

BEFORE THE HEARING PANEL OF THE
FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING A JUDGE NO. 06-249
RE: JUDGE MICHAEL E. ALLEN

CASE NO. SC07-774

**JQC'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF
PURPORTED MISCONDUCT OF OTHERS**

The JQC, by its undersigned counsel, moves the Hearing Panel to exclude evidence of the purported misconduct of others that the JQC believes respondent will offer at the final hearing in this matter, and submits the following memorandum in support of this motion.

MEMORANDUM

I. The JQC's Case Against Judge Allen.

On June 28, 2006, Judge Michael Allen issued a concurring opinion based on innuendo and supposition that accused his fellow judge, Charles Kahn, of corruption.

The concurring opinion speaks for itself, but at bottom, is nothing more than respondent's character assassination of his colleague, Judge Kahn. There is no evidence that the purported corruption existed in fact. The issue before the Hearing Panel is whether Judge Allen's attack on Judge Kahn arose from Judge Allen's personal feelings of animosity, hostility and ill will toward Judge Kahn.

II. The Standards the Hearing Panel Must Apply to Judge Allen's Concurring Opinion.

In Re Richard A. Kelly, Circuit Judge, 238 So.2d 565 (Fla. 1970):

The question is whether the motive of, and the methods used by, the petitioner together with the resulting turmoil created by his actions should be considered as conduct unbecoming a member of the judiciary and contrary to the Canons of Judicial Ethics. (*Id.* at 569).

* * *

Criticism is not neutral. When a judge sets himself up to criticize other judges, his criticism ultimately must be viewed as having been constructive or destructive in its impact. If he has been tempered and judicious, his criticism is likely to be, in its ultimate result, beneficial to the community which he serves – and it does not matter whether this constructive criticism is publicly or privately voiced. On the other hand, impetuous argument, or criticism taken by methods which prevent honest discussion and a fair rebuttal can be expected only to have a destructive result. No matter how bland or even wholesome the content, if the methods used raise suspicion of motives among the judges, and renders the court's all suspect to the public, the result can only be an increase in disrespect for law and order, an increase in lawlessness, a greater tendency among some of our citizens to let loose their tendencies to disorder. (*Id.* at 569-70).

* * *

He cannot avoid the resulting inquiry as to his motive and methods by invoking the right of freedom of speech in this disciplinary proceeding. We are not concerned with his right to speak, ***but whether his motive or method does violence to the Canons of Judicial Ethics.*** (*Id.* at 570) (emphasis added).

* * *

Every man in public office hungers for public esteem, but no man has the right to buy this esteem with the stolen coin of other men's public reputations, not even a twice-elected member of the judiciary. (*Id.* at 573).

III. The Evidence the JQC Seeks to Exclude.

At the depositions taken in this cause, Judge Allen continued the public character assassination of Judge Kahn that he began when he published his

concurring opinion. He questioned each witness about any derogatory information they might conceivably have about Judge Kahn. For example, he sought testimony that Judge Kahn is "volatile," and "duplicitous," and that he has temper tantrums. The questioning also sought information about Judge Kahn's sexual activities and any JQC investigation relating to those activities. In general, the questions focused on purported misbehavior by Judge Kahn.

IV. A Judge May Not Introduce Evidence of the Misconduct of Others to Justify Violations of the Code of Judicial Conduct.

In *In Re Shea*, 759 So. 2d 631 (Fla. 2000) Judge Shea justified his conduct as "an attempt to improve the administration of justice in the Upper Keys and to improve access to mental health resources in the community." The court held:

In *Graham*, [*In Re Graham*, 620 So.2d 1273 (Fla. 1993)] this Court removed a judge who abused his judicial power but attempted to justify his conduct as an effort to rid the county of what the judge perceived as political favoritism and corruption. The Court found that the alleged misconduct of others did not justify the judge's departure from the guidelines established in the Code of Judicial Conduct. *Id.* at 1275. Similarly, Judge Shea's allegations of improper conduct on the part of others do not excuse his abuse of his judicial office.

