IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 92,913

INQUIRY CONCERNING A JUDGE

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RE: STEVEN P. SHEA

INITIAL BRIEF
OF
STEVEN P. SHEA

ON REVIEW OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS
OF THE JUDICIAL QUALIFICATIONS COMMISSION

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REFERENCE TABLE FOR ALL ABBREVIATIONS USED IN THIS BRIEF

The record in this proceeding contains sequentially-numbered pleadings, hearing transcripts, depositions, exhibits, and the ?Findings, Conclusions and Recommendations? of the Commission panel. These materials are referenced as shown below.

?R. __? references a pleading or other document as it appears in the Index to Pleading File prepared in the Commission proceeding, a copy of which has been filed with the Court in a ?Notice of Filing Commission?s Pleading Index?.

?T. __? references the transcript of hearing.

?[name] depo. at __? references a deposition transcript for the named individual.

?P. Ex. __? references an exhibit filed by the prosecutor.

?R. Ex. __? references an exhibit filed by respondent Shea.

?S.C. Summary? references ?Special Counsel?s Summary of Evidence Adduced on the Charges,? which was filed after the Panel proceeding.

?Code Canon __? references a Canon of the Code of Judicial Conduct.

?FC&R __? references the Panel?s filing with the Court.

For readability, a shorthand reference is provided for the names of the decisions of the Court rendered in disciplinary cases brought by the Judicial

Qualifications Commission in the form:

?*In re* [name of judge or case number]?.

CERTIFICATE OF TYPE SIZE AND STYLE

The type size and style used in this brief is ?CG Times,? 14 point.

STATEMENT OF THE CASE

Steven Shea was elected a circuit court judge of the Sixteenth Judicial Circuit (Monroe County) in November 1994. (FC&R 2). At all relevant times, Judge Shea was the only circuit court judge sitting in the Upper Keys at the Plantation Key Courthouse. (FC&R 2).[1] The other circuit court judges in the Circuit sat in Marathon (Middle Keys), which is 40 to 45 miles away from Plantation Key, and in Key West, which is 89 miles away. (T. 20-21).

Pursuant to Commission Rule 6(b), Judge Shea was notified on March 9, 1998, that he was being investigated by the Commission with respect to **55** complaints. (R. 6). He engaged counsel for his defense, and testified before the investigating panel.

On May 1, Judge Shea was served with a Notice of Formal Charges containing six non-specific ?prefatory charges? alleging that he had abused the power of his office by engaging in vindictive and retaliatory conduct, and **33** specific, alleged violations of the Code of Judicial Conduct (?the Code?). (R. 1). In his answer to the Notice, Judge Shea moved to dismiss all 33 charges. (R. 21). Judge Shea was subsequently served with an Amended Notice which added another **4** alleged specific violations to the original 33, bringing the total number of charges to **37**. (R. 39).

Simultaneously with its filing of the Notice, the Commission recommended to the Court that Judge Shea immediately be suspended from office. The Court ordered Judge Shea to file a response. A response was duly filed (R. 6), but his suspension was ordered one day later.

Prior to the trial on charges against Judge Shea before the hearing panel (?the Panel?), both parties engaged in extensive lawyering. As examples of the activity, Special Counsel to the Commission (?the prosecutor?) filed a motion seeking to

redress perceived problems with comments, motions and deposition scheduling by Judge Shea?s counsel (R. 101, 104), a motion for the appointment of a special master to monitor depositions (R. 9, 68, 79), motions to compel, and motions for sanctions. (R. 67, 141, 181, 194, 206). In defense of the charges, counsel for Judge Shea moved to have the hearing conducted in Plantation Key where Judge Shea resided and performed his judicial duties (R. 21, 48), moved to disqualify the Panel chairman, Judge Frank Kaney (R. 7, 25, 179), moved to dismiss the charges, and moved for summary judgment on all charges. (R. 131-39, 145-58, 211-24). Judge Shea?s motions to dismiss, for summary judgment, and to disqualify the Panel chairman were denied. (R. 11, 55a, 196).

A formal hearing on the charges against Judge Shea was conducted over a period of two weeks. (T. 5-2982). At the conclusion of the prosecution?s case, the prosecutor announced that she had ?presented no evidence? on **12** of the 37 charges against Judge Shea (T. 1163),
leaving **25** charges for the Panel to consider. One additional charge (Charge No. 19) was later abandoned by the prosecutor when she declined to address the charge in her written closing argument.

In due course, the Panel filed a 67-page set of Findings, Conclusions and Recommendations (?the FC&R?) which announced the Panel?s dismissal of another **6** charges for insufficient evidence.[1] The FC&R found Judge Shea guilty of **18** charges, and recommended that he be removed from office for alleged violations of Code Canons 1, 2, 3 and 5. The FC&R also asked for attorney?s fees

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[1] All **19** of the charges dropped by the prosecutor and dismissed by the Panel had been the subject of motions for dismissal and summary judgment.

and costs.

STATEMENT OF THE FACTS

I. Prefatory observations.

The FC&R is divided into sections which are numbered, have been given titles, and describe the factual and legal foundations alleged to support the Panel?s recommendations. Among the charges titled and discussed in the FC&R are several matters that were the subject of complaints against Judge Shea but never charged by the investigating panel, and several charges that were unproved and formally dismissed by the hearing panel. The FC&R acknowledges that the Panel was influenced in its decision-making by some of these uncharged and unproved matters. (*E.g.*, FC&R 27). Nonetheless, this brief does not identify facts or present argument as to these sundry charges, as they are not properly subject to consideration by the Court.

The titles given by the Panel in the FC&R contain rhetorical text inappropriate for a fair evaluation of the issues. This Statement omits this argumentative material, and instead identifies each charge by reference to its Panel-assigned number, a short-hand statement of its subject matter, and an identification of the pages in the FC&R where the particular charge is addressed by the Panel.

The Panel?s FC&R contains no identification or commentary on Judge Shea?s performance, temperament or demeanor as a jurist, although considerable evidence on that issue was presented. As Judge Shea?s ?bench conduct? is deemed by the Court to be relevant to any consideration of the Panel?s case, the facts on that issue are presented first in this Statement.

II. Facts relative to Circuit Judge Steven Shea, the jurist.

Judge Shea is highly regarded as a jurist, according to 80% of the Keys? attorneys who practice before him (R. Ex. 15; *and see* T. 2366), according to bar leaders and bar ethics counsel from Florida (*Id.*), according to bar leaders, judges and ethics counsel in Louisiana where Judge Shea had practiced before moving to Florida (*Id.*), according to his judicial assistants (R. Ex. 20; T. 1428; *and see* T. 2696) and bailiffs (T. 2160, 2170), according to the public defenders who regularly appeared before him (T. 1224-25, 1360) and according to all three of the character witnesses which the Panel allowed Judge Shea to present in his defense. (T. 1625-30, 1865-66, 2214). One hundred percent of all jurors submitting post-trial, standard juror questionnaires approved of Judge Shea?s demeanor and temperament. (R. Ex. 21; *and see* T. 2900).

The evidence is uncontradicted that Judge Shea conducts judicial proceedings with courtesy to all parties, all lawyers, all witnesses and all members of the public; that he spends long hours at his job, going beyond the materials provided him by lawyers to do independent research; that he continually strives to learn; that he willingly reconsiders any matters appropriately called to his attention; and that in criminal matters he unfailingly rules ?right down the middle? ? being neither pro-defense nor pro-state. (T. 715, 1224-26, 1228, 1232-33, 1235, 1406, 1498, 1508).

Attorneys identified by the Panel as having been adversely affected as a result of actions taken by Judge Shea nonetheless had a high opinion of his conduct as a jurist.

> Judge Shea was extremely fair and really gave his best to do the right thing in every case . . . . [H]e was very familiar with every case that came before him because he stayed late at night and reviewed each case

> and even did his own legal research [e]ven though counsel . . . provided him with legal authority . . . .

(T. 1224-25, quoting public defender Michael Strickland[2]). According to Mr. Beckmeyer,[2] his law firm ?was given a fair shake in front of Judge Shea? (T. 177) and Judge Shea ?was making rulings based on fact and on the facts in the law generally.? (T. 178).

Not one of the 18 charges against Judge Shea relate in any way to bench conduct: that is, to the manner in which he presides in court or maintains courtroom decorum. Not one of the 18 charges against Judge Shea relates in any way to his competence as a jurist: that is, his mastery of legal issues and facts before making rulings; to the development of thoughtful analyses; or to the issuance of even-handed decisions. Not one of the 18 charges which ground the Panel?s request for removal from office impugns Judge Shea?s judicial temperament or dedication to being a sound and competent jurist.

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[2] Mr. Strickland is mentioned at FC&R 12-14, 17-19.

III. Facts relating to the charges for which Judge Shea was found guilty by the Panel.

A. Prefatory charges alleging a pattern of conduct (FC&R 3-5).

The FC&R finds Judge Shea guilty of ?prefatory charges? ? that he abused his office through an alleged pattern of vindictive and retaliatory conduct toward those who disagreed with him ? based on ?the more specific allegations on which Judge Shea has been found guilty.? (FC&R 63). The absence of direct, identifiable facts to support these charges constitutes a violation of Commission Rule 6(e), which requires that charges brought by the Commission ?shall allege the essential facts? on which they are based. The Panel?s reliance on supporting facts which are ***not*** specified, but allegedly repose somewhere else in its FC&R, makes it impossible for Judge Shea to identify record facts relating to these prefatory charges. It also effectively forecloses his opportunity to challenge these charges on any basis unless the Commission, in its *answer* brief, decides to reveal the factual foundation for these charges.

Judge Shea will not attempt to speculate as to what unidentified ?facts? support the Panel?s prefatory charges. The Panel?s violation of its own Rule, and fundamental notions of due process,[3] require that the Court reject any attempt by the Panel to utilize its ?pattern? theory as a basis for discipline against Judge Shea.

B. Charges involving orders entered in judicial proceedings.

1. Charge 2: Show cause order to Joan Baptiste (FC&R 19-23).

Judge Shea was the presiding judge in a case involving repeated attempts by the Florida Department of Revenue to collect past-due support payments for Joan Baptiste from her former husband. (T. 458-59).[4] Ms. Baptiste lived in Delaware, but counsel for the Department regularly appeared in Judge Shea?s court in connection with support enforcement proceedings. (R. Ex. 14).

Dissatisfied with the collections against her ex-husband, Ms. Baptiste wrote to the Governor of Florida complaining that the ?court? in Key Largo would not help her or uphold her children?s legal rights, that child support workers have ?worked tirelessly to bring this problem to the attention of Judge Steven Shea,? that Judge Shea had made ?all his rulings? in favor of her ex-husband, and that her children would have a better chance to survive if ?Judge Shea would serve his elected position as one who upholds his own rulings as well as the laws . . . .? (R. Ex. 13) (emphasis added).

A copy of this letter was introduced into evidence by counsel for the Department at a hearing before Judge Shea in the *Baptiste* case. (R. Ex. 13). Subsequently, Judge Shea issued an order setting forth record facts contradicting the allegations in Ms. Baptiste?s letter, directing her to show cause why she should not be held in indirect criminal contempt for her public pronouncements in derogation of the Monroe County Circuit Court and himself, and simultaneously recusing himself from further involvement in the case as required by Criminal Rule 3.840(e). (R. Ex. 14). Before entering that order, Judge Shea researched and relied on case law as to its efficacy. (T. 2837-40).

Ms. Baptiste was upset by the order. (T. 463, 466-67). When a show cause

hearing was conducted before Sixteenth Judicial Circuit Court Chief Judge Taylor, Ms. Baptiste participated by telephone. (T. 465-66). Judge Taylor affirmatively ruled that the court had jurisdiction to consider indirect criminal contempt charges against Ms. Baptiste. (FC&R 19). Judge Taylor declined to find her in contempt, however. *Id*.

In the proceeding against him brought by the Commission, Judge Shea recognized he may have been too ?thin skinned? with respect to Ms. Baptiste?s letter, and that he has learned from these proceedings. (T. 2539-40, 2837, 2839; Shea depo. at 322-25).

2. Charge 3: Show cause order to Barbara Martin (FC&R 23-26).

In his private practice before election to the bench, Judge Shea was concerned with, experienced in and knowledgeable about substance abuse and mental health problems in the Upper Keys. (T. 2415-17; P. Ex. 61). Judge Shea is a state certified addiction professional. (P. Ex. 61).

Upon ascending to the bench, he assumed judicial responsibility in the Upper Keys for the Adult Drug Court, the Juvenile Drug Court, and all circuit court proceedings involving domestic violence, family law, juvenile dependency and delinquency, and felony criminal law. Over 75% of criminal, juvenile, family law, and domestic violence cases in the Upper Keys involve substance abuse or mental health issues. (T. 2421).

The only publicly-funded substance abuse and mental health clinic in the Upper Keys was the Guidance Clinic of the Upper Keys (?the Guidance Clinic?). (T. 2368, 2544-45). As a matter of policy, the Guidance Clinic declined to provide evaluations or treatment to individuals who were sent to the clinic by

court order (T. 24, 502, 511-12), and a representation was made to Judge Shea that the clinic received only $98,000 in public funds. (T. 2548-49, 2565). The unwillingness or inability of the clinic to provide needed services to indigent juveniles and families in the Upper Keys was a source of frustration to the staff of the Juvenile Justice Department. (T. 2369). It was also a concern to Judge Shea. (T. 2545).

As a result of a domestic battery incident within the jurisdiction of Judge Shea?s Domestic Violence Court, a Baker Act evaluation of Mr. Prentice Wood was made for the sheriff?s office by Barbara Martin, a counselor at the Guidance Clinic, in order to determine if he had mental problems and if he was a danger to himself or others. (T. 479). Two weeks later, Mr. Wood appeared before Judge Shea in the domestic violence/dissolution proceeding which involved Mr. Wood?s alleged threat to commit suicide in front of his minor children. (R. 268-69). Judge Shea ordered him to submit to a psychological re-evaluation with Ms. Martin or some other counselor at the Guidance Clinic. (R. 47).

Although Mr. Wood had agreed to pay for the re-evaluation, the clinic declined to evaluate him when it was learned that the evaluation was the result of a court order, and it declined to provide Judge Shea with Ms. Martin?s earlier Baker Act report. (T. 483).[5] Judge Shea issued a show cause rule to Ms. Martin in the mistaken belief that she was subject to the court's jurisdiction. (R. 54).

At a hearing on the rule, Judge Shea vacated his show cause rule when the jurisdictional error was called to his attention, but he expressed frustration with the lack of needed support services for domestic violence matters and stated that he would talk to the Guidance Clinic?s funding sources to see if some of the resources sent to the clinic could be used for needed services elsewhere. (T. 385-

88, 493-94; R. Ex. 64). Shortly after the Wood incident, Judge Shea learned upon inquiry that the Guidance Clinic was not receiving less than $100,000 a year in public funds, but almost $1 million. (T. 2565).

Soon after this incident, Judge Shea had occasion to remove a child from the Guidance Clinic in order to obtain a substance abuse evaluation by another provider. (T. 514; *but see* 508, 513). His dismay at the unwillingness of the clinic to provide needed services to indigents in the Upper Keys was conveyed in private conversations to his long-time friend who ran the Middle Keys clinic, Dr. David Rice (T. 540), and to the Department of Corrections, one of the clinic?s funding sources. (R. 33).[3] As a result of these informal contacts, a meeting of all interested persons was held, and all problems between the clinic and Judge Shea were satisfactorily resolved. (T. 2350, 2563-64).

