answer and Defenses, ¶ 12). Specifically, she said she "at no time failed to tell the truth because her testimony was based upon her best recollection and understanding." (Id.).

"Looking at the Files"

Judge Ford-Kaus testified at the 6(b) hearing she spent time on November 6, 7, and 8, 1996, "looking at the files" in the McBee appeal. (Answer and Defenses, ¶ 12). At the formal hearing, she said she surrounded herself immediately after the election with the McBee file and materials, wanting to be productive on the brief, but failing. (T 451:9-14). The JQC did not establish where then-

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[9] The transcript of Judge Ford-Kaus' testimony at the 6(b) hearing was not introduced into evidence at the formal hearing. Some excerpts related to items "A," "B," and "C" above were read without objection, however. Nonetheless, the Hearing Panel was limited to the admitted statements and the excerpts that were read.

Accordingly, the Hearing Panel had no context for the admitted allegation in "A" that Judge Ford-Kaus testified she spent time in the three days following the election "looking at the files" in the McBee appeal. The relevant excerpt regarding "B" was read to the Hearing Panel, but there was no excerpt read regarding "C," no transcript introduced, and no direct quotations from that transcripts alleged. Thus, the Hearing Panel was left with the general statements alleged in "C" and Judge Ford-Kaus' admission to making those statements. It is impossible to find by clear and convincing evidence that someone was untruthful absent specific words to compare and contrast to subsequent testimony. See, e.g., In re Davey, 645 So.2d 398, 406 (Fla. 1994) (requiring "particularized findings on specific points in the record" to discipline a judge for untruthfulness).

Attorney Ford-Kaus did this work, although there was undisputed evidence she attempted to work on the McBee brief at home around the same time. (T 516:10-18). Griffin testified Ford-Kaus did not work in the office on the three days following the election but stopped by to pick up congratulatory messages and give regards. (T 88:7-21).

Although Attorney Ford-Kaus billed McBee for three eight-hour days on November 6-8, 1996, Judge Ford-Kaus admitted those time entries were inaccurate in her 6(b) testimony and her formal hearing testimony. (T 500:22 - 501:9; 451:6-8). Judge Ford-Kaus also testified at the formal hearing that she was diagnosed with pneumonia immediately after the election, that she "really was very near collapse[,]" that "it was very clear I wasn't functioning[,]" that she "couldn't concentrate on any particular task[,]" and that "as a practical matter, I was not productive for some time after the election day." (T 393:5-8, 12-15; 394:7, 8).

Based on this evidence, the JQC concluded clear and convincing evidence "showed that Judge Ford-Kaus did no work whatsoever" on November 6, 7, and 8, 1996. (Findings at 16). From this inference, the JQC inferred Judge Ford-Kaus' testimony at the 6(b) hearing that she spent time "looking at the files" was "calculated to mislead the Investigatory Panel."[10]

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[10] The actual Findings refer to subparagraph "A" of formal charge twelve as "concerning a secretary preparing the bills . . . ." (Findings at 12). The allegation involving a secretary and bills appeared at "12.B." in both the charging document and earlier in

"Who Prepared Your Bills?"

At the 6(b) hearing, the Commissioner Tate asked Judge Ford-Kaus, "Who prepared your bills?" (T 501:10). Judge Ford-Kaus answered, "A secretary." (T 501:11). Judge Ford-Kaus thought the question was a general one: "I heard, 'Who prepared your bills,' generally, not 'Who prepared this bill.'" (T 501:12-14).[11] The JQC concluded that testimony was either false or calculated to mislead the Investigatory Panel,[12] apparently because Commissioner Tate had been asking about events related to a November 15, 1996, bill to McBee before he asked the general question about billing. (See generally T 500:22 - 501:11).