In *In Re Graham*, 620 So.2d 1273 (Fla. 1993), one of the charges against Judge Graham was that he used his position as judge to make allegations of official misconduct and improper criticism against fellow judges, elected officials and others without reasonable factual basis or due regard for their personal and professional reputations. Graham viewed his activities as "a valiant effort at

riding Citrus County of the political favoritism and government corruption that caused the demise of his predecessor." The Florida Supreme Court held:

His zealous pursuit of a pure society apparently clouded his ability to impartially adjudicate the matters before him. His motives are acceptable, but his methods are not. *Unfortunately, Graham fails to recognize that the alleged misconduct of others does not justify his repeated departure from the guidelines established in the Code of Judicial Conduct.* To go beyond those duties, as Graham has done, amounts to an abuse of power that threatens the integrity of the judicial branch. (*id.* at 1275) (emphasis added).

In *In Re McMillan*, 797 So.2d 560 (Fla. 2001), Judge McMillan attempted to justify his conduct based on a conspiracy in Manatee County to prevent his election and that his election was necessary to break up such conspiracies of power. The Florida Supreme Court held:

As in *Shea* and *Graham*, we reject Judge McMillan's rationalization for his campaign misconduct. When any person, and most especially a lawyer or judge, has reason to believe that public corruption exists at any level of government, that person is obligated to disclose such information to the appropriate authority without hesitation. However, when charges are leveled without basis in fact, enormous harm is inflicted upon our public institutions by loss of confidence among a public little equipped to sort out the valid from the invalid and campaign rhetoric from fact. In this instance when the smoke has cleared and the evidence is examined, there appears to be absolutely no credible factual basis for Judge McMillan's assaults on the local justice system and a sitting county judge. Nevertheless, the harm to the system will linger.

In *In Re Graziano*, 696 So.2d 744 (Fla. 1997), the Florida Supreme Court specifically upheld the JQC's granting of a motion in limine precluding the questioning of any witness about alleged improprieties by judges other than the respondent. Specifically, the Court held:

Next, we consider and find no merit to the contention that respondent's due-process rights were prejudiced by the JQC's ruling on a motion in limine, in which the JQC precluded questioning of any witness about alleged improprieties by judges other than respondent. We find the information sought in respect to other judges was beyond the scope of permissible inquiry in this proceeding.

V. Argument.

The issue before the Hearing Panel is whether Judge Allen's concurring opinion arose from the intense animosity, hostility and ill will that he has long harbored toward Judge Kahn. Whether Judge Kahn is "Peck's bad boy" is simply irrelevant to the question of Judge Allen's animosity, hostility and ill will. And even if Judge Allen contends that his intense animosity, hostility and ill will toward Judge Kahn was provoked by Judge Kahn's misbehavior, such a contention provides no basis for admitting evidence of purported misconduct by Judge Kahn. The issue is the existence of ill will – not its cause.

The authorities cited above make it clear that a judge may not excuse his departure from the Code of Judicial Conduct by introducing evidence of the misconduct of others, and the *Graziano* opinion provides full support for an order prohibiting the introduction of such evidence at the hearing in this matter.

CONCLUSION

For the reasons set forth above, the Hearing Panel should grant the JQC's motion in limine and prohibit the respondent from introducing evidence of the purported misconduct of others.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing JQC's Response to Motion to Dismiss has been furnished by regular U.S. mail to Richard C. McFarlain, Esq., Carr Allison, 305 South Gadsden Street, Tallahassee, FL 32301; Guy Burnette, Jr., Esq., 3020 N. Shannon Lakes Drive, Tallahassee, FL 34309; Bruce S. Rogow, Esq. and Cynthia Gunther, Bruce S. Rogow, P.A., 500 East Broward Blvd., Suite 1930, Ft. Lauderdale, FL 33394; Hon. Paul Backman, Chairman, Hearing Panel, Broward County Courthouse, 201 S.E. 6th Street, Suite 5790, Ft. Lauderdale, FL 33301; Lauri Waldman Ross, Esq., Lauri Waldman Ross, P.A., 9130 S. Dadeland Blvd., Datan II, Suite 1612, Miami, FL 33156; and Michael Schneider, General Counsel and Brooke S. Kennerly, Executive Director, Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, FL 32303 the this _____ day of February, 2008.

Respectfully submitted,

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