3. Charges 15 and 16: Orders entered in *Overton v. State* (FC&R 42-47).

Judge Shea routinely consulted with other judges on matters of judicial administration (T. 297-99), including Chief Judge Susan Schaeffer of the Sixth Judicial Circuit, Judge Stanford Blake of the Eleventh Judicial Circuit, and Chief Judge Richard Payne of his own Sixteenth Judicial Circuit. (T. 297-99, 2087-88). One of the administrative techniques commended to Judge Shea by Judge Blake

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[3] The Department had previously expressed concern to Judge Shea about sending probationers to the clinic. (T. 2568-69). Ultimately, the Department did not discontinue funding for the clinic as a result of Judge Shea?s contact. (T. 537).

was the setting of regular status hearings. (T. 2087-88).

In late 1996, Judge Shea was assigned his first capital punishment case: *State v. Overton*. (T. 2643). A short time later, he reviewed the decision of the Court which amended the Rules of Judicial Administration to require that every judge presiding in a capital case must successfully complete a ?Handling Capital Cases? course. *Amendment to the Florida Rules of Judicial Admin., Rule 2.050(b)(10)*, 668 So. 2d 320 (Fla. 1997). The special concurring opinion of Justice Anstead in that case emphasized that, in addition to the high standards of preparation and performance required of judges, the frequency of appeals in which the Court had found ineffective assistance of counsel required that judges in capital cases ?must be certain that only highly qualified lawyers? are appointed to represent indigent defendants. 688 So. 2d at 321. The same point had been made by Justice Wells in *Landry v. State*, 666 So. 2d 121, 130 n.14 (Fla. 1995), who also admonished judges to report directly to the Bar any violations of Rules of Professional Conduct which involved attorney incompetence.

Judge Shea ordered all counsel of record to appear for a status hearing on February 18, 1997, in the *Overton* case. (R. 260). Chief assistant state attorney Jonathon Ellsworth and defense attorney Jason Smith failed to appear. (R. 136). On February 21, Judge Shea entered an order requiring the personal attendance of all counsel of record at hearings in the case, stating in the order that non-compliance would result in referral to The Florida Bar and the Chief Justice. (R. Ex. 136).

At a hearing on March 11, Judge Shea advised counsel of his notification from the office of the Chief Justice that he was excused from attendance at a capital case seminar, but that the Court nonetheless wants to make sure ?everything is done properly, and the cases move along, and the defendant is represented properly, and the state is providing discovery, whatever else needs to be. . . . I?m just more concerned about moving the case along properly and I think the Chief Justice is also.? (T. 208-09; P. Ex. 8).

At a status conference seven months later, Judge Shea denied an oral motion by the state to continue the scheduled trial date for the *Overton* case. (T. 212; P. Ex. 9). No continuance was ever sought by the defense, yet a defense motion was filed which sought to recuse Judge Shea from *Overton* based on his interjection into the proceeding. (T. 214; R. Ex. 156). Judge Shea denied the motion (T. 214-15; R. Ex. 158), but one day later reversed his decision and recused himself after conferring with Judge Schaeffer regarding the issue of recusal and the fact that a three-week trial in *Overton* was scheduled to commence in three weeks. (P. Ex. 11; R. Ex. 159; T. 303-04, 351). As a result of his conversation with Judge Schaeffer (T. 301), Judge Shea included in the recusal order his observation that counsel?s representation in *Overton* may have been ineffective. (R. 159).

In a subsequent evidentiary hearing, Circuit Judge Mark Jones found that the representation in *Overton* was not ineffective, and vacated Judge Shea?s Memorandum on the issue. (R. 1, charge 16; T. 265).

4. Charge 31: Order entered in *Overton v. State* referencing court reporting issues (FC&R 57).

A jury trial in the *Overton* case was scheduled to be held before Judge Shea in Key West in October of 1997. In anticipation of that trial, Judge Shea entered an order in the *Overton* case setting the procedures for the trial and, as part of the order, directed the judicial circuit?s ?Managing Court Reporter? to provide a court reporter for the trial. (R. Ex. 234). The order also contained a directive that the sole Upper Keys court reporter should remain in Plantation to cover civil and criminal matters before Judge Ptomey or any visiting judge ? a directive contrary to a memorandum from the Managing Court Reporter which had assigned that court reporter to the Key West trial.

Shortly after Judge Shea?s order was issued, Chief Judge Taylor sent a memorandum on official court stationery to Judge Shea pointing out that all official court reporter assignments are under the direction of the chief judge, that she had delegated assignments to the Managing Court Reporter through an administrative order, that she respectfully requested that he rescind the *Overton* case order, and that she would work with Judge Shea to accommodate the court reporting needs of the Upper Keys. (R. Ex. 236).

Two days later, Judge Shea sent a memorandum to Chief Judge Taylor explaining his sensitivity and special concern for the conduct of a murder trial, and his lack of confidence in the Managing Court Reporter in light of prior mistakes she had made. (R. Ex. 237). Simultaneously, he entered an order vacating the *Overton* order and reciting that

> the Court [had been] assured by the Chief Judge that the problems previously encountered by this Court with the Managing Court Reporter will be addressed . . . .

(R. Ex. 235). This language in Judge Shea?s order was found by the Panel to violate the ?confidence? of the chief judge as expressed in her memorandum requesting vacation of the *Overton* order.

5. Charge 20: Order of contempt entered in *Roof v. Brown* (FC&R 47, 49, 54).

Roof v. Brown was a domestic relations case in which Ms. Elena Roof sought an injunction against Mr. Brown to prevent domestic violence. (R. Ex. 185). Judge Shea held an injunction hearing on the petition, but neither Mr. Brown nor his counsel attended. (R. Ex. 185). As a result, Judge Shea entered an order granting injunctive relief with a requirement, not requested by the petitioner, that Mr. Brown participate in and successfully complete the Upper Keys? Domestic Safety Program (?the Program?). (R. Ex. 185).

Brown?s attorney, J. Allison DeFoor, moved for a partial rehearing to have the requirement for participation in the Program removed from the order. *Id*. at ? 2. Judge Shea denied the motion. *Id*. Counsel for Mr. Brown filed a renewed motion for rehearing and a motion for stay, both of which were also denied. *Id*. at ? 3. Mr. Brown then filed an appeal, but sought no appellate stay of the order requiring participation in the Program. *Id*. at ? 4.

Ten days later, the Program advised Judge Shea that Mr. Brown had not enrolled. *Id*. at ? 5. Ten days after that, Mr. Brown filed a second renewed motion for partial stay of the injunction. *Id*. at ? 6. In due course, this motion was also denied, and Mr. Brown and his counsel were told that the court had been advised of Brown?s non-compliance with the order to enroll in the Program. *Id*. at ?? 6-8.

A hearing was conducted on an order to show cause why Mr. Brown should

not be held in contempt for non-compliance with a court order. At the hearing Mr. Brown?s counsel refused to allow Mr. Brown to testify although he was present in court, choosing instead to rely on a letter stating that Mr. Brown had tried to enroll. *Id*. at ? 9. Judge Shea declined to consider the letter in light of Mr. Brown?s presence and availability to testify, and entered an order finding that Mr. Brown had the ability and the time to enroll in the Program, holding Mr. Brown in civil contempt, and providing appropriate purge opportunities. *Id*. at ? 11. The order included a statement to the effect that repetitious motions filed by his attorneys had encouraged Mr. Brown?s disobedience of the court?s order. *Id*. at ?? 10-11; T. 389-401.

Later that same day, the contempt order was vacated, the injunction order dismissed, and the case closed when petitioner Roof testified before Judge Shea that her allegations of domestic violence were not ?entirely accurate,? that she was under medication when she filled out the allegations, and that she does not fear for her safety. (R. Ex. 186).

C. Charges stemming from internal communications with judicial colleagues in the Sixteenth Judicial Circuit.

1. Charge 8: Comments made in private to another judge in the judicial circuit (FC&R 31-34).

Following his election to office in 1994, Judge Shea had private conversations with Upper Keys County Court Judge Ptomey in which he expressed a belief that there were problems in the Monroe County judicial system, including corruption and incompetence in the Sheriff?s Department and incompetence in the Trial Court Administrator?s office. (Shea depo. at 658; T. 542-43, 971-73, 1024-25, 1106). Judge Shea stated he planned to correct those problems. (T. 971-72). In these conversations with Judge Ptomey, Judge Shea stated his belief that past and present members of the state attorney?s office had opposed his election, and that Keys judges and clerks were not pleased with his election victory over Judge Overby. (T. 971-72).

2. Charge 23: Comments made during meeting of judges of the circuit (FC&R 55-56).

A meeting of the judges of the Sixteenth Judicial Circuit was held on December 5, 1997. (T. 2720). The business session of the meeting included a discussion between Judge Shea and Chief Judge Taylor as to whether a directive prohibiting the use of official court reporters for civil proceedings in the Circuit, previously approved for the Circuit without Judge Shea?s input, was an administrative order within the discretion of the chief judge or a local rule which required local bar input and approval of this Court. (T. 2721). Judge Shea had written to the Supreme Court and to the Bar?s Local Rules Advisory Committee, with a copy sent to the Upper Keys Bar Association, inquiring if the Rules of Judicial Administration should be deemed to apply to that directive. (R. 192).[6]

Following the business session of the meeting, the chief judge opened the floor to a discussion of any other matters that anyone wanted to raise. (T. 2721). At that point in time, all essential business of the conference had been concluded. (T. 1047-2732). Judge Ptomey used that occasion to express his disapproval of Judge Shea?s having written to the Court about the proposed directive to discontinue the reporting of civil cases by official court reporters in the Circuit, and his having sent a copy of his ruling request to the local bar association. (T. 2722). Prior to this meeting of the judges of the Circuit, Judge Ptomey had drafted, and redrafted, a complaint against Judge Shea which he proposed to send to the Judicial Qualifications Commission. (T. 1052-53, 1524-25, 2731).

Judge Ptomey was joined in criticisms of Judge Shea by Judges Miller, Becker and Taylor, and the discussion became quite heated with Judge Ptomey speaking the loudest. (*E.g.*, T. 1007, 1051-52, 1524-25, 2722-27). It is not

unusual for the judges of the Sixteenth Judicial Circuit to have a heated exchange of views at their meetings (T. 1052), or to use those occasions to vent their frustrations. (T. 1142-43, 2723). Judge Shea reacted to the criticisms of his colleagues by leaving the meeting. (T. 1007-08, 1527, 2730).

D. Charges involving actions taken to improve the administration of justice in the courts in the Sixteenth Judicial Circuit.

1. Actions directed at court support personnel.

a. Charge 6: Non-lawyer preparation of domestic violence petitions (FC&R 28-31).

Judge Shea?s judicial responsibilities include the injunctive power to remove a spouse from a home, or to take a parent away from his or her children, when there has been domestic violence. Sections 741.30(5)(a) and (6)(a), Fla. Stat. (1997). Petitions for injunctive relief presented to Judge Shea were often prepared for indigents after being interviewed by non-lawyer personnel in the office of the clerk or by personnel of the Upper Keys Domestic Abuse Shelter (?the Shelter?). (T. 73-74). These petitions sometimes included factual recitations which the complainant would later testify were exaggerations, were inaccurate, had been inserted without his or her knowledge, or which the complainant would just later recant. (T. 167-68, 232-33; R. Ex. 83).

In an effort to assure that injunctions were not issued based on false information, in May of 1997 Judge Shea created a certificate designed to be executed by the clerk of the court or by Shelter employees, and to be attached to petitions for injunctive relief, which declared under penalties of perjury that the allegations in the petition had been communicated to the certificate signatory by the complainant, that they had been read back to the complainant, and that the

complainant had acknowledged they were true and accurate (?the Certificate?). (P. Ex. 16; T. 556-57). The Shelter objected to the use of the Certificate (T. 554-57, 576). There is no evidence that the clerk objected.

After meeting with Shelter personnel (T. 562), Judge Shea announced that the Shelter agreed with the use of the Certificate. (R. Ex. 84; T. 588-89). Although the Shelter staff acknowledged that Judge Shea might reasonably have thought it had agreed (T. 560-61, 589-90), in fact they did not. (T. 560-61, 589-90). This led to further communications with Judge Shea, and a request by the Shelter for advice from the chief judge of the Circuit and from Judge Ptomey. (T. 567, 1110-11).[7] Following these discussions with Shelter personnel, Judge Shea agreed that he would not require the Certificate for domestic violence petitions. (T. 2581).

He advised, however, that he was nonetheless concerned that the completion of these petitions by non-lawyers might constitute the unauthorized practice of law, and that henceforth he would require use of the non-lawyer disclosure form prescribed by the Supreme Court for the preparers of domestic violence petitions.[4] (T. 2581). He told Shelter representatives that he would not require personal names on the form, and that the only address that need be inserted would be the initials ?DAS? and a listing of the post office box. (T. 2582).

In the meantime, domestic violence injunctions continued to come before Judge Shea for *ex parte* consideration in unabated numbers. (R. Ex. 85). In June,

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[4] Form 12.980(b), as adopted in *Family Law Rules of Procedure*, 663 So. 2d 1049 (Fla. 1995).

Judge Shea dismissed an injunction petition in the belief that a Shelter worker had falsified its contents, and ordered the Shelter director to review the hearing transcript and report back to the court. (Shea depo. at Ex. 8; T. 563). A review was performed, and the director reported to the court that no false information had been conveyed in the petition, but that the complainant had simply recanted her allegations, as was often the case with complainants. (T. 565).

At a later point in time**,** the petitioner in a repeat violence case before Judge Shea vehemently denied the allegations of a petition which had been prepared by someone other than the petitioner. (T. 573).[5] Subsequently, Judge Shea sent the Shelter a newspaper article which highlighted his concerns about exaggerated domestic abuse claims. (P. Ex. 19; T. 570-71).

b. Charge 9: Responding to egregious misconduct by a deputy sheriff (FC&R 32, 35-38).

Steve Barney was a deputy sheriff of Monroe County who served as a bailiff in Judge Ptomey?s court. (T. 69). Judge Shea had concerns regarding Mr. Barney?s professionalism. (T. 975, 2617-18; R. Ex. 245). On Christmas eve in

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[5] The FC&R mistakenly suggests that Judge Shea referred ?the Shelter? to The Florida Bar for an inquiry into the unauthorized practice of law. (FC&R 30). This is not the basis of any charge of misconduct, but the record should be clarified. Judge Shea referred ?the case? to the Bar (P. Ex. 21), and then later withdrew his referral when the Supreme Court vacated the requirement for non-lawyer disclosures in domestic and repeat violence petitions in *Amendments to the Florida Family Law Rules*, 713 So. 2d 1 (Fla. 1998). (R. Ex. 86).

1995, Mr. Barney took to his home and kept overnight a young domestic violence offender who was being released from the county jail, Victoria Arena. (T. 1022-23).