Judge Ford-Kaus acknowledged that a few days before Election Day 1996, amid "pandemonium" and "chaos," her secretary, Merrily McFadden, had left. (T 388:17 - 390:11). McFadden had been Attorney

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the Findings. (Cf. Second Amended Notice, ¶ 12, and Findings at 8). Judge Ford-Kaus presumes the reference to "subparagraph (A)" in the Findings was a typographical error. She is disadvantaged by the uncertainty, however, because the Findings conclude her testimony as recounted in "subparagraph (A) . . . was false[]" while "[p]aragraphs (B) and (C) were situations where Judge Ford-Kaus phrased her answers in a manner calculated to mislead the Investigatory Panel." (Findings at 17). Thus, on the one hand, she has to defend a finding that "A" and "B" were "false," and on the other hand, a finding that "A" or "B" were "calculated to mislead."

Fortunately, the JQC's confusion is cleared by the record which demonstrates a lack of clear and convincing evidence to support either finding. Where a constitutional officer's career is at stake, however, the JQC should be exacting in its Findings. See also supra note 1.

[11] The question she "heard" was indeed the question asked.

[12] See discussion, supra note 10.

Ford-Kaus' legal assistant who also prepared Ford-Kaus' bills. (T 387:12 - 388:2). For a brief time after the election, Attorney Ford-Kaus did her own bills until she ascended to the bench. (T 391:7-23). Specifically, Attorney Ford-Kaus prepared the November 15, 1996, bill to McBee. (T 502:10-12).

Nonetheless, when asked the general question, "Who prepared your bills?" Judge Ford-Kaus did not think the she was being asked about the November 15, 1996, bill specifically. "I was asked who prepared my bills, and I thought he was going in a different direction."[13]

Based on the foregoing, the JQC concluded clear and convincing evidence showed Judge Ford-Kaus was intentionally untruthful at the 6(b) hearing.

The Pink Letter

The final accusation attacking Judge Ford-Kaus's truthfulness to the 6(b) panel involved a draft of a letter that was never sent to anyone. (JQC 28). Although no actual testimony was introduced or even read to the Hearing Panel, Judge Ford-Kaus admitted testifying at her 6(b) hearing that Griffin would not handle the McBee appeal because McBee was accusatory toward Griffin, blamed her for the

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[13] For example, he could have been laying the foundation for general office practices prior to asking specific questions about the November 15, 1996, bill. Additionally, it bears noting Judge Ford-Kaus was actually present at the 6(b) hearing when the question was asked, whereas the JQC Hearing Panel was merely listening to its Special Prosecutor's reading of the transcript.

brief being stricken, and threatened her with malpractice. (Answer and Defenses, ¶ 12). McBee did not testify regarding those issues. She did deny threatening Griffin with a Bar grievance and denied "going to the press about her." (T 242:12-17).

Griffin did not testify either about the issues raised in the JQC allegation. She said nothing about McBee being accusatory to her, blaming her for the brief being stricken, or threatening her with malpractice. Griffin did testify McBee was not "confrontational and adversarial" toward her, did not threaten to file a grievance against her, and never threatened to "go to the press" about Griffin. (T 87:4-17).

There was ample other testimony about the "pink letter," a draft written on pinkish paper. (T 85:17-23). Griffin testified it was inaccurate, and she would not sign it because she feared her signature "would put me right in the middle."[14] (T 87:18-21, 3). Judge Ford-Kaus testified the letter was just her venting frustration. (T 489:7 - 492:17).[15] It is undisputed the letter was

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[14] Regarding the contents of the draft letter, Griffin testified, "There's nothing in there [that is] accurate." (T 87:21). The draft included the statement, "A competent brief has been filed . . . ." (JQC 28). McBee testified, however, that Griffin had told her in October 1996 during a telephone conversation that Griffin said she had personally read the brief and it "looked good." (T 249:3-9).

[15] The testimony cited includes the Special Prosecutor reading without objection from Judge Ford-Kaus' deposition testimony. (T 489:16 - 491:9). Although provided here to explain and corroborate Judge Ford-Kaus' innocence of the charge of being untruthful, the Second Amended Notice accused her of being untruthful to the Investigative Panel, not in her deposition. (See

never sent to McBee or anyone else. (See, e.g., T 490:14-24).

