

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

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

JQC'S RESPONSE TO MOTION TO DISMISS

[F]ragile as reason is, and limited as law is as the . . . institutionalized medium of reason, that's all we have standing between us and the tyranny of mere will and the cruelty of unbridled, undisciplined feeling.

Felix Frankfurter
Time, Sept. 7, 1962 at 15

Judge Michael Allen succumbed to the "tyranny of mere will and the cruelty of unbridled, undisciplined feeling." Based not on evidence and law, but upon innuendo and supposition, Judge Allen accused a fellow judge of corruption and published the accusation in the Southern Reporter where it will stand for all eternity.

He published his allegation of corruption *after* the case in question was removed from the three-judge panel that initially decided it, and *after* the full court decided the case contrary to the three-judge panel's decision. So at the time of Judge Allen's public assertion of his colleague's corruption, there was no danger that the purported corruption would taint the Court's decision.

Judge Allen's professed concern – that the decision was tainted by corruption – had already been resolved when Judge Allen published his charge. Judge Allen's act was not grounded on fact and law, but arose from his "unbridled, undisciplined" personal hostility and ill-will toward his fellow judge.

It is in the nature of the legal system that judges frequently disagree with each other on legal principles, and those disagreements are sometimes expressed in strong language. But Judge Allen's disagreement with his colleague was not over a legal principle. It was a bald allegation of corruption – based on no evidence and no law – in the context of a case where neither party asked Judge Kahn to recuse himself.

In the 1960's, Sixth Judicial Circuit Judge Richard A. Kelly engaged in a pattern of conduct reflecting hostility toward many attorneys, court officials and fellow judges. After being elected presiding judge of the Circuit, his erratic behavior caused his fellow judges to take steps to remove him as presiding judge. After meeting with his fellow judges and hearing that they fully intended to remove him, he resigned and threatened those judges in attendance that he would embarrass them and cause them to regret their decision. *In re Richard A. Kelly Circuit Judge*, 238 So.2d 565 (Fla. 1970).

He then met with a local newspaper editor and several reporters and told them about a "petition" he would file with the Sixth Circuit Clerk. The essence of Judge Kelly's written criticism of his fellow judges by "petition" was focused on the administration of the criminal justice system and was not a public charge of corruption as in the present case. The Supreme Court found (*Id.* at 568):

[Judge Kelly] knew judicial reform could be attained in a variety of ways 'under the law.' But vengeance could best be served through publicizing his grievance. This was accomplished when [Judge Kelly], in his official capacity as a judge, filed his ex parte petition with the clerk so that it would be a public record.

In finding that Judge Kelly engaged in conduct unbecoming a member of the judiciary and publicly reprimanding him, the Court made the following points that apply to the present case:

- Since we have a government of law and not men, no member of the judiciary should act officially as a 'judge' save only as it is found in and defined by the law. (*Id.* at 568).

* * *

- 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).

* * *

- There are many authorized methods of protest, dissent and criticism within the framework of the judiciary, such as the preparation of dissenting opinions, petitions to the Supreme Court for changes in the rules of procedure, submission of suggested changes to various committees of the Florida Bar, participating in the various legal seminars conducted by the Committee on Legal Education, or taking an active part in the state and local conferences as judges. (*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 courts 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).

* * *

- 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).

If the high ideals and standards of the Code of Judicial Conduct, the Rules of Professional Conduct of The Florida Bar and the Oath of Admission of The Florida Bar are to have any meaning, the Judicial Qualifications Commission must condemn Judge Allen's action.

THE CONSTITUTIONAL GRANT OF AUTHORITY TO THE JQC

The nub of Judge Allen's argument is that to bring charges, the JQC is constitutionally required to allege facts that "demonstrate[] a present unfitness to hold office, . . ." Art. V, Sec. 12(a)(1), Fla. Const. (1968). A review of Art. V, §12 reveals the fallaciousness of this argument. The Constitution vests the JQC with two distinct powers:

- [I]nvestigate and recommend to the Supreme Court of Florida the removal from office of any justice or judge whose conduct, during term of office or otherwise . . . demonstrates a present unfitness to hold office, . . ."
- [A]nd to investigate and recommend the discipline of a justice or judge whose conduct . . . warrants such discipline.

In 1998, the voters of Florida amended Section 12 to include the following definition of "discipline:"

For purposes of this section, discipline is defined as any or all of the following: reprimand, fine, suspension with or without pay, or lawyer discipline.

A finding of "unfitness to hold office" would perforce lead to a recommendation of removal from office. But the JQC is not limited to that recommendation. The Constitution expressly vests in the JQC the authority to recommend the "discipline," of an errant judge who steps over the line into improper behavior, and that recommended discipline may involve a reprimand, fine, suspension with or without pay, or lawyer discipline, or some combination of all of them. Thus, the JQC is specifically empowered to recommend the "discipline" of Judge Allen even if his offense does not lead to the conclusion that he is "unfit" to hold office, and if the Commission should find that Judge Allen's level of animus is so powerful that it renders him unfit to hold office, it can recommend removal.

The Florida Constitution by its very terms refutes the basis for Judge Allen's motion to dismiss.

A MOTION TO DISMISS IS INAPPROPRIATE WHERE MOTIVE IS AT ISSUE.

The Florida Rules of Civil Procedure apply to these proceedings. Rule 12, SJQCR. We allege in paragraph 14 of the notice of formal charges that Judge Allen's concurring opinion was "motivated by ill-will." The Florida Supreme Court has made it clear that motive is critical in assessing a judge's conduct. *In Re Richard A. Kelly*, 238 So.2d 535 at 570 (Fla. 1970) ("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.") *In Re Gary G. Graham*, 620 So.2d 1273 at 1275 ("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.")