Ms. Arena was advised by Lieutenant Simpson, the bailiff commander in the sheriff?s department, to talk with Judge Shea about the incident. (T. 1272). Judge Shea interviewed Ms. Arena in his office under oath (T. 1026-67; R. Ex. 95), and he then gave her sworn statement to the sheriff?s office. (R. Ex. 97).

No investigation of Mr. Barney was underway when Ms. Arena?s statement was taken. (T. 1273). There is no evidence that Judge Shea?s interview in any way interfered with processes or procedures in the sheriff?s office. Mr. Barney was subsequently disciplined and demoted. (R. Ex. 98).

c. Charges 12 and 18: Supervision of the bailiff supervisor (FC&R 39-42).

Melody Wilkinson served as bailiff supervisor at the Plantation Key courthouse. (T. 839). In March of 1997, Judge Shea spoke with Wilkinson, privately in the coffee room at the courthouse, regarding a courtroom incident in which a bailiff had allowed an inmate to get too close to the bailiff?s gun. (T. 843-44, 846-87; R. Ex. 123). Subsequently, Judge Shea learned that Ms. Wilkinson was delaying official court reporter Rex Lear?s early entry into the courthouse for the purpose of setting up for Judge Shea?s 8:30 a.m. hearings. (T. 2670-72). In another conversation with Ms. Wilkinson, Judge Shea admonished her to use common sense. (Lawson depo. at 12, 59, 30 *et seq*; Poppell depo. at 66-68; T. 917-19).

Ms. Wilkinson later prevented a news reporter from attending a public hearing in a juvenile proceeding. (T. 1732-33). Judge Shea reported this incident

to her superior, asked for a full supervisory review, and barred her from his courtroom pending the review. (R. Ex. 112; T. 858-89, 862-63). Ms. Wilkinson was investigated, found to have violated departmental policy, and ordered to get appropriate training. (R. Ex. 115). The next day she filed a complaint with the Judicial Qualifications Commission. (R. Ex. 116). Later, she resigned.

d. Charge 22: Administrative inquiry concerning court reporter directive as a local rule or administrative order (FC&R 54-55).

A meeting of the judges of the Sixteenth Judicial Circuit was scheduled to be held in Key West on November 7, 1997, at which one of the agenda items was a proposed administrative order to prohibit official court reporters from reporting in civil cases. (R. 193). Judge Shea had permission to attend by telephone, but was unable to do so due to an ongoing civil jury trial. (R. Ex. 193, 196). The proposal for an administrative order was approved by the judges present at the meeting. (R. Ex. 188).

The president of the local bar association expressed concern to Judge Shea regarding the proposed administrative order. (T. 2159, 2711-12). In a memorandum to Chief Judge Taylor shortly after the judges? meeting, Judge Shea stated that the proposed administrative order ?seriously affects and impedes? the operation of the court in the Upper Keys, and he expressed his view that the Rules of Judicial Administration may require notification to the local circuit bar, inquiry of the Supreme Court?s Local Rules Advisory Committee, and Supreme Court approval before adoption of a matter with this impact. (R. Ex. 193). In a responsive memorandum, Judge Taylor stated that he had been misinformed as to the reason for the administrative order, and she set forth her view that, as chief

judge, she had the unilateral authority to issue the administrative order. (R. Ex. 196). She stated that, nonetheless, she had taken steps to get local bar input on implementation of the administrative order before its effective date.

Judge Shea called Judge Marguerite Davis, chair of the Local Rules Advisory Committee, to inquire whether the court reporter rule was a local rule requiring bar input or an administrative order. (R. Ex. 192). Judge Davis advised him to write a letter with that question to her committee. (R. Ex. 192; T. 2715). As a result, Judge Shea wrote to her committee and to the Clerk of this Court requesting a ruling as to whether the proposed administrative order was a ?local rule? subject to Judicial Administration Rule 2.039. (R. Ex. 192). Copies of this letter were sent to the judges of the Sixteenth Judicial Circuit, the Upper Keys Bar Association, and the Office of the State Courts Administrator. *Id*. at 2.

e. Charge 36: Supervision of court clerk regarding a lack of quality control (FC&R 57-58).

Judge Shea and others involved with courts in the Keys had experienced quality control problems in the office of the Clerk of the Circuit Court, including the issuance of inappropriate bench warrants (R. Ex. 87) and the misfiling of public documents. (T. 1359-60; 1414; R. Ex. 248-59, 265). One defendant spent nearly 6 months of unwarranted, additional time in prison due to the misplacement of his felony file and the appellate mandate directing credit for time served. (T. 250-55, 2764).

As a result of repeated errors by the clerk?s office, attorneys practicing before Judge Shea began to threaten legal action against the Clerk?s office for the recovery of attorney?s fees attributable to clerical errors. (T. 2762). Judge Shea wrote to the Clerk concerning the apparent ?lack of quality control throughout the

Clerk?s office,? and advised that he was prepared to begin the assessment of attorney?s fees against the Clerk?s office if litigants incur unnecessary fees and costs as a result of clerical problems. (R. Ex. 248). This letter, and a resulting meeting with the Clerk and others, produced constructive changes. (T. 1237, 1413, 1853, 2838).

2. Maintenance of the integrity of judicial proceedings through a prohibition on *ex parte* contacts by attorneys with the court in contested proceedings.

a. Charge 17: Admonition to assistant state attorney McClure regarding *ex parte* communications (FC&R 47, 52-54).

Judge Shea established and published a policy of not entertaining *ex parte* communications with attorneys in connection with adversary proceedings. (T. 665, 1459). Early in 1996, assistant state attorney Gina McClure telephoned Judge Shea?s office and spoke to his judicial assistant in an attempt to modify a court order designating a date for jury selection in an upcoming criminal case. (T. 629-30, 1446-47). The judicial assistant asked Ms. McClure to hold the line for a moment, and told Judge Shea that Ms. McClure was asking to change the court order setting the jury selection date. *Id.* Judge Shea told his assistant to advise Ms. McClure to ?just put it in writing.? (R. 629-30).

The following day Ms. McClure appeared before Judge Shea in *State v. De Puerto.* Judge Shea used the occasion to admonish her not to engage in *ex parte* communications with his office, and not to call his office for ?disputes with other counsel.? (T. 636).

b. Charges 32 and 33: Admonition to assistant state attorney Garcia regarding *ex parte* communications (FC&R 47, 51-53).

In March of 1996, Judge Shea granted a motion to dismiss charges against the defendant in *State v. Gonzalez* based on the prosecutorial misconduct of assistant state attorney McClure. (T. 615, 626). In a later conversation between Judge Shea and supervising assistant state attorney Luis Garcia, Mr. Garcia criticized the dismissal order in *Gonzalez* and stated that Judge Shea would have to recuse himself in all cases involving the detective whose testimony had caused the mistrial in *Gonzalez*. (T. 736-40).

A week later, Judge Shea wrote Mr. Garcia saying that it was improper to contact his office *ex parte* in order to complain of or criticize a ruling of the court, that he had misrepresented the order entered in *Gonzalez*, and that further misrepresentations by him or his office toward the court would result in a reference to The Florida Bar for appropriate action. (R. Ex. 238). Copies of this letter were sent to the State Attorney, the Public Defender and the Chief Judge of the Circuit. *Id*. Shortly thereafter, Judge Shea again admonished Mr. Garcia concerning *ex parte* communications during a break between cases in his courtroom. (T. 752).

E. Charge involving Judge Shea?s personal property interest in two mobile homes (FC&R 9-19).

Judge Shea was served on October 9, 1997, with a ?Notice of Eviction/Change in Land Use? prepared by an out-of-Keys attorney, stating that a mobile home park in the Keys was going to be closed due to a change in the land use for the property. (R. Ex. 6). Judge Shea owned two mobile homes in the mobile home park, one of which he intended to use upon retirement. (T. 2280, 2282, 2446, 2462; R. Ex. 4).

On a Saturday morning approximately nine days after he received this Notice, Judge Shea read in the local newspaper that an ?attorney representing the park owners? was in fact a local attorney friend of Judge Shea?s, Nicholas Mulick. The article quoted Mr. Mulick as saying that his client no longer wants to continue the existing mobile home park use, and that the proposed ?change in land use is from use as a mobile home park to some other use.? (R. Ex. 7). Judge Shea picked up the telephone and called Mr. Mulick. (T. 2278).

In this private, Saturday morning conversation, Judge Shea advised Mr. Mulick that he owned mobile homes in the subject mobile home park, and stated his assumption that if Mr. Mulick had known of Judge Shea?s ownership interests he would not have agreed to represent the new owners in land use change/eviction proceedings. (T. 86, 2280, 2463). Judge Shea further stated that he was already involved in contesting the eviction to protect his private interests with a suit against the new owners, and he pointed out that the adversity between his personal interests and those of Mr. Mulick?s client, in his view, required his recusal from all cases in which Mr. Mulick appeared as attorney of record. (T. 87, 2464-65).

Mr. Mulick initially disclaimed to Judge Shea any involvement in the

eviction proceedings, stating that he had only been consulted regarding land use matters and that he was ?not actively involved in any aspect of the representation of the client.? (T. 86, 87, 2464). Allegedly, Judge Shea stated in the course of this conversation that his conflict with the new owners would no longer exist if they were to purchase his two trailers, and he expressed his view that his trailers were worth, respectively, up to $50,000 and $100,000. (T. 89, 2477, 2479).[8]

On the Monday following, Judge Shea called Mr. Mulick?s law partner, Karl Beckmeyer, to alert him to the fact of his mobile home ownership in his client?s trailer park, and to advise him as well that the adversary nature of the law firm?s client and Judge Shea?s personal interests would require Judge Shea to recuse himself from all of the law firm?s cases. (T. 154-55).

As a result of the situation created by their clients? conflict with Judge Shea, and the possible consequence to their practice and their clients of having to try their cases in Marathon rather than in Plantation Key, Messrs. Mulick and Beckmeyer terminated their representation as local counsel for the mobile home park owners. (T. 95). The Panel found that Judge Shea?s telephone calls constituted an abuse of the power of his judicial office.

The FC&R recites that the Panel ?considered? but made no finding as to whether Judge Shea?s reference to a valuation of $150,000 was ?exorbitant.? (FC&R 14, 17).[6] The Panel did, however, use the valuation-related testimony from Judge Shea, from his judicial assistant and from his appraiser as a basis to

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[6] Evidence on the issue included a formal appraisal that put the value of the two trailers at $140,000. (R. Ex. 12).

evaluate Judge Shea?s ?believability . . . and underlying thought processes and intentions? (T. 15), and to conclude that the valuation information ?raises serious questions as to what happened, why it happened, and his underlying motives.? (T. 17).

IV. Facts relating to Judge Shea?s attempts to disqualify the Panel chairman.

Judge Shea filed a motion to disqualify the Panel chairman, Circuit Judge Frank Kaney, with appropriate affidavits, based on a reasonable belief and concern (among other reasons alleged) that Judge Kaney had engaged in *ex parte* communications with two Keys judges who served with Judge Kaney on the Florida Judicial College, who had been complainants to the Commission about Judge Shea, and who had given sworn statements in support of the Panel?s request for Judge Shea?s suspension from office. (R. 7). This motion was denied (R. 11), as was a request for full Panel consideration of the motion. (R. 55a).

Judge Shea filed a renewed request for Panel consideration based on newly discovered evidence that substantiated the fact that an *ex parte* communication relating to Judge Shea?s disciplinary proceeding had in fact taken place. (R. 179). That motion was also denied. (R. 196).

SUMMARY OF ARGUMENT

The Panel has alleged that Judge Shea violated the Code of Judicial Conduct by the entry of six judicial orders. Each order had a foundation in law and fact, was regular on its face, and was narrowly tailored to the circumstances of the situation the order addressed. The Panel has only attacked Judge Shea?s motives for the orders based on its subjective and undocumented belief as to why the orders were entered. The Panel does not contend that any order was unlawful, and it had no clear and convincing evidence to support its belief as to Judge Shea?s motivation for the orders.

The Panel has charged that Judge Shea has violated the Code by comments made in a private conversation with one judicial colleague, and in one conference among seven of the judges in the Sixteenth Judicial Circuit. Discussions held between judges in private cannot constitute Code violations, irrespective of the subject matter, the nature of the comments, the personal convictions which prompted the comments, the decibel level of the comments, or the colorfulness of the rhetoric.

The Panel has charged Code violations for steps taken by Judge Shea to improve the administration of justice in the courts of the Sixteenth Judicial Circuit by enforcing his policy against *ex parte* communications by attorneys, by insisting on the compliance of non-lawyers with a rule of this Court in domestic violence cases, by addressing incompetence and malfeasance in offices of the clerk and the bailiffs, and by making a Court-authorized inquiry of the Local Rules Advisory Committee regarding the status of a local directive that would eliminate all civil case reporting by official court reporters in the Keys. There is no clear and convincing evidence, and there can be no Code violation, in Judge Shea?s

legitimate attempts to improve the ethics and performance level of the lawyers and court support personnel in the Sixteenth Judicial Circuit.

The Panel found Code violations in private telephone calls made by Judge Shea to attorney-friends he had learned were participating in his eviction from a Keys mobile home park. The Panel has acknowledged that Judge Shea had the right to protect his private property interests. Judge Shea also had the absolute right to call his friends in order to advise them of his ownership interests in the mobile home park, and to point out the adverse situation that existed with his sitting in their cases. Judge Shea had discretion to recuse himself from all cases in which these attorneys appeared as counsel of record. There is no clear and convincing evidence that Judge Shea intended or caused these attorneys to terminate their representation of the new owners of the mobile home park.

The Panel?s recommendation of removal is out of line with the evidence and with precedent, and fails to take into account mitigating factors recognized by the Court in other cases such as inexperience, remorse and the quality of being a good jurist.

The Panel chairman, Judge Frank Kaney, should have disqualified himself as a Panel member when evidence was presented that he had engaged in *ex parte* communications with two judicial colleagues ? one of whom was a co-officer and the other a faculty member with Judge Kaney on the Florida Judicial College ? who had both complained against Judge Shea and provided affidavits in support of his suspension.

ARGUMENT

When considering a request from the Judicial Qualifications Commission to remove a judge from office, the Court has the delicate responsibility of balancing competing considerations. On the one hand, the Court has a responsibility to protect and preserve the integrity of the judiciary either by subjecting to ?appropriate discipline? a judge who has violated the Code of Judicial Conduct or by removing from office a judge who demonstrates ?a present unfitness to hold office.? Art. V, ? 12(c)(1), Fla. Const.

On the other hand, the Court recognizes its responsibility to protect and preserve the independence of the judiciary by *retaining* in office a judge who has demonstrated integrity, honesty and a dedication to the maintenance of high standards for the bench and bar.

> The Code is not to be construed to impinge on the essential independence of judges in making judicial decisions . . . . It is not intended . . . that every transgression will result in disciplinary action.

Fla. Code Jud. Conduct, Preamble. *And see, In re J.Q.C. No. 77-16,* 357 So. 2d 172, 177-78 (Fla. 1978):

> In the interest of protecting and preserving a strong and independent judiciary, we must be careful never to judge a respondent and determine whether to remove him from office on the grounds that he possesses an unpopular philosophy, has offensive idiosyncrasies, has rendered unpopular decisions or is too compassionate.