Based on the foregoing, the JQC concluded clear and convincing evidence showed Judge Ford-Kaus was untruthful to the Investigative Panel when she testified Griffin would not handle the McBee appeal because McBee was accusatory toward Griffin, blamed her for the brief being stricken, and threatening Griffin with malpractice.

Argument

I. THE JQC ERRED BY FINDING IT PROVED ALL THE CHARGES BY CLEAR AND CONVINCING EVIDENCE.

A. Clear and Convincing Evidence is an Exacting Level of Proof, Requiring Precision, Firm Conviction, and No Hesitancy.

The degree of proof required to discipline a judge is "clear and convincing." In re LaMotte, 341 So.2d 513, 516 (Fla. 1977). This level of proof is intermediate, greater than "preponderance" but less than "beyond a reasonable doubt." In re Davey, 645 So.2d 398, 404 (Fla. 1994). It includes both qualitative and quantitative standards. Id.

Qualitatively, the evidence must be credible. Id. Witness memories must be clear, without confusion, and distinctly remembered. Id. Testimony must be precise and explicit. Id.

Quantitatively, "'The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.'" Id. (quoting Slomowitz v. Walker, 429

Second Amended Notice, ¶ 12).

So.2d 797, 800 (Fla. 4th DCA 1983)).

By contrast, evidence that is "indecisive, confused, and contradictory [is] a far cry from the level of proof required to establish a fact by clear and convincing evidence." Davey, 645 So.2d at 405. Moreover, clear and convincing evidence is not established "from the testimony of one witness unless such witness is corroborated to some extent either by facts or circumstances." In re Boyd, 308 So.2d 13, 21 (Fla. 1975).

Furthermore, clear and convincing evidence cannot be established through an impermissible stacking of inferences:

> [I]n a civil case, a fact may be established by circumstantial evidence as effectively and as conclusively as it may be proved by direct positive evidence. The limitation on the rule simply is that if a party to a civil action depends upon the inferences to be drawn from circumstantial evidence as proof of one fact, *it cannot construct a further inference upon the initial inference in order to establish a further fact unless it can be found that the original, basic inference was established to the exclusion of all other reasonable inferences.*

Nielsen v. City of Sarasota, 117 So.2d 731, 733 (Fla. 1960) (emphasis added). See also School Bd. of Broward County v. Beharrie, 695 So.2d 437 (Fla. 4th DCA 1997) (circumstantial evidence established a soccer coach yelled to his players to hurt an opposing player, and opposing player was hurt shortly thereafter, but impermissible to infer the offending player heard the coach and then infer he acted on the coach's instructions); Schaap v. Publix Supermarkets, Inc., 579 So.2d 831 (Fla. 1st DCA

1991) (improper inference stacking); Publix Super Markets, Inc. v. Schmidt, 509 So.2d 977 (Fla. 4th DCA 1987) (impermissible to build inferences on top of inferences to conclude negligence); and Food Fair Stores, Inc. v. Trusell, 131 So.2d 730 (Fla. 1961) (prohibiting "mental gymnastics of constructing one inference upon another inference" where the initial inference was not justified to the exclusion of all other reasonable inferences.)

B. The JQC Cannot Attempt to Punish Judges for Honestly Maintaining Their Innocence or Disagreeing with the JQC's Version of the Facts.

This Court has recognized the difficulty faced by judges under JQC scrutiny who are accused of being untruthful:

> Simply because a judge refuses to admit wrongdoing or express remorse before the Commission, . . . does not mean that the judge exhibited lack of candor. Every judge who believes himself or herself truly innocent of misconduct has a right--indeed, an obligation--to express that innocence to the Commission, for the Commission above all is interested in seeking the truth.

Davey, 645 So.2d at 405.

This analysis is similar to the Court's analysis in Florida Bd. of Bar Examiners re: G.J.G., 23 Fla. L. Weekly 262 (Fla. May 7, 1998). There, the Court admonished the Bar Examiners not to both accuse an applicant of a fact he or she denied, and then accuse him or her of lacking candor for maintaining the denial, concluding such action placed the applicant in an "ultimate catch-22[:] either admit wrongdoing and relieve the Board of its burden of proof, regardless of the truth of the allegation, or deny it and, if the Board finds the allegation true, have the Board also conclude he is

lying." Id. This Court concluded such a finding regarding untruthfulness "lacks independent significance because it is simply the direct result of the Board's findings . . . ." Id.