At the pleading stage, this body is required to accept as true all allegations of the notice of formal charges, including the specific allegation that Judge Allen's concurring opinion was "motivated by ill-will." Judge Allen's motivation is a question of fact that cannot be resolved on a motion to dismiss. *DeMartino v. Simat*, 948 So.2d 841 (Fla. 2d DCA 2007) and *Holland v. Anheuser Bush, Inc.*, 643 So.2d 621 (Fla. 2d DCA 1994).

"THERE IS 'SOMETHING SPECIAL IN THE JUDICIAL ROLE.' "¹

Simply put, judges must live up to higher standards than the rest of society. "This Court and others have recognized that judges hold a unique position in our society that warrants distinguishing them and what they can do from the general citizenry." *In Re Code of Judicial Conduct*, 603 So.2d 494 at 498 (Fla. 1992). "Because judges are held to a very high standard of conduct, . . . they are frequently required to make some sacrifices that other individuals are not called to make. By accepting the privilege of serving as a judge and by taking the oath of office, Graham agreed to live and operate his courtroom by that high standard." *In Re Gary G. Graham*, 620 So.2d 1273, 1276 (Fla. 1993). "Judges should be held to even stricter ethical standards [than

¹ *In Re Code of Judicial Conduct*, 603 So.2d 494, 497 (Fla. 1992).

lawyers] because in the nature of things even more rectitude and uprightness is expected of them [than] lawyers." *In Re Boyd*, 308 So.2d 13, 21 (Fla. 1975).

On the face of our notice of formal charges we allege facts showing that Judge Allen did not live up to those higher standards.

OTHER POINTS MERITING COMMENT

The Claim that this is an unprecedented action.

The *Kelly* decision, *supra*, is ample precedent for reprimanding a judge for maligning another judge. It is true that Judge Allen has cited no case, and we have located no case in Florida jurisprudence where a sitting appellate judge in an opinion publicly accuses his colleague of corruption. So to the extent this is an unprecedented proceeding, Judge Allen brought it on with his unprecedented act.

The use of non-record newspaper articles in the opinion.

There is nothing inherently wrong with citing a newspaper article in an appellate opinion. But there is something inherently wrong with citing non-record newspaper articles that do not even mention Judge Kahn and using them through a series of tortured inferences to assert a charge of corruption against a colleague. Grounding a conclusion of corruption solely on innuendo and supposition from non-record newspaper articles is contrary to an appellate judge's duty to stand above the fray and to base his opinions on hard evidence and law.

Based on non-record newspaper articles alone Judge Allen constructed this faulty syllogism:

- Levin and Childers were friends, and Childers sponsored legislation that benefited Levin.
- Judge Kahn was once a member of Levin's law firm.
- Levin was responsible for Judge Kahn's appointment to the Court.
- Therefore, Judge Kahn's vote to reverse the Childers conviction was a "payback" to Levin for facilitating Judge Kahn's appointment.

There is no record evidence to support this conclusion. We expect better of our appellate judges.

The failure to report the matter to the JQC.

If Judge Allen had information that Judge Kahn was corrupt, Canon 3D(1) required Judge Allen to "take appropriate action." The commentary to the rule defines "appropriate action:"

'Appropriate action' may include direct communication with the judge . . . who has committed the violation, other direct action if available or reporting the violation to the appropriate authority or other agency.

Over 30 years ago, the Florida Supreme Court outlined the proper course of action for a judge on a multi-judge court to follow upon obtaining evidence of improper conduct:

The proper course for a Justice of a multi-judge court to pursue is to bring forward any improper attempt to influence him and the evidence he has thereof to the attention of his fellow judges and to others in authority who have a duty and responsibility to purge such influence and to mete appropriate discipline therefor. *In Re Boyd*, 308 So.2d 13, 20 (Fla. 1975).

In re Kelly, supra, holds there are proper and improper ways to criticize a fellow judge. Judge Allen chose an improper way.

CONCLUSION

For the foregoing reasons the JQC should deny the motion to dismiss.

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 facsimile and regular U.S. mail to Richard C. McFarlain, Esq., Carr Allison, 305 South Gadsden Street, Tallahassee, FL 32301 and Bruce S. Rogow, Esq., Bruce S. Rogow, P.A., 500 East Broward Blvd., Suite 1930, Ft. Lauderdale, FL 33394; and by regular U.S. mail to Hon. Paul Backman, Chairman, Hearing Panel, Broward County Courthouse, 201 S.E. 6th Street, Suite 5790, Ft. Lauderdale, FL 33301; John Beranek, Esq., Ausley & McMullen, 227 South Calhoun Street, Tallahassee, FL 32301; and Brooke S. Kennerly, Executive Director, Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, FL 32303 the this _____ day of June, 2007.

Respectfully submitted,

F. WALLACE POPE, JR.
FBN #: 124449
JENNIFER A. REH
FBN #: 0581496
JOHNSON, POPE, BOKOR,
RUPPEL & BURNS, LLP
P.O. Box 1368
Clearwater, FL 33757
727-461-1818
727-441-8617 – fax
Special Counsel for Florida
Judicial Qualifications Commission

and

Marvin E. Barkin
FBN #: 3564
Interim General Counsel
2700 Bank of America Plaza
101 East Kennedy Blvd.
Tampa, FL 33601-1102
813-223-7474
813-229-653 – fax

408380