The Court?s need to protect the independence of judges is no more evident than when a jurist with unblemished bench performance is hauled before the Commission early in a judicial career for actions taken in an effort to heighten the standards of practice by the bar and the performance of court support personnel in

his community, and that jurist has acknowledged to the Commission in retrospect that his zeal might have been to some extent unwise. In circumstances such as these, the Court should pay particular attention to whether any actual harm befell any litigants or lawyers from the alleged mistakes, and discount any allegations of judicial misconduct which may have inflicted nothing more harmful than bruised feelings and subjective discomfort.

Nothing in the Panel?s FC&R provides the Court with a basis to balance the competing interests. The FC&R *excludes* all mention of Judge Shea?s competence as a jurist, and leaves out any reference to his having learned from his mistakes and expressed remorse. The Panel?s FC&R *includes*, though, facts pertaining to matters which had been raised in the investigatory phase of the proceeding but not charged against Judge Shea ? matters which are stated to have influenced the Panel?s decisions[9] ? and facts pertaining to unproved charges. These materials should not be considered by the Court.

The Panel?s unbalanced presentation reflects a lack of even-handedness which has not advanced the interests of the judiciary. Its processes and filings with the Court have generated widespread publicity of numerous allegations of sordid misconduct by Judge Shea which were either false when uttered or have been proven to be untrue,[7] resulting in public disrepute affecting all of Florida?s

[7] Among the headline-grabbing but uncharged or unproved allegations were the suggestions that Judge Shea was mentally unstable, that he brandished a weapon in court, that he beat his wife, that he sexually harassed a clerk, that he consorted with prostitutes, and that he fished with drug dealers ? all based on Commission-generated comments or allegations which were ultimately dropped,

judges. This is not the first instance of the Commission?s pursuit of unprovable charges.[8] The Panel?s lack of objectivity in the FC&R leaves to this Court a heightened responsibility to ensure that both Judge Shea *and* the court system are accorded the objective evaluation which a public respect for the judiciary requires.

I. Legal standards for evaluating alleged judicial misconduct and for appellate review.

Proof of judicial misconduct must be established by clear and convincing evidence. *E.g., In re LaMotte*, 341 So. 2d 513 (Fla. 1977). Findings of the Commission are viewed as persuasive and given great weight. *E.g., In re Kelly*, 238 So. 2d 565 (Fla. 1970), *cert. denied*, 401 U.S. 962 (1971). Under Art. V, section 12(c)(1) of the Florida Constitution, the Court may reject any finding of the Commission which lacks the requisite degree of proof in whole or in part, and it is not unusual for the Court to do just that. *E.g., In re Davey*, 645 So. 2d 398 (Fla. 1994) (determining from a review of the record that one of three findings by the Commission had no record support and rejecting a recommendation of removal from the bench); *In re Gridley*, 417 So. 2d 950 (Fla. 1982) (rejecting one of two charges brought by the Commission).

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disavowed, withdrawn or not pursued by the Panel. *See* Shea depo. at 245-56; R. 1, 31.

[8] *E.g., In re Perry*, 641 So. 2d 366, 367 (Fla. 1994) (Commission charged ten counts of misconduct, dismissed three and found Judge Perry not guilty of five); *In re Leon*, 440 So. 2d 1267 (Fla. 1983) (Commission charged six counts of misconduct, dismissed one, and the prosecutor dismissed another).

On review of action taken and recommended by the Commission, the Court undertakes an assessment of the factual findings and the recommendation independently, based on its own study of the record. *E.g., In re Graham*, 620 So. 2d 1273, 1276 (Fla. 1993), *cert. denied*, 510 U.S. 1163 (1994). In considering appropriate discipline, a review of precedent suggests that bench conduct which directly affects the lives and property of litigants and is made in a public setting has the greatest potential to erode public confidence in the judiciary, unlike non-bench conduct which causes no harm and does not involve issues of moral turpitude.

II. The individual charges against Judge Shea either did not constitute acts of judicial misconduct or were not proved by clear and convincing evidence.

A. Charges involving orders entered in judicial proceedings.

Orders entered by trial judges, just as opinions rendered by appellate courts, are the vehicles by which judges not only command action but express their concerns regarding the integrity and the operation of the judiciary. Trial court orders may be summary and non-textual, or discussional, and no two judges frame their orders in the same way. When orders are required by law to include specific information there is reason for an evaluation of particular language in the orders,[10] but even in that situation the appropriate source of review is an appellate court.

In no case, however, should the state?s judicial disciplinary authority make findings of judicial misconduct through a subjective review of the content of court orders which are legally authorized and appropriate for the circumstances in which they are issued. The Court has recognized that

> [e]very judicial officer is granted broad discretionary powers, and one of the great strengths of our system is the carefully guarded right to exercise independently those powers.

In re J.Q.C. No. 77-16-16*Justice v. State*

400 So. 2d 1037 (Fla. 1st DCA 1981)Fla. Code Jud. Conduct, Canon 1*Rose v. Palm Beach County*

361 So. 2d 135 (Fla. 1978)*Inquiry Concerning a Judge, Crowell*

379 So. 2d 107 (Fla. 1979)*Inquiry Concerning a Judge, Vitale*

630 So. 2d 1065 (Fla. 1994)*State, Dep=t of Health & Rehabilitative Services v. Hollis*

439 So. 2d 947 (Fla. 1st DCA 1983), 379 So. 2d at 110.

If the Commission is free to offer its surmise as to subjective motivation for the inadvertent entry of a mistaken judicial order, every order of every trial judge becomes fodder for a complaint to the Commission by an offended lawyer, party or other affected person unwillingly brought into a judicial proceeding, such as a deponent. The Panel should have been attentive to Judge Shea?s attempts to solve a problem in discharging his job, rather than to the subjective sensitivities of Guidance Clinic personnel who affirmatively declined to assist the court in its necessary work and who suffered no consequence as a result of Judge Shea?s order.

3. Charges 15 and 16: Orders entered in *Overton v. State* (FC&R 42-47).

These charges allege violations of the Code based on explanatory text in an order directing the personal appearance of all counsel at future hearings in Judge Shea?s first capital case, a comment in open court about the Court?s and the Chief Justice?s concerns in capital punishment cases, and the entry of an order of recusal which recited as background Judge Shea?s views and concerns regarding the ineffectiveness of counsel. As with the preceding charge, these charges must be broken apart for a proper evaluation.

There is absolutely no basis for discipline when a trial judge requires the personal appearance of counsel at hearings. That requirement may well not have been consistent ?with customary practice? of the Keys as the Panel contends (FC&R 43), but it is not grist for judicial discipline. The impetus for Judge Shea?s order in the *Overton* case was both warranted and legitimate, given the responsibilities which this Court had contemporaneously expressed with regard to

the conduct of capital punishment cases and the fact that this was Judge Shea?s first such case. The order produced by Judge Shea was reviewed by Chief Judge Payne of his Circuit, who described it not only as proper but ?wonderful.? (R. Ex. 136).[11]

The factual accurate recitation in the body of Judge Shea?s order ? that attorneys had previously disregarded a court order to appear in the proceeding ? was certainly no basis for judicial discipline. Nor was Judge Shea?s commentary in the order as to how he viewed the quality of defense representation. Judge Shea reasonably believed that Judge Schaeffer had told him that information such as this could appropriately be included in a recusal order. (T. 2091-92). Most importantly, it is assuredly not within the ambit of Commission responsibility to criticize recitations in the orders of courts simply because they offend identified counsel.

Trial courts, just as appellate courts, are free to direct their orders to perceived misconduct in a proceeding. *See e.g.*, *Ruiz v. State*, 1999 WL 176049, *7 (Fla. April 1, 1999); *State v. Murray*, 443 So. 2d 955, 956 (Fla. 1984); *State v. Myrick*, 636 So. 2d 785, 787 (Fla. 1st DCA), *review denied*, 649 So. 2d 234 (Fla. 1994); *State v. James*, 710 So. 2d 180, 182 (Fla. 3d DCA 1998); *Rapid Credit Corp. v. Sunset Park Centre, Ltd.*, 566 So. 2d 810, 812 (Fla. 3d DCA 1990), *prohib. denied sub nom., Sunset Park Centre, Ltd. v. District Court of Appeal,*

Case No. 76,888 (Fla. 1991).[9]

Aside from the propriety of references in court orders and decisions to the improprieties of counsel, it is important to note that the legal system provided defense counsel in *Overton* with an ample and appropriate means of relieving any embarrassment stemming from a failure to comply with the order of the court, through a request that reference to their disobedience be expunged, disavowed, corrected or explained in a subsequent order. The order subsequently obtained by counsel in the *Overton* case, for example, removed the suggestion of ineffectiveness as counsel which had concerned Judge Shea. (R. 1, charge 16; T. 265).

Nor is there any basis for discipline when a judge advises counsel that ethical lapses will be the subject of referral to The Florida Bar. Such advisories should be commended, not condemned, as a wise cautionary prelude to the more drastic action which is well within the scope of judicial responsibility. *See e.g., Cerf v. State*, 458 So. 2d 1071 (Fla. 1984) (approving attorney discipline directly initiated by a trial judge). In a capital case particularly, a warning to counsel is more than justified in light of the pronouncement of Justice Wells on precisely that point in the *Landry* decision.

Other recitations in the FC&R add no measure of support for a finding of judicial misconduct here. For example, it cannot be a basis for discipline that a

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[9] Judges, of course, are often the targets of uncomfortable commentary from attorneys, such as those contained in the motion to recuse in *Overton* which was filed by these very defense attorneys. (T. 213-14).

trial court denies a motion to recuse without a hearing, as the Panel seems to suggest. (FC&R 42). Rule 1.160(f) contemplates summary denial. Even if holding a hearing were a better practice, the Panel here should not be heard to make that claim when the Panel chairman, and then the full Panel itself, acted to deny the chairman?s recusal without providing a hearing on Judge Shea?s motion.

Judge Shea?s actions in *Overton* reflected his newness to the intensity of capital cases, and an eagerness to handle his first capital case correctly in consideration of the contemporaneous spotlight shone on that class of cases by this Court. Judge Shea acknowledged in hindsight that it may have been a mistake to mention the Court?s scrutiny in this area of the law, but that reference was surely harmless. Counsel in any capital case cannot be unaware of the grave concerns which have prompted the Court, and the individual Justices, to give heightened scrutiny to the performance of counsel in this class of cases. In any event, Judge Shea?s communication with the office of the Chief Justice had only been made to obtain a waiver of the seminar requirement for judges trying capital cases, and his commentary on the status of that request in open court can hardly constitute a disciplinary offense.

4. Charge 31: Order entered in *Overton v. State* referencing court reporting issues (FC&R 57).

This charge alleges that Judge Shea violated a confidence of Chief Judge Taylor by referencing in a memorandum her assurance to Judge Shea that problems he had previously encountered with the Managing Court Reporter for the Circuit would be addressed. No specific Canon is identified as having been violated, undoubtedly because none was. This finding of judicial misconduct is another example of the Panel?s concern for the feelings of other judges in the Circuit, rather than attempting to assess the propriety of the action taken by Judge Shea.

The memorandum which was sent to Judge Shea by Chief Judge Taylor was not labeled as confidential, and it was not transmitted in a manner which suggested it was to be treated in confidence (as Judge Taylor later claimed she had intended). (T. 1144-45). It was written on the official stationery of the chief judge?s office. It traveled from the bottom to the top of the Keys in some fashion, and the Commission had no evidence to indicate that it was transmitted as a confidential communication.

If Judge Taylor personally typed the memorandum as she testified (T. 1145-47), she certainly did not take the additional steps of labeling or transmitting the memorandum appropriately to reflect a desire for confidentiality. Judge Shea could not read her mind. By sharing with the bar of his community the fact that the chief judge intended to address problems which Judge Shea had encountered with the Managing Court Reporter ? a subject of special interest to lawyers in the Upper Keys ? Judge Shea neither embarrassed nor impugned Chief Judge Taylor.

There was no clear and convincing evidence that any confidence of the chief

judge was breached, and there was no harm resulting from the exposure of the chief judge?s commitment to curing court reporter problems in the Upper Keys. The Panel had no basis to assert that Judge Shea?s action constituted judicial misconduct.

5. Charge 20: Order of contempt entered in *Roof v. Brown* (FC&R 47, 49, 54).

This charge by the panel alleges that Judge Shea violated the Code by criticizing attorneys for Mr. Brown in a contempt order which stated that their motions for rehearing and stays encouraged his non-compliance with the court order. The Panel has set forth a litany of specific allegations which presumably explain this charge (FC&R 49), but once again these individual recitations must be pulled apart to see if any has merit. None does.

The starting point of analysis is the order of contempt which Judge Shea entered against Mr. Brown. The Panel does not and cannot find fault with the contempt order entered by Judge Shea, as it is undisputed that Mr. Brown chose to disregard an order specifically directing his participation in Monroe County?s only statutory batterer?s intervention program ? the Domestic Safety Program. The order was valid, enforceable and not subject to any stay.

Mr. Brown?s counsel filed **3** motions for rehearing. Perhaps Keys lawyers were accustomed to having their complaints about judicial directives revisited whenever they asked, but Judge Shea had the absolute right, if not the duty, to independently determine whether Mr. Brown required participation and the successful completion of the Domestic Safety Program. The matter before Judge Shea was domestic violence. Section 741.30(6)(a)5, Fla. Stat. (1997) provides that, in domestic violence proceedings, the court may ?grant such relief as the

court deems proper, *including . . .* [*o*]*rdering the respondent to participate in . . . counseling services.*? (Emphasis added).

Judge Shea was charged with the responsibility of evaluating the allegations against Mr. Brown, and to prescribe appropriate remediation measures. When Mr. Brown and his counsel chose not to attend the hearing which had been set on the motion for an injunction, they knowingly left Mr. Brown open for whatever remediation and directive the trial judge thought was warranted by the motion and the record. Notably, Mr. Brown?s counsel ?didn?t quibble with [Judge Shea?s] ability to order [participation in the program] or even the wisdom of it . . . .? (T. 428).

The Panel?s concern stems from the belated efforts of Mr. Brown?s counsel to avoid his participation in the program *despite* the court?s order and *without* a stay. In the absence of a stay, of course, a trial court has full authority to enforce its orders. *E.g., Greenberg v. Carlisle*, 481 So. 2d 106 (Fla. 4th DCA 1986). The Panel states that Judge Shea ?refused to grant a hearing,? and ?canceled a hearing? set by Mr. Brown?s counsel on Mr. Brown?s motion for rehearing of the order which required his participation in the Program. The Court well knows, and certainly the Panel should have known, that no hearing is required on a motion for rehearing. The Commission does not sit to discipline judges for exercising their discretion to grant or deny oral argument on a motion for rehearing, and the Court should not be asked to do so.

The nub of the Panel?s concern seems to be that Mr. Brown?s counsel was miffed at ?having the burden? of not getting the same informal treatment from Judge Shea that he had been accustomed to receiving. (T. 449-50). That is not the basis for a disciplinary charge, however. The remedy, if the ruling was incorrect,

lay in an appeal. In fact an appeal *was* taken for Mr. Brown, but it became moot when Judge Shea vacated his order of contempt *later the same day* when the charging petitioner recanted her charges against Mr. Brown.