Indeed, in Davey, this Court set forth a three-prong analysis the JQC was supposed to use before finding lack of candor. First, lack of candor must be formally charged. 645 So.2d at 406. Second, the Commission must make "particularized findings on specific points in the record[.]" Id. Third, the lack of candor must be "knowing and willful" and "must concern a material issue in the case." Id. at 406, 407.

Accordingly, where an accused judge is simply performing her duty to express her innocence, the JQC cannot conclude she was untruthful because it disagreed with her expression of innocence. Moreover, absent compliance with the three-prong Davey test, JQC conclusions about untruthfulness cannot stand.

C. The JQC Did Not Prove Untruthfulness by Clear and Convincing Evidence.

The gravamen of the JQC's complaint against Judge Ford-Kaus is that she engaged in a pattern of dishonesty from the commencement of the McBee representation through her testimony before the Hearing Panel, and that the pattern demonstrated her present unfitness to serve on the bench. (See generally Findings at 12-23, 25).[16] Essentially, the JQC concluded Attorney Ford-Kaus backdated

[16] The JQC candidly admits it cannot use its findings on matters not charged as a basis for discipline. (Findings at 19 (citing Davey, 645 So.2d 398)). Accordingly, Judge Ford-Kaus will

the McBee brief, lied at the 6(b) hearing, and was untruthful to McBee regarding the status of the brief and her bills. Most of these conclusions are not supported by clear and convincing evidence, lack particularized findings, and lack an affirmative showing Judge Ford-Kaus knowingly made a false statement.[17] Thus, the JQC conclusions cannot stand as a basis for the recommended discipline.

1. *The JQC engaged in impermissible inference stacking to conclude Attorney Ford-Kaus backdated the brief and intended to mislead the court and opposing counsel.*

"Backdating" means "Predating a document or instrument prior to the date it was actually drawn." (Black's Law Dictionary 138 (6th ed. 1990)). Examples are when a judge directs a date entered on an order prior to the actual date of the order, or when an attorney participates in the execution of documents in December, but knowingly lets a date from the previous October be written intending to reap the advantage of the earlier date. See In re Johnson, 692 So.2d 168 (Fla. 1997), and The Florida Bar v. Adler, 505 So.2d 1334, 1335 (Fla. 1987). In other words, "backdating" means intentionally and falsely putting a prior date on a document to indicate to others that the document was prepared or served on

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not discuss extraneous "findings" regarding matters not charged.

[17] Judge Ford-Kaus admitted, and apologized repeatedly for, being untruthful to McBee regarding certain statements about the status of the brief and the improper bills. See supra pages 17-20.

the day of the prior date. "Backdating" does not mean sending documents but forgetting to change a previously written date.

Judge Ford-Kaus denied backdating the McBee brief and the letter to the Clerk of the Second District Court of Appeal. The JQC did not produce direct evidence to the contrary. It did not present witnesses who saw Attorney Ford-Kaus date the brief, nor did it present a time-stamped computer file showing the date on which the clerk's letter was written. To support its conclusion of backdating, the JQC relied on circumstantial evidence and the improperly admitted "expert" opinion of Kreusler-Walsh.

Even the circumstantial evidence, however, did not lead the JQC to a "firm conviction" of the inference of backdating. The JQC admitted the certificate of service itself was "extremely confusing." It made a "most likely" conclusion, not a finding "without hesitation" as is required. Accordingly, there was insufficient evidence to support the JQC's original, basic inference that Attorney Ford-Kaus on November 18, 1996, wrote "10" on the certificate of service line. There was also insufficient evidence to support the JQC's inference that Attorney Ford-Kaus sat at a computer on November 18, 1996, and wrote a letter to the clerk but dated it "November 10, 1998."