The Panel next recites that Judge Shea issued the show cause order for Mr. Brown?s non-attendance at the program based on a ?hearsay? document ? a letter of non-attendance received from the director of the Program. To the extent the Panel is suggesting that no order to show cause should have been entered because of the manner in which Judge Shea learned of Mr. Brown?s non-compliance with his order, it is wrong. It would have been irresponsible for Judge Shea to disregard a communication from the program director that Mr. Brown never showed up, and it was entirely proper for Judge Shea to use the vehicle of a show cause order to inquire as to the accuracy of that communication. The order was a proper exercise of judicial responsibility.

The Panel states that Judge Shea refused to consider ?hearsay? evidence when he held Mr. Brown in contempt. The Commission has no valid role in evaluating evidentiary orders for their merit, and in this case the Panel?s view of the ruling happens to be quite wrong. Mr. Brown?s counsel proposed to introduce a letter which would explain facts which Mr. Brown himself, standing in court, was available but unwilling to explain. Judge Shea?s evidentiary ruling with respect to the inadmissibility of the letter under those circumstances was well within his judicial discretion. His ultimate determination that Mr. Brown was in fact in contempt for non-compliance with an earlier order was indisputably correct. Both rulings were warranted *in light of the circumstances which Mr. Brown?s counsel chose to create.*

The Panel next recites that Judge Shea ?castigated? defense counsel with a

finding that repetitious motions encouraged Mr. Brown?s disobedience. Castigation is the Panel?s dramatic term for an entirely proper recitation in Judge Shea?s order. It is not improper, or unusual, for trial and appellate courts to use their decisions as a critique of repetitive acts of counsel which are unwarranted, and which produce troublesome effects for the administration of justice. *See e.g., Lawyers Title Ins. Corp. v. Reitzes,* 631 So. 2d 1100, 1101 (Fla. 4th DCA 1993); *Elliott v. Elliott,* 648 So. 2d 135, 136 (Fla. 4th DCA 1994); *Goter v. Brown,* 682 So. 2d 155, 158 (Fla. 4th DCA 1996), *review dismissed,* 690 So. 2d 1299 (Fla. 1997). The facts fully support Judge Shea?s commentary.

It is a fact that Mr. Brown did not comply with the court?s order to enroll in the Program. It is a fact that repetitive motions were filed by his counsel, but that none stayed the effectiveness of the order. It is a fact that Mr. Brown had been available to enroll in and attend the Program. It is a fact that no explanation whatever was offered by his counsel for Mr. Brown?s disregard of the court?s order.

It is hornbook law that a party must comply with court orders validly entered, and that disobedience is not an acceptable alternative to an appeal or a stay.

> It is well settled in this state, and elsewhere, that where a court acting with proper jurisdiction and authority renders an order, an aggrieved party?s failure to abide by the order may be punished by contempt . . . . [T]he need for obedience far outweighs any detriment to individuals who may be temporarily victimized by the order . . . .

Vizzi v. State, 501 So. 2d 613, 618-19 (Fla. 3d DCA 1986), *review denied,* 506 So. 2d 1043 (Fla. 1987). Under the circumstances, it was eminently reasonable for Judge Shea to infer that Mr. Brown was acting on the advice of his counsel, who may have been mistakenly guided by his prior experience with judges in the Upper

Keys.

Judge Shea?s entry of the contempt order against Mr. Brown, and the attendant circumstances, provide no foundation for judicial discipline. The denial of repeated requests by Mr. Brown?s counsel to rehear or stay the original order was an exercise of judicial discretion. The comment in the contempt order ? that repetitious motions for stay contributed to Mr. Brown?s disobedience of a valid court order ? had the salutary effect of signaling the Upper Keys bar that lawyers do not always help their clients with redundant motions. Not infrequently, courts utilize their orders and decisions to provide just such general guidance to the bar. *See e.g., Winstead v. Adams*, 363 So. 2d 807, 808 (Fla. 1st DCA), *dismissed*, 366 So. 2d 886 (Fla. 1978) (opinion written as a ?means of serving a caveat upon attorneys who in the future ignore the Appellate Rules?).

The Panel has made much ado about nothing with this charge, seemingly in deference to the cries of individuals in the Keys who were accustomed to having more control over judicial decision-making processes than Judge Shea was inclined to permit. No basis for judicial discipline is warranted.

B. Charges stemming from internal communications with judicial colleagues in the Sixteenth Judicial Circuit.

The Panel has charged that Judge Shea violated the Code for his commentary in private discussions with his judicial colleagues, saying that he verbally mistreated them and created dissension among co-workers in the court system of the Circuit, with a consequential lessening of public respect for members of the judiciary. (FC&R 39). The Panel?s recitation of the basis for this charge is neither dispassionate nor complete. It is cloaked in incendiary rhetoric which, when stripped away, reveals no factual or legal foundation for judicial discipline.

Two principles should have been used by the Panel for a dispassionate evaluation of the charges against Judge Shea for private comments to his colleagues. First, the Panel should have recognized that judges are authorized, if not obliged, to endeavor to improve the courts and the administration of justice. *See* Code Canon 1; Roger A. Silver, *The Inherent Power of the Florida Courts*, 39 U. MIA. L. REV. 257, 263-64 (1985). Even judicial *candidates* are authorized to speak out on the need to improve the courts and the administration of justice, and to promise that they will strive toward those goals if elected. Code Canon 7A(3)(d).

Second, the Panel should have honored the notion that judges are free to speak to their colleagues in private discussions on issues of court administration and their intent to effect change. *E.g., Code of Judicial Conduct (Canons 1, 2 and 7A(1)(b))*, 603 So. 2d 494 (Fla. 1992). Indeed, this Court?s rules specifically provide fora for just that purpose. *See e.g.*, Fla. R. Jud. Admin. 2.120(b)(3), which creates a forum in which judges can ?meet and discuss mutual problems and solutions.?

It cannot be a violation of the Code of Judicial Conduct for judges to disagree, even if they do not always communicate their disagreement agreeably. Judges can become heated in their discussions, and apparently that is not an unusual occurrence among the judges in the Keys. (*See* T. 1007-08, 1051-52, 1526). Judge Shea was neither the loudest nor the most critical of the Keys judges. (T. 1224-25). It is unfortunate that a judge might leave a discussion with colleagues feeling disappointed, angry, or even in doubt about his ability to maintain future collegiality as was the case with Judge Miller (T. 963-64), but those personal feelings are not a basis for judicial discipline. Judges should be less thin-skinned with respect to the criticisms of their colleagues.

The circumstances surrounding these charges against Judge Shea are suspect in any event. Judge Ptomey complained of Judge Shea?s private discussion, and as regards the court conference on December 5 Judge Ptomey initiated the post-conference criticisms of Judge Shea, had the loudest voice, and had been hard at work preparing a complaint against Judge Shea to be filed with the Commission.

1. Charge 8: Comments made in private to another judge in the circuit (FC&R 31-34).

Judge Shea is charged with Code violations for having stated to Judge Ptomey, privately, what he believed to be problems in the Keys? court system ? incompetence and corruption ? and to declare that he intended to correct them; for having stated to Judge Ptomey that personnel within the judicial system had not supported him and were not pleased with his election victory over Judge Overby; and for alleged verbal and other abuse toward court personnel.

By this charge, the Panel declares that it violates the Code of Judicial Conduct for a judge to share confidences in private with another judge regarding

the operation and integrity of their court system, and to comment on the political aspects of a previous judicial election. Even without reaching obvious concerns regarding free speech, this charge by the Panel should cause the Court grave concern.

Surely any judge is entitled to share in a private, verbal conversation with a judicial colleague that he or she perceives problems in the operation of the courts and will endeavor to correct them. Surely any trial judge who is required to seek judicial office through a contested election is entitled to comment in private on the elective process, and on his or her perception of who supported and who opposed the candidacy.

Judge Shea?s conversation with Judge Ptomey was held in private, not in public. Surely, his oral comments are entitled to the same degree of confidentiality as the Panel is willing to accord to Chief Judge Taylor?s written memorandum to Judge Shea concerning court reporter problems in the Circuit.[12]

As for the Panel?s tag-along suggestion that Judge Shea verbally abused court personnel, the same principle applies. The Panel points to no statement by Judge Shea to court support personnel which were made in public; all were in private conversations. Additionally, the Panel identifies no statement to court personnel which can legitimately be considered ?abusive? in a way that has generated judicial discipline. *See In re Lantz*, 402 So. 2d 1144 (Fla. 1981) (?repeated instances of arrogance, and a lack of courtesy, dignity and patience to litigants, witnesses, lawyers and others?); *In re Wood*, 720 So. 2d 506, 507 (Fla. 1998) (comments during hearings which were ?rude, insensitive, and which caused . . . humiliation and embarrassment?).

Here again, the Panel went beyond its only legitimate concern of determining

whether any comment by Judge Shea to court support personnel brought disrespect to the judiciary. No such comment is identified. The Panel has grounded a recommendation of judicial discipline on nothing more than the subjective reactions of court support personnel who were unaccustomed to any criticism of their performance and who were unreceptive to the changes which Judge Shea sought to institute for the betterment of the Upper Keys? courts.

2. Charge 23: Comments made during meeting of judges of the circuit (FC&R 55-56).

Charge 23 alleges that Judge Shea made comments during a meeting of the judges of the Sixteenth Judicial Circuit at which he was criticized by his colleagues for a communication to the Upper Keys Bar Association regarding a matter of court administration ? a proposed discontinuance of the use of official court reporters in all civil cases. (FC&R 55-56). The Panel has misstated the facts of what occurred, but a more important principle is at stake. Intra-circuit discussions among judges cannot be the basis of selectively charging one of the several participants with judicial misconduct. ?Candid discussion and mutual trust among the judges of a court are of great value? in attaining the ends of sound law, wise public policy and justice. *In re Kelly*, 238 So. 2d at 573.

A meeting of the judges in the Circuit was held on December 5, 1997. The business portion of the meeting included discussion of a proposed directive that would discontinue altogether the use of official court reporters for civil cases in the Keys. Judge Shea feared the tremendous impact of the proposal on the lawyers in the Upper Keys, and he expressed his view that they should be given input on the issue. He believed that the directive adopted by the other judges in the Circuit was a local rule which *required* local input, while Chief Judge Taylor believed it

was just an administrative order she was free to promulgate on her own.

After airing their views during the agenda portion of the December meeting, Judge Shea and Judge Taylor agreed to await a ruling from the Local Rules Advisory Committee in response to Judge Shea?s request for clarification. (T. 1103). The business of the meeting then continued to its conclusion. (T. 1047).

Judge Ptomey then complained that Judge Shea should not have sent a copy of his ruling request concerning the court reporter situation to lawyers in the Upper Keys. (T. 1108). Judge Miller then joined Judge Ptomey in criticizing Judge Shea by complaining about his demeanor in a telephone conversation concerning a bond reduction order. (T. 1524-25). Judges Becker and Taylor chimed in with their disapproval of Judge Shea. (Shea depo. at 684-88). Led by Judge Ptomey?s vocal escalation, the discussion became heated. (T. 1108; Shea depo. at 682).

Judge Payne was in attendance and observed the escalating dialogue. He considered Judge Shea?s commentary to be merely a reaction to the criticisms of the others. (T. 1527). In the final analysis, though, nothing whatever came of the verbal fracas; no blows were exchanged, and no threats of harm were conveyed. The discussion terminated when Judge Shea simply walked away. (T. 1528, 2730; Shea depo. at 702).

The Panel misstates what occurred on this occasion when it suggests that Judge Shea?s departure from the meeting interrupted the business of the meeting. (FR&C 56). It did not. (T. 1038, 1047, 1108, 1138, 1524, 2732). The Panel unfairly singles out Judge Shea for responding to the verbal onslaught initiated by others.

Factual inaccuracy aside, much more significant mischief lies in the Panel?s apparent willingness to find a violation of the Code of Judicial Conduct in ***any*** comments made by a judge in the course of an intra-court conference concerning court administration matters, no matter how heated. This is not an issue of credibility behind which the Panel can retreat. Even if Judge Shea was animated, the Panel?s charge is not based on what he said or how he said it but rather on whether he had the right to say it. The Panel has concluded that Judge Shea was not permitted to ruffle the feathers of colleagues in a verbal free-for-all without violating judicial ethics. Any such basis for judicial discipline threatens the very core of independence in the judiciary, for it leaves unanswered questions which the Panel did not choose to answer and never thought to ask:

1. Who provoked discussion and disagreement, and who exceeded any level of discourse which is appropriate among judicial officials engaged in private verbal exchanges?

2. How can private speech between judges become an erosion of *public* confidence in the judiciary, unless one of the parties to the discussion went public with his or her view of the event, and if so, who was the one who did that?

3. If feelings were hurt, and even if one participant felt that future collegiality was jeopardized, is a charge of judicial misconduct *ever* appropriate in these circumstances, or will resort to the Commission for private pique have a chilling effect on the attempts of judges to privately discuss and remediate intra-circuit problems?

It is a far-reaching and pernicious doctrine to hold, as the Panel asks the Court to do here, that non-public, intra-court discussions can become the basis of disciplinary charges against one of the participants.

C. Charges involving actions taken to improve the administration of justice in the courts in the Sixteenth Judicial Circuit.

Code Canon 1 provides that judges ?should participate in establishing, maintaining, and enforcing high standards of conduct.? Judges have responsibility for the performance of lawyers and court personnel within their ambit and control. Code Canon 3C(2). For 3? years, Judge Shea was the highest ranking judicial official ? the only circuit court judge ? in the Upper Keys.

By charging Judge Shea with misconduct in taking steps to improve the performance and professionalism of court support personnel in the Upper Keys, and by requiring local attorneys to desist from *ex parte* contacts with the court in contested cases, the Panel has perverted the Code. Judge Shea?s interaction with the clerk of the court, a deputy sheriff and the bailiff supervisor, and his concern for sufficient court reporting services in the courts and with the accuracy in the preparation of domestic violence petitions, are appropriate responsibilities for any judicial officer in his position. The Panel has totally ignored the fact that Judge Shea was right in his belief that the court personnel were acting improperly or were incompetent, although it had evidence aplenty that he was right on the mark: deputy sheriff Barney was disciplined and demoted for taking a young female prisoner leaving jail for an overnight stay in his house; bailiff supervisor Wilkinson was disciplined for misbehavior and ordered to take appropriate training; prisoners languished in jail due to the misfeasance of the clerk of the court.

1. Actions directed at court support personnel.

a. Charge 6: Accuracy in domestic abuse petitions (FC&R 28-31).

This charge alleges that Judge Shea violated the Code by limiting the rights of *pro se* domestic violence petitioners through ?restricting court support personnel from assisting? them by means of an affidavit requirement which chilled ?the willingness of victims and assistants to come forward with legitimate claims.? (FC&R 28). This charge has little record support. This charge, like the others, reflects the Panel?s unwarranted transmogrification of the discomfort of members of the Keys community into imaginary grounds for judicial discipline, ignoring completely the validity and importance of the action taken by Judge Shea.

Judge Shea had the unquestioned judicial authority to take steps necessary to ensure that domestic violence petitions prepared by non-lawyer members of the Upper Keys Domestic Abuse Shelter were an accurate reflection of the facts presented by complainants to those scriveners. He had encountered enough instances of ***inaccurate*** petitions prepared by these non-lawyers that he was motivated to remedy the process flaws. (T. 1859).

He first addressed the problem with a certificate to be attached to petitions which would assure that each petitioner understood and agreed to what personnel in the office of the clerk or in the Shelter were representing. Since it had not been the practice of Shelter personnel to provide this level of recognized responsibility, they were not happy campers. Judge Shea listened to their concerns, and in response stopped requiring the use of these certificates. (T. 17).

In place of the certificate, though, Judge Shea directed the use of the Supreme Court?s required form for disclosure of the name of non-lawyers who

prepared court documentation. When later a Shelter-prepared petition came before him with misinformation and he was obliged to dismiss an injunction petition, he directed the Shelter director to perform a review. This was an appropriate response to a legitimate judicial concern, and the internal review was performed without complaint.

Subsequently, another petition came before Judge Shea with allegations prepared by a non-lawyer which were vehemently denied. Here Judge Shea again saw first-hand the insidious effects on the courts of the unauthorized practice of law by non-lawyer preparers of domestic violence petitions. He reacted by doing what is standard and appropriate under the circumstances; he referred ***the matter*** ? not ?the Shelter? as the FC&R states (FC&R 30) ? to the Bar for an inquiry. (P. Ex. 21). Judge Shea later withdrew his referral to the Bar, when this Court rescinded the requirement of a disclosure in *Amendments to the Florida Family Law Rules*, 713 So. 2d 1, 3 (Fla. 1998). (Shea depo. at 295).

The Panel?s reaction to Judge Shea?s concern for accuracy in domestic violence petitions reflects an exaggerated sensitivity to complaints of Shelter personnel, but no acknowledgement of the salient purpose for his concern. In misguided criticism of Judge Shea and a mix-and-match recitation of unrelated events, the Panel charges that his efforts to assure the accuracy of domestic abuse petitions constituted a limitation on the rights of *pro se* petitioners. The record indeed reveals that one or two Shelter employees claimed to have limited their intake process as a result of their unwillingness to execute any disclosure form (T. 575), but their personal refusal to be accountable cannot be elevated into a charge that Judge Shea?s action limited access to the court by *pro se* petitioners. The record does not contain evidence that any *pro se* petitioner was denied access

to the court, and the record affirmatively shows that petitions of this nature continued unabated after Judge Shea introduced the disclosure requirement. (R. Ex. 69-70, 85).

The Panel?s charge, in any event, starts with two erroneous premises. The FC&R recites that Judge Shea continued to require his Certification form after the judges of his circuit had adopted a uniform petition which did not require any certification. (FC&R 30). In fact, usage of the Certification had been suspended by Judge Shea in favor of the form for disclosure which had been mandated by this Court. R. Regulating Fla. Bar 10-2.1.

The adoption by judges in the Circuit of a form for domestic violence petitions which did not contain any disclosure requirement had nothing whatever to do with Judge Shea?s efforts to require disclosure of the identity of petition preparers. That action was simply the Circuit?s annual update and re-adoption of its standard petition form.

Judge Shea?s desire to assure accuracy in petitions prepared by non-lawyers was a commendable exercise of his judicial discretion, designed to avoid the adjudication of injunction petitions based on misinformation. The mandated use of a disclosure form which had been prescribed by this Court was surely not an ?unreasonable? requirement as the Panel concludes (FC&R 30), and by following the court?s directive Judge Shea can hardly be accused of having ?unreasonably placed Shelter personnel in jeopardy or at risk in the performance of their assigned duties.? (FC&R 31).

The Panel?s charge is an over-reaction to the cries of Shelter personnel who were not happy with having to take responsibility for representations they were routinely making in a judicial pleading ? a responsibility they had not previously

been required to assume during the administration of a predecessor judge. Their discomfort provides no basis for a disciplinary charge against Judge Shea. In responding as it did, the Panel has completely overlooked the rectitude of Judge Shea?s actions with respect to the exercise of his judicial functions, and disregarded this Court?s caution that the Commission should eschew this type of rigidity.

> There will not be an independent, effective judiciary if we expect all judges to fit a common mold or encroach upon their discretionary powers by instituting disciplinary proceedings against those who deviate in some minor way from the model constructed by the members of the Judicial Qualifications Commission.

In re J.Q.C. No. 77-16-16Fla. Jud. Qual. Comm=n R. 6.

The Panel has constructed a tale of intrigue by ascribing to Judge Shea an ulterior motive with regard to Mr. Barney which, for the most part, is derived from private, confidential conversations which Judge Shea had with Judge Ptomey. (FC&R 35-37). In doing so, the Panel has ignored entirely the propriety of Judge Shea?s action regarding Mr. Barney?s outrage, in an effort to create support for its theory that Judge Shea?s every act was motivated by antipathy towards Keys court support personnel. The Court has learned that the Commission?s themes have not always been supportable. *In re Davey*, 645 So. 2d at 404 (?The commission?s theory of wrongdoing . . . is unsupported by the record.?).

c. Charges 12 and 18: Supervision of the bailiff supervisor (FC&R 39-42).

The FC&R alleges a violation of the Code from three comments made by Judge Shea to bailiff supervisor Wilkinson regarding her performance, and his request to her supervisor that she undergo a supervisory review. The Panel ignores the fact that Judge Shea?s comments and actions with regard to Ms. Wilkinson were entirely proper, and that the review performed by her supervisor resulted in a directive that she take appropriate training for her job.

These charges are based on allegations that Judge Shea filed a complaint with Ms. Wilkinson?s supervisor, ?slamming the door in her face? when she sought to explain her actions, ?inappropriately? criticized her, and instructed her to use common sense. (FC&R 39). All of the criticisms leveled by Judge Shea were delivered in private settings. The Panel does not suggest, nor could it, that a judicial officer is powerless to exercise control over the bailiff in his courtroom, or to communicate to the bailiff supervisor any grounds for displeasure in the discharge of her duties. The Panel?s finding against Judge Shea reflects only its alignment with Ms. Wilkinson?s sensitivity to Judge Shea?s criticisms, and her distress at the manner in which his criticisms were communicated.

The implication of the Panel?s action ? that private displeasure regarding the performance of courtroom personnel who are unaccustomed to be criticized, however forcefully voiced ? is to chill properly-motivated judicial interaction with court employees. The Panel has faulted Judge Shea for his effort to improve the administration of justice in the Upper Keys in the face of record evidence that the criticized performance of court-related duties by Ms. Wilkinson was viewed by her supervisor as substandard. This charge provides no factual or legal basis for

judicial discipline.

d. Charge 22: Administrative inquiry concerning court reporter directive as a local rule or administrative order (FC&R 54-55).

This charge seeks judicial discipline for Judge Shea?s public dissemination of his version of an internal dispute on the use of official court reporters. The charge emerges out of a strong concern by Judge Shea, confirmed by ***all*** attorneys who responded to Judge Taylor?s request for bar input (R. Ex. 199-206), that a policy of ?no civil case reporting? adopted by the fellow judges in his Circuit for the Circuit?s official court reporters, without his participation, would seriously impinge the operation of his court in the Upper Keys.

Judge Shea was entitled to be concerned about the impact of a proposed administrative order on the operation of his court and the attorneys who appeared before him. There was only one official court reporter, and only one private court reporter, in the Upper Keys. (T. 2706-07). The private court reporter had advised Judge Shea she was overworked. (T. 2706). The policy on civil case reporting adopted without Judge Shea?s participation would have precluded the official court reporter from doing civil work, and either would have forced the private reporter to hire assistants or forced attorneys to bring court reporters in from Miami. (T. 2706-07). Judge Shea?s concern was genuine and appropriate, and the Panel does not suggest otherwise. (FC&R 54-56).

Under the circumstances, Judge Shea was entitled to be concerned with the proposed directive approved by his lower Keys colleagues. This Court has recognized expressly that a judge is entitled to question whether a proposed directive is an administrative order, or a local rule for which the Rules require

input from the local bar, by seeking an opinion on the question from the Local Rules Advisory Committee:

> [A]dministrative orders may be challenged as court rules or local rules by applying for a determination by the Local Rules Advisory Committee, as provided in Florida Rule of Judicial Administration 2.050(e)(2).

Wild v. Dozier, 672 So. 2d 16, 18 n.5 (Fla. 1996). Even Chief Judge Taylor acknowledged Judge Shea?s right to request a ruling, when she agreed at the December meeting of the judges to delay implementation of her directive until the Advisory Committee had issued its ruling. (T. 1102-03, 2721).

There is no basis for disciplinary action in the fact that Judge Shea sent a copy of his inquiry to the Clerk of the Florida Supreme Court and to the Office of the State Courts Administrator. Rule requests are not secret communications, and all decisions from the Advisory Committee are reported to the Supreme Court in any event. *See* Fla. R. Jud. Admin. 2.050(e)(2). Judge Shea?s dissemination of his inquiry to the top echelon of the state judiciary may not have been a necessary part of the inquiry process, but staying in touch with the Court on matters relating to its Rules and the administration of the courts hardly provides a basis for judicial discipline.

The Panel?s criticism of Judge Shea seemingly rests on the fact that his judicial colleagues were up in arms about his dissemination of his Committee inquiry to the local bar association. The Panel lost sight of the fact that those judges were not the only persons affected by the proposed administrative order, and that the problem of having a shortage of court reporters was a serious concern, of keen interest, to the lawyers practicing in the Upper Keys. The impact of the

proposed administrative order on the local bar was ultimately recognized by Chief Judge Taylor, who promised Judge Shea that she would contact the bar for comments on implementation before her proposed administrative order became effective. (R. Ex. 196). Here again, the foundation for this charge rests entirely on the Panel?s unwillingness to recognize that Judge Shea was legitimately pursuing a genuine concern for the operation of his court and the needs of the judicial system.

e. Charge 36: Supervision of court clerk regarding a lack of quality control (FC&R 57-58).

This charge asserts that Judge Shea was guilty of judicial misconduct in writing to the clerk of the circuit court to note that there had been numerous mistakes in the performance of the duties of his office, and to advise that attorney?s fees might well be levied against the office if future mistakes resulted in financial harm to clients. It is exceedingly difficult to understand how the Panel could base a charge of judicial misconduct on Judge Shea?s letter.

The only facts before the Panel on this issue more than justify Judge Shea?s communiqué. He was aware that the clerk?s office had made a number of *serious* mistakes, some of which produced unconscionable harm to persons enmeshed in the Keys? courts. (T. 2167; R. Ex. 249, 250-55, 258-59, 265). He was aware that attorneys in the Upper Keys intended to seek attorney?s fees from the clerk?s office if future acts of incompetence caused harm to their clients. (T. 2761-62). His letter was a suitable and appropriate cautionary warning which, it turned out, produced positive results. (T. 1237).

The prosecutor adduced no evidence on this issue. There is no record basis

to support the notion of a vendetta against the clerk. Consequently, there was no plausible basis for the Panel to charge a violation of the Code, and there is no evidence before the Court to support the charge.

2. Maintenance of the integrity of the courts through a prohibition on *ex parte* contacts by attorneys with the court in contested proceedings.

Code Canon 3B(7) states that no judge should consider *ex parte* communications concerning a pending proceeding. The Court has reprimanded judges for violating this prohibition, in recognition that the Canon ?was written with the clear intent of excluding all *ex parte* communications, except when they are expressly authorized by statutes or rules.? *In re Clayton*, 504 So. 2d 394, 395 (Fla. 1987). For its part, the Commission has recommended removal from office for a single instance of improper *ex parte* contact. *In re Boyd*, 308 So. 2d 13 (Fla. 1975); *In re Dekle*, 308 So. 2d 5 (Fla. 1975).

Yet here, implausibly, the Panel has recommended Judge Shea?s removal from office for enforcing a policy which ***prohibits*** all *ex parte* communications. The Court should summarily reject these charges.

a. Charge 17: Admonition to assistant state attorney McClure regarding *ex parte* communications (FC&R 47, 52-54).

This charge alleges that Judge Shea violated the Code by stating to assistant state attorney Gina McClure that he considered her telephone call to his office, to change a court order setting a jury selection date, as an improper *ex parte* communication, and by cautioning her that future *ex parte* contacts with his office could result in the filing of a Bar complaint. In making this charge, the Panel has again embellished the facts with damning characterization, but ignored the law.

The record establishes that Ms. McClure called Judge Shea?s office to change a court order for a jury selection date knowing full well that he had instituted a policy of barring ***all*** *ex parte* communications. (T. 662-63, 665-66). Judge Shea?s judicial assistant asked her to hold the line while Judge Shea was contacted, inasmuch as the assistant did not believe (rightly) that she had authority to change a jury selection date which Judge Shea had ordered. (T. 630, 1446-48, 1464). The assistant then passed Ms. McClure?s request on to Judge Shea. (T. 1446). Judge Shea did not, as the Panel asserts, ?overhear[] part of the phone conversation.? (FC&R 52).

Judge Shea directed his assistant to tell Ms. McClure that she should put her request in writing. This was a completely appropriate response to a request for modification of a court order which affects not just the caller but opposing counsel. The Panel totally disregards the propriety of this response.

The following day Judge Shea?s court repeated his displeasure with her disregard of his *ex parte* communication policy, and told Ms. McClure that further *ex parte* contacts could lead to the filing of a disciplinary complaint with the Bar. The Panel also disregards the propriety of a judge giving warning of possible

consequences for disregarding orders, and the propriety of the action he said would be taken.

Judge Shea was indisputably *entitled* to establish an *ex parte* policy. *E.g.*, R. Regulating Fla. Bar 4-3.5(b); *The Florida Bar v. Broida*, 574 So. 2d 83, 87 (Fla. 1991). He was indisputably entitled to apply it to all of his orders, and indisputably entitled to advise a non-compliant attorney of the possible consequences of continuing to disregard that policy. His policy should have been viewed by the Panel as an admirable improvement in the administration of the Upper Keys court, rather than a basis to sympathize with attorneys unaccustomed to more formal judicial proceedings and unwilling to change the status quo.

Judge Shea?s concern with *ex parte* communications by attorneys reflects precisely the sentiments of this Court. In *In re Miller*, 644 So. 2d 75 (Fla. 1994), the Court used its review of a Commission proceeding as an ?opportunity to stress that [*ex parte*] communications are not appropriate,? stating:

> Except under limited circumstances, no party should be allowed the advantage of presenting matters to or having matters decided by the judge without notice to all other interested parties.

Id. at 78, quoting with approval an earlier decision by the Court. In disregard of the Court?s position and its pronouncement that an *ex parte* communication with a judge ?obviously violates the canons of the Code of Judicial Conduct? (*Id*.), the Panel has faulted Judge Shea for enforcing a policy which *prohibits* just such communications. This charge is unwarranted.[13]

b. Charges 32 and 33: Admonition to assistant state attorney Garcia regarding *ex parte* communications (FC&R 47, 51-53).

These charges allege a violation of the Code for Judge Shea?s criticism of the ethics of assistant state attorney Luis Garcia in a letter and a statement made to him during an appearance in Judge Shea?s court. This brouhaha stemmed from a conversation between Judge Shea and Mr. Garcia regarding the performance of another attorney in his office and under his supervisory control, assistant state attorney Gina McClure. The first fundamental flaw with these charges is the same as the charge brought with respect to assistant state attorney Gina McClure ? this charge, like that one, is an unwarranted reaction to Judge Shea?s exercise of discretion in insisting that *ex parte* communications with his court will not be tolerated.