To the contrary, Judge Ford-Kaus provided a quite reasonable explanation of what happened: exhausted, exhilarated, and sick with pneumonia, she tried to add her touch to Olsen's draft of the McBee brief. For several days she tried. She gave up on the 10th, dating

the brief and writing the letter, but chose not to send them. She may have mistakenly thought the day was the 8th--hardly unusual given the undisputed pace she kept and her post-election mental and physical condition--and written an "8" first, only to overwrite it with a "10." After eight more days of good intentions but no productivity, she realized the brief was late and sent it out to the court and opposing counsel by Federal Express without changing the previously written date. This explanation was reasonable and plausible, but was discounted by the JQC merely because it did not match the Hearing Panel's version of the truth.

Accordingly, it was improper for the JQC to stack another inference on its original, shaky inference. The second inference was that Attorney Ford-Kaus intended to mislead the court and opposing counsel with the dates on the brief and the letter. The inference flows only from the conclusion that Attorney Ford-Kaus wrote the letter and the service date of the brief on November 18, 1996, rather than on November 10, 1996, as she testified. Given the shaky foundation, this second inference cannot stand.

Thus, the JQC did not demonstrate by clear and convincing evidence that Attorney Ford-Kaus backdated the brief with the intent to deceive the appellate court and opposing counsel.

2. *The JQC chair erred by allowing Kreusler-Walsh to opine the brief was backdated.*

Florida law allows opinion testimony in two instances. First, Section 90.701, Florida Statutes (1997), permits opinion testimony

from a lay witness when the witness cannot testify about a perception without including inferences, where the inferences are not misleading or prejudicial, and where the opinions and inferences do not require special knowledge, skill, experience, or training. Generally, acceptable lay opinion testimony involves matters such as distance, time, size, weight, form, and identity. Fino v. Nodine, 646 So.2d 746 (Fla. 4th DCA 1994). See also Charles W. Ehrhardt, Florida Evidence ¶ 701.1 (1997 ed.) (lay testimony that "the board was rough" is admissible). If a timely objection is made, a lay witness should not be allowed to give an opinion unless the opinion is based on personal knowledge of underlying facts. Id.

Second, Section 90.702 allows an expert to express an opinion if "scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue . . . ." As a prerequisite to that testimony, the statute requires the witness be qualified as an expert. Fla. Stat. § 90.702 (1997).

Kreusler-Walsh was never qualified as an expert, not even in appellate procedure. Judge Kaney, the Hearing Panel chair, said, "I never use the term 'expert,' nor do I ever qualify anybody as an expert. I simply permit certain folks to have -- to express opinions." (T 8:16-20). Counsel for Judge Ford-Kaus objected to Kreusler-Walsh testifying at all, based on her prior attorney-client relationship with a panel member, but specifically objected to her rendering an opinion about whether the McBee brief was

backdated. Even if she had been qualified as an expert in appellate procedure, that expertise gave her no specialized knowledge to decide, based solely on a review of transcripts and evidence, whether Attorney Ford-Kaus wrote "10" on the 18th or on the 10th of November 1996. Her opinion that the brief was backdated was clearly inappropriate and inadmissible. Accordingly, the objection should have been sustained. Her testimony on that point cannot be relied on as evidence of backdating.

Thus, because it impermissibly stacked inferences and allowed inadmissible testimony, the JQC erred by concluding Attorney Ford-Kaus backdated the McBee brief and intended to deceive the court and counsel.

3. *The JQC did not prove by clear and convincing evidence that Judge Ford-Kaus was untruthful at the 6(b) hearing and, again, impermissibly stacked inferences.*

12.A. "Looking at the Files"

The JQC did not produce any witness to rebut Judge Ford-Kaus' 6(b) testimony that she spent time in the three days after the general election "looking at the files" in the McBee appeal. Thus, it based its conclusion on the circumstantial evidence that Judge Ford-Kaus admitted the three eight-hour billings on November 6, 7, and 8, 1996, were inaccurate and on Griffin's testimony that Judge-elect Ford-Kaus did not work in the office on those three days.