The presentation of this charge in the FC&R presents the Court with a more serious concern, though, applicable not only in this proceeding but in others brought by the Commission. The Panel?s recitations regarding these two charges is interwoven with an extended discussion of matters as to which Judge Shea was never charged, including several which had been the basis of the initial 55 complaints brought against Judge Shea but dropped by the investigative panel and never brought forward as charges for consideration by the hearing panel: *State v. Davis* (FC&R 48-49); *State v. Avins* (FC&R 49-50); the circumstances of *State v. Gonzalez* (FC&R 50-51), and one telephone call from State Attorney Zuelch. (FC&R 51).

Having never been charged, these matters *cannot* form the basis for disciplinary action or support the Panel?s theme of a ?pattern? against lawyers in the state attorney?s office or court support personnel. Yet the Panel?s very

recitations indicate that, to some unspecified degree, the Panel relied on them. These incidents have no place whatever in the FC&R. They constitute an irredeemable taint not just to charges number 32 and 33, but to the Panel?s overall conclusions and recommendation. *Cf. Farrell v. State*, 682 So. 2d 204, 206 (Fla. 5th DCA 1996) (conviction reversed where court unable to conclude that erroneous admission of evidence regarding other crimes ?did not affect the verdict.?).

The Court cannot accept as clear and convincing evidence of specific misconduct, or accept as legitimate, a Panel recommendation of removal from office based to any extent on matters which were never formally charged. *In re Miller*, 644 So. 2d at 78.

D. Charge involving Judge Shea?s personal property interest in two mobile homes (FC&R 9-19).

The Panel has charged Judge Shea with violating the Code by making telephone calls to two local attorney friends who were involved in eviction/land use change proceedings from a well-situated Keys mobile home park in which Judge Shea owned two mobile homes. The Panel declares that Judge Shea intimidated Messrs. Mulick and Beckmeyer into withdrawing from representation of the new park owners, thus causing their clients to lose the counsel of their choice. The Panel also charges that Judge Shea?s telephone calls were ?totally improper? regardless of his ?perceived? friendship; that he should not have threatened to recuse himself from *all* of these lawyers? cases; and that his alleged suggestion of a price to purchase his interests was improper.

The *objective* facts with respect to this charge are not in dispute. Judge Shea acknowledged making the two calls and having the discussions that concerned the

Panel. (T. 85, 154, 2462). It is undisputed that Judge Shea owned two mobile homes in the mobile home park which was identified in the Saturday morning newspaper article he read. It is undisputed that, before Judge Shea learned of Mr. Mulick?s representation of the new owners of the mobile home park and placed his Saturday morning call, he had been served with an eviction notice which was titled ?Notice of Eviction/Change in Land Use.? It is undisputed that, dating from his receipt of the Notice, Judge Shea intended to oppose the eviction/land use change, was drafting a complaint for that purpose, and was in contact with an attorney for that purpose. It is undisputed that the newspaper article he read accurately stated that Mr. Mulick was counsel for and represented the new park owners, and that Mr. Mulick was not, as he represented to Judge Shea during the telephone call, no longer actively representing them. (FC&R 11; T. 86, 2464).

The issues presented in this charge are whether it was a violation of any Code provision for Judge Shea to initiate telephone calls to his attorney-friends, and whether his comments during the course of conversations constituted an improper use of the power of his judicial office. The first issue is easy to dispatch.

Judge Shea had a property interest in mobile homes which was threatened by the eviction/land use change proceeding of Messrs. Mulick?s and Beckmeyer?s clients. The Panel has acknowledged that Judge Shea had an absolute legal right to protect and defend that property interest to the limits of the law. (FC&R 18). When he learned through a newspaper article that his attorney-friend was representing parties who had already commenced eviction proceedings and land use changes which Judge Shea intended to legally oppose ? a fact incidentally that Mr. Mulick well knew but had chosen to ignore (T. 112) ? Judge Shea was certainly within his rights to call his friend to advise of his ownership interest and

the conflicts his representation posed. Nothing in the Code prevents a judge from reacting, after learning from a newspaper article that a close friend may unknowingly be involved in an eviction proceeding against him, with a telephone call.

The concern of the Panel seems not to have been the call, but its belief that Judge Shea?s contact with Messrs. Mulick and Beckmeyer was motivated improperly by

> his desire to effect the removal of two well-respected attorneys from the representation of party that he perceived as an enemy.

(FC&R 17). The Court will find no clear and convincing evidence in this record which supports that damning and unfounded hypothesis.

Not one word in the testimony of this proceeding indicates that Judge Shea wanted his friends to lose the representation of the mobile home park?s new owners. Any implication that he threatened his friends with having to suffer the travel consequences to their other clients of having to ply their craft in Marathon if he entered an order of recusal is sharply disputed. *E.g., compare* T. 129-30 *with* T. 95-96. There is a significant difference between what Messrs. Mulick and Beckmeyer said they perceived would be the consequences of Judge Shea?s recusal, on the one hand, and what Judge Shea communicated regarding their client?s adversity and his inability to sit on their cases, on the other. Indeed, the consequences of his recusal were largely imagined, for while they believed they would not be able to practice in the Plantation Key Courthouse (T. 95-96) in fact their cases could have been tried there before assigned judges or Judge Ptomey. (T. 130).

The Panel chose to view these telephone calls as a threat by Judge Shea to

intimidate Messrs. Mulick and Beckmeyer into having their client purchase his interest in two mobile homes. Mr. Mulick testified that he was not threatened or intimidated. (T. 114, 132). Mr. Beckmeyer, in contrast, testified that Judge Shea described the impact of his recusal on their law practice in ?a very threatening manner? (T. 155; *and see* 158-59, 161, 183), but significantly his reaction to the perceived threat was to ask: ?Is there any way this can be worked out?? (T. 156). That is precisely what good friends might say to each other, and precisely what Judge Shea suggested when he commented that the problem of adversity would not exist if he no longer owned the mobile homes.

A careful look at Judge Shea?s conversations with Messrs. Mulick and Beckmeyer reveals that the Panel?s finding of an abuse of judicial office is a view of the evidence not established clearly and convincingly ? that is, the Panel?s finding of abuse is based on testimony of a character which is not clear and convincing but rather ?indecisive, confused, and contradictory.? *In re Davey*, 645 So. 2d at 405.

1. Judge Shea began his conversation with Mr. Mulick by stating that he owned two mobile homes in the park, and that Mr. Mulick?s representation of the client seeking his eviction put the two of them at odds to the point that Judge Shea could not be involved in Mr. Mulick?s cases. (FC&R 11). That statement is unobjectionable from any point of view. It is factually accurate, and it is ethically correct. There can be no judicial misconduct in Judge Shea?s advising personal friends serving as counsel for the mobile home park?s new owners ? a fact he was surprised to learn more than a week after being served with eviction/land use change papers ? that he had a personal, financial interest in the park which would place him in recusable conflict with the owners? lawyers. *See* Code Canon

3E(1)(c).

2. Mr. Mulick was disingenuous with Judge Shea. He disclaimed involvement with the eviction proceeding; he indicated that he had only been involved with land use change matters and not the eviction proceeding; he affirmatively stated that he was not at the time actively representing the new owners; and he claimed not to recognize any necessity for Judge Shea?s recusal based on adversity and the appearance of impropriety. (FC&R 11-12; T. 84, 86, 90, 131-32).[14] He later contradicted those statements, faced with documentary evidence to the contrary in his own files, by acknowledging that he was actively representing the new owners at the time of Judge Shea?s call, that in fact he had drafted and reviewed eviction complaints (or at least billed his client for having drafted and reviewed the complaints) (T. 109, 112-14, 124, 126-27, 134-36), and that a broad recusal would certainly have been a valid judgment call which Judge Shea was entitled to make. (T. 113).

This disingenuous attempt to distance himself and his law firm from an eviction process which he knew was going to financially impact Judge Shea, and to leave Judge Shea in the unknowing position of presiding in his law firm?s cases while he secretly represented a client directly adverse to Judge Shea?s property

and financial interests,[10] is highly relevant to the clarity and convincingness of the evidence that Judge Shea was not guilty of verbal manipulation in his calls with Mr. Mulick.

3. Judge Shea stated that his adversity to Mr. Mulick?s client required his disqualification in all cases where Mr. Mulick appeared as counsel of record. (FC&R 11). The Panel first appears to suggest that Judge Shea should have recused himself only in the eviction proceeding (FC&R 17), but in the final analysis agrees with Judge Shea that recusal in all of the Mulick and Beckmeyer cases would be proper ? provided (according to the Panel) that it was done ?in the context of an actual case.? (FC&R 18). The Panel?s notion that the propriety of a recusal depends on an in-case context is not accurate, and it is not shared by other judicial officers.

Recusal from all of the cases brought by an attorney with a conflict of interest, outside the context of a particular suit, is legally sound. *See* Code Canon 2, and section 38.05, Fla. Stat. (1997). Indeed, recusals of this nature had been the practice of other judges in the Keys. (T. 175-76).[11]

[10] The notice of eviction served on Judge Shea declared unequivocally that it was based on eviction and a ?land use change.? (R. Ex. 6). Mr. Mulick had been hired by the new owners of the park to effect that land use change. (T. 2972). The first, indispensable step in eviction is the land use change which Mr. Mulick was engaged to effect. *See* section 723.061(1)(d), Fla. Stat. (1997).

[11] Further precedent is found in the Court?s own records, where Justice Grimes maintained a pre-filed recusal from every case in which his former law partner,

4. The Panel disputes Judge Shea?s advisory to Mr. Mulick that he was going to oppose eviction in defense of his property interest. That representation by Judge Shea is borne out by the record. Judge Shea had drafted a comprehensive complaint to challenge the eviction, and he had contacted attorney Robert Citron for personal representation in the eviction proceeding.[12] Mr. Citron decided to represent the home owners? association in a class action, though, and in doing so he used in large part the complaint which Judge Shea had personally drafted. (R. 1168, 1180, 1181-82, 1205).

5. The Panel has criticized Judge Shea?s discussion of purchase as a

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Chesterfield Smith, might ever appear as counsel of record.

[12] Mr. Beckmeyer, actually saw a draft of Judge Shea?s 15-20 page complaint during a friendly, drop-in visit to Judge Shea?s office. (T. 159-60, 178).

wrongful use of his judicial office to promote a personal financial interest.[13] That conclusion can only be reached if the context of events is ignored. Judge Shea learned from a newspaper article that one of his very good friends was representing the new owners of a park in which Judge Shea owned two mobile homes. He had received a ?Notice of Eviction/Change in Land Use? more than a week earlier, but had no knowledge of his friend?s involvement. He picked up the telephone and made a perfectly natural contact with his friend to ask: ?Hey, Nick, what?s this I read??

In response to Judge Shea?s comment that he could no longer sit on his cases if that representation existed, Mr. Mulick at first dissembled by telling Judge Shea he no longer represented the new owners of the park. When Mr. Mulick later acknowledged that he in fact had ongoing representation of the new owners, and when Judge Shea?s recusal became a genuine likelihood, it was natural for both of

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[13] Judge Shea valued his two units in the mobile home park at $150,000. The Panel finds that Judge Shea?s valuation presents no basis for taking action against him (FC&R 16), but it went out of its way to include in its FC&R extensive, 3-page discussion regarding the valuation evidence. (FC&R 14-16). This type of discussion has not been condoned as a basis for Commission action. ?[O]nly where lack of candor is formally charged and proven may it be used as a basis for removal or reprimand.? *In re Davey*, 645 So. 2d at 406. Inasmuch as the Panel did not charge Judge Shea with a lack of candor before the Commission, it could not use his valuation testimony as a prop for its findings, conclusions and recommendation.

them to mention the obvious solution to this problem ? the purchase of Judge Shea?s mobile homes. It disregards entirely the context of the moment and the informal relationship between the parties for the Panel to have concluded that Judge Shea was knowingly misusing his judicial position. His comments were simply a forgivable indiscretion.

6. Messrs. Mulick and Beckmeyer terminated their representation of the mobile home park owners, but the evidence is far from clear or convincing that this occurred through any fault of Judge Shea?s. These attorneys practice predominantly in the Plantation Key courthouse where Judge Shea presides. (T. 95-96). If he were not available to preside over their cases, however, their cases could be handled at the Plantation Key courthouse either by visiting judges or by Judge Ptomey. *See* section 38.09, Fla. Stat. (1997); Fla. R. Jud. Admin. 2.160. Even if it were necessary to try their cases in another locale, any inconvenience was due to Circuit geography and not Judge Shea?s response to an ethical dilemma.

There is an absence of evidence that Judge Shea intended his conversations as a way to have his mobile homes purchased, or that he was motivated to punish his friends for representing the new owners of the park. These were conversations with long-time friends in a closely-knit, small community of lawyers and judges; not with perceived enemies as the Panel seems to have concluded. In fact, Judge Shea never intended to sell one of the mobile homes, and hoped to live in it when he retired. (T. 2902). The Court has required more objective support for charges of this nature than this record provides. *In re Davey*, 645 So. 2d at 407 (rejecting findings and a conclusion for lack of clear and convincing evidence ?although the [judge?s] actions were clearly ill-advised?).

It bears noting that Judge Shea was a relatively new judge, and that he acknowledged in hindsight that his telephone calls might not have been the best way to deal with the conflict between his personal interests and his judicial responsibilities. (T. 2906). These mitigating factors have been considered by the Court to be quite important. *E.g., In re Turner*, 421 So. 2d 1077, 1081 (Fla. 1982) (?The actions of Judge Turner occurred early in his judicial career. . . . The transition from a forceful, effective advocate to an impartial, considerate judge is not an easy task and cannot always be accomplished overnight.?); *In re Davey*, 645 So. 2d at 405 (?Where a judge admits wrongdoing and expresses remorse before the Commission, this candor reflects positively on his or her present fitness to hold office . . . .?). A momentary lapse in judgment does not call for removal from the bench.

The recommended penalty of removal from office is not warranted by the evidence, mitigating factors or precedent.

The Panel has recommended to the Court that Judge Shea be removed from the bench. That draconian level of punishment is not warranted for several reasons. First, removal is not warranted by the evidence, inasmuch no bench misconduct has been charged and the Panel?s findings as to non-bench conduct are not supported by clear and convincing evidence. Second, removal is not warranted in light of the factors which this Court has said should determine the degree of punishment for judicial misconduct, such as the seasoning and experience of the judge, his acknowledgement of mistakes, his remorse, consideration of the whether the alleged misconduct is in the discharge of judicial responsibilities in the public setting (which is not the case here) or in private, and the motivation for the behavior which is criticized. Third, removal is not warranted by precedent.

In considering the Panel?s recommendation of removal, the Court must begin by considering the full context of this proceeding, starting with the distinctive culture of the Keys. One two-lane road connects lawyers practicing in the Keys to their courts. The intimacy of that condition is intensified by the division of the Keys into three judicial arenas.[15] As a result of these factors, each judge is the focus of intense attention by all law-related personnel in his or her discrete locale on that two-lane road: the lawyers and the support personnel associated with the operation of a judicial system ? bailiffs, court reporters, and other non-lawyer support service personnel.

The judicial environment in the Upper Keys is unlike any other in the state. The Upper Keys has had only three circuit court judges, and two of three have

been the subject of public disciplinary proceedings brought by the Commission. Oddly, this proceeding stems from Judge Shea?s efforts to introduce into the Upper Keys a new and appropriate level of professionalism for the administration of justice.

This is not to say that the ethical and moral responsibilities of Keys? judges are to be judged by a lessened level of adherence to the Code of Judicial Conduct. This ***is*** to say, however, that the operation of courtrooms and the interaction between judges and attorneys in communities such as Orlando, Miami, Jacksonville and Tallahassee do not portray the experience or reality of practice in the Keys, and that Judge Shea should be judged with a sensitivity to the unique intimacy and familiarity which inhered in the Keys culture. As Mr. DeFoor testified:

> this is a small country courthouse. We have not had the burden of having to do things quite that formally for all these years . . . .

(T. 450).

A. The evidence does not support removal.

The charges brought by the Panel are not based on clear and convincing evidence, and in many instances on any evidence at all. A detailed recitation of these evidentiary deficiencies would be duplicative of the discussion presented in connection with the separate charges, but certain categorical observations are appropriate.

With regard to orders Judge Shea entered in judicial proceedings, nothing of consequence happened to the persons affected other than personal dismay. Judge Shea promptly vacated one order that he entered by mistake (Barbara Martin of the Guidance Clinic) and another when the complaining witness disavowed the

underlying charges (Mr. Brown). Another judge ruled favorably for the person asked to show cause concerning possible contempt (Ms. Baptiste), and for the attorney defending the effectiveness of his representation in *Overton* after Judge Shea had struggled with the gravity of his first capital punishment case. Chief Judge Taylor suffered no embarrassment in Judge Shea?s disclosure of her willingness to assist with the problems he had encountered with the court reporter manager. Beyond the absence of harm from Judge Shea?s orders, the record does not support impropriety as to any of his legal rulings, and the evidence is neither clear nor convincing that they violated any Canon of the Code.

With regard to internal communications with court colleagues, all of the evidence of personal pique by judicial colleagues is immaterial to any charge of judicial misconduct. Judge Shea simply shared thoughts about the judicial system in a private conversation with Judge Ptomey, and he simply responded to criticism from colleagues after the business portion of court conference. He clearly had the right to do both without fear of disciplinary reprisal.

With regard to actions directed toward court support personnel, Judge Shea in each instance addressed in appropriate fashion a serious problem in the administration of his judicial duties as the senior judicial official in the Upper Keys: attempting to get disclosure of the names of non-lawyers preparing petitions for injunctions in domestic violence cases; developing and sending to the proper authority facts regarding misconduct of deputy sheriff Barney; admonishing bailiff supervisor Wilkinson privately to do her job with common sense; cautioning the clerk that attorney?s fees could be awarded if incompetence continued; seeking authorized advice from an appropriate committee of the Bar concerning the proposed termination of civil court reporting in the Circuit. No clear or

convincing evidence surrounding these actions points to any violation of the Code of Judicial Conduct.

With regard to his efforts to curtail *ex parte* contacts with the court, the propriety of his actions cannot be questioned. There is no clear and convincing evidence that Judge Shea was motivated other than by this Court?s directives for the standard of practice in adversarial court proceedings.

With regard to the defense of his mobile home properties, there is a serious and direct testimonial dispute between what Judge Shea said to Messrs. Mulick and Beckmeyer and what they claim to have heard. Mr. Mulick?s testimony is rife with inconsistencies. The Panel?s finding of impropriety rests on the thin reed of its subjective view of Judge Shea?s motives ? a theme that appears to have dominated the Panel?s view of every allegation brought against Judge Shea.

B. Exonerating and mitigating factors were not considered by the Panel.

It is relevant to point out that the Sixteenth Judicial Circuit has a relatively small population, and that the people in that community *elected* Judge Shea to the bench just three and one half years before his suspension. He represents the choice of that electorate, and that fact should weigh against removal.

> Any arm of government should be reticent in exercising the power to nullify the elective process by discipline or removal of elected officials.

In re Kelly, 238 So. 2d at 573.

Also weighing against removal, and ignored entirely by the Panel, is the overwhelming evidence that Judge Shea is a *good* judge ? indeed a *fine* judge according to all who expressed a view on his bench conduct. Evidence of judicial stature, and the manner in which judicial tasks are in fact performed, are highly

relevant to a disciplinary proceeding. *E.g., In re Dekle*, 308 So. 2d 5, 12 (Fla. 1975) (?His status as an outstanding jurist for several years past must be considered in the overall picture herein and taken into consideration in fixing the discipline to be imposed.?). In fact, the Court has defined the bench responsibilities of a trial judge in a way that could have been written as a commentary on Judge Shea himself:

> Judges are expected to be temperate, attentive, patient and impartial, diligent in ascertaining facts, and prompt in the performance of a judge?s duties. Common courtesy and considerate treatment of jurors, witnesses, court personnel, and lawyers are traits properly expected of judges. Court proceedings and all other judicial acts must be conducted with fitting dignity and decorum . . . .

In re Turner, 421 So. 2d 1077, 1081 (Fla. 1982).

C. Precedent does not support removal.

The Panel?s reliance on case law to justify removing Judge Shea from office is misplaced. The Panel relies on *In re Graham* and *In re Crowell* as ?less egregious cases.? (FC&R 62). They are not. In *Graham*, the Court used as examples of misconduct Judge Graham?s bench conduct (arbitrarily increasing a sentence and berating another defendant?s mother), and the Court stressed that Judge Graham ?refuses to recognize his own transgressions,? ?shows no remorse? and therefore presumably would continue to violate the precepts of the Code. 620 So. 2d at 1276.[16] None of the charges against Judge Shea involve bench conduct, and Judge Shea has recognized that at times he exercised less than perfect judgment.

In *Crowell*, egregious misconduct in a public setting included having a ?propensity to summarily adjudicate and incarcerate a citizen . . . without according to the accused a right to be heard or any opportunity to defend himself.? 379 So. 2d at 108. His transgressions also included using his judicial position to have a counselor of the Division of Youth Services fired, transferred or suspended. No such direct, flagrant abuse of judicial power is attributable to Judge Shea. The negative and critical reactions of individual counselors and staff in the Upper Keys Guidance Clinic and the Domestic Abuse Shelter reflect only resistance to change. If Judge Shea erred in pursuing unwelcome changes, at least his actions were taken in private, promptly corrected if in error, and made in pursuit of a better judiciary in the Keys.

Judge Shea?s alleged misconduct, taken in the worst possible light, falls in line with cases where judges have received public reprimands.

In re Wright, 694 So. 2d 734 (Fla. 1997) (reprimand given for rude, abusive

and insulting conduct toward two assistant state attorneys);

In re Steinhardt, 663 So. 2d 616 (Fla. 1995) (reprimand given for behaving angrily and vindictively after receiving a ticket from a police officer; demanding that an attorney appear *ex parte* in chambers to be questioned about an unflattering news article);

In re Miller, 644 So. 2d 75 (Fla. 1994) (reprimand given for giving a mother notice of a custody hearing only after the hearing began and forcing her to represent herself; writing letters criticizing the judicial system);

In re Perry, 641 So. 2d 366 (Fla. 1994) (reprimand given for admonishing, berating and abusing an army recruiter for wearing dress uniform to court; exercising contempt powers arbitrarily, without regard for due process and beyond any statutory or common law authority);

In re Colby, 629 So. 2d 120 (Fla. 1993) (reprimand given for convicting absent criminal defendants without a plea or a trial);

In re Fleet, 610 So. 2d 1282 (Fla. 1992) (reprimand given for displaying and loading a handgun in open court);

In re Perry, 586 So. 2d 1054 (Fla. 1991) (reprimand given for verbal abuse and intimidation of attorneys, witnesses and parties; improper *ex parte* communications; failing to recuse in a timely manner; inappropriate comments on pending proceedings);

In re Trettis, 577 So. 2d 1312 (Fla. 1991) (reprimand given for rude and overbearing behavior toward jurors, defendants and attorneys in open court; improper *ex parte* communications, abuse and intimidation of courthouse personnel and fellow judges; inappropriate comments on pending proceedings; allowing personal relationships to influence judicial conduct, and using position as

judge to create employment for others in the judicial system);

In re Zack, 570 So. 2d 938 (Fla. 1990) (reprimand given for using profane language in reference to the sheriff);

In re Eastmoore, 504 So. 2d 756 (Fla. 1987) (reprimand given for compelling newspaper reporter to come to chambers for a personal matter, precluding a mother from testifying in a child custody hearing and raising his voice to the mother; acting in an overbearing and dictatorial fashion toward the mother);

In re Lantz, 402 So. 2d 1144 (Fla. 1981) (reprimand given for arrogance and a lack of courtesy, dignity and patience to litigants, witnesses, lawyers and others; seeking a personal favor from a law professor friend who was also a litigant before him; directly soliciting election support from a member of the bar; ordering a large fee for a close personal friend); and

In re Kelly, 238 So. 2d 565 (Fla. 1970), *cert. denied*, 401 U.S. 962 (1971) (reprimand given for pattern of hostility toward many attorneys, court officials and fellow judges; concerted effort to bolster his personal image through press releases at the expense of the judiciary).

IV. The Panel proceeding was tainted by the participation of the Panel chairman Judge Frank Kaney.

Judge Shea moved on a timely basis for the Panel chairman to disqualify himself based on improper *ex parte* communications with judicial colleagues who had both filed formal complaints against Judge Shea and provided affidavits in support of his suspension ? Keys? Judges Ptomey and Miller. The chairman denied the motion, and the full Panel denied both an initial motion to review the chairman?s ruling and a renewed motion based on newly discovered evidence. These rulings were error, and infected the entire proceeding with a reversible taint.

Even without formal motions for disqualification, Judge Kaney had an obligation to disclose on the record his communications with two co-members of the Florida Judicial College, Judges Ptomey and Miller, both of whom had formally complained to the Commission about Judge Shea. *In re Code of Judicial Conduct (Cannons 1, 2 and 7A(1)(b))*, 659 So. 2d 692, 693 (Fla. 1995) (disclosure required of information which would be relevant to disqualification). Additionally, once the disqualification motion and renewed motion were filed, disqualification was required as the facts contained in the motion were legally sufficient. Commission Rule 25(a); Code Canon 3E(1)(a).

Judge Kaney?s participation in the hearing, not to mention his role as presiding member of the Panel, was improper and prejudicial. The entire proceeding under Judge Kaney?s guidance violated Judge Shea?s right to an impartial tribunal, and the FC&R issued by the Panel should be vacated. *See, CH2M Hill Southeast, Inc. v. Pinellas County*, 598 So. 2d 85 (Fla. 2d DCA 1992).

CONCLUSION

The FC&R should be set aside in light of Judge Kaney?s participation. The same result is required with respect to the findings of the Panel, which are not supported by clear and convincing evidence or law. Each and every finding of a Code violation should be vacated by the Court.

If the Court concludes otherwise, Judge Shea should not be removed from the bench. In light of the totality of circumstances, precedent and the preservation of judicial independence, no punishment is warranted in this case beyond that which Judge Shea has already endured ? humiliation, vilification and suspension from office simply for trying too hard to impose ethical standards on attorneys, and to require competence from court support personnel in a locale where more lax

standards had prevailed. If that were not deemed to be punishment enough, then a reprimand would be the most that this record could support.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this initial brief was hand-delivered on June 11, 1999, to Lauri Waldman Ross, Esq., Ross & Tilghman, Two Datran Center, Suite 1705, 9130 South Dadeland Boulevard, Miami, Florida 33156.

[1] The Monroe County Circuit Court seat occupied by Judge Shea was created by the Florida Legislature in 1980, at which time the legislature also directed that at least one judge in the County be a resident of the Upper Keys. Ch. 80-164, ? 1, Laws of Florida (codified as section 26.021(16), Florida Statutes (1997)). The first occupant of the Upper Keys seat was David Kirwan, who resigned from office following the filing of formal charges against him by the Judicial Qualifications Commission. (T. 58-59). The second occupant of the Upper Keys judicial seat was J. Jefferson Overby, who served the unexpired term of Judge Kirwan and then one 6-year term before being defeated in his re-election bid by Mr. Shea. (T. 60-61).

[2] Mr. Strickland is mentioned at FC&R 48.

[3] *See e.g., James v. State*, 706 So. 2d 64 (Fla. 5th DCA 1998), applying Fla. R. Crim. P. 3.140 which has language virtually identical to Commission R. 6(g).

[4] *State, Dep?t of Revenue ex rel. Baptiste v. Baptiste,* Sixteenth Judicial Circuit Court Case No. 93-20227-FR-04. (R. Ex. 14).

[5] Ms. Martin mistakenly believed she had been directed to do a ?custody? evaluation, a very different form of evaluation than was sought for Mr. Wood and which the Guidance Clinic does not perform as a matter of policy. (T. 485-86, 488, 491, 505, 545-46).

[6] This letter is itself the subject of charge number 22 against Judge Shea, and is more fully discussed in connection with that charge.

[7] There is no record of any action being taken or any directive being issued by

the chief judge in connection with this matter.

[8] Judge Shea and his wife, who overheard the entire conversation, testified that no discussion of a purchase occurred during this Saturday morning telephone conversation. (T. 2282).

[9] *See* FC&R 2, 4-5, 6-7, 26-27, 28, 30, 34, 35, 38, 41, 48, 49, 50, 53, 61, 63-64.

[10] The law requires detailed findings of fact in a number of situations. *See, e.g.*, Rules 8.330(g) and 8.525(i); sections 39.467(5) and 985.228(4), Fla. Stat. (1997).

[11] The customary practice of a judge who is ?a recognized expert in capital cases,? such as the one who testified before the Panel (FC&R 44), is hardly a basis to evaluate a newly-elected and inexperienced judge who has diligently researched and is assiduously attempting to apply directives from this Court.

[12] Without seeming to recognize the contradiction in its positions, the Panel has inconsistently charged Judge Shea with judicial misconduct for communicating privately with Judge Ptomey and for violating Judge Taylor?s right to maintain the privacy of her communications.

[13] The Panel far exceeded the bounds of its authority when it grounded a finding of judicial misconduct on its determination that the ?Panel does not view? Ms. McClure?s call as ?any sort of prohibited *ex parte* contact.? (FC&R 53). Even if the Panel?s after-the-fact, narrow view of what constitutes a prohibited *ex*

parte communication were an acceptable legal position, that view cannot serve as the basis for judicial discipline. It is well within the bounds of judicial discretion for Judge Shea to have established a policy against *ex parte* communications which established a higher standard for attorneys than a panel of the Commission would choose to impose.

[14] Mr. Beckmeyer also could not see a basis for a general recusal. (T. 158, 161).

[15] The hearings on charges against Judge Shea were held in Key West although Judge Shea had made a timely and compelling request for the conduct of hearings in Plantation Key. Key West is 90 miles from Plantation Key, Judge Shea?s residence and the site of the charges against him.

[16] More recently, the Court has said that judges may appropriately assert their innocence of wrong-doing. *In re Davey*, *supra*.