Such evidence does not comply with the third prong of the Davey analysis. The evidence does not demonstrate that Judge Ford-

Kaus "made a false statement that . . . she did not believe to be true." Davey, 645 So.2d at 407. To the contrary, at the formal hearing Judge Ford-Kaus repeated her earlier assertion that she had kept the McBee appeal files close to her and tried repeatedly to work on them, only to be unproductive in the end. Thus, like Davey, "evidence presented before the Commission falls short of clear and convincing proof that [Ford-Kaus] *deliberately* testified untruthfully at any point." Id. at 407.

12.B. "Who Prepared Your Bills?"

This allegation is a classic Catch-22, as discussed in G.J.G. and implied in Davey. The JQC did not believe Judge Ford-Kaus' explanation that she thought she was being asked a general, office-policies-and-procedures question as opposed to a specific question about the November 15, 1996, bill. Either interpretation is a reasonable one, although Judge Ford-Kaus' is more exacting based on the plain language of the question.[18] Regardless, the evidence regarding this allegation falls far short of that required by Davey and the clear and convincing standard. Accordingly, it cannot serve as a basis for the recommended discipline.

12.C. The Pink Letter

The irony in this allegation of untruthfulness is that the

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[18] Any lawyer who ever examined a witness could easily understand Judge Ford-Kaus' explanation. Questions can frequently bounce from the general to the specific and back again several times regarding several different subject matters in an effort to test a witness's credibility.

document was essentially an intra office memo that did not go anywhere. McBee never saw it. Griffin never signed it. Ford-Kaus never sent it. Nor did she ever revise it. But for the JQC's zeal in prosecution, McBee would never have known of the draft letter.

The specific testimony at the 6(b) hearing on the letter was neither expressly charged nor presented at the formal hearing. Thus, the JQC failed to meet the first two prongs of Davey. Moreover, neither McBee nor Griffin testified about the allegations that were formally charged, although they disagreed with various statements made in the letter. (Cf. Second Amended Notice, ¶ 12.C. with JQC 28). This evidence, however, falls far short of that necessary to prove Judge Ford-Kaus intentionally deceived the 6(b) panel with her testimony.[19]

D. THE CHARGES TO WHICH JUDGE FORD-KAUS ADMITTED DO NOT REQUIRE HER REMOVAL FROM OFFICE.

The object of this Court's review of the JQC's Findings is not to punish, but to determine "whether one who exercises judicial power is unfit to hold a judgeship." In re Kelly, 238 So.2d 565 (Fla. 1970). This Court has the constitutional authority to "accept, reject, or modify in whole or in part the findings, conclusions, and recommendations of the commission and it may order

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[19] Furthermore, the third prong of the Davey analysis requires any allegedly untrue statements to be material. It can hardly be said that statements made in a letter that was never signed, sent, or received but that contained merely a lawyer's "venting" were material to a determination of Judge Ford-Kaus' present fitness to serve as a judge.

that the justice or judge be subjected to appropriate discipline . . . ." Fla. Const. art. V, § 12(c)(1) (1997). Among the types of discipline available to the Court are a public reprimand by written opinion, a public reprimand in person before the Court, a suspension with credit for the time a judge has been off the bench pending a final determination, a prospective suspension, or removal. The JQC has recommended removal. Judge Ford-Kaus asserts a lesser penalty is appropriate.

Removal is an "extreme discipline" that should not be used unless it is "free from doubt that [a judge or justice] committed serious and grievous wrongs of a clearly unredeeming nature." Boyd, 308 So.2d 13, 21. This Court's constitutional authority to remove a judge from office must be grounded in either "persistent failure to perform judicial duties or for other conduct unbecoming a member of the judiciary demonstrating a present unfitness to hold office . . . ." Fla. Const. art. V, § 12(c)(1).

For example, removal was warranted where a judge's actions in patronage for a friend constituted "the rank misuse of [the judge's] judicial office for her personal reasons . . . ." In re Graziano, 696 So.2d 744 (Fla. 1997). Backdating official court documents between forty-two and fifty-seven times, with full knowledge both of the wrongdoing and its effect on the system, struck "at the very heart of judicial integrity" and warranted removal. In re Johnson, 692 So.2d 168, 172, 173 (Shaw, J., dissenting on penalty, concluding a six-month suspension would have

been more appropriate). Where a judge's actions demonstrated that he or she was "basically dishonest" and possessed a "serious character flaw," removal was warranted. In re Berkowitz, 522 So.2d 843, 844 (Fla. 1988) (McDonald, C.J., dissenting on penalty, concluding a public reprimand was more appropriate).

Knowingly committing a crime of moral turpitude warranted removal. In re Garrett, 613 So.2d 463 (Fla. 1993) (judge staked out and stole an item from a department store, then ran when confronted in the parking lot by security). Theft from the state by consistent and repeated use of a state air travel card for personal reasons with no intent to repay was grounds for removal. In re LaMotte, 341 So.2d 513 (Fla. 1977). Repeated and egregious instances of bad temperament, coupled with a refusal to recognize transgressions, meant a judge was presently unfit to stay on the bench. In re Graham, 620 So.2d 1273 (Fla. 1993). Sexually harassing a judicial assistant, engaging in ex parte communications, and intentionally abusing certain advocates warranted removal. In re McAllister, 646 So.2d 173 (Fla. 1994).

In every case where this Court has removed a judge, the conduct was unforgivable. The conduct could not be redeemed. The conduct involved an abuse of power, something that cannot be tolerated by the judiciary lest the citizenry view judges as arbitrary tyrants. The conduct involved basic and unrepentant dishonesty over a long time period, something that cannot be tolerated lest the people wrongly conclude the system is one not of

laws, but of men and women, with different standards for the privileged than the masses. The conduct was premeditated theft, suggesting a deeper psychological need that remained unmet, causing privileged men to resort, at best, to bizarre behavior and, at worst, to succumb to greed.

The theme running through these cases of removal is the protection of society by maintaining confidence in the judiciary to, in short, do the right thing. The people must believe their judges will try to follow the law and do what is right. Judicial power rests largely on the recognition by the public and respect for judicial authority. While judicial authority is regularly challenged, in cases of appeal, or roundly criticized when unpopular decisions are rendered, recognition of and respect for that authority continues until a judge's behavior becomes unforgivable and their present fitness is destroyed.

The behavior becomes unforgivable when the issue is no longer the ruling, the case, or the controversy, but the judge. The behavior becomes unforgivable when citizens appearing before the offending judge would worry more about judicial behavior than judicial reasoning. The behavior becomes unforgivable when citizens no longer believe the "opportunity to be heard" aspect of due process has any meaning because a judge has become a habitual liar, a cheat, a crook, or a tyrant. When the public stops respecting judicial authority because of judicial behavior, then the strength of the judiciary is weakened, and with it, one of the pillars of

civilized society.

This Court is the gatekeeper of public confidence in the judiciary. Its task is akin to a high-wire act. If it leans too far one way and removes a judge who repented of his or her transgressions and whose conduct was forgivable, then it has unintentionally become what the people feared. By contrast, if this Court leans too far the other way and declines to remove a judge from office when his or her offenses can never be forgiven, then this Court has unintentionally suggested to the public that different rules apply for people in power, that we are a state of men and women, not laws. It is clear that for her transgressions, Deborah Ford-Kaus should be disciplined, but forgiven.

This Court has twice before faced lawyers who committed numerous ethical violations during the difficult transition period between closing down a law practice and ascending to the bench. In In re Meyerson, 581 So.2d 581 (Fla. 1991), the Court publicly reprimanded a judge who violated nine Disciplinary Rules as an attorney, including engaging in dishonest conduct, charging a clearly excessive fee, failing to represent a client properly, and mishandling client funds. Id. at 582. The court found, and the judge admitted, charging an excessive fee to "various *clients.*" (Id.) (emphasis added). In In re Tyler, 480 So.2d 645, 645 (Fla. 1985), the judge admitted violating "several disciplinary rules by neglecting her professional duties and by failing to inform her

clients of her election to the bench and her consequent inability to continue representing them." The Court issued a public reprimand.[20] Id. at 646. See also In re Byrd, 511 So.2d 958, 959 (Fla. 1987) (written public reprimand for violations of both the Code of Professional Responsibility and the Code of Judicial Conduct); In re Block, 496 So.2d 133, 134 (Fla. 1986) (public reprimand before the Court for violating eight Disciplinary Rules as an attorney).

Thus, violations of ethical rules governing attorneys--while serious and something all attorneys, candidates, and judges-elect must avoid--do not rise to the level of unforgivable conduct.

Judge Ford-Kaus should be forgiven. She has repented, apologized, and paid the *one* client she wronged, handsomely. She has been truthful with the JQC despite being in the Catch-22 implied in Davey and described in G.J.G. She performed admirably on the bench, with the one beginner oversight of not disclosing her

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[20] The JQC noted two mitigating circumstances in Tyler: she made restitution to her clients in instances "not reasonably the subject of dispute," and "the stress of her campaign for the office of county court judge." 480 So.2d at 645, 645 n.*. Although Judge Ford-Kaus may have lingered in denial of her wrongdoing to McBee longer than Judge Tyler by declining to refund McBee's legal fees, within a few months Judge Ford-Kaus authorized a settlement amount more than three times that sought by McBee originally. Moreover, the JQC, without stating its reasoning, concluded the stress and chaos of the campaign were not mitigating factors for Judge Ford-Kaus, although they were for Judge Tyler. In reality, although the stress of a campaign does not *excuse* inappropriate behavior nor *justify* it, it does *explain* why the behavior was an anomaly and worthy of forgiveness.

legal relationship with Halverson during an uncontested ten-minute status conference. She did nothing to impede Salisbury's cases, and promptly granted properly filed motions. She timely notified McBee her election meant she could no longer handle the appeal, and suggested alternate counsel. Both Judge Ford-Kaus and McBee thought Griffin was McBee's new attorney, only to learn later that Griffin--in an effort to protect herself at the expense of McBee--was refusing to represent McBee. Attorney Ford-Kaus failed to keep McBee informed regarding the status of the brief, overbilled her, and did a poor job on the appeal, but she has recognized her errors, confessed them, apologized for them, and provided McBee monetary compensation that was acceptable to McBee. She did not backdate the brief nor did she intentionally deceive the 6(b) panel.

In short, she badly mishandled one case for one client and one series of bills, and forgot to disclose a conflict at one uncontested hearing. These transgressions do not rise to the level of unforgivable, unredeeming conduct demonstrating present unfitness. Instead, they reflect an individual who deserves to be publicly reprimanded, perhaps even in front of the Court, or who at most should be suspended retroactive to the date she voluntarily stepped down from the bench. She should not, however, under these circumstances be removed from office. The JQC has simply failed to carry its burden to demonstrate her present unfitness.

Conclusion

For the foregoing reasons, Judge Ford-Kaus requests this Court reject the erroneous findings of fact referenced herein, reject the JQC's finding and recommendation that Judge Ford-Kaus is presently unfit to serve as a Circuit Judge, and issue a form of discipline more appropriate to her admitted but forgivable transgressions.

Respectfully submitted this 23rd day of June, 1998.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing has been filed with the Honorable Sid J. White, Clerk of the Supreme Court of Florida, 500 S. Duval Street, Tallahassee, Florida 32399, with a copy by Hand Delivery to: Brooke Kennerly, Executive Director, and Thomas R. McDonald, General Counsel, Florida Judicial Qualifications Commission, Room 102, The Historic Capitol, Tallahassee, Florida 32399; John Beranek, Counsel to the JQC Hearing Panel, Ausley & McMullen, 227 South Calhoun Street, Tallahassee, Florida 32301; and by U.S. Mail to: Lauri Waldman Ross, Special Prosecutor for JQC, Ross & Tilghman, P.A., Two Datran Center, Suite 1706, 9130 South Dadeland Blvd., Miami, Florida 33158; and Timothy W. Ross, Ross & Burger, P.A., Special Counsel for JQC, 2900 Southwest 28th Terrace, Miami, Florida 33133